

1933
 V.P.R.P.L.
 FIRM
 v.
 THE COMMISSIONER OF
 INCOME-TAX,
 BURMA.
 PAGE, C.J.

regarded as rebutting the inference which otherwise might have been drawn from the facts, namely, that these remittances were profits earned at Negambo and not capital sums sent to Rangoon by way of loan, was not a question of fact but a question of law. In my opinion such a contention cannot be sustained. The question being one of fact, and the finding upon the question being based upon materials before the Income-tax authorities, no question of law arises.

The result is that the application fails, and it is dismissed with costs, ten gold mohurs.

DAS, J.—I agree.

WORKMEN'S COMPENSATION ACT REFERENCE.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Dunkley.

1933
 May 16.

IN THE MATTER OF MAUNG YA BA, DECEASED.*

Workmen's Compensation Act (VIII of 1923), Sch. II, cl. 12—Workman employed in a hand-dug well.

A workman employed in a hand-dug well may come within the ambit of clause 12 of Schedule II of the Workmen's Compensation Act.

On the 27th October 1932 the Commissioner for Workmen's Compensation, Yenangyaung, made a reference to the High Court; and the question of law submitted by him is set out in the judgment. The High Court returned the proceedings to the Commissioner to ascertain whether the employment of the deceased workman Maung Ya Ba was of a casual nature, and the work in which he was employed when he met his death. The succeeding

* Civil Reference No. 16 of 1932.

Commissioner made a report on the 22nd February 1933 from which the following facts are taken.

Maung Ya Ba met his death while working in a hand-dug well. The Commissioner found that the deceased was a "twintu" which is ordinarily translated "well-digger", and that his work was not of a casual nature. He was engaged at a daily rate, and was paid his wages every ten days or so. A hand-dug well is not made by the process of drilling, but by breaking up the dry rock or sandstone with an implement held in the hand. The whole of a square area of which the sites vary from 7 feet to 5 feet according to the depth has to be broken up and removed. The work has always been called in English "digging", whence the expression "hand-dug well".

The well in question had fallen in about 100 cubits from the surface, and the work of the deceased and his mates was to dig out the fallen earth and timbers, and to reline the well with new timbers; the debris being collected and sent up to the surface. The deceased could be correctly described as a "digger", and the job on which he was engaged was a long repairing job which included something which might be called "cleaning". It was incorrect to state that the deceased descended the well for the purpose of extracting oil.

About the time the deceased met his death, the oil-sand had been reached. He and his mates had placed a platform or *ningyan* in the bottom of the well so that they could crouch down on a fairly firm surface although the *ningyan* was covered by the oil and water. The relining of the walls was almost complete, and all that remained was to make places for resting the timbers and fitting them in. Presumably the deceased's work was to dig out

1933

IN THE
MATTER OF
MAUNG
YA BA,
DECEASED.

1933

IN THE
MATTER OF
MAUNG
YA BA,
DECEASED.

the wall, and to fit timbers when he met his death.

A Notification of the Government of India, Department of Industries and Labour No. L. 1446 dated the 13th December 1926, declared certain occupations in connection with operations for winning natural petroleum or gas to be hazardous occupations and directed that the provisions of the Workmen's Compensation Act should apply in the case of any person employed in such occupation. This Notification was subsequently embodied in the Act as clause 12 of Schedule II by the Workmen's Compensation Amendment Act V of 1929.

Kin Maung Gyi (2) for the employer.

PAGE, C.J.—The question of law that has been submitted under s. 27 of the Workmen's Compensation Act VIII of 1923 is:

“Whether a person employed on a hand-dug well who descends the well for the purpose of extracting oil is a person whose occupation is covered by the description of any of the occupations specified in the Notification.”

Now, having regard to the provisions of s. 2 (1) (ii) of the Workmen's Compensation Act the material provision was not the Notification that is cited, but clause 12 of Schedule II of the Act. Further, as the Commissioner for Workmen's Compensation has found as a fact that the deceased workman did not descend the well “for the purpose of extracting oil” the question referred becomes merely of academic interest, and this Court does not usually express an opinion except in connection with a concrete case. It appears, however, from paragraph 3. of the reference that a question has arisen as to whether clause 12 of Schedule II applies to workmen

employed in a hand-dug well, and as the deceased workman was so employed we feel ourselves at liberty to express an opinion upon that question. We hold that a workman employed in a hand-dug well may fall within the ambit of clause 12 of Schedule II, but whether he is employed in connection with the operations therein referred to or any of them is a question of fact which has to be determined by the proper authority, and not by this Court. We answer the question submitted in this sense.

DAS, J.—I agree.

DUNKLEY, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Cunliffe and Mr. Justice Mya Bu.

MAUNG GYI *v.* A.L.K.P. CHETTYAR FIRM.*

1933

May 16.

Insolvency—Dismissal of petition of adjudicating creditor—Provincial Insolvency Act (V of 1920), s. 16—Application by another creditor for substitution.

Where a petition for the adjudication of a debtor filed by a creditor has been dismissed by the Court another creditor cannot apply under s. 16 of the Provincial Insolvency Act to be substituted in place of the original creditor. This section applies where the proceedings are pending, and not where they have terminated by the dismissal of the petition.

Hormasji for the appellant.

Aiyar for the respondent.

CUNLIFFE and MYA BU, JJ.—This appeal must be allowed.

The learned Judge of the District Court at Hanthawaddy was sitting in insolvency. He was

* Civil Misc. Appeal No. 229 of 1932 from the order of the District Court of Hanthawaddy in Insolvency Case No. 50 of 1932.