

THE UNITED STATES, PLAINTIFF AND APPELLANT, VS. LIM CO, DEFENDANT AND APPELLEE.

G.R. No. 4838. February 03, 1909

Ponente: CARSON, J.

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CARSON, J.:

This is an appeal taken by the United States from a judgment of the Court of First Instance of Manila, discharging from custody Lim Co, the defendant and appellee. The proceedings were had under and by virtue of the provisions of Act No. 702 of the Philippine Commission, upon a sworn complaint alleging that the defendant is a Chinese laborer; that he was found in the city of Manila on the 12th day of November, 1907; that at that time he did not have in his possession a certificate of residence prescribed for such persons in the above-mentioned Act, and that he never has acquired such certificate.

The trial court found that Lim Co was born at Amoy, China; that he is about 30 years of age and came to the Philippine Islands about twenty-two years ago; that for a number of years and covering the period in which certificates of registration were being issued he was operating an opium store; that he gave up the opium store upon the change in the law in relation to the selling of opium, and operated a pansiteria in which he had invested P500; that he also has an interest in the manufacture and sale of vermicelli in which business he has invested the sum of P2,000; that the license for conducting the business is in the name of his partner, and that the partnership agreement, which is written in Chinese in the books of the firm, indicates that the business belongs to the defendant with his partner; and that the evidence is satisfactory to show that the defendant, Lim Co, is not a Chinese laborer; and that the certificate of registration required by Act No. 702 is not necessary to said Lim Co.

To this judgment and to the order overruling a motion for a new trial plaintiff excepted, and the case is now submitted to this court on plaintiff's bill of exceptions, to which no objection has been made either as to form or content.

The Act of Congress of April 29, 1902, entitled "An Act to prohibit the coming into and to regulate the residence within the United States, its Territories, and all territory under its jurisdiction, and the District of Columbia, of Chinese and persons of Chinese descent," provides in section 1 as follows:

"That all laws now in force prohibiting and regulating the coming of Chinese persons and persons of Chinese descent into the United States, and the residence of such persons therein, including sections five, six, seven, eight, nine, ten, eleven, thirteen, and fourteen of the Act entitled 'An Act to prohibit the coming of Chinese laborers into the United States,' approved September thirteenth, eighteen hundred and eighty-eight, be, and the same are hereby reenacted, extended, and continued so far as the same are not inconsistent with treaty obligations, until otherwise provided by law, and said laws shall also apply to the island territory under the jurisdiction of the United States, and prohibit the immigration of Chinese laborers, not citizens of the United States, from such island territory to the mainland territory of the United States, whether in such island territory at the time of cession or not, and from one portion of the island territory of the United States to another portion of said island territory; Provided, however, That said laws shall not apply to the transit of Chinese laborers

from one island to another island of the same group; and any islands within the jurisdiction of any State or the District of Alaska shall be considered a part of the mainland under this section."

Section 4 of said Act of Congress provides as follows:

"That it shall be the duty of every Chinese laborer, other than a citizen, rightfully in and entitled to remain in any of the insular territory of the United States (Hawaii excepted) at the time of the passage of this Act, to obtain within one year thereafter a certificate of residence in the insular territory wherein he resides, which certificate shall entitle him to residence therein, and upon failure to obtain such certificate as herein provided he shall be deported from such insular territory; and the Philippine Commission is authorized and required to make all regulations and provisions necessary for the enforcement of this section in the Philippine islands, including the form and substance of the certificate of residence so that the same shall clearly and sufficiently identify the holder thereof and enable officials to prevent fraud in the transfer of the same; Provided, however, That if said Philippine Commission shall find that it is impossible to complete the registration herein provided for within one year from the passage of this Act, said Commission is hereby authorized and empowered to extend the time for such registration for a further period not exceeding one year."

Pursuant to the authority conferred by Congress in the latter section, the Philippine Commission on March 27, 1903, passed Act No. 702, entitled "An Act to regulate the registration of Chinese persons in the Philippine Archipelago, and to carry into effect and enforce the provisions of section four of the Act of Congress approved April twenty-ninth, nineteen hundred and two, entitled 'An Act to prohibit the coming into and to regulate the residence within the United States, its Territories, and all territory under its jurisdiction, and the District of Columbia, of Chinese persons and persons of Chinese descent.'"

In section 3 of this Act it is provided as follows:

"Each certificate of registration shall contain the name, age, date, and place of birth, registry of birth, if any, local residence, occupation, and photograph of the person therein described, and such other data in respect to him as shall be prescribed by the Insular Collector of Customs, and shall be issued by the proper officer upon payment to him of a fee of fifty cents, United States currency, said fee to be accompanied by a true photograph of the applicant in triplicate to the satisfaction of such officer."

Section 5 of the Act provides as follows:

"Every Chinese person having a right to be and remain in the Philippine Islands shall obtain the certificate of registration specified in section three of this Act as evidence of such right and shall pay the fee and furnish his photograph in triplicate as in said section prescribed; and every Chinese person found without such certificate within the Philippine Islands after the expiration of the time limited by law for registration shall be presumed, in the absence of satisfactory proof to the contrary, to be a Chinese laborer and shall be subject to deportation as provided in section four of this Act. Every Chinese person shall, on demand of any customs official, police, Constabulary, or other peace officer, exhibit his certificate, and on his refusal to do so may be arrested and tried as provided in section four of this Act."

Said section 4, above-mentioned, provides in part as follows:

"Any Chinese laborer within the limits of the Philippine Islands who shall neglect, fail, or refuse to obtain within the time prescribed by section four of the Act of Congress of the United States referred to in section one of this Act, the certificate of registration by this Act provided to be issued, and who shall be found within the Philippine Islands without such certificate of registration after such time has elapsed, may be arrested upon warrant issued by the Court of First Instance of the province or by the justice's court of the municipality returnable before said Court of First Instance, by any customs official, police, Constabulary, or other peace officer of the Philippine Islands and brought before any judge of a Court of First Instance in the Islands, whose duty it shall be to order that such Chinese laborer be deported from the Philippine Islands, either to China or

the country from whence he came, unless he shall affirmatively establish clearly and to the satisfaction of such judge, by at least one credible witness other than Chinese, that although lawfully in the Philippine Islands at and ever since the passage of this Act he has been unable by reason of accident, sickness, or other unavoidable cause to procure the certificate within the time prescribed by law, in which case the court shall order and adjudge that lie procure the proper certificate within a reasonable time and such Chinese laborer shall bear and pay the costs of the proceeding: Provided, however, That any Chinese laborer failing for any reason to secure the certificate required under this law within two years from the date of its passage shall be deported from the Islands. If it appears that such Chinese laborer had procured a certificate in due time but that the same has been lost or destroyed, he shall be allowed a reasonable time to procure a duplicate from the Insular Collector of Customs or from the officer granting the original certificate, and upon the production of such duplicate such Chinese laborer shall be discharged from custody upon payment of costs."

It will be seen that under the provisions of section 5 of Act No. 702, every Chinese person found without the prescribed certificate after the expiration of the time limited by law for registration is presumed, in the absence of satisfactory proof to the contrary, to be a Chinese laborer, and is subject to deportation, as provided in the Act; in other words, in proceedings looking to the deportation of Chinese persons under the provisions of this section, the burden of proof rests upon the defendant to show that he is not a Chinese laborer.

Similar provisions in the Chinese Exclusion Act of May 5, 1892 (27 Stat. at L., 25) have been held valid. (*Low Foon Yin vs. Commissioner of Immigration*, 145 Fed. Rep., 791; see also *U. S. vs. Lung Hong*, 105 Fed. Rep., 188; *U. S. vs. Sing Lee*, 125 Fed. Rep., 627; *U. S. vs. Yee Gee You*, 152 Fed. Rep., 157-159.) And it has been held that proceedings brought under the Chinese Exclusion Act for the deportation of a Chinese person are civil and not criminal (*In re Lam Jung Sing*, 150 Fed. Rep., 008); and that the facts constituting the defense in such cases are peculiarly within the knowledge of the party charged, and the burden of proof is naturally placed upon him. (*In re Sing Lee* and *In re Ching Jo*, 54 Fed. Rep., 334.) Reference to these cases appears to furnish a sufficient answer to contentions based upon the constitutionality of the provisions of the Act in this regard.

Defendant and appellee does not deny that he is a Chinese person or that he was found, as alleged in the complaint, in the city of Manila, on the 12th day of November, 1907, without the certificate prescribed in the above-cited provisions of law for persons of his race and citizenship; but he denies that he is a Chinese laborer, alleging that he is a merchant and that he is now and has been ever since the passage of the Act lawfully in the Philippine Islands, but that he was unable, by reason of sickness and other unavoidable causes, to procure a certificate within the time prescribed by law.

The evidence introduced at the trial in support of defendant's allegations consists of the testimony of the defendant himself, and of the witnesses, Adriano Cabuncal, Ng Tao, Lim Tao, and Ng Kim Till.

The defendant swore that he had a pansiteria store at 209 Calle Lavezares, and that he is a partner in a vermicelli factory at No. 75 Calle Ilaya; that the pansiteria store is worth P500; that his share in the vermicelli factory is worth P2,000; that he has been in the business and connected with these stores about four years; that the pansiteria is a Chinese "chow house" or a restaurant where cooked food is sold; that the vermicelli factory is a camarin (warehouse) where vermicelli is manufactured; that vermicelli is prepared as a food; that there are three kinds of vermicelli made out of flour; that the license for the factory is in the name of his partner, and that the business is conducted not in his own name but in the name of his partner; that in the Chinese book it appears that the witness is a partner although the business is not conducted in his name, but in the name of another Chinaman; that the witness does not buy and sell merchandise in this vermicelli factory, but that the factory is conducted by his companion; that the license is not in his name because he has not had a picture taken, that is to say, he has not a certificate of registration; that he has no certificate of any kind either as a merchant or as a laborer, although he has been in the Philippine Islands for twenty years and has been living in Manila all the time; that the only reason

he did not get a registration certificate was that he was sick with beri-beri in the years 1903 and 1904; that he was born at Chincan, China. On examination by the court defendant stated that he had an opium store about five years ago, but that he closed that business as soon as the Americans commenced regulating that business, as it was too troublesome, and that he had about P1,500 invested in the opium business at that time; on cross-examination lie stated that the opium store was both for selling and smoking opium, and that the people who patronized it came in and paid for the opium and smoked it on the premises, but on redirect examination by his counsel he testified that he sold opium to people who smoked on the premises and also to people who carried it away.

Adriano Cabuncal testified that lie is a plumber at the market; that he has known the defendant Lim Co ever since Spanish times; that lie knew him when he had a store in the pueblo of Arayat; that the defendant now has a store of pansit (pansiteria), and a vermicelli factory; that he could not state the value of the store. On cross-examination he stated that all he knew about the pansiteria business is that occasionally he goes and buys and eats there; that there are many kinds of pansit; that there is *glug glug* which is eaten with sauce, and pansit eaten with soup; that it is a food prepared to eat, which anyone can buy at the pansiteria.

Ng Tao testified that he had lived in Manila for more than sixteen years; that he has known the Chinaman Lim Co for about the same time; that Lim Co dealt in opium; that he went to the provinces as a trader, but that he now has a vermicelli factory and a pansiteria; that, in the opinion of the witness, the pansiteria is worth about P500; that Lim Co has an interest of about P2,000 in the vermicelli factory; that in the *camarin* a large business is done manufacturing vermicelli and selling it to all the stores; that Lim Co works in the pansiteria, but he does not work in the vermicelli factory but pays the laborers; that he is a partner and it is not necessary for him to work there; that Lim Co is what might be called the head man and sees that the laborers work, and pays them; that once the witness went to the factory to buy vermicelli and saw Lim Co there, and that he seemed to be a kind of head man; that at times when he saw Lim Co he was weighing the *mishwa*, and placing it in large boxes; that the pansiteria is a shop where you sit down, and that Lim Co collects the money from those who go there and eat.

Ng Kim Tiu testified that he has known this Chinaman, Lim Co, since Spanish times; that Lim Co has a pansiteria and is witness' partner in a vermicelli factory; that his business is worth about P6,000 and Lim Co's share is about P2,000; that he is mentioned in the Chinese books as the partner of the witness; that there are four books in the store, a book for the partnership, a book of daily sales, a book of those people who owe the firm, and a book for the workmen; that the vermicelli business is conducted in the name of the witness, Ng Kim Tiu, and the license for the business is in his name, as also are all the books pertaining to the business; that he has now no company name and none of the business is done in the name of the defendant Lim Co. Over the objection of counsel for the plaintiff, the following question was asked: "Who appears in the books of your business as owning it?" to which witness replied: "In the Chinese book it appears that he (defendant) is a partner and has a share, but the license could not be taken in his name because he has not a picture like me." It further appears from the record that this witness produced a certificate as a Chinese laborer, and that his license, No. 1095, is issued in the name of Ng Kim Tiu, and purports to be a manufacturer's license.

The finding of the trial court that the defendant operates a pansiteria in which he has invested P500, and that he has an interest in the manufacture and sale of vermicelli, in which business he has invested the sum of 2,000, is not satisfactorily established by the testimony of record; and there is no competent evidence in the record in support of the finding that "the partnership agreement, which is written in Chinese, indicates that the business belongs to the defendant with his partner." The evidence with which the defendant undertakes to establish his allegations, that he is the owner of a pansiteria worth P500 and that he has an interest of P2,000 in a vermicelli factory is unconvincing and unsatisfactory. We do not think that the owner of such property, situated in the city of Manila, would have failed to introduce more satisfactory proof of these allegations, in proceedings looking to his

deportation from the Islands, if these allegations were true, for it would appear that strong and convincing proof must have been easily available, and might readily have been produced in the Court of First Instance of the city of Manila, in which city the store and factory are said to be located. The only evidence introduced in support of these allegations consists of the verbal declarations of the defendant himself and of his alleged partner. The testimony of the other witnesses that they had seen the defendant working in and about the store and factory does not support the truth of the allegations that he was owner or part owner of these establishments. The verbal testimony as to the contents of the alleged partnership books was clearly incompetent and inadmissible over the objection of the plaintiff, not being the best evidence as to the truth of the contents thereof. This secondary evidence should not have been admitted over the objection of counsel for the United States, which was interposed in due time; and in our opinion the trial court undoubtedly erred in admitting this testimony and in refusing to accede to the motion of counsel for plaintiff to compel the defendant to bring the books into court. The burden of proof resting upon the defendant, it would seem that he should have offered the books in evidence, if he conceived that they could, or would sustain any of his material allegations, and his failure so to do after their production had been called for, justifies the presumption that, if introduced in evidence, they would not have supported defendant's allegations.

But disregarding the question of the inadmissibility of some of the testimony, and granting that the statements of the defendant and his witnesses could be accepted as satisfactory evidence in this case, such evidence is not in our opinion sufficient to sustain the ultimate conclusion of fact by the trial court that Lim Co is a "merchant" and not a "Chinese laborer." There is no evidence whatever in the record to show that the pansiteria was conducted in the name of the defendant; and it affirmatively appears that the vermicelli factory was not conducted in the name of the defendant but in the name of his alleged partner, and that the license therefor was also in the name of the alleged partner. The term "merchant," as defined in the Act, is limited to a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and the defendant having wholly failed to prove that either the pansiteria or vermicelli factory is conducted in his own name, he must be presumed, under the provisions of section 5, to be a Chinese laborer and subject to deportation, as provided in section 4, since it is not denied that he is a Chinese person found without the prescribed certificate within the Philippine Islands, after the expiration of the time limited by law for registration.

We are satisfied that the meaning which we have given to the words "Chinese laborer" and "Chinese merchant," as used in the Act of the Commission, is in conformity with the express provisions of the Act itself; and it will be found that a similar meaning has been given these words as used in the Chinese Exclusion Acts of the Congress of the United States by the Federal courts of the United States and the rulings and regulations of the Treasury Department, which, by the express provisions of section 12 of the Act, are made authoritative guides as to the definition which should be given these terms in this jurisdiction.

In the case of *U. S. vs. Chung Ki Foon* (83 Fed. Rep., 143, 144) it was held that "Chinese laborers," as used in Act of November 3, 1893 (c. 14, sec. 1, 28 Stat., 7, U. S. Comp. St. 1901, p. 1322), relating to certificates of residence, "refer not only to those actually engaged in manual labor at the date of the passage of that Act, but were intended to include all Chinese persons dependent upon their manual labor as a means of securing an honest livelihood and self-support, and those who are not 'officers, teachers, students, merchants, or travelers for curiosity,' within the meaning of the treaty of November 17, 1880, between the United States and China."

In the case of *U. S. vs. Pin Kwan* (100 Fed. Rep., 609) it was held that proof "that a Chinese person, since he came to the United States, has been assisting in the business of a mercantile company, keeping the books and selling the goods, and that he has an interest in the stock of goods of such company, is insufficient to establish his status as a merchant within the statute."

In the case of *U. S. vs. Chung Ki Foon* (83 Fed. Rep., 143, 144) it was held that "the words, 'Chinese laborers,' in

the Act of November 3, 1893 (28 Stat. 7, sec. 1), amending the Act of May 5, 1892 (27 Stat. 25, sec. 6), and relating to certificates of residence, included a Chinaman engaged in the business of keeping a restaurant and lodging house, and all Chinese persons, dependent upon their labor for support whether actually employed as laborers or not."

In the case of *U. S. vs. Quan Gin* (61 Fed. Rep., 395) it was held that under the statute not only must the business be conducted in the Chinese person's own name, but that a Chinese person seeking admission upon the ground that he was a returning merchant must be excluded where it appears that the business was conducted under a firm name of which his own name was no part. In that case there was evidence that the defendant was a partner and that Chinese persons do not in general conduct business in individual or partnership names, but the court said (p. 397):

"It is contended in opposition to this view of the law, that such an interpretation will exclude nearly every Chinese merchant seeking to enter the United States, since, as before stated, it is claimed that Chinese merchants do not, as a rule, conduct their business affairs in individual or partnership names. This may be so, but if it is so, it is a consideration to be addressed to the lawmaking power and not to the court."

And referring to an opinion of the Attorney-General of the United States, dated April 6, 1904, the court further said:

"The Attorney-General gives a most convincing reason for his interpretation of the statute. He says:

"This requirement that a merchant must conduct a business in his own name can have but one purpose, to wit, that he who is a merchant in fact shall also be known to be such by the parties with whom he deals and by the public generally. That purpose could readily be defeated if it were possible to conceal his identity by trading under an assumed name, or under the disguise of a "Co."

"When it is considered how easy it is for a Chinese person seeking admission into the United States to claim a small interest in the business of buying and selling merchandise, it is evident that the statute has been wisely framed to prevent the admission of Chinese persons into the United States upon the fictitious and fraudulent claim that they are merchants. In my opinion, therefore, when an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in business in this country as a merchant, he must, before being admitted, establish by the testimony of two credible witnesses, other than Chinese, among other things, that he conducted the business in which he was engaged, either in his own name, or in a firm name of which his own is a part."

The Department of Commerce and Labor of the United States (to which by Act of Congress the final decision of administrative appeals from rulings of immigration officers has been transferred from the Treasury Department) ruled on May 18, 1904, as follows:

"Another and more important reason exists, however, for the denial of the appellant, to wit: According to his own sworn statement, the Canton firm in which he claims membership is engaged in the manufacture of 'black-wood furniture,' a circumstance which removes him from the mercantile class as contemplated by the Chinese Exclusion Law. Upon this point see department decision of December 7, 1903 (No. 10723-C), and December 14, 1903 (No. 9774-C), in the last mentioned of which the following passage is quoted from the decision rendered February 18, 1895, in the *Lai Moy* case, by the United States Circuit Court of Appeals, Ninth Circuit (66. F. R., 955) :

"The designation "merchant" does not include, comprehensively, all who are not laborers, but strictly "A person (to quote the Act) engaged in buying and selling merchandise." To fabricate merchandise as appellant did, is not to buy and sell it. Nor may both be done, for the "merchant" may not (again to quote the Act) "engage in the performance of any manual labor except such as is necessary in the conduct of his business as

such merchant;" that is, in buying and selling merchandise; and the manual labor which is precluded is skilled as well as unskilled."

It has been suggested that while the defendant failed to offer affirmative proof that he conducted the pansiteria or restaurant in his own name, nevertheless, in view of the fact that he testified that he is the owner of the pansiteria and that no evidence was introduced in rebuttal of this testimony, the fact that the business was conducted in the name of the defendant might fairly be presumed from his claim of ownership thereto. We do not think that this contention is well founded since the burden of proof to establish the fact that he is a merchant, is placed upon the defendant merchant by the express provisions of law, and especially in view of his own statement that the reason the vermicelli factory was not conducted in his name was that he could not secure a license because he had no certificate of registration. It may fairly be presumed that the same reason would have prevented him from obtaining a license for the pansiteria, and indeed we are satisfied that if it had been conducted in his own name he would have said so.

But even were it true that he owned and conducted in his own name a Chinese restaurant or "chow house," worth at his own estimate about P500, we do not think that fact would make him a merchant within the meaning of the term as used in the Act. The proprietor of a small eating house where raw food is cooked and served upon the premises can hardly be said to be engaged in buying and selling merchandise. He is in truth no more than a skilled laborer and is not entitled to the privileges accorded "merchants" under the Act.

"A restaurant proprietor, who keeps a place for serving meals, and provides, prepares, and cooks raw materials to suit the tastes of his patrons, is a laborer, and is not privileged to enter the United States as a merchant." (In re Ah Yow, 59 Fed. Rep., 561.)

"A Chinese man, who owns an interest in a mercantile firm, but is not actively engaged in the conduct of its business, and who works as head cook in a restaurant, of which he is a part proprietor, is a laborer, and not a merchant, within the terms of the Act of November 3, 1893 (28 Stat, 8)." (Mar Bing Guey vs. United States, 97 Fed. Rep., 576.)

See also In re Wentworth Lunch Co. (159 Fed. Rep., 413, May 21, 1908), wherein it is held, in construing the bankruptcy law, that "a corporation operating a restaurant is not subject to adjudication as a bankrupt under the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat, 544 [U. S. Comp. St., 1901, p. 3418], authorizing an adjudication against corporations engaged in 'mercantile pursuits;' the dishes furnished not being merchandise, nor the proprietor a merchant engaged in 'mercantile pursuits.' "

It appearing that the defendant is not a "merchant" within the meaning of that term as used in the Act, and that he is a Chinese laborer, and that he has neglected, failed or refused to register under the provision of the Act of Congress of April 29, 1902, and the provisions and regulations enacted pursuant thereto by the Philippine Commission in Act No. 702, it was the duty of the trial court to order his deportation from the Philippine Islands, and the judgment of that court discharging him from custody is, therefore, reversed without costs in this instance.

In twenty days judgment will be entered reversing the judgment of the trial court and ten days thereafter the record will be returned to the court wherein it originated, where judgment will be entered in conformity herewith. So ordered.

Arellano, C. J., Torres, Mapa, Johnson, and Willard, JJ., concur.
Tracey J., dissents.

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