

## APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.*

1934

Dec. 6.

## U PO SEIN v. E. M. BODI.\*

*Suit for price of goods—Alternative claim against two defendants—Plaintiff's election to take decree against one defendant—Subsequent claim against the other defendant.*

The respondent filed a suit against the appellant and others for the price of goods sold and delivered by him. The plaintiff was in fact seeking to realise his money from the proprietor of a certain business, and sued the appellant and another person *L* in the alternative as such proprietor. He elected to take and obtained a decree against *L*. The respondent subsequently applied to the Court to pass a decree against the appellant also.

*Held*, that the claim was made against the defendants not jointly but only in the alternative, and that the plaintiff having elected to take his decree against *L* was precluded thereafter from obtaining a decree against the appellant.

*Moore v. Flanagan*, (1920) 1 K.B. 917; *Morel Bros. & Co., Ltd. v. Earl of Westmorland*, (1904) A.C. 11; *Scarf v. Jardine*, 7 A.C. 345—referred to.

*Thein Maung* (with him *Tha Kin*) for the appellant. There is no evidence that the appellant bought the goods or authorized any other person to buy them on his behalf. The plaintiff has taken his decree for the price of goods against the fourth defendant. He cannot claim a decree for the same sum against the appellant.

[PAGE, C.J. If the claim against the two parties is in the alternative, *Morel Bros. & Co., Ltd. v. Earl of Westmorland* (1) applies.]

*K. C. Bose* (with him *Dadachanji*) for the respondent. The claim against the defendants is not joint but in the alternative and *Morel Bros.*' case applies. See also *Scarf v. Jardine* (2); *Moore v. Flanagan* (3).

\* Civil First Appeal No. 106 of 1933 from the judgment of this Court on the Original Side in Civil Regular Suit No. 386 of 1932.

(1) (1904) A.C. 11.

(2) 7 A.C. 345.

(3) (1920) 1 K.B. 917.

PAGE, C.J.—This appeal must be allowed.

1934

It appears that one Tsoenas was the proprietor of a confectioner's business carried on at No. 181-183, Phayre Street, Rangoon. On the 5th of February 1932 Tsoenas by an indenture of even date purported to sell the said business to the appellant for the consideration *inter alia* that the appellant would discharge the liabilities of the business set out in the second schedule to the deed. Among these liabilities was a liability of Tsoenas to the respondent. Immediately after the deed of the 5th February 1932 had been executed disputes ~~arose~~ between Tsoenas and U Po Sein as to the meaning and effect of the deed, and the liability of U Po Sein thereunder. As a result of these disputes on the 17th of February 1932 a deed was executed by Tsoenas, U Po Sein, and one Lim Kar Gim in which it was stated that Tsoenas was carrying on the business at 181-183, Phayre Street, and that U Po Sein who purported to be the purchaser under the deed of the 5th of February 1932 was in fact merely the *benamidar* of Lim Kar Gim. In the deed it was provided that, subject to a separate agreement to which U Po Sein was a party, the deed of the 5th February 1932 was to be regarded as cancelled. Lim Kar Gim undertook to purchase the business upon the terms set out in the indenture of the 5th February 1932, U Po Sein being relieved from all further liability thereunder. In these circumstances the respondent, who had supplied goods to Tsoenas for the business, was uncertain whether he could recover the price of the goods sold and delivered for the purpose of the business from U Po Sein or from Lim Kar Gim. He therefore pleaded (1) that the first defendant U Po Sein was liable for the price of the said goods, and (2) that "in the event

U Po SEIN  
v.  
E. M. BODI.

1934  
 U PO SEIN  
 v.  
 E. M. BODI.  
 PAGE. C.J.

of it being held that the first defendant is not liable plaintiff submits he is entitled to judgment against the second, third and fourth defendants," the fourth defendant being Lim Kar Gim.

Now, the third defendant was the Vienna Cafe, which according to the plaintiff's case was merely an *alias* under which either U Po Sein or in the alternative Lim Kar Gim was carrying on the business, and the claim in the alternative against the second defendant Tsoenas was for damages for breach of warranty of authority.

It is obvious, therefore, that the plaintiff's claim was against the person who was the proprietor of the business known as the Vienna Cafe, and that U Po Sein or in the alternative Lim Gar Kim was sued as such proprietor for the price of the goods that the plaintiff had supplied to the Vienna Cafe.

Mr. K. C. Bose, who appeared for the plaintiff-respondent, properly conceded that the liability of U Po Sein and Lim Kar Gim was not alleged to be joint but in the alternative; indeed, it is manifest from the facts that I have stated that this must be so, because it has never been suggested in the course of these proceedings that U Po Sein and Lim Kar Gim were jointly carrying on business, and/or were the joint proprietors thereof. On the 5th April 1933 the plaintiff elected to take a decree against the fourth defendant for the full amount claimed in the suit with costs, and he has executed that decree. At the hearing of the suit it was contended on behalf of U Po Sein that, inasmuch as the plaintiff had taken a decree for the full amount claimed against Lim Kar Gim, he could not obtain a decree against U Po Sein. The learned trial Judge overruled the objection. In my opinion, however, in the circumstances that I have stated this case is governed by

*Scarf v. Jardine* (1); *Morel Bros. & Co., Ltd. v. Earl of Westmorland* (2); and *Moore v. Flanagan* (3). The respondent, having elected to take a decree for the amount claimed against Lim Kar Gim, the fourth defendant, in my opinion was precluded thereafter from obtaining a decree against U Po Sein.

The result is that the appeal is allowed, the decree of the trial Court is set aside as against the appellant U Po Sein, and as against him the suit is dismissed. The appellant is entitled to his costs of and incidental to the suit. Each party will pay his own costs of the appeal.

MYA BU, J.—I agree.

### APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.*

U PO SEIN AND ANOTHER

v.

E. M. BODI.\*

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Dec. 6.

*Alternative claim against defendants—Plaintiff's election to take decree against one defendant—Claim on appeal for a decree against the other defendant.*

Where the plaintiff in a suit claims relief against two defendants not jointly but in the alternative, and elects to take a decree against one of them, he cannot claim on appeal that a decree ought to be passed against the other defendant.

*Chettyar Firm of S.A.A. v. Chettyar Firm of A.R.P.R.M.P., Civil First Appeal No. 148 of 1932, H.C. Ran.; Morel Bros. & Co., Ltd. v. Earl of Westmorland, (1904) A.C. 11—referred to.*

*K. C. Bose* (with him *Dadachanji*) for the respondent raised a preliminary objection. The claim against the defendants was not joint but in the alternative.

(1) (1882) 7 A.C. 345.

(2) (1904) A.C. 11.

(3) (1920) 1 K.B. 917.

\* Civil First Appeal No. 42 of 1934 from the judgment of this Court on the Original Side in Civil Regular No. 59 of 1933.