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PRIVY COUNCIL.

MOUNG THA HNYEEN (PLAINTIFF) *v.* MOUNG PAN NYO (DEFENDANT.)

[On appeal from the Special Court of Lower Burma at Rangoon.]

P. C.* 1900 *July* 6.

Privy Council, Practice of—Concurrent judgments on fact.

Provided that there has been no contravention of law or procedure, or of any principle of justice, the rule is observed by the Judicial Committee and commonly recognized by Courts of second appeal, that there will be no interference with concurrent judgments of Appellate and Original Courts upon matters of fact unless very definite and explicit reasons are assigned for it.

Such concurrent judgments are, however, open to argument before the Committee, as in this case.

APPEAL from a decree (26th April, 1899) of the Special Court at Rangoon affirming a decree (23rd September, 1898) of the Judge of Moulmein.

The appellant, a trader in timber at Moulmein, sued on the 4th March 1897 Moung Pan Nyo, a forester then dwelling there, the respondent on this appeal, for payment of Rs. 58,537, money lent, and interest, on promissory notes made in the year 1890. The defence claimed an account, and raised the question whether the defendant was or was not entitled to be credited with two sums one of Rs. 21,350, and the other of Rs. 8,200.

* *Present:* LORDS HOBHOUSE, MACNAGHTEN, and LINDLEY, SIR RICHARD COUCH, and SIR HENRY STRONG.

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It was necessary that this question should be decided before the account could be taken, and it rested upon a finding of fact as to which both the Courts below had been in concurrence. This question was whether an agreement had been made having the effect of discharging the defendant in respect of the above sums, or so much thereof as should be found by the account to be covered by the value of timber that had come into the plaintiff's possession. That agreement was alleged by the defendant to have been orally made between him and the plaintiff in 1890 to the purport that the proceeds of the sale of a certain number of teak logs, sent from the forests in Siam floating down the Salwin river to Moulmein, should be dealt with in payment of those debts. The logs were sent by Ko Pa Thaw, the plaintiff's principal at Zimme, since deceased. The agreement was that their proceeds were to be applied by the plaintiff in satisfaction of the defendant's debt to him in priority over any claim thereupon on the part of Ko Pa Thaw, and that only the balance of the sale proceeds should be appropriated to liens created by the latter upon the logs, which were marked in a way to which the agreement referred.

The Judge of the Court at Moulmein held as to the agreement that the burden of proving it lay heavily on the defendant, but that in his opinion the agreement had been proved. The defendant's case was, and the plaintiff's was not, in accordance with the indisputable facts of the case. The proved state of things was that in 1890 the defendant and the plaintiff had made a special agreement regarding the circumstances of the case, and the timber sent down by Ko Pa Thaw. Their agreement was that in consideration of the defendant's relinquishing a lien which he had upon logs, which Ko Pa Thaw, who was the plaintiff's principal at Zimme, was sending down to Moulmein, and in further consideration that these logs should be marked with the plaintiff's hammer mark, "Pon," (so that on arrival the logs might be at the disposal of the plaintiff), the latter should credit defendant's account with the proceeds of these logs to the extent of what was due upon the two sums in which the defendant was indebted to him. Only the balance of the proceeds of the "Pon" marked timber was to be held to the credit of Ko Pa Thaw's account.

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The Special Court affirmed the conclusion arrived at by the Judge of the Court below, holding the defendant entitled to the account on the basis of his being credited with the proceeds of the logs in question to an amount covering the two sums in which he was indebted to the plaintiff, any balance that might be left being credited to Ko Pa Thaw's estate.

On this appeal the respondent, in his case, relied on the concurrence of the two Courts in finding that the agreement of 1890 had been in fact made to the above effect.

Mr. *R. B. Haldane*, Mr. *J. Lowis* (of the Rangoon bar) and Mr. *J. W. McCarthy*, for the appellant, argued that the judgments of the Courts below were against the weight of the evidence. The Courts below had failed to deal with, on their right footing, two separate transactions in which the plaintiff was contracting with two distinct parties. The Courts had directed that the defendant's account with the plaintiff should be credited with the sale proceeds of logs that belonged to a person who had no direct connection with the matters involved in this suit. This was Ko Pa Thaw, a timber trader of Zimme in Siam, for whom the plaintiff was agent at Moulmein. In the right course of business the proceeds of these logs should be credited to the account of Ko Pa Thaw's estate. The judgments below had discredited the defendant's evidence as to many points of detail. Nevertheless his evidence had been acted upon. The documents and admitted facts supported the plaintiff's contentions as to the real contract. The evidence showed that all logs marked with the hammer mark specified were logs hypothecated by Ko Pa Thaw to the plaintiff for advances made long before the transactions to which this suit related. The evidence showed that the only logs to be taken into account between the plaintiff and the defendant were certain logs differently marked from those on which the lien of the defendant was asserted; and for the former the plaintiff appellant gave the defendant full credit in respect of their proceeds.

Mr. *Herbert Cowell*, for the respondent, was not called upon.

Their Lordships' judgment was then delivered by—

LORD HOBHOUSE—This case has been very ably argued for the appellant, and there is no doubt a great deal of obscurity,

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and some puzzling circumstances in it. But it has been the subject of an extremely elaborate and careful judgment by the first Court below, and that judgment has been examined by the Court of Appeal, who have agreed with the first Court. Although acute criticisms have been made upon some points in the case, there has been nothing to show that there has been a miscarriage of justice, or that any principles of law or of procedure have been violated in the Courts below. This case is one which very decidedly falls within the valuable principle recognised here, and commonly observed in second Courts of Appeal, that it will not interfere with concurrent judgments of the Courts below on matters of fact, unless very definite and explicit grounds for that interference are assigned. In all probability their Lordships would be doing a great deal more harm than good if they were induced to disturb judgments arrived at by the local Judges on such criticisms as have been assigned in this argument.

Their Lordships will humbly recommend Her Majesty to dismiss the appeal; and the appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *A. H. Arnold & Son.*

Solicitors for the respondent: Messrs. *Richardson & Co.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

1900 *June* 21 & 26.

UMAKANTA ROY (OPPOSITE PARTY) *v.* DINO NATH SANYAL (PETITIONER.) *

Second Appeal—Civil Procedure Code (Act XIV of 1882), ss. 244 (c), 311, 312, 588—Decree—Order setting aside a sale in execution of decree—Fraud, allegation of.

No second appeal lies from an order setting aside a sale under section 312 of the Code of Civil Procedure, although an allegation of fraud

* Appeals from Orders Nos. 22 and 23 of 1900, against the order of W. H. Vincent, Esq., District Judge of Burdwan, dated the 5th of June 1899, affirming the order of Babu Basanta Kumar Ghose, Munsif of Katwa, dated the 22nd of December 1898.