## CRIMINAL REVISION.

*Before Mr. Justice Mosely.*

## MAUNG PO NWE *v.* MA PWA CHONE.*

1939
*June 19.*

*Judgment of civil Court—Criminal proceeding on the same facts—Suit for hire and recovery of cattle—Dismissal of suit—Criminal prosecution for breach of trust—Judgment* in rem—*Evidence Act, ss. 40, 41, 42, 43*—Res judicata—*Civil and criminal proceedings—Same cause of action.*

A judgment of a civil Court other than one *in rem* cannot finally decide a matter subsequently dealt with in a criminal Court even though the facts in dispute in the civil suit govern the only question that can arise in the criminal proceedings.

A person whose suit for hire and recovery of cattle has been dismissed is not precluded from prosecuting the defendant for criminal breach of trust in respect of the cattle. The judgment of the civil Court neither operates as *res judicata*, nor does it come under s. 40, 41, 42, or 43 of the Evidence Act; and is irrelevant in the criminal proceedings.

*Padmanabhani Ramanamma* v. *Golusu Appalanarasayya*, I.L.R. 55 Mad. 346; *Trailokyanath Das* v. *Emperor*, I.L.R. 59 Cal. 136, referred to.

*In re N. F. Markur*, I.L.R. 41 Bom. 1, dissented from.

MOSELY, J.—The learned District Magistrate has submitted the proceedings in Criminal Trial 50 of 1939 of the Township Magistrate of Kyaukkyi with the recommendation that they be quashed. The reason given was that the matter in issue had already been decided in favour of the accused in a civil suit between the same parties.

The complainant there, Ma Pwa Chone, prosecuted Maung Po Nwe and another, Tun U, for criminal breach of trust or cheating. The case, after a preliminary inquiry by the police, proceeded against Po Nwe alone under section 406 of the Penal Code. The complainant's case was that she had bought cattle for Po Nwe and hired them to him and that he had disposed of them by selling them to Tun U.

*Criminal Revision No. 221B of 1939 from the order of the District Magistrate, Toungoo, in Cr. Misc. No. 20 of 1939.

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This criminal case was only instituted after Ma Pwa Chone brought a civil suit in the Township Court of Kyaukkyi (Small Cause Suit No. 3 of 1939) where she sued Po Nwe, who is her cousin, for recovery of the hire and the bullocks. The witnesses whom she produced there, Aung Ba and San Hla, however, made the transaction of sale and exchange one with Po Nwe and not with Ma Pwa Chone at all, and she also failed to prove payment of any hire. Her suit was accordingly dismissed.

The present criminal case has proceeded on the same facts and the same evidence, though I note that Aung Ba has modified his statement in Ma Pwa Chone's favour here. His evidence, however, will not be worth considering in view of his previous statement in the civil suit. The complainant, after her preliminary examination did not tender herself as a witness.

Maung Po Nwe seems to have made a verbal application to the Magistrate to allow him to file a copy of the judgment in the civil suit, and his prayer for adjournment for that purpose was apparently refused. He then applied to the District Magistrate for transfer of the case, but the District Magistrate has recommended the quashing of the proceedings.

The question usually presents itself in the reverse way. The judgment of a criminal Court is irrelevant in a civil suit as proof of the point decided by the criminal Court. Similarly here the decision in the civil suit was not *res judicata*. The judgment in that suit was not one which by law prevented the criminal Court from taking cognizance of the case and holding a trial (section 40 of the Evidence Act), nor was it a judgment *in rem* as defined in section 41 of that Act, which could be conclusive proof of the matters dealt with in it, nor, again, did that suit relate to matters of a public nature (section 42 of that Act). A judgment of

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a civil Court other than one *in rem* cannot finally decide a matter subsequently dealt with in a criminal Court even though the facts in dispute in this civil suit govern the only question that can rise in these criminal proceedings, for if the property in question was bought by the accused he could not be convicted of any offence with respect to it on the complaint of the complainant.

The only other *res judicata* known to the criminal law is *autrefois acquit* and *autrefois convict* (section 403 of the Criminal Procedure Code).

It has been held in one case by the High Court of Bombay in *In re N. F. Markur* (1), that a copy of the judgment in a civil suit should have been allowed to be filed in the subsequent criminal proceedings. It was said there that that judgment was relevant to know what the rights of the parties were with respect to the matter in dispute. Heaton J. said,

"It is a matter of the first importance, of the very highest relevancy to show to a criminal Court that the matter which the criminal Court is asked to adjudicate on has already been fully dealt with by a civil Court . . . . . The judgment is relevant not for the purpose of proving or disproving facts in dispute in the case, but for the purpose of enabling the Magistrate to decide whether he should . . . . exercise the discretion given him by clause (2) of section 253 of the Criminal Procedure Code."

The Evidence Act, however, does not warrant this proposition of law. The judgment in the civil suit was not one of those mentioned in sections 40, 41 and 42, and was, therefore, irrelevant, not being a fact in issue, nor relevant under some other provisions of the Evidence Act (section 43 of the Act). Then, again, as admittedly the judgment should not be used to prove or disprove the charge, it is difficult to see how the

(1) (1914) I.L.R. 41 Bom. 1, 5.

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Magistrate could have used it on which to ground his order of discharge. That would have been equivalent to treating it not merely as relevant but as conclusive. It is clear, I think, that the decision in *In re N. F. Markur* (1) was on grounds of policy rather than of law, for it was said :

> "We cannot have criminal courts trying over again matters which have been finally dealt with and finally decided by a civil court of competent jurisdiction."

*In re Markur*'s case (1) was dissented from in *Padmanabhani Ramanamma* alias *Bullemma* v. *Golusu Appalanarasayya* (2) where it was rightly remarked that though the civil suit and the prosecution may be based on exactly the same cause of action, the parties are, strictly speaking, not the same. The burden of proof is differently placed and different considerations may come in. The result may, therefore, be a conflict in decision. Instances are given there, a trial for murder in which the confession is inadmissible in evidence and a suit for damages for the murder where the confessional statement is admissible : another instance is more familiar, a prosecution for defamation governed by the provisions of the Penal Code and a suit for damages governed by the English law of slander and libel. As is again said there, in a passage quoted from another judgment, the risk of such conflict is one that is inherent in the division of causes into criminal and civil. The judgment of neither Court is binding on the other and each must decide the cause on the evidence before it. If they arrive at different conclusions it is regrettable but unavoidable.

A similar recent decision is *Trailokyanath Das* v. *Emperor* (3).

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(1) (1914) I.L.R. 41 Bom. 1. (2) (1931) I.L.R. 55 Mad. 346.
(3) (1931) I.L.R. 59 Cal 136.

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I am unable, therefore, to accept the learned District Magistrate's recommendation on the ground given by him. In the present case, however, I think that this recommendation can be supported on another somewhat analogous ground. The applicant is a poor man who could not afford to be represented in the criminal proceedings. It is obvious that if he had filed or were allowed to file a copy of the evidence of Maung Aung Ba, given in the civil suit in this trial, the trial could not possibly result in his conviction. It will, therefore, be directed that the proceedings be quashed and the accused, Maung Po Nwe, acquitted.