

(1876) 02 PRI CK 0003

In the Privy Council

Moung Shoay Att

APPELLANT

Vs

Ko Byaw

RESPONDENT

Date of Decision : 14-02-1876

Acts Referred:

Citation : (1876) 3 IndApp 61

Hon'ble Judges : James W. Colville, Barnes Peacock, Montague E. Smith, Robert P. Collier, JJ.

Judgement

M.E. Smith, J.—This is an appeal from a decree of the Special Court of British Burma, reversing a decree of the Judge of Moulmein, which had dismissed the plaintiff's suit, and giving instead of that decree a judgment for the plaintiff for the sum of Rs. 8,480, with interest.

2. The plaintiff and defendant are merchants in the timber trade, residing at Moulmein, in British Burma, and it is their practice to go up into the Siamese territory, and under permission from the Government to cut timber there, and bring it down in a manner which has been described by Mr. Coryton, to Moulmein. The plaintiff, at the time when the transactions which gave occasion to these proceedings took place, did not go into the Siamese territory himself, but employed an agent called Douk to purchase timber for him, and entrusted him with a considerable sum of money, and with elephants used in drawing the timber which has been cut. It seems that Douk, on the 20th September 1870, entered into an agreement with a man called Pho to purchase some timber, 200 logs, if Pho could obtain a permit. It will be necessary, hereafter, to consider that agreement more in detail; it is sufficient now to state the fact that such an agreement was made, and the general purport of it. A few months afterwards, on the 3rd of January in the following year 1871, the defendant, who was personally on the spot, also entered into an agreement with the same man Pho, to cut timber for him, under a permit which the defendant had obtained from the Siamese authorities. The defendant entered into agreements with two other foresters of a similar kind. Timber was cut by Pho and by the two other foresters, and on the 6th May, Douk, the plaintiff's agent, went to the two creeks which

seem to be called Whaypoogan and Whaykoonpai, where the timber was stacked, and put his mark upon 152 logs. It appears upon the evidence, that at that time there were no marks upon the timber, except those of the foresters who had cut it. It seems that Pho had cut 81 of these logs, and the two other men had cut 71 logs. The defendant hearing of this proceeding, complained to a Siamese officer, styled binyakin, who was said to be a Judge of the district, of what Douk had done, and the Judge sent a peon with the defendant to arrest Douk, and to bring him before him. It seems that after searching for Douk for two or three days, he was found, and taken into custody, considerable violence being used. How far some violence was necessary to secure him, or what degree of force might reasonably have been employed for that purpose, does not appear, but certainly it would seem that a great deal of violence was used; that he was beaten, tied with a rope, and in this state carried into the presence of the binyakin. When there the binyakin put Douk into irons, with an iron collar round his neck, and it is said that threats of personal violence were used towards him, unchecked by the binyakin. There is probably some exaggeration in the evidence upon that point. But enough remains to show that he was not only placed in imprisonment, but had these irons put upon him, and an iron collar. Under these circumstances he was charged with having put his mark upon the logs, and he was charged with having so done fraudulently and criminally. That being the state of affairs, and Douk being evidently under great apprehension at the time as to what further might happen, it was proposed that he, having put his mark upon the timber, should purchase it; then there was a parley as to the price, and ultimately it was stated that the price he must give for this timber should be 45 rupees a log, a price certainly much larger than the value of the timber as it then lay. It is said to be the law of Siam that a man who has improperly put his mark upon timber which does not belong to him is liable to pay the value of 10 logs for every log so marked. That law or custom is by no means clearly proved, but whether it be so or not, it is clear that the agreement for the purchase of the logs by Douk was at a price considerably beyond their value.

3. It has been argued on the part of the appellant that although Douk must be considered as a prisoner at the time before this Judge, yet his imprisonment was lawful, and therefore that the contract cannot be avoided on the ground that he was under illegal constraint at the time he made it. The Judge of Moulmein is right in his view of the law of England, that in this country if a man is under lawful imprisonment for a civil debt, an agreement which he makes while subject to that constraint is not, by reason of his being so subject to it, capable of being avoided, provided that it is not unconscionable. But imprisonment in a country where there is no settled system of law or procedure, and where the Judge is invested with arbitrary powers, is duress of a wholly different kind. In the one case the prisoner knows that the length and severity of his imprisonment are defined and limited by the law, and cannot be exceeded; whereas in the other the prisoner neither knows what will be the length of his imprisonment, nor what amount of pain and misery he may be put to; all is indefinite; and therefore the

apprehension acting on the mind of a man in such a situation would be infinitely greater than if he were imprisoned in a country like England, where the law is settled, and cannot be exceeded by the Judge.

4. With regard to the actual circumstances of this imprisonment, there was a great deal of violence used at the time of the arrest, and whether some violence was justified or not by Douk's resistance, it is unquestionable that he received a severe beating, which would affect the state of his mind. Then he was put into irons. The charge is made against him--not that he had unintentionally put his mark upon the property of another--but that he had done so criminally, with a view to steal it. He knew what had happened and might happen again in this Siamese territory,--that a wrongful act of that kind might be very severely punished, and to an extent which in this country might be supposed to be disproportionate to the offence.

5. No doubt, speaking generally, all matters relating to a contract are to be decided by the law of the country where the contract is made, but there are principles of universal application by which all contracts, wherever made, must be judged. The first principle of contract is, that there should be voluntary consent to it. In this country duress has always been held to avoid a contract, except in certain cases where the imprisonment is lawful. But this exception would not be held to apply to a case where a man is in custody upon a criminal charge like the present, and has made an agreement to give a benefit to another to release him from that charge; in fact such a contract in this country would be held to be void on other grounds. Upon the face of it, this contract shows that the man was charged with a criminal offence. "Treephaw"--that is Douk--requests not to raise contention against me with regard to having stolen, impressed, and struck with hammer mark the 152 logs of teak timber which has been cut, worked, and kept at the place allotted by Mounng Shoay Att in the forest, for which Mounng Shoay Att obtained the Imperial order and written permit." It was to get rid of that charge of having stolen these logs, when he was in custody under the circumstances which have been referred to, that this agreement was made. Their Lordships therefore think that the plaintiff may repudiate it, as having been made by his agent when under duress.

6. It is to be observed that the treaty between the British Government and the Siamese Government contains this clause: "With reference to the punishment of offences or the settlement of disputes, it is agreed that all criminal cases in which both parties are British subjects, or in which the defendant is a British subject, shall be tried and determined by the British Consul." It seems, therefore, that the binyakin had no jurisdiction to try the offence, and the proceedings bear the character of an attempt, by bringing Douk before this Judge, to extort an agreement from him.

7. Their Lordships for these reasons think that this agreement does not in any way bind the plaintiff; and inasmuch as Rs. 3,000 of his money was paid, and his elephants were delivered under it, that he is entitled to bring this suit.

8. A question was raised whether the agreement had not been confirmed and ratified by the subsequent acts of the plaintiff, or Douk as his agent. No doubt, if there had been a clear ratification, it being in the power of the plaintiff to ratify or reject it, if there were circumstances from which a ratification might properly be presumed, he would be bound by it, but their Lordships do not find any evidence of such a ratification. The delivery of the elephants was in effect made before the constraint or the apprehension of constraint had disappeared; for simultaneously with entering into this agreement, it appears that Douk gave an order to the man who had the custody of the elephants, to give them up to the defendant, and although the actual delivery did not take place immediately, it was made in consequence of that order, and Douk says he was in such a state of apprehension that he could do nothing afterwards, and as soon as he recovered from his beating, went down to Moulmein. The other point is that the timber was accepted by the plaintiff. But their Lordships think that it was not accepted under such circumstances as constitute a ratification, because, all the way through, Douk was protesting against this agreement, and so was the plaintiff, claiming the timber as his own property.

9. Another ground suggested by the Special Court on which this agreement could not be sustained as against the plaintiff, seems to their Lordships to be well founded. Douk being in custody upon a criminal charge had clearly no authority to part with his employer's property, or to make an agreement to part with it, to relieve himself from such a charge. If there had been any question of a civil nature, it might have been within the scope of his authority, as a general agent, to compromise such a claim, but when charged with personal misconduct and a crime, which it cannot be assumed that his principal had authorized, no authority from the employer can be implied that his money and his elephants should be handed over to the man making the charge, in order to relieve his agent from it. It is sufficient, however, to decide that the agreement is avoided on the ground of duress, for, as the lower Appellate Court observes, this last ground for impeaching the agreement was not made in the pleadings.

10. Their Lordships having come to this conclusion upon the agreement, it follows that the decree in favour of the plaintiff must stand.

11. Then the question arises whether a deduction should not be made from the amount of the decree for the value of the timber, which their Lordships are satisfied the plaintiff got into his possession. Undoubtedly if the timber belonged to the plaintiff, and the claim made by the defendant upon it was an invalid one, no deduction ought to be made from the damages, although possession of it may have been obtained in consequence of this agreement. This raises the question of whom the timber belonged at the time when this agreement was made up on the 10th may. (His Lordship, after going through the evidence on this point and finding it in favour of the defendant, continued) Their Lordships are therefore of opinion that the total amount decreed and payable to the plaintiff under the decree appealed from should be reduced by the sum of Rs. 3040, being the value

of the 152 logs of timber at Rs. 20 per log. The amount so reduced will be payable to the plaintiff with interest thereon at 5 per cent. From the date of the said decree to the date of realization.

12 Their Lordships will humbly advise Her Majesty that the decree be varied by making the reduction in these terms, and that in other respects it be affirmed. The decree being thus varied, their Lordships think there should be no costs of this appeal.