

*Privy Council Appeal No 85 of 1916.*

**Maung Po Naing** - - - - - *Appellant,*

v.

**Ma On Gaing** - - - - - *Respondent,*

FROM

**THE COURT OF THE JUDICIAL COMMISSIONER OF UPPER BURMA.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL DELIVERED THE 26TH OCTOBER, 1917.

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*Present at the Hearing:*

LORD BUCKMASTER.

SIR JOHN EDGE.

SIR WALTER PHILLIMORE, Bart.

SIR LAWRENCE JENKINS.

[*Delivered by* LORD BUCKMASTER.]

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This case involves the consideration of no questions of law. Its determination depends solely upon the resolution of uncertain evidence relating to a question of fact. The materials upon which the judgment of the Board is based are only those to be found in the depositions of the witnesses and the documents that are contained in the record, and those materials are so insufficient that it is not surprising that the two Courts before whom this matter has already been heard have taken different views as to the true result.

The circumstances that have led up to this Appeal can be stated very shortly. It appears that the appellant was what is known as a *Twinzayo*, that is, a person to whom the Government was in the habit of making annual grants of certain oil wells in Upper Burma. In 1908 two of such oil wells had been applied for by him, and their numbers were known and their position specified by references to certain revenue records. They were known as Nos. 115 and 493 of 1904.

On the 26th June, 1908, the appellant agreed to sell for 36,000 rupees to the respondent these two named and specified oil wells, and the agreement provided that, in the event of the vendor being unable to deliver the sites owing to the grants

not being assigned to him by the Government, he should be compelled to refund to the plaintiff the purchase money, the whole of which was paid in advance. It is said by the appellant, and it may be accepted, that at this time there was good reason to think that the particular sites specified in the contract were the sites of wells which the Government were not prepared to grant, for on the 8th July, 1908, only a fortnight after the date of the written contract, formal applications were sent in by the defendant to the Government asking for two wells to be allotted in the place of the two that had been defined in the agreement. The case can be put in the manner most favourable for the appellant by assuming that the plaintiff knew throughout that the original application of 1904 had not been granted, and that the agreement was intended to cover, and was accepted by both parties as covering, not merely those two sites but whatever wells should be granted by the Government in the place of the application that had already been refused. The applications were, ultimately, as late as May of 1912, definitely refused by the Government, but, in the place of the wells in respect of which they had been in the habit of making annual grants to the Twinzayo, they appear to have granted a group of twenty-eight wells. The appellant alleges that the respondent agreed to accept two of those twenty-eight wells in the place of the two that were specifically named in the contract of the 26th June, 1908 (this substituted agreement being effected orally between the respondent and himself or some agent on his behalf); and he accordingly declined to pay back the purchase price of the 36,000 rupees, which, by the terms of the written contract, was repayable at the latest after the 16th May, 1912. The respondent denies that any such substituted agreement was ever made, and brought these proceedings to recover the 36,000 rupees.

The learned Judge, before whom the case was heard in the first instance, thought that there had been a new agreement to the effect alleged, and he accordingly made an order which dismissed the plaintiff's suit, and compelled the plaintiff to accept two out of the wells which the defendant possessed, those two to be determined by lot.

The learned Judge of the Court of Appeal, before whom the matter was brought on the plaintiff's instance, reversed that judgment, and held that the evidence was insufficient to establish any such bargain. From that judgment the defendant has appealed to His Majesty in Council.

The Board have given the most careful consideration to all the circumstances of the case. They have tried to the best of their power to consider the position of the parties between whom this arrangement is said to have been made and have borne in mind, that the strict rules applicable as between merchants over here who are accustomed to prompt and expeditious methods of business cannot always be expected to apply with untempered severity to people far away, living

under different conditions and having different habits of life. They have gone carefully through the evidence with the assistance of Counsel on both sides, and remembering, as they are bound to remember, that the burden of establishing this independent agreement must rest upon the defendant, they find themselves unable to ascertain from the evidence before them that that burden has been discharged. They do not think that any good purpose would be served by going in detail through the evidence of each one of the witnesses again. It has already been the subject of critical examination by the learned Judge from whom this appeal has been brought, and has been very carefully discussed in the course of the argument before this Board. They only wish to add this in conclusion: that while the Board always think that great weight should be given to the decision upon a question of fact by a Judge who has had the opportunity of hearing and seeing the witnesses, yet, in a case where the conclusion that is drawn from statements made by witnesses whose credibility is not impeached, is a conclusion that those statements will not support, they cannot rely with the same confidence that they otherwise would upon the opinion that has been formed by the Judge who has had the advantage of hearing and seeing the witnesses first hand. It is noticeable in this case that the learned Judge nowhere imputes untrustworthiness to any of the witnesses who came before him, and it is perfectly obvious that there has been some confusion or misunderstanding between the parties to this dispute; the one thinking that proposals and discussions amounted to a definite and concluded contract, and the other thinking that they did not. The opinion of the Board is that no such definite and concluded contract is established and they will consequently humbly advise His Majesty that this appeal should be dismissed with costs.

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In the Privy Council.

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MAUNG PO NAING

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MA ON GAING.

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DELIVERED BY

LORD BUCKMASTER.