

APPELLATE CIVIL.

*Before U Thein Maung, Chief Justice.*H.C.
1948U BA U (APPLICANT) *v.* U YWET (RESPONDENT).*

Feb. 19.

Civil Procedure Code, s. 115—Direction in the judgment regarding burden of proof—Successor giving direction to the contrary—Interference in Revision.

Held : That where the judgment and decree of the Court gave directions regarding procedure and burden of proof, and there was no appeal against the decree, the successor of the Judge had no jurisdiction to alter the direction regarding the burden of proof.

Where a lower Court has failed to take into consideration some material proposition of law or some material fact in evidence, it has acted illegally in the exercise of its jurisdiction and its decision may be revised by the High Court.

Fut Chong v. Maung Po Cho, (1929) I.L.R. 7 Ran. 339, followed.

The High Court will not interfere in revision against an Interlocutory Order unless some grave injustice or hardship would result from a failure to do so.

L.P.R. Chettyar Firm v. R. K. Bannerji, (1931) I.L.R. 9 Ran. 71, followed.

*Thein Moun*g for the applicant.

U THEIN MAUNG, C.J.—This is an application to revise the order of the District Court of Mandalay, dated the 7th August 1947, in which it is stated that the burden of proof lies on the present petitioner U Ba U and that the Commissioner for taking accounts should proceed on the basis of the burden of proof being on him. The main ground for revision is that the learned District Judge has acted without jurisdiction in passing the said order which is in direct conflict with the judgment of the Assistant District Judge, Mandalay, in Civil Regular Suit No. 14 of 1940, dated the 8th September 1941.

The following is an extract from the said judgment :

“ As U Po Thin was liable to render accounts to the plaintiffs there should be a preliminary decree for taking accounts. The plaintiffs should first produce full evidence of the properties

* Civil Revision No. 80 of 1947 against the order of the District Court of Mandalay in Civil Misc. No. 66 of 1946, dated the 7th August 1947.

(books, documents, moneys, etc.) handed over to U Po Thin and, if they like, produce full evidence of the uses made by U Po Thin of the said moneys or any portion thereof, *e.g.*, in purchasing the Kankauk land or erecting the barrack. Then the defendant will produce full evidence in rebuttal of the evidence produced by the plaintiffs, *e.g.*, the evidence to show (a) that no money was handed over to U Po Thin, (b) that the Kankauk land was purchased with U Po Thin's own money or (c) that U Po Thin did not erect any barrack at all. He will render account of the properties handed over or received by U Po Thin. Thus the decree will direct an enquiry into (i) the properties handed over to U Po Thin as trustee and treasurer, (ii) the expenditure incurred or payments made by him in such capacity, (iii) the profits received by him and by the defendant after his death and (iv) how much money is payable by him (*i.e.*, his estate or his legal representative) to God or *vice versa* and what property is or properties are recoverable from him (*i.e.*, his estate or his legal representative).

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So the Commissioner who has been appointed to take accounts in accordance with the said judgment must follow the procedure which has been prescribed in the above extract. The learned District Judge has no jurisdiction to review the said judgment, or to give directions to the contrary.

It has been held in *Fut Chong v. Maung Po Cho* (1) that if a lower Court has failed to take into account some proposition of law or some material fact in evidence, it has acted illegally and its decision may be revised by the High Court. In this case it is fairly obvious that the learned District Judge has failed to take into account the fact that the question as to the burden of proof is not an open one in view of the above extract from the said judgment. He has overlooked the fact that the said judgment contains directions as to the procedure to be followed by the Commissioner in taking accounts.

As has been pointed out in *L.P.R. Chettyar Firm v. R. K. Bannerji* (2), the High Court does not interfere

(1) (1929) I.L.R. 7 Ran. 339.

(2) (1931) I.L.R. 9 Ran. 71.

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unless some grave injustice or hardship would result from a failure so to do. However, in this case I am satisfied that a grave injustice or hardship will result from the burden of proof being placed on the present petitioner contrary to the directions contained in the said judgment.

The application is allowed with costs, advocate's fee three gold mohurs. The order of the District Court is set aside and the Commissioner for taking accounts must proceed in accordance with the directions contained in the said judgment.