

APPELLATE CIVIL.

Before U On Pe, U San Maung and U Aung Tha Gyaw, JJ.

H.C.
1948
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May 13.

IN THE MATTER OF U KHIN MAUNG, HIGHER
GRADE PLEADER, AS AN ADVOCATE OF THE
HIGH COURT.*

Advocates' Admission Rules, 1930—Rule 5 (1)—Advocate enrolled by Supreme Court—Whether enrolment valid—No notice to Bar Council—Effect.

Applicant was enrolled by the Supreme Court. He applied under Advocates' Admission Rules, 1930. The Bar Council was not functioning then, and no notice was possible to them, but the admission of advocates was considered by the Hon'ble Judges.

Held : That the Supreme Court was a duly constituted court exercising the functions and powers of the High Court including enrolment of advocates.

The Fing v. Maung Hmin and three others, (1946) (R.L.R. 1, followed and applied.

Everything possible seemed to have been done in conforming to the rules governing admission of advocates, and applications were carefully considered by the Hon'ble Judges of the Supreme Court. Compliance with the statutory requisite to give a notice to the Bar Council would not be possible and the Court could do nothing except dispense with the performance of what is impossible.

Maxwell on Interpretation of Statutes, 9th Edn. p. 387, referred to.

Held further : That orders made by the Supreme Court are followed in all respects and have the same effect as if they had been made by the High Court of Judicature at Rangoon.

Criminal Reference No. 2 of 1947, referred to.

The present court, the successor of the Supreme Court, has no power of sitting in judgment over the official act of the said Court.

The judgment of the Special Bench was delivered by

U ON PE, J.—This is an application by one U Khin Maung, a Higher Grade Pleader at Paungdè, for admission as an advocate of the High Court. The application is dated the 22nd November 1947, and contains all the particulars as required under Rules 3 and 4 of the Advocates' Admission Rules, 1930, of the

* Civil Misc. Application No. 11 of 1948.

High Court. It is supported by testimonials of good character and conduct and also certificate of his conduct as a pleader. The required notice of this application under Rule 5 (1) of the Advocates' Admission Rules, 1930, has been given to the Bar Council.

The Bar Council is represented by its member U Aung Min, *Barrister-at-Law*, and the Assistant Attorney-General also appears.

A question of considerable importance has been raised in the next case (the case of U Tin Toon, *Barrister-at-Law*) before this Special Bench to-day, the question being whether or not it is necessary for a person to whom the then Supreme Court had issued a Certificate of Admission and Enrolment as an advocate to apply again for admission as an advocate of the High Court. This question is relevant to this case, although the point has not been raised by U Khin Maung, inasmuch as U Khin Maung's name was admittedly on the Roll of Advocates as prepared and published by the then Supreme Court up to April 1944, his name being No. 125 on that roll. In our view, if the answer to the question is that it is not necessary for such a person to apply again for admission as an advocate of the High Court, the other points raised in U Khin Maung's application will not require consideration for the disposal of his application.

We therefore propose to consider this question now. To determine this question the following points present themselves for consideration, *viz.* whether the then Supreme Court was a duly constituted Court exercising functions and powers of the High Court which it displaced during the occupation period and whether, in particular, enrolment of advocates by it as contemplated in section 8 of the Bar Council Act was valid. The solution of these points rests on whether

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the Supreme Court was a duly constituted Court. The status of the Supreme Court was brought out in *The King v. Maung Hmin and three others* (1), in which it was held that the Japanese Commander-in-Chief by his order styled "Military Ordinance No. 6" continued in force the old laws and the old Courts. Mootham J.'s comment on Article 43 of the Hague Regulation, which defines the duty of an occupying power to re-establish and ensure public order and safety, respecting at the same time the laws in force of the occupied country, is apposite :

"This Article imposes upon the occupying power the duty of taking such measures as are necessary to restore and maintain public order, employing for this purpose, so far as it is possible to do so, the ordinary law of the country of which it is in occupation. The object of the Article, as I understand it, is to prescribe a rule of conduct for an invader which, while not hampering him in the carrying out of any legitimate operation of War, will, as far as possible alleviate the consequences of the inevitable disruption of ordinary life caused by the occupation. This object will however be but partially achieved if the Government of the invaded State on its return refuses to recognize as valid acts of the invader done by him under the authority of Article 43. The effect of such a refusal would be to cause much unnecessary confusion and distress."

Sir Ba U sums up his view in these words :

"The laws and procedure followed by the Supreme Court were the same as was followed by the High Court in exercise of its Appellate Jurisdiction. Therefore I am of opinion that the Courts that functioned during the time of the Japanese occupation were Courts of competent jurisdiction * * * *"

The Supreme Court being thus held to be a duly constituted Court, it follows that it was functioning as the High Court did, during the Japanese occupation in matters relating to admission and enrolment of advocates. It carried out the provisions of

(1) (1946) R.L.R. 1.

section 8 (2) of the Bar Council Act by preparing and maintaining a Roll of Advocates and of section 8 (5) of the Act by issuing certificates of enrolment. Apparently everything possible seemed to have been done in the way of conforming to the rules governing the admission of advocates. A statement has been made from the Bar that, as the Bar Council was not functioning then, the admissions of advocates made would not be valid. This is asking us to sit in judgment over the official act of the said Court which, we do not think, we have the power to do. We cannot, however, pass without mentioning that it is on record that applications for admission of advocates made to the Court were carefully considered by the then Hon'ble Judges, one of whom was no less a person than the Chief Justice of the Union of Burma.

On the other hand, it is admitted that the Bar Council could not meet in any case, the majority of its members being away from Rangoon. The Chairman and the Secretary were in India, and the rest were all away from Rangoon except one or two. A war was on and the Court had to take steps—in fact it was its duty—to enrol advocates to make possible the functioning of Courts. The Hon'ble Judges of the then Supreme Court could not have overlooked that compliance with the statutory requisite to give a notice to the Bar Council in the case of each admission under the Admission Rules, would not be possible. In those circumstances what could the Court do except to dispense with “the performance of what is prescribed when performance of it is idle or impossible.” Maxwell on Interpretation of Statutes says (1) :

“Enactments which impose duties on conditions, when these are not conditions precedent to the exercise of a jurisdiction

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* * * * are understood as dispensing with the performance of what is prescribed when performance of it is idle or impossible."

Those were the circumstances in which the then Supreme Court admitted advocates, issued certificates of admission and maintained a Roll of Advocates as required under section 8 of the Bar Council Act.

When the said Court was again displaced by the High Court on the re-occupation by the British, the question arose as to the validity of the admissions and enrolments of advocates by the then Supreme Court. The answer is found in the judgment of the Special Bench of the High Court in Criminal Reference No. 2 of 1947 (1), and the relevant portion of it is in these words :

"There can, therefore, be no doubt in my mind but that the Supreme Court established in Burma by the Japanese authorities during their occupation was a duly constituted Court of law, that decrees and orders made by it are now valid in all respects and are of the same effect as if they had been made by the High Court of Judicature at Rangoon either before or after the Japanese occupation here, and that we are successors to the Supreme Court."

It follows that the act of admission of advocates by the then Supreme Court remains valid to-day in this Court which has succeeded the said Supreme Court. It will therefore not be necessary for U Khin Maung, whose name, being No. 125, is on the Roll of Advocates of the then Supreme Court, to apply again for admission as an advocate of this High Court.

(1) Criminal Reference No. 2 of 1947, High Court Rangoon.