ORIGINAL (CIVIL).

Before Mr. Justice Braund.

MAUNG NYI PU *v.* EAST END FILMS.*

1938

Feb. 21.

Actionable wrong—Inducing another to commit wrongful act—Procurement of object not wrongful by illegal means—Action detrimental to third party—Lawful action done by persuasion and lawful means—Motive and malice—Film actress a minor—Inducement to put an end to her contract—Offer of higher salary—Contract Act, s. 11—Infringement of copyright—"Authorising" publication—Copyright Act, s. 1 (2).

A man may be liable for inducing another to commit an actionable wrong, whatever means he employs, or he may be held liable for inducing another to do something, though not wrongful, to the detriment of a third party, if the means he employs for so inducing him are themselves illegal.

But a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has no remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though such person was actuated by malice.

Held, that a person who induces a film actress to put an end to her contract of service with another, she being a minor and consequently not bound by her contract, and to come to him on a higher salary, commits no actionable wrong. Persuasion and offer of a higher salary are not illegal means.

Allen v. *Flood*, (1898) A.C. 1; *De Francesco* v. *Barnum*, 45 Ch.D. 430, referred to.

Held also, that in s. 1 (2) of the Copyright Act the word "authorise" had a wide meaning as in the English Act and would cover anything done with the knowledge and connivance of a person.

Falcon v. *Famous Players Film Co.*, (1926) 2 K.B. 474; *Performing Right Society, Ltd.* v. *Ciryl Theatrical Syndicate, Ltd.*, (1924) 1 K.B. 1, referred to.

Foucar for the plaintiff.

Rauf for the defendant.

BRAUND, J.—I do not in this case propose to reserve my judgment, and I shall compress it into as small a space as I can, because, in my view, the issues are really quite simple.

* Civil Regular Suit No. 206 of 1937.

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The suit is one by a gentleman named Maung Nyi Pu, who is the sole proprietor of a film-producing business called the "A1 Film Company." The plaintiffs, under that name, have been engaged for some little time in producing Burmese films for exhibition in Rangoon and in Burma generally. The suit is brought against a rival concern called the "East End Films," of which the sole proprietor is an Indian gentleman named Anand Singh. The subject-matter of the differences which have arisen between the plaintiffs and the defendants is a young film actress by the name of Ma Than Tin, otherwise called Gracie May Than.

The plaint puts the matter in this way. It says by paragraph 2 that Ma Than Tin in the years 1935 and 1936 had entered into a contract with the plaintiffs to act in a number of films of their production and, in particular, it seems—there is no dispute about this—that on the 22nd June 1936, Ma Than Tin together with her mother purported to enter into a contract with the plaintiffs that she would act in five films for the plaintiffs at a salary which, I think I am right in saying, was to be Rs. 300 for each of the five films. It is right that I should say that this so-called contract was the third of three contracts that Ma Than Tin had had with the plaintiffs, the other two being earlier ones in point of time. And I am prepared to accept it for the purposes of this judgment, on the evidence that I have heard, that it is fair to say that such reputation as an actress as Ma Than Tin enjoyed in Burma had been acquired through the medium of the plaintiffs' pictures in which she had been engaged. It seems that only two of those five pictures had been completed by May 1937. The first one was a comparatively short one. But the other—a picture by the name of "Webagi"—was of such a character that considerable difficulty arose both in the photography and in the setting of it

and, in consequence, it occupied a period, I think, of nine months or more. In the result, therefore, up to May 1937 there had, as I have said, been completed only two out of the five pictures in which Ma Than Tin was engaged to act. I am prepared to believe that by that time there may have been present in the minds of Ma Than Tin and her mother some disappointment at the length of time which it had taken to fulfil the former's engagement, because it should be remembered that her remuneration was not based on a time scale but upon a fixed remuneration for each picture.

The plaint then goes on to allege by paragraph 4 that the defendants induced Ma Than Tin to leave the plaintiff's service. I think, perhaps, I had better read paragraph 4 in its entirety :

"That in the month of May 1937 whilst the said Ma Than Tin was actually and in fact in the employment of and in receipt of wages from the Plaintiffs she was approached by the Defendants and wrongfully and improperly induced by them to leave the service of the Plaintiffs."

And it proceeds, upon that basis, to claim against the defendants damages for enticing Ma Than Tin away from them and inducing her to leave their service. The amount of damages for that claimed by the plaintiffs is Rs. 8,000.

There is a second cause of action pleaded by the plaint, which is to the effect that, after Ma Than Tin had left the plaintiffs and had entered into an engagement with the defendants, the defendants caused to be published in the Burmese Cinema Journal of June 1937 an advertisement or announcement of their forthcoming productions in which Ma Than Tin was to perform and—so the plaintiffs allege—there was reproduced in that advertisement or announcement a photograph of

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Ma Than Tin which photograph was the copyright of the plaintiffs. And upon that footing the plaintiffs claim against the defendants an injunction to restrain them from infringing their copyright in the photograph and Rs. 100 by way of nominal damages.

That, then, is, in short, the case with which I have to deal. And I will deal with it in the order in which I have set it out, namely, the question of enticing Ma Than Tin away from the plaintiffs will be dealt with first.

Now, the first question that arises in this case is whether, as the defendants have pleaded, Ma Than Tin was, on the 22nd June 1936 and in May 1937, a minor. The relevancy is this. If Ma Than Tin was a minor, then it is contended that she was a person incapable of contracting and, accordingly, that there could *ex hypothesi* have been no relationship founded in contract between her and the plaintiffs. And it is said that if that is so, then there can be in law no enticing away so as to give rise in the plaintiffs to any right of action in damages against the person who enticed her. I have, therefore, first to determine the question what the age of Ma Than Tin is.

I have heard some evidence upon this question. In particular I have seen the girl's father in the witness-box. He has sworn quite definitely that she was born on the 30th September 1921, which, if it is true, would make her now rather less than seventeen years of age. In addition to that, the defendants have had her medically examined by a lady doctor in Rangoon (Dr. Ferguson), who has come here and expressed an unequivocal opinion that Ma Than Tin is still under the age of eighteen years. I have no real evidence to the contrary and in face of this I do not find it possible to doubt but that I must accept it that Ma Than Tin is still a minor.

That being so, the next question that I have to consider is the effect of that fact. The contractual capacity of a minor is dealt with by section 11 of the Contract Act, which says :

"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

And it has been conclusively decided by the Judicial Committee of the Privy Council, upon that section, that a person who is thereby made incompetent to contract—as, for instance, an infant—cannot make a contract at all in India. In other words, if a minor does purport to contract, that contract is not, as it is in England, voidable only at the minor's instance but is completely void.

Upon that view of the matter, I am bound to come to the conclusion that, as between Ma Than Tin and the plaintiffs, there existed in May 1937 no legal contractual relationship. Such attempts as there have been to create such a relationship were, in my judgment, clearly void. And it makes no difference whether or not the parties themselves and their advocates considered that they were bound by the contract. It is, I think, clear that there was no contractual relationship between Ma Than Tin and the plaintiffs at the date on which she left their employment in May 1937.

Now, I have heard without interruption all the evidence on both sides relating to whether, as a matter of fact, the defendants did or did not entice Ma Than Tin from the service of the plaintiffs. But before I discuss that question, it is right that I should, as briefly as possible, consider how the law stands upon questions of this kind. If, as the result of a consideration of the law, it should appear that, even if there were

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inducement, no cause of action would result from it, then it would, I think, become unnecessary for me to discuss the question of fact whether yea or nay the defendants did induce Ma Than Tin to leave the plaintiffs' service.

Perhaps I should add that it is quite clear that by the 15th May 1937,—if not earlier—Ma Than Tin had definitely expressed to the plaintiffs her intention of severing her connection with them. That is contained in a letter of the 15th May 1937—which is exhibit A2—from a Higher Grade Pleader named Maung Po Ba, acting on behalf of Ma Than Tin, addressed to the plaintiffs. In that letter she complains of certain breaches by the plaintiffs of their agreement and says that, as they have failed to carry out the terms of the contract, she now treats it as rescinded. It is quite true that Ma Than Tin in that letter is treating herself as being in a contractual relationship with the plaintiffs. But, as I have already said, in view of section 11 of the Contract Act, it does not matter in the least in what relationship to each other the parties themselves considered they stood. The substantial thing is that by the Contract Act it is definitely provided that, whatever their relationship was, it could not be one of contract because the minor was incapable of contracting. It is quite clear also upon the evidence that at this date—the 15th May 1937—Ma Than Tin had in fact ceased to do any work for the plaintiffs, and, indeed, it is one of their complaints that she refused to take part in the remaining three pictures. On the same day Ma Than Tin signed a contract to appear in a picture for the defendants.

In my judgment the whole of the law upon this question is to be found in the English case of *Allen* v. *Flood* (1). That, of course, is one of the best known

(1) (1898) A.C. 1.

cases in English law. It is a decision of the House of Lords, and it still stands as representing what the law really is. I do not think I am concerned with the facts of the case, because they are quite different from the facts of this case. The whole matter may be put quite briefly by taking the well-known passage from the speech of Lord Watson at page 96 of the Report. He says there :

"There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party ; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (1), the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party."

So, there are two alternatives. A man may be liable for inducing another to commit an actionable wrong, whatever means he employs ; or he may be liable for inducing another to do something, though not wrongful, to the detriment of a third party, if the means he employs for so inducing him are themselves illegal. And at the bottom of page 97 Lord Watson explains what he means by "illegal means." He says :

"According to the decision of the majority in *Lumley* v. *Gye* (1), already referred to, a person who by illegal means, that is means which in themselves are in the nature of civil wrongs, procures the lawful act of another, which act is calculated to injure, and does injure, a third party, commits a wrong for which he may be made answerable."

(1) 2 E. & B. 216.

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There is only one other passage that I desire to refer to. It is from the speech of Lord Macnaghten. He says at page 151 :

" I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct if it could be inquired into was without justification or excuse."

And he proceeds to give instances of the many cases in which a man may with impunity cause loss to another, even maliciously, so long as he employs no unlawful means to cause such loss. And he adds at the bottom of page 152 the words :

" The truth is that questions of this sort belong to the province of morals rather than to the province of law."

That statement, with the greatest respect, is, in my view, true.

There is only one other case that I desire to refer to, and that is the case of *De Francesco* v. *Barnum* (1). I refer to that case because it appears to me to be so exactly in point in this case. There certain infants were engaged by an apprenticeship deed to serve the plaintiff for a period of time and they were induced by the defendant to commit a breach of their obligations under the apprenticeship deed. Whereupon, the plaintiff sued the defendant for damages. Now, the point of that case was this. Normally an apprenticeship deed may be binding upon an infant but it is not binding if there are provisions

(1) 45 Ch.D. 430.

in the deed which are unreasonable. It was held, as a matter of fact, that this particular apprenticeship deed was not binding on the infants by reason of the fact that there was therein something which was unreasonable. We have, therefore, to my mind, an almost exact parallel to the present case. We have infants purporting to bind themselves by contract, which contract proves in reality to be not binding upon them at all. Ma Than Tin, in this case, purported to bind herself by contract and it proves that that purported contract does not exist. In *De Francesco* v. *Barnum* (1) it was held that, inasmuch as the infants were not in law in any way bound to the plaintiff, the act of the defendant, whatever it may have been, could have induced no wrongful breach of contract by the infants. It is summed up in the concluding words of Fry L.J. in which he says :

"I hold, therefore, this instrument is one by which the infants are not bound ; and consequently Mr. Barnum having only enticed them away from an employment or contract of a nature which is not binding upon them, no action can be maintained against Mr. Barnum."

I have, I think, said enough to indicate that, in my judgment, the plaintiffs must fail in their suit so far as it is based upon the footing that the defendants, even if they did as a matter of fact entice Ma Than Tin away, committed an actionable wrong towards the plaintiffs. At the time this happened, in the first half of May 1937, Ma Than Tin was bound by no contract with the plaintiffs. She was free to leave them, as she in fact did, at her will and the plaintiffs could have had no complaint against her. In leaving the plaintiffs she committed no wrong and accordingly, upon the authority of *Allen* v. *Flood* (2), it does not in my judgment matter whether or not she was induced

(1) 45 Ch.D. 430. (2) (1898) A.C. 1.

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to do it or what were the motives of the defendants in inducing her, if they did induce her. The suit fails for that reason under the first branch of the law laid down in *Allen* v. *Flood* (1). It fails equally under the second, for it cannot be contended that the Defendants employed any means which were in themselves illegal in enticing Ma Than Tin away from the Plaintiff's service, if, indeed, they did entice her. Persuasion is not an "illegal means." It is not illegal to offer a person a salary larger than that which he is at the moment receiving. It is not illegal to persuade. And, as is finally settled, by *Allen* v. *Flood* (1) it matters not at all what the motive is and whether it is a malicious one or not. Upon that part of the case the plaintiffs must, in my opinion, fail also.

That brings me to the other branch of the case, which is a comparatively minor one, namely the question of copyright. While in the plaintiffs' employment Ma Than Tin was, of course, photographed many times. And it appears to be the practice of film companies to take what they call "Stills", that is to say, ordinary photographs of an actress as a stationary figure. It goes without saying, I think, that the copyright of any such photograph when taken by a film company for its own purpose and with its own apparatus belongs to that company. That is what happened in this case, the photograph in question being exhibits E1 and E2. Shortly after May 1937 the defendants were minded to insert in the Burmese Cinema Journal the announcement or advertisement which I have mentioned and for that purpose they placed an order with the publishers of that journal. The actual announcement or advertisement is a full page one consisting principally of letter press describing the

(1) (1898) A.C. 1.

character of the defendant company and mentioning a number of its directors and officials together with the name of Ma Than Tin as one of the film stars employed by the defendant company. It occupies, as I say, one whole page. On either side in the middle of the page there appear two photographs, a photograph of Ma Than Tin being on the right and a photograph of Saya Shwe on the left. There is no question in this case but that the photograph of Ma Than Tin is a reproduction of the photograph exhibit E1.

By section 1, sub-section (2) of the Copyright Act 1911, the meaning of "copyright" is defined. It is defined as meaning "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever" and is made to include, among other things, the sole right to produce, reproduce, perform, or publish any translation of the work and to "authorize" any such production or reproduction, performance or publication. It is quite clear upon the facts in this case that there was no actual publication by the defendants. The block made from the photograph exhibit E1, from which this advertisement was produced, was admittedly at all material times in the possession of the proprietor of the Burmese Cinema Journal and was never the property, nor under the control, of the defendants. There is, therefore, no question of actual publication in this case by the defendants. The question that does arise is whether or not the defendants "authorized" that publication.

Before I deal with the facts it will be necessary for me to consider for a moment what is meant by "authorizing" the publication of a work in such a way as to infringe a copyright. As I have said, in this particular case the defendants had no actual control over either the photograph itself or over the block made from it. But, of course, the defendants had control in

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this sense, namely, that it was within their power to direct what should or what should not be inserted in their advertisement. In other words, although they did not control the means of reproduction, they did control the question of whether there should be reproduction at all. And I find that in English law a very wide meaning has been given to the word "authorized" in section 1 of the Copyright Act of 1911. In *Falcon* v. *Famous Players Film Co.* (1) Bankes L.J. referring to certain earlier decisions approves of the word "authorized" in this context being construed to mean "sanction", "approve" and "countenance." Those, of course, are extremely wide words. And, again, in the case of the *Performing Right Society, Ltd.* v. *Ciryl Theatrical Syndicate, Ltd.* (2), Bankes L.J. again, sitting in the Court of Appeal with Scrutton L.J. and Atkin L.J. accepts a view of the word "authorized" which covers anything done with the knowledge and connivance of a person. In that case the company and its Managing Director engaged a band to produce a play of theirs. The band on two occasions performed musical works, the copyright of which the plaintiffs were the owners. But that was done without the knowledge of the Managing Director of the company. It was accepted for the purposes of this case that the band were not the servants of the Managing Director or of the company. But nevertheless it is clearly indicated in the judgments that, if anything in the nature of even indirect evidence of permission or countenance of the performance of the works could be found, it would be sufficient to constitute "authorizing." Bankes L.J. at page 9 says :

"In order to succeed the respondents had to adduce evidence either of authority given by the appellant for the performance, or

(1) (1926) 2 K.B. 474. (2) (1924) 1 K.B. 1.

of permission to use the theatre for the performance of these pieces. I agree with Mr. Henn Collins that the Court may infer an authorization or permission from acts which fall short of being direct and positive; I go so far as to say that indifference, exhibited by acts of commission or omission, may reach a degree from which authorization or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorized the performance or permitted the use of a place of entertainment for the performance complained of.

In the present case I cannot draw the inference which the learned Judge drew from the conduct of the appellant. The band was employed and paid by the Syndicate; in July 1921, the appellant was abroad; there is no evidence that he either knew or had reason to anticipate or suspect that the band in his absence were likely to give performances which would be infringements of copyright."

Now, reverting to the case actually before me, what upon those principles I have to consider is whether there is anything in the facts of this case to give rise to a reasonable inference that the proprietor of the defendant company either knew or had reason to anticipate or suspect that the owners of the Burmese Cinema Journal would publish the photograph of Ma Than Tin in infringement of the copyright.

[On the pleadings and evidence his Lordship came to the conclusion that there was an "authorization" by the defendant of the infringement of plaintiff's copyright. His Lordship allowed the relief claimed by the plaintiff as to the infringement and dismissed the claim as to other reliefs and ordered the plaintiff to pay three-fifths of the defendant's costs.]