## LETTERS PATENT APPEAL.

*Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Sharpe.*

1938

*May 12.*

# THE MUNICIPAL COMMITTEE OF MYAUNGMYA

*v.*

# PAW HAING.*

*Pawnshop license—Grant of license by municipal committee—Contract validly made—Rule 24, Chap. VI, Burma Municipal Rules, 1934—Rule not observed—Rule directory only and not mandatory—Validity of contract—Suit for injunction—Burma Municipal Act, ss. 54, 71, 229* (g).

A contract in writing and satisfying the provisions of s. 54 of the Burma Municipal Act, by which a municipal committee grants a license to a person to carry on business as a pawnbroker upon the terms and conditions and for the period therein mentioned is valid and binding upon the committee notwithstanding that the provisions of Rule 24 of Chap. VI of the Burma Municipal Rules, 1934, relating to the sales of pawnshop licenses have not been observed. The Rule is not mandatory but is merely for the guidance of municipal committees notwithstanding the use of the word "shall" therein.

*Nowell* v. *The Mayor of Worcester*, 9 Ex. 457, followed.

Injunction against breach of contract granted by the trial Court and upheld by the High Court on appeal confirmed.

*Per* ROBERTS, C.J.—Rule 24 must be deemed to have been made under s. 229 (g) of the Burma Municipal Act, and not under s. 71 which relates to assessment, collection, remission or refund of taxes, and accordingly the rule was issued as a matter of guidance only.

*Per* SHARPE, J.—Rule 24 was made either under s. 71 or under s. 229 (g) of the Act. If it was made under the former section, it was *ultra vires*, as it has nothing to do with the assessment, collection, remission or refund of any tax. If it was made under the latter section, it was directory only and cannot affect the validity of a contract duly made by the committee.

*K. C. Bose* for the appellant. The advertisement for the auction sale for a pawnshop license did not contain the necessary particulars. The bidders did not know whether they were bidding for the license for one or for three years. No contract arose out of the auction. It was by a subsequent resolution of the Committee embodied in Exhibit A that the Committee gave the license for the year 1936-37 to the respondent. The

* Letters Patent Appeal No. 2 of 1938 arising out of Special Civil Second Appeal No. 273 of 1937 of this Court.

subsequent contract for two years was void and not binding on the Committee. It was in direct violation of the rules, and the Committee had no power or capacity to enter into it. The Commissioner's sanction was necessary to effect the contract and that was never obtained. The respondent cannot sue upon the contract or seek an injunction in respect of it when it was not binding upon the Committee. See ss. 7, 13, 47, 71, 229 (*g*) of the Burma Municipal Act, and the Notification of the Local Government at p. 129 of the Burma Municipal Manual. Rule 24 of Chapter VI of the Burma Municipal Rules, 1934, governs the case and its provisions which are mandatory were not observed.

A contract made by a municipal body in contravention of the form or procedure prescribed by law is not binding.

*Young & Co.* v. *The Mayor and Corporation of Royal Leamington Spa* (1); *Abaji Modak* v. *The Trimbak Municipality* (2); *Radha Krishna Das* v. *Municipal Board of Benares* (3); *M. E. Molla* v. *Commissioners for the Port of Chittagong* (4).

*Rafi* for the respondent. Rule 24 is not mandatory; it is only directory. The Committee has the power to decide whether it will grant a license for a period of one, two or three years. The rule is only made for the guidance of the Committee; the contract in writing which the Committee made with the licensee is binding upon it. See *Nowell* v. *The Mayor of Worcester* (5). The remedy of the licensee for the threatened breach of the contract is by way of injunction.

ROBERTS, C.J.—The appellant in this case, Paw Haing, brought an action seeking an injunction, under

(1) 8 App. Cas. 517, 524.
(2) I.L.R. 28 Bom. 66.
(3) I.L.R. 27 All. 592.
(4) I.L.R. 54 Cal. 189.
(5) 9 Ex. 457.

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section 54 of the Specific Relief Act, against the Municipal Committee of Myaungmya restraining them from selling to any other person the licence to conduct the business of a certain pawn shop at Myaungmya for the years 1937-1938 and 1938-1939. In the Township Court he secured the relief prayed for, but on appeal the District Court set aside the decree; the High Court has restored it again, and the defendants in the original action have appealed.

The course of conduct between the parties shows that there was first of all an advertisement issued on the 27th January, 1936, by the appellants, which stated that licences for carrying on the business of pawnbrokers in two shops for one or three years, at the option of the Committee, from the 1st of April, 1936, would be disposed of by public auction. We are told that the effect of that advertisement was that when the bidders attended the auction they did not know whether they were bidding for the licence for one or for three years. The respondent, however, attended the auction and his was the highest bid, namely, of Rs. 7,310. A report of the auction was accordingly sent to the Committee, and at the head of the report are the words, "For the year 1936-1937."

The auction had taken place on the 10th of February 1936, and on the 12th of February, 1936, the respondent wrote a letter asking the President and members of the Myaungmya Municipal Committee to allow him to retain the licence, which he had purchased for Rs. 7,310 at the auction for a period of three years. It seems clear to me, upon a consideration of what happened at the auction, that there was no concluded contract between the parties arising from that: the Committee had not made up their mind what they were going to sell, or, even if they had, the respondent had no idea of what he was going to buy. However, on the 22nd of

February there was a further meeting and a document, which has come to be known as Exhibit A, was drawn up. It states :

"Under bye-laws made under section 142 (*e*) of the Burma Municipal Act, 1898, Mr. Paw Haing of Rangoon is hereby licensed by the Municipal Committee of Myaungmya to carry on business as a Pawnbroker at Myaungmya, subject to the conditions stated on the reverse hereof and prescribed by the abovementioned bye-laws.

The license may be cancelled by the committee for breach of any one or more of the said conditions. The license will be in force until the 31st March 1937 unless previously cancelled."

This was signed by the President of the Municipal Committee. The terms of payments to be made by the licensee were endorsed upon the document. It is also signed and witnessed by him, and, in my opinion, it constituted a valid contract between the Municipal Committee and the respondent by which the latter purchased for one year the right to carry on the business.

It appears that after that nothing more happened until the 11th of June, 1936, when the Committee purported to extend the licence already given, for a further period of two years. It is important to note that there was new consideration for the new promise. It was in effect a contract for two more years on terms similar to the preceding contract. And thereupon a second document, known as Exhibit B, in the same terms was entered into between the parties, stating that the licence would be in force until the 31st of March, 1939, and stating the new consideration.

It is now contended that the second contract was void and *ultra vires* the Myaungmya Municipal Committee. And our attention has been drawn to Chapter VI of the Burma Municipal Rules, paragraph 24. The effect of Rule 24, so far as it concerns the present case,

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is that when pawn shop licences are sold, they shall be sold by public auction, unless the Committee, with the sanction of the Commissioner, direct their disposal by sealed tenders, if there is no public auction and no disposal by sealed tender, any other proposals made by the Committee shall be submitted to the Commissioner for his prior sanction, and his order shall determine the period and method of notice of the disposal and any other matter incidental thereto.

Now, the question which arises is whether neglect to do that has rendered the Municipal Committee's contract void. It is necessary to examine how these rules came to be made. And it appears that they are expressed to be made in exercise of the powers conferred by various sections of the Burma Municipal Act and sundry other statutes. The notification is "Local Government (Administrative Department) Notification No. 127, dated the 9th July, 1934. Mr. Bose has taken us through the various sections under which the Local Government has power to make rules.

Section 71 of the Act reads :

"The Local Government may make rules consistent with this Act for the assessment, collection and remission or refund of taxes leviable under this Act and for preventing evasion of the same.

Such rules may also authorize the committee to dispose in accordance with such rules, by way of lease or otherwise of the right to collect any tolls leviable under section 62, sub-section (*1*), Division (*A*), clause (*h*)."

In passing, it may be noted that those tolls relate to tolls, not exceeding eight annas, on every vehicle, or beast, used in a certain manner, entering the Municipality and not liable to taxation under the preceding clause. I cannot hold that any rules which are made in relation to the sale by the Municipal Committee of pawn shop licences are rules for the assessment, collection, remission or refund of taxes leviable under the Act.

Accordingly, turning back to the notification, the next section of any Act under which this particular rule might be made is clearly section 229 (*g*) of the Municipal Act. That section says that the Local Government may make rules consistent with the Act

"generally, for the guidance of committees and public officers in all matters connected with the carrying out of this Act."

In my opinion, this is what they have done in Rule 24 of Chapter VI: what they have done is to issue a rule as a matter of guidance. There is nothing in that rule to make it so mandatory that a breach of the rule means that any contract entered into in contravention of it is void.

In this connection, we have been referred by Mr. Rafi to the case of *Nowell* v. *The Mayor of Worcester* (1). In that case the plaintiff and the defendants entered into a contract without the estimate and report of the surveyor of the defendant Corporation having been obtained ; and, to that extent, section 85 of the Public Health Act, 11 and 12 Vic. c. 63, was not observed. It was nevertheless held that when a contract under seal was entered into between the Board and a third party for the execution of certain works, such contract was valid. Pollock C.B. said :

"Now, local boards of health are appointed by the statute, and they have power given them by it to enter into contracts, which the defendants, as constituting such a board, have done ; and the question is, whether they are liable upon the contract so made. The first objection is, that they ought to have obtained an estimate of expense from their surveyor ; but what have the plaintiffs to do with that ? It may be incumbent upon the defendants themselves to take that course, but it is no part of the plaintiff's duty to ascertain that they have done so ; for the plaintiffs have no means of ascertaining the fact. The question, then, upon this part of the case is, whether these directions are to be treated as conditions

(1) 9 Ex. 457.

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precedent, so as to render a contract invalid, if they are not complied with ; or whether, according to the modern phrase, they are only directory, that is, whether they are such that parties are bound to comply with them, and in many cases would be liable to an indictment if they do not, but yet do not constitute conditions precedent to the validity of the contract. I am of opinion that these matters are merely directory, and that the plaintiffs were not bound to ascertain whether they had been observed ; consequently the first objection falls to the ground."

Parke B. said :

" The plea therefore raises the question, whether the directions in the 85th section are formal conditions to the validity of obligations by boards of health under the Act, or whether they are only directions to them, with which they are bound to comply, under the penalty, in case of non-compliance, of being deprived of all remedy of reimbursement against their constituents. I am clearly of opinion that these matters are not conditions precedent, but that they are what are called in ordinary language 'directory.' "

In my opinion, these observations apply equally to the present appeal, because of the express words of section 299 (*g*) of the Municipal Act, under which this rule was made which shows that it was made generally, for the guidance of committees and public officers in all matters connected with the carrying out of the Act : and that means that it has a directory and not a mandatory significance.

In my opinion, therefore, the second contract which was entered into between the Municipal Committee of Myaungmya and the respondent was a valid contract, although the Municipal Committee had not complied with the directions in the rules, and if there has been a breach of that contract the respondent is entitled to relief. The grant of an injunction is a discretionary matter, and both the Township Judge and the learned Judge of the High Court who dealt with the matter on

second appeal considered that the case was one for an injunction. And, speaking for myself, I am not prepared to interfere with that decision.

Accordingly, in my opinion, this appeal should be dismissed, with costs, advocate's fee twenty gold mohurs.

SHARPE, J.—We have been told by the advocates that this is an important case ; doubtless that is so. I will therefore give my reasons for agreeing with the conclusions at which my Lord the Chief Justice has arrived.

In the month of February, 1936, there was what was called an auction of the Myaungmya Pawn Shop. My Lord has referred to what took place at that auction, and the surrounding circumstances of that auction, and I need not repeat them.

Section 54 of the Burma Municipal Act says :

"When a contract made by or on behalf of the committee exceeds in value or amount one hundred rupees, it shall be in writing and signed by the president or vice-president and at least one other member of the committee."

The respondent before us, who was the plaintiff in the original Court, rests his case (as indeed he must, in view of the section to which I have just referred), upon two writings which have become known as Exhibits A and B in this case. One is dated the 22nd of February 1936, and the other the 26th of June 1936.

To my mind it is unnecessary to consider the legal effect of what took place before those documents came into being and were signed, as they were signed, by both the parties, and I do not propose to go into those details preliminary to the signing of those two documents.

There is really no dispute about the first of them, which granted the respondent the right to carry on

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business as a pawn-broker at Myaungmya for one year from the 1st of April, 1936. It is the second document which causes all the trouble in this case.

On the face of it, by this document the appellants sold to the respondent the right to carry on the business of a pawn-broker in Myaungmya for two years from the 1st of April, 1937 : that is what the plaintiff alleged in his Plaint, and he pleaded that the defendants threatened to re-sell the right to the Myaungmya pawn shop for those two years ; and, in those circumstances, he claimed an injunction restraining the appellants from so reselling that right.

The appellants' whole defence can be found in paragraph 5 of their Written Statement, wherein they submitted that this second contract "was *ultra vires* and without jurisdiction" and that they "had no power to extend or grant lease" for those two years. That was reiterated in paragraph 10 of their Written Statement, wherein, after repeating that the license was invalid and *ultra vires* as far as those two years were concerned, they also alleged that neither the plaintiff nor any one else acquired any interest by the license and that they were perfectly within their legal rights in re-selling it.

The whole of their case rests upon a certain rule made by the Local Government, as it then was. Before examining that rule, I will say this : it appears to me that the only point in this case is, was it within their power to make this contract of the 26th of June, 1936 ?

Now, Rule 24 of Chapter VI of the Burma Municipal Rules is the rule relied upon by the appellants. That is one of many rules made by the then Local Government in pursuance, it is said, of certain powers vested in them by statute : and the heading of those rules recites that they are made in exercise of the powers

conferred by a number of sections of three different Acts, the most important of which is the Burma Municipal Act, 1898.

Turning to the sections referred to in that recital, it appears that the Local Government had undoubtedly power to make certain rules which would have the force of law: other sections, notably section 229 (g), gave them the power to make rules generally for the guidance of committees and public officers in all matters connected with the carrying out of that Act. So that, it is clear, I think, that the rules which could be made by the Local Government under the powers given to them fall into two distinct categories, each with a different effect from the other.

Unfortunately, as it turns out, the Local Government did not say which of the rules they were making under one section and which under the other, and it has now fallen upon us to say whether rule 24 of Chapter VI was made under section 71, or whether it was made under section 229.

It is a little difficult to know precisely under which section it was made. If it was made under section 71, it seems to me that the Local Government had no power to make the rule, because section 71 empowered them to make rules "for the assessment, collection and remission or refund of taxes." This particular rule being incorporated amongst the rules headed "Chapter VI—Taxation" somewhat leads one to suppose that this rule was made under section 71, and I am inclined to think that it was, and that it was, therefore, beyond the power of the Local Government to make this rule, because the rule has nothing to do with the assessment, collection, remission or refund of any tax.

But, assuming that I am wrong and that it was made under section 229 (those are the only two sections under which, apparently, it could have been made), then it

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was, in my judgment, merely a rule for the guidance of the Committee.

I need not repeat the passages which my Lord has read from the case of *Nowell* v. *The Mayor of Worcester* (1), a case which seems to me to be directly in point. The words of section 85 of the then Public Health Act in England were that "the local board shall obtain from the surveyor an estimate", and so on; the word used is "shall", as in Rule 24. Yet in that case the conclusion reached by, if I may say so, a very strong Court, was that that section was merely directory; and I think that that is all that can be said about the present Rule 24, on which the appellants rely in this case.

In my view, the rule was either under section 71 and beyond the powers of the Local Government to make, or, if I am wrong in that, at least it was only directory, and it could not in any way interfere with the right acquired by third persons under any contract entered into by them with the appellants, even though the appellants had entered into it otherwise than in accordance with the directions given in the rules.

The contract between the parties must, in my judgment, stand. The appellants cannot escape from the liability into which they entered when they executed the contract, exhibit B, of the 26th of June, 1936.

As far as the relief prayed for is concerned, it appears to me that the learned Township Judge, who originally granted this injunction, appreciated all those factors which ought to be taken into account in such a case as this: he considered them, and it is impossible to say either that the injunction so granted by him, and restored by Mackney J. on appeal, was not the proper relief or that the respondent was not entitled to it.

I, therefore, agree with my Lord the Chief Justice in dismissing this appeal.

(1) 9 Ex. 457.

G.B.C.P.O.—No. 49, H.C.R., 5-12-38—1,750