with stolen property in his possession, and the property is seized from him, but the thief himself succeeds in making good his escape, then surely the order under S. 523 would not direct the return of the property to the thief. Also, when the person from whom the property is seized admits or alleges that the property was left in his temporary custody by some other person it could not be returned to him; and, equally it could not be returned to him if he admitted that the property was found on his premises, but alleged that it was there without his knowledge. But where, as under S. 512 (1), the proceeding before the Magistrate is neither an inquiry nor a trial, the Magistrate has no authority to arrive at conclusions regarding facts which are in dispute between the contending parties, in order to decide which of these parties is the person entitled to the possession of the property; he must give possession to the person so entitled, having regard to the indisputable or admitted facts, and leave the contending parties to fight out their rights in a civil Court.

In the present case, it is clear that on the admitted facts the person entitled to the immediate possession of the money representing this paddy is the respondent. Therefore the order of the Sub-divisional Magistrate of Kyaukpyu, dated 5th November 1935, is wrong, and it must be set aside; and, instead thereof, it must be directed that the money shall remain in the possession of the respondent, Balabux Sodani, until the applicant, U Ba Hlaing has established his title thereto in appropriate civil proceedings brought for the purpose.

D.S./K.S. *Order accordingly.*

## A. I. R. 1937 Rangoon 45

ROBERTS, C. J. AND DUNKLEY, J.

*Bombay Burmah Trading Corporation, Ltd.*—Appellant.

v.

*Ma E Nun*—Respondent.

Misc. Appeal No. 66 of 1936, Decided on 13th August 1936.

**(a) Workmen's Compensation Act (1923), Sch. 2, Cl. 22—Occupation of workman at time of accident must be considered to determine whether he is 'workman'—Elephant rider is workman — Elephant rider while employed as mere messenger meeting death ceases to be workman — Dependants are not entitled to compensation.**

In deciding whether a person is a workman within the meaning of the Act, the present occupation of the workman at the time when he met with the accident must be considered. [P 46 C 2]

A person, who is employed as an elephant rider, is a workman within the meaning of Workmen's Compensation Act; nevertheless when such person at the time of his death is employed as a mere messenger and not as an elephant rider, he ceases to be a workman and his dependants are not entitled to any compensation: *A I R 1930 Bom 44* and *A I R 1929 Mad 698, Rel. on.*

[P 46 C 2; P 47 C 1]

**(b) Workmen's Compensation Act (1923)—Interpretation — Act must be construed strictly.**

The Workmen's Compensation Act is a quasi penal statute and must not be interpreted with sympathetic leniency but must be construed strictly. It can always be altered by the Legislature but until the Legislature protects persons who may be and are protected in some other countries, the duty of the Courts is to interpret the Act as the Courts find it: *A I R 1931 Rang 173, Foll.*

[P 46 C 2]

*Beecheno*—for Appellant.

**Roberts, C. J.**—This is an appeal under S. 30, Workmen's Compensation Act, against an award made to the respondent who is the mother of Maung Ba Aye, a person employed by the Bombay Burmah Trading Corporation, Ltd., in the capacity of an elephant driver. He was sent with a letter by a person whose duties corresponded with those of a head forester for certain rice to be sent by Mr. Barlow, who was the English assistant of the appellant company, and it was delivered, and it was on the way back on foot on the road that Maung Ba Aye, who had a companion with him, was attacked by a bear which came out from the jungle. The companion escaped, but Maung Ba Aye was fatally injured and died on his way to hospital. We have to consider two points which have been laid before us for determination. The first is a contention by the appellants that at the time of the accident the deceased was not a workman within the meaning of the Workmen's Compensation Act, and the second is that, if he were a workman within the meaning of the Act the accident did not arise out of and in the course of his employment.

The definition of a workman in the Act is to be found in S. 2 (1) (n), and means for the purpose of the present case any person who is employed on monthly wages not exceeding Rs. 300 in any such capacity as specified in Sch. 2, and in Sch. 2, Cl. 22 the term "workman" includes a person who is employed in the training, keeping or working of elephants or wild animals. By virtue of sub-s. (3), S. 2 the Governor-General in Council has notified as hazardous certain other occupations and has

added them to Sch. 2. They are the felling and logging of trees, the transport of timber by inland waters, the control or extinguishing of forest fires and elephant catching operations. We observe first of all in general that the respondent's son was employed in the training, keeping or working of elephants or wild animals, but we have to consider whether he was so employed at the time at which he met the accident and in relation to that matter our attention has been drawn to the case in 54 Bom 114.[1] In that case it was held that a workman who was employed to unload bales from a railway wagon standing in a dock and to take them to a shed adjoining the wharf and stack them there was not entitled to compensation if injured whilst arranging the bales in the shed by a bale which fell down. The acting Chief Justice pointed out that the provisions of the Act show that the intention of the Legislature was that the person should be directly concerned in the act of loading the ship, and that circumstance is seen when para. 5, Sch. 2, of the original Act of 1923, is looked at. This original paragraph was thought to be too narrow, and the Legislature therefore amended it, and it now appears in a much wider form in para. 7, Sch. 2, and covers operations which were not covered when the case in 54 Bom 114[1] was decided. We have also considered the case in 52 Mad 747,[2] and there the judgment of the learned Coutts-Trotter, C. J. contains these words :

> There is this difference between the English and the Indian Statute, that whereas the former applies to all workmen, the latter only applies to certain defined classes of workmen and casts upon us, in my opinion, the duty of defining these classes with such precision as is possible,

and he goes to examine the case of a person who was employed at a warehouse in receiving goods lowered by a crane inside in a godown. These goods were to be carried to a quay in carts for the purpose of loading a ship some quarter of a mile away and a workman in the godown was injured by the fall of a bale so lowered. It was held that he was not employed for the purpose of loading a ship within the meaning of Cl. 5, Sch. 2 of the Act of 1923. Now applying those facts here it is clear that at the time that the deceased was being sent out on a message to Mr. Barlow he was not employed in the task of training, keeping or working of elephants or wild animals. He was a person who was normally employed in that capacity, but was being given other duties to perform on that particular day. He therefore was not running the risks incidental to persons who are employed in one of the hazardous occupations which form part of the schedule or have been added thereto. If the Legislature desires in its wisdom to protect workmen employed upon these duties, that can be done by a notification under sub-s. (3), S. 2, Workmen's Compensation Act, that their occupation is a hazardous one. That fact was pointed out by Waller, J. in 52 Mad 747.[2] But being obliged to administer the Act as it stands, we are constrained to say that the deceased was not a workman within the meaning of the Act for the purposes of this appeal. It is therefore unnecessary for this Court to consider the second question put before us, namely whether the accident was one arising out of and in the course of his employment. The Workmen's Compensation Act, as was pointed out by Page, C. J. in 9 Rang 46,[3] is a quasi-penal statute and it must not be interpreted with sympathetic leniency but must be construed strictly. It can always be altered by the Legislature, but until the Legislature protects persons who may be and are protected in some other countries, the duty of the Courts is to interpret the Act as the Courts find it, and in this case we have no doubt in saying that the respondent is not entitled under the Workmen's Compensation Act to recover from the appellant company. We therefore allow the appeal and dismiss the application for compensation.

**Dunkley, J.**—I agree that the order of the Commissioner for Workmen's Compensation must be reversed. The point of the decision in 54 Bom 114[1] was that in deciding whether a person is a workman within the meaning of the Act, the present occupation of the workman at the time when he met with the accident must be considered. No doubt as an elephant rider the deceased Maung Ba Aye was a workman within the meaning of the Act, but

1. Parsu Dhondi v. Trustees of the Port of Bombay, A I R 1930 Bom 44=1930 Cr C 85=123 I C 495=54 Bom 114=31 Bom L R 1304.
2. Ralli Brothers, Madras v. Perumal, A I R 1929 Mad 698=118 I C 770=52 Mad 747=57 M L J 88 (F B).
3. *In the matter of* Maung Kyan, A I R 1931 Rang 173=1931 Cr C 669=131 I C 734=9 Rang 46 (S B).

although this was his normal occupation at the time when he met with the accident he was employed in the subsidiary task of a messenger, and a messenger does not come within Sch. 2 of the Act, and consequently he was not a workman within the meaning of the Act at the time when he met with the accident, and therefore the appellant company cannot be ordered to pay compensation to the respondent. It is conceded that the dependants of a messenger are not entitled to compensation under the Act and merely because the deceased in the present case was for part of his time employed as an elephant rider, that cannot entitle his dependants to compensation when the accident occurred while he was being employed as a messenger.

B.D./R.K. *Appeal allowed.*

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## A. I. R. 1937 Rangoon 47

BAGULEY, J.

*Ma Kyin Hone* and *others*—Appellants.

v.

*Ong Boon Hock* and *others* — Respdts.

Special Second Appeal No. 154 of 1936, Decided on 19th August 1936.

**(a) Electricity Act (1910), S. 9 (2) and (3) — —Word 'transfer' includes transaction by which party divests himself of portion of interest—Word, 'undertaking' includes everything which appertains to supply of electricity under license — Licensee taking in partners and vesting building, machinery and license, etc., in partners without consent of Local Government—Transaction held void.**

The word 'transfer' is a word of very wide meaning and includes every transaction whereby a party divests himself or is divested of a portion of his interest, that portion subsequently vesting or being vested in another party. The word 'undertaking' includes all lands, buildings, machinery, lines of supply, goodwill etc.; in fact everything which appertains to the supply of electricity under the license. [P 48 C 1, 2]

Where a licensee took in partners and the partnership deed vested the buildings, machinery, books, papers and the license of electricity in the partners without the previous consent of the Local Government :

*Held* : that the licensee transferred a part of his undertaking within the meaning of S. 9 (2) and the transaction being without the previous consent of the Local Government was void : *A I R 1930 Rang 271, Foll.; 37 Bom 320; 12 Bom 422; A I R 1929 All 210* and *A I R 1917 Bom 250, Expl.* [P 47 C 2; P 49 C 1]

**(b) Contract Act (1872), Ss. 24 and 57—Licensee of electricity supply creating partnership—Partnership agreement transferring undertaking to partners who in their turn agreeing to pay one-tenth of profits to licensee and after his death to his heirs—Contract held was indivisible and therefore void as whole under S. 24—The contract being single one and having no contingent part S. 57 did not apply.**

A licensee of electric supply created a partnership. The partnership agreement vested the building, machinery, license and book, etc., in the partners and the partners agreed to pay one-tenth of the profits to the licensee and after his death to his heirs as long as the company was in existence :

*Held* : that the transfer of the undertaking was a portion of the consideration whereby the other members of the partnership agreed to pay one-tenth of the profits to the licensee and his heirs. The contract was not divisible and therefore void as a whole under S. 24. [P 49 C 1]

*Held further* : that the contract was a single contract and had no contingent part. Hence S. 57 did not apply. [P 49 C 1]

*P. S. Chari*—for Appellants.

*P. K. Basu*—for Respondents.

**Judgment.**—This appeal arises out of a suit for a declaration and accounts. It would appear that one Tan Moon San had got a license under the Electricity Act for the supply of electricity to the town of Pyinmana. It would seem that he had not got enough capital to carry out the necessary expenditure; so he took other persons into partnership or borrowed money from them. Subsequently further money was required. In the end a document headed "partnership agreement" was executed between Tan Moon San on the one hand and a number of other people who are now represented by the respondents on the other. By this deed a partnership was created. The money to be contributed by the various partners was specified, Tan Moon San contributing no money at all. Ong Ma Po was appointed president and cashier and Ko Wunna was appointed manager and vice-president, Tan Moon San being, it would appear, the chief engineer. These partners got salaries from the partnership. Tan Moon San was to get ten per cent of the profits and there is a proviso that in the event of his death his heirs were to withdraw the money as long as the company was in existence. If there were no profits Tan Moon San was not liable for losses. The proportions in which the other partners were to divide the remainder of the profits are laid down. Then there comes a clause :

The buildings and machines of the Electric Supply Company which has been established and miscellaneous things and the license for electric lighting and registers, books and papers are to be properties of the present partners who have agreed to it.

Tan Moon San died and it would appear that his heirs did not get any payment from the company, so they