

SUPREME COURT.

MA THIN (APPELLANT)

v.

MAUNG SEI TIN (RESPONDENT).*

† S.C.
1949

Feb. 10.

Constitution of Burma, s. 228—Union Judiciary Act, 1948—Lower Burma Courts Acts of 1889 and 1900—Upper Burma Civil Code Regulations—Shan States Civil Justice Subsidiary Order.

Held : During the British regime the Director of Frontier Areas Administration had final Appellate Jurisdiction in Shan States and that power was not extinguished by reason of Burma attaining independence. That jurisdiction was continued under the existing law as defined by s. 228 of the Constitution. Under s. 134 and 135 of the Constitution the final appellate jurisdiction in respect of Shan States continued in the Director of Frontier Areas Administration till the Union Judiciary Act, 1948, was enacted. After the passing of the Union Judiciary Act, 1948, the power of the Director of Frontier Areas Administration as the final appellate authority passed on to the High Court, Rangoon.

Thet Tun for the appellant.

Ba Nyunt for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The short point for consideration in this appeal relates to the powers and functions of the High Court of the Union of Burma in proceedings which had not reached final adjudication before the Director, Frontier Areas, at a time when the Union of Burma was established as an independent State. The facts are simple. The appellant had obtained a decree for possession of a house in her suit before the Assistant Superintendent (Civil Justice), Taunggyi. The decree in her favour was on appeal confirmed by the Resident, Southern

* Civil Appeal No. 11 of 1948.

† *Present* : SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

Shan States, and the respondent preferred an application in revision to the Director, Frontier Areas Administration. This application in revision was, it is said, heard *ex-parte*, and the Director set aside the decree granted by the Courts below in favour of the appellant. This order in revision by the Director, Frontier Areas Administration, was made on the 9th July 1947.

No action was taken to have this *ex-parte* order set aside till after the 4th January 1948. We have not been told and it is not necessary for the purpose of this appeal for us to know, the cause of the delay. We assume, but we must not be taken to have held, that the appellant could have adduced sufficient cause to excuse the delay in making her application so as to overcome the bar of limitation.

When after the 4th January 1948 the application to set aside the *ex-parte* order of July 1947 was made, it came ultimately before the High Court. The learned Judge (San Maung, J.) took the view that the High Court was not competent to entertain an application to set aside an *ex-parte* order made by the Director, Frontier Areas Administration, before the High Court was established under the Constitution and its powers and functions defined by the Union Judiciary Act, 1948. The learned Judge in a very short judgment referred to section 31 of the Union Judiciary Act and clause 44 of the Letters Patent constituting the High Court of Judicature at Rangoon and deduced therefrom that in the absence of a specific provision made in that behalf, either in the Constitution or the Union Judiciary Act, 1948, no proceeding of the Director of the Frontier Areas Administration (sitting as a High Court) which had not reached final adjudication could be continued or concluded in the High Court of the Union of Burma.

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Section 31 of the Union Judiciary Act enables proceedings pending before the High Court of Judicature at Rangoon to be continued and concluded in the High Court of the Union of Burma. Clause 44 of the Letters Patent constituting the High Court of Judicature at Rangoon contained provisions for proceedings pending in the Chief Court of Lower Burma or in the Court of the Judicial Commissioner of Upper Burma being continued and concluded in the High Court of Judicature at Rangoon.

We find it difficult to appreciate the logic of the learned Judge of the High Court that because the Union Judiciary Act, 1948, in respect of proceedings pending in the High Court of Judicature at Rangoon and the Letters Patent of 1922 in respect of proceedings pending in the Chief Court of Lower Burma and in the Court of the Judicial Commissioner of Upper Burma made specific provisions for their continuation and conclusion in the High Court of the Union of Burma and in the High Court of Judicature at Rangoon respectively, similar provisions are essential for proceedings pending before the Director, Frontier Areas Administration (sitting as a High Court for the Shan States) to be continued and concluded before the High Court of the Union of Burma.

For a proper appreciation of the points involved in the determination of this appeal it is necessary to bear in mind the history of the judiciary in Burma since 1886. The Upper Burma Laws Act of 1886 (Act No. XX of 1886) defined the powers of the Governor-General-in-Council to extend to the Shan States any enactment enforced in any part of Burma at the date of the extension. The Lower Burma Courts Act, 1889 (Act No. XI of 1889), set up for Lower Burma, *inter alia*, the Court of the Judicial Commissioner of Lower Burma. By section 10, this Court had granted to it

“ the powers of a High Court in relation to all Civil Courts in Lower Burma except the Special Court, the Court of the Recorder and the Court of Small Causes, Rangoon.” By the Lower Burma Courts Act, 1900 (Act VI of 1900), the Courts of the Judicial Commissioner of Lower Burma and of the Recorder of Rangoon were merged in the Chief Court of Lower Burma, established under the Act, and the Chief Court was made the highest civil Court of Appeal and the highest Court of Criminal Appeal and Revision in and for Lower Burma. The Upper Burma Civil Courts Regulations, 1896, established *inter alia* the Court of the Judicial Commissioner, Upper Burma, and in section 12 it was provided “ that the Court of the Judicial Commissioner shall have all the powers of a High Court established under Statute 24 and 25 Victoria, Chapter 104, and shall be the Court of final jurisdiction throughout the area to which this Regulation for the time being applies.”

In 1875 there had already been established for the tract known as the Hill Districts of Arakan a final Court of Appeal in the person of the Commissioner of Arakan. Section 4 of the Arakan Hill District Laws Regulation, 1874, provided that “ the functions of the High Court in all civil and miscellaneous matters shall be discharged by the Commissioner.” By amendments to the Arakan Hills Civil Justice Regulation of 1874 the Commissioner of Arakan Division and the Chief Court of Lower Burma (later the High Court of Judicature at Rangoon) were made at the option of the Chief Court (or the High Court of Judicature at Rangoon) the final appellate authorities for the area known as the Hill Districts of Arakan.

The Kachin Hill Tribes Regulations, 1895, and the Chin Hills Regulations, 1896, empowered the Local Government (later, the Governor) or a delegate of the

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Local Government (later, the Governor) to appoint the final appellate authority in civil and criminal matters.

For the areas then known as the Shan States (now forming the Shan State) section 12 of the Burma Laws Act, 1898, made provision for definition of the powers and the regulation of the procedure of authorities appointed to administer criminal and civil justice. In pursuance of this provision of the Act, the Shan States Civil Justice (Subsidiary) Order, 1906, in section 18A had the following: "The Commissioner shall have all the powers of a Superintendent and in addition shall exercise the appellate and revisional powers of the High Court over all orders passed by a Superintendent; provided that no 2nd appeal shall lie from the appellate judgment and decree of the Superintendent to the Commissioner."

In 1922 the High Court of Judicature at Rangoon was established by Letters Patent. Section 113 of the Government of India Act, 1919, reads:

"His Majesty may, if he sees fit, by letters Patent, establish a High Court of Judicature in any territory in British India, whether or not included within the limits of the local jurisdiction of another High Court, and confer on any High Court so established any such jurisdiction, powers and authority as are vested in or may be conferred on any High Court existing at the commencement of this Act; and, where a High Court is so established in any area included within the limits of the local jurisdiction of another High Court, His Majesty may, by Letters Patent, alter those limits, and make such incidental, consequential and supplemental provisions as may appear to be necessary by reason of the alteration."

The High Court of Judicature at Rangoon was established, as clause 1 states, "for those portions of the province of Burma at present within the limits of the jurisdiction of the Chief Court of Lower Burma and of the said Judicial Commissioner of Upper Burma."

Thus, immediately after the establishment of the High Court of Judicature at Rangoon there were for the areas, which now form part of the Union of Burma, several authorities exercising final appellate jurisdiction, each of which in respect of the areas within its authority was either specifically or by implication invested with all the powers of a High Court for that particular area.

In 1946 the Frontier Areas Adaptation Regulation was enacted by the Governor of Burma and by section 4 the "Director, Frontier Areas Administration, or Director, whichever is most appropriate therefor, or in respect of the powers of the High Court conferred by any law such officer as the Governor may by notification invest with such powers", was to exercise in the areas specified in Part II of the 2nd Schedule of the Government of Burma Act, 1935, all the powers of the Commissioner under the Regulation relevant to any of these areas. Thus, on the eve of the establishment of an independent Union of Burma there were for the areas now forming part of the Union of Burma normally two jurisdictions that could claim to be the High Courts in these areas, namely, the High Court of Judicature at Rangoon and the Director, Frontier Areas Administration. We have used the qualification "normally", as section 3 of the Regulation of 1946 enabled the Governor to invest the powers of the High Court also in an authority other than the Director, Frontier Areas Administration; but it does not appear that such investiture was made before the 4th of January 1948.

Of these two jurisdictions which could rightly claim to be High Courts for the areas in Burma respectively under their authority, one was the creature of an enactment by the Governor exercising legislative powers. The other, namely, the High Court of

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Judicature at Rangoon, was the creature of the Letters Patent emanating from His Britannic Majesty in 1922 and was one of His Majesty's Superior Courts of Judicature.

The High Court of Judicature at Rangoon on the enactment of the Burma Independence Act, 1947 (11 Geo. 6 Ch. 3) and by the operation of the Constitution of the Union of Burma ceased to exist on the 4th of January 1948. The Government of Burma Act, 1935, stood repealed as from that date and section 1 of the Burma Independence Act, 1947, provided that "on the appointed day Burma shall become an Independent country, neither forming part of His Majesty's dominions nor entitled to His Majesty's protection". Section 226 of the Constitution, in view of the definition of the term "existing law" in section 222, does not operate to save the Letters Patent, which brought into being the High Court of Judicature at Rangoon. The proviso to section 223 puts the matter beyond all doubt.

The final appellate jurisdiction vested in the Director, Frontier Areas Administration, however, was not extinguished by reason of Burma attaining independence. That jurisdiction being the creation of "existing law" within the meaning of the Constitution was saved and section 228 of the Constitution applies to it. The position then clearly is this: The High Court of Judicature at Rangoon had ceased to exist as soon as Burma attained independence and the Constitution came into operation but the other "High Court" would continue to exercise its jurisdiction until "new Courts are established by law in accordance with the Constitution". It is true that the High Court of the Union of Burma is coeval with the Constitution but the Constitution in sections 134 and 135 left the extent of the appellate jurisdiction of that

High Court to be defined by Parliament. Accordingly, the final appellate jurisdiction in respect of the Shan State continued in the Director, Frontier Areas Administration, till the Union Judiciary Act, 1948, in section 21 enacted that "the High Court shall be a Court of appeal from all civil Courts of the Union other than the Supreme Court."

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The matter may be stated in another way. The High Court of Judicature at Rangoon came to an end without a successor to it on the 4th of January 1948 ; whereas the " High Court " for the Shan States continued to exist in the person of the Director, Frontier Areas Administration, till by the combined operation of section 228 of the Constitution and section 21 of the Union Judiciary Act, 1948, that jurisdiction was transferred to the High Court of the Union of Burma.

This difference between the position of the High Court of Judicature at Rangoon and the " High Court " for the Shan State would appear to explain why the provisions of section 31 of the Union Judiciary Act referred to by the learned Judge of the High Court found a place therein. Clause 44 of the Letters Patent appears to have been inserted *ex cautela*. A similar provision is to be found in the Letters Patent constituting the Nagpur High Court but not in the Letters Patents constituting the High Court of Lahore or the Patna High Court or the High Court of Allahabad.

In these circumstances we set aside the order of the learned Judge of the High Court in Civil Miscellaneous Application No. 17 of 1948 and direct that the High Court do proceed with the determination of the application made to it under Order 41, rule 21 of the Code of Civil Procedure by the appellant before us, in accordance with law. The respondent will pay the appellant's cost of this appeal. Advocate's fees ter gold mohurs.