APPELLATE CIVIL.

Before Mr. Justice Dunkley.

1939

July 12.

U WIN SU

v.

THE SECRETARY OF STATE FOR BURMA.*

Negligence of municipal councillors—Liability for loss of municipal funds—Liability as that of trustees—Gross neglect of duty—Burma Municipal Act, s. 59.

The position of municipal councillors in regard to Municipal funds is in law that of trustees ; and their liabilities, therefore, must be determined upon that footing. As trustees they are bound to exercise over the trust property the same degree of caution and care as a man of ordinary prudence would exercise in the case of his own property. As trustees they would be liable for any loss of the trust fund which was facilitated by the gross neglect of their duties as trustees, and upon this footing their liability would be the same whether the loss was caused by an act free from moral turpitude or by a crime.

Manilal Desai v. *Secretary of State for India*, I.L.R. 40 Bom. 166, followed.

Campagnac for the appellant.

Thein Maung (Advocate-General) for the Crown.

DUNKLEY, J.—This is a second appeal under the provisions of section 100 of the Civil Procedure Code, and therefore the findings of fact of the first appellate Court are binding upon me, however gross the appellant may assert those findings to be.—*Mussummat Durga Choudhrain* v. *Jawahir Singh Choudhri* (1). I have listened on behalf of the appellant to a long argument which has been mainly directed to showing that on the evidence the learned Judges of the Courts below should have held that the deceased *Akunwun* was responsible for this embezzlement and that the appellant, who was the President of the Municipal Committee at the time, had no responsibility for it.

* Civil 2nd Appeal No. 116 of 1939 from the judgment of the District Court of Toungoo in Civil Appeal No. 49 of 1938.

(1) (1890) 17 I.A. 122.

Out of this argument only two questions of law arose. One was that there was no evidence whatever in support of the two findings of fact : first, that the President received from U Min Din, the father of the defaulting tax collector, Ba Zan, prior to Ba Zan's appointment a letter warning him of Ba Zan's bad character. In regard to this matter the conclusion must be that there is no evidence to show that the appellant ever received this letter. Consequently, I must hold that that letter has not been proved ; but, in fact, the learned District Judge on first appeal has attached no importance to it.

The second finding of fact in regard to which it is alleged that there was no evidence is the finding that the appellant received from the *Akunwun* at different times a number of reports warning him that Ba Zan had not furnished the required security and further warning him that Ba Zan would not permit his tax tickets and collections to be checked, and ultimately warning him that a report of the contumacy of Ba Zan ought to be made to the District Superintendent of Police and the Deputy Commissioner. In regard to this matter the appellant's own evidence is sufficient proof, to my mind, that these reports were received by him. He admits that on the 18th April, 1934, he made a detailed answer to charges which had been framed against him by the Committee when he was called upon to make good the loss of municipal funds. In charges Nos. 3 and 4 these reports were set out : altogether there were six of them. In his answer to those charges the appellant did not deny that he had received any of these reports. The appellant has further admitted in his evidence that at the special meeting, which was held to consider the explanation of the *Akunwun* on the 9th September, 1933, this explanation was read and discussed. This explanation mentioned all these reports and attached to it were copies of the reports themselves. The

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appellant admits that at the meeting he did not deny that these reports had been received by him. There was therefore, in my opinion, ample evidence upon which the learned District Judge could hold that all these reports had been received by the appellant.

The second question of law which has been raised is that even on the facts which have been found it has not been established that in law the appellant is liable for the loss which has been incurred by the Municipal Committee.

The responsibility of a member of the Committee rests upon the provisions of section 59 of the Burma Municipal Act, which is as follows :

" Every person shall be liable for the loss, waste or misapplication of any money or other property belonging to the committee if the loss, waste or misapplication is a direct consequence of his neglect or misconduct while a member of the committee, * * *."

The construction of the provisions of a section of the Bombay District Municipalities Act, similar to this section of the Burma Municipal Act, was considered by a Bench of the Bombay High Court in *Manilal Gangadas Desai* v. *The Secretary of State for India in Council* (1). In the course of his judgment Batchelor J. said (at page 175)

" the position of the Councillors in regard to the Municipal fund is in law that of trustees ; and their liabilities, therefore, must be determined upon this footing. As trustees there can be no doubt that they would be bound to exercise over the trust property the same degree of caution and care as a man of ordinary prudence would exercise in the case of his own property. * * * As trustees, therefore, it seems to me that they would be liable for any loss of the trust fund which was facilitated by the gross neglect of their duties as trustees, and upon this footing their liability would be the same whether the loss was caused by an act free from moral turpitude or by a crime."

(1) (1915) I.L.R. 40 Bom. 166.

And Hayward J. said :

" The Councillors have thus been placed in the position of public trustees, and would, therefore, be liable under the ordinary law for any misapplication, whether by their own acts or by any other agency through their neglect, of the property of the Municipality."

With these observations I am in entire agreement. It is idle for the appellant to set up that, because the *Akunwun* did not take certain steps in this matter, which if they had been taken would have prevented the embezzlement, therefore any negligence of which he himself has been guilty cannot make him liable under the provisions of section 59 of the Municipal Act because, as the *Akunwun*'s neglect has intervened, the loss cannot be held to be a direct consequence of his neglect. On the contrary, if the appellant's acts led to this embezzlement and to the situation, which arose therefrom, in which the Municipal Committee was unable to recover either from the tax collector or his sureties the amount embezzled, then, whatever further negligence on the part of some other person may have intervened, the loss to the Municipal Committee is plainly the direct consequence of the appellant's neglect.

Now, according to the bye-laws of the Toungoo Municipality the President is the chief executive authority in all departments ; that is, it is for him to see that the subordinates of all departments carry out their duties in the manner prescribed. Under rule 9 in Chapter II, Part IV, of the rules under the Burma Municipal Act, it is laid down that every officer or servant of a Committee who is appointed whether permanently or temporarily to a post in which he is required to receive or disburse money belonging to such Committee shall give security to such sufficient amount as the Committee may fix in each case, and the security shall be of such a nature as is required by the

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Government from a Government servant of a similar class who performs similar duties.

Maung Ba Zan was appointed a tax collector by the order of the appellant. The appellant admits that he had no authority to appoint a tax collector, as tax collectors could be appointed by the Committee only. By an order of the appellant as President, the tax tickets were handed over to Maung Ba Zan on the 6th June, 1932. The *Akunwun* received this order and was, of course, compelled to obey it. He duly handed over the tax tickets to Ba Zan, although on that date Ba Zan was not a tax collector or employed by the Committee in any capacity whatever, there was no vacancy of tax collector, and Ba Zan himself had not made an application for appointment. Incidentally, of course, Ba Zan had furnished no security. On the 7th June, that is the next day, one of the tax collectors applied for leave to the appellant. On the 8th June Ba Zan made an application for this leave vacancy. This application, instead of being presented at the Municipal Office as it ought to have been, was presented direct to the appellant. On the reverse thereof the appellant passed an order appointing Ba Zan to this vacancy and directing that the usual security should be taken from Ba Zan. He made no attempt to find out whether Ba Zan furnished the security or not. He admits himself that he made no enquiries about Ba Zan, as to whether he was a man suitable for the appointment, or whether he was able to furnish security, or whether the persons whom he had named in the application as willing to stand surety for him were prepared to stand surety, or even if prepared to stand were persons of property who were likely to be suitable as sureties. On the 9th June there was a meeting of the Municipal Committee. This appointment of Ba Zan was not mentioned by the appellant at this meeting although he

presided at it. Yet he admits himself that he made an appointment which he had no authority to make, and although he had an opportunity on the 9th June of getting the appointment confirmed by the Committee, he did not take that opportunity, and for very obvious reasons. On the 17th June he received from the *Akunwun* a report to the effect that Ba Zan had not furnished security. He took no action whatever on that report. On the 6th July the appointment of Ba Zan came before one of the Sub-Committees of the Municipal Committee for confirmation of the President's order of appointment. The appellant did not mention to the Sub-Committee that Ba Zan so far had not furnished security. He now alleges that he did not do so because the *Akunwun* or the Secretary, I am not sure which he means, informed him that the practice was that no security need be given until the appointment had been confirmed by the Committee. If such information was given, it was, of course, contrary to the provisions of the statutory rule 9 of Chapter II in Part IV of the Burma Municipal Rules. But it is quite clear that no such information was given to him because already on the 17th June the *Akunwun* had reported Ba Zan's failure to give security. This appointment of Ba Zan was confirmed by the Sub-Committee although, quite clearly, it would not have been confirmed if the Sub-Committee had been apprised of the true facts, or at least if it had been confirmed, then the negligence would have been passed on to the Committee unless the Committee took steps to see that the security was immediately furnished. On the 9th July the proceedings of this Sub-Committee came before a full meeting of the Committee, over which the appellant presided, for confirmation, and again no mention was made of the fact that Ba Zan had failed to furnish any security. During July, August, September and October the *Akunwun*

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made no less than five reports to the appellant, in which he set out that Ba Zan still had not furnished any security; further, that he had attempted on several occasions to get into touch with Ba Zan in order to check his collections and his tax tickets but had not been able to do so. He asked for the President's orders and received no orders. These reports of the *Akunwun* were, to use familiar language, burked by the appellant.

Now, on the 3rd November the *Akunwun* took action on his own authority and he seized the tax tickets from Ba Zan. Then on checking them he found that there was a shortage of over Rs. 4,000. What did the appellant do in this extremely serious state of affairs? Nothing, unless we are to believe the evidence which has been called on behalf of the plaintiff-respondent that the appellant was delaying matters in order to assist Ba Zan to find the money to make good the shortage. Instead of doing what any reasonable, prudent and honest man would have done, that is, call an immediate meeting of the Committee, he called no meeting of the Committee at all until the 19th December; and in the meantime no action of any kind was taken against Ba Zan, and only upon the order of the Committee which was passed at that meeting was a report made to the police against Ba Zan on the 22nd December.

These are the simple facts of this case. The acts of which the appellant was guilty were acts of the grossest malfeasance, not merely of misfeasance. It is clear that owing to the appellant's failure to perform his duty and his gross-misconduct Ba Zan was appointed as tax collector without any security being furnished and was allowed to break all the rules and regulations for the periodical checking of his accounts. It cannot be said that the loss to the Municipal Committee has not been

directly caused by the misconduct of the appellant. The decisions of the lower Courts were plainly correct, and the appellant is certainly responsible to make good the loss to the Municipal funds.

This appeal is therefore dismissed with costs, advocate's fee twenty gold mohurs.

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