# APPELLATE CIVIL

*Before U Thoung Sein, J.*

H.C. 1948

*June 24.*

MAUNG THIT MAUNG (APPELLANT)

*v.*

MAUNG TIN AND THREE ORTHERS (RESPONDENTS).*

*Code of Civil Procedure, s. 10—Stay of Suit—Pre-evacuation pending suit whether can be revived only in accordance with Act VI of 1305 (B.E.)—Time limit fixed—Whether valid.*

Prior to war plaintiff-respondent instituted Civil Regular Suit No. 2 of 1942 of the Subdivisional Court of Maubin for specific performance of a contract for sale. Japanese Military Administration followed. Act VI of 1305 (1943) was promulgated by the government of the occupation period and it provided that litigants were to revive or reconstruct all cases pending before the evacuation within 90 days of the promulgation of the Act. The plaintiff-respondent however filed a fresh suit Civil Regular Suit No. 9 of 1944 on the same cause of action. Defendant contended that a subsequent suit was not maintainable. After the retreat of the Japanese the latter suit was revived as Civil Regular Suit No. 4 of 1946. Plea that the suit was barred by Act VI of 1305 (B.E.) was negatived in both courts.

*Held on Second Appeal*: That provisions of s. 10 of the Code of Civil Procedure are mandatory and the courts are bound to stay a subsequent suit if a former suit is pending irrespective of whether a party makes an application for stay or not. If Act VI of 1305 (B.E.) was followed, then it ceased to have legal effect from the date of restoration of Civil Government in 1946. Lost records may be reconstructed at any time by the courts concerned. Moreover it was not within the competence of the Commander-in-Chief of the Japanese Armed Forces to enact Act VI of 1305 (1943).

*The King v. Maung Hmin and three*, (1946) Ran. 1, applied.

Under Military Ordinance VI of 1942 old courts were continued and no special legislation was necessary for pending cases and the Commander-in-Chief had no right to fix any time limit for reviving or reconstructing such cases.

*M. Zakaria* for the appellant.

*S. Choung Po* and *Thein Moung* for the respondents.

U THAUNG SEIN, J.—In Civil Regular No. 2 of 1942 of the Subdivisional Court of Maubin instituted on

* Civil 2nd Appeal No. 1 of 1948 against decree of the District Court of Myaungmya (Maubin) in Civil Appeal No. 3 of 1947, dated the 22nd September 1947.

21st February 1942 the plaintiff-respondents sued the appellant-defendant for the specific performance of a contract of sale of certain lands, a house and 10 heads of cattle. As a result of the Japanese invasion of Burma and the consequent evacuation of the Civil Government to India in 1942, the Courts in the Maubin District were closed down and the above suit remained pending. Then there followed the Japanese Military Administration which revived or reopened all civil and criminal courts which were in existence immediately before the British withdrawal, *vide* Military Ordinance No. 6 of 1942 by the then Commander-in-Chief of the Japanese Armed Forces. It appears that under Act No. VI of 1305 (1943) promulgated by "the Government of Independent Burma" with the approval of the Commander-in-Chief of the Japanese Armed Forces, litigants were given the opportunity of reviving or reconstructing all cases pending before the British evacuation within 90 days of the promulgation of the Act in question. For some unknown reason the plaintiff-respondents did not avail themselves of this opportunity but instead filed a fresh suit, namely, Civil Regular Suit No. 9 of 1944 in the Court of the Subdivisional Judge of Maubin on the same cause of action and against the same defendants.

The defendants contested the suit and pleaded, *inter alia*, that the subsequent suit, Civil Regular Suit No. 9 of 1944, was not maintainable as the plaintiffs had failed to revive the former suit and should therefore be considered to have abandoned their claims. This plea was disallowed by the learned Subdivisional Judge and the suit went to trial. However, before the suit could be decided finally the Japanese Army began to retreat from Burma and once again the civil and criminal court of Maubin and other parts of Burma were closed down. Next, there followed the restoration of the Civil

H.C. 1948

MAUNG THIT MAUNG v. MAUNG TIN AND THREE OTHERS.

U THAUNG SEIN, J.

Government which had been in exile in India and the civil and judicial administration of the pre-evacuation regime were revived. The plaintiff-respondents then applied to the learned Assistant Judge, Maubin, to continue with the hearing of Civil Suit No. 9 of 1944 of the Subdivisional Court of Maubin and their application was allowed and the suit was registered afresh as Civil Regular Suit No. 4 of 1946 of the former Court. The defendants repeated their defence that the suit in question was not maintainable so long as Civil Regular Suit No. 2 of 1942 of the Subdivisional Court of Maubin was pending and that the plaintiff-respondents should be considered to have abandoned the former suit. The learned Assistant Judge refrained from dealing with this plea as the learned Subdivisional Judge of the Japanese regime had already held that Act No. VI of 1305 B.E. was no bar to a fresh suit. He then framed other issues which arose on the pleadings and finally decreed the plaintiff-respondents' claim. The defendant-appellant appealed to the District Court of Maubin but without result and he has now come up to the High Court on second appeal.

The main contention urged by the learned Counsel for the defendant-appellant is that the plaintiff-respondents are debarred from filing a fresh suit so long as Civil Regular Suit No. 2 of 1942 of the Subdivisional Court of Maubin is pending. Now, section 10 of the Code of Civil Procedure clearly lays down that:

> "No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit is pending in the same or any other Court in Burma having jurisdiction to grant the relief claimed."

If Civil Regular No. 2 of 1942 of the Subdivisional Court of Maubin may be considered as pending then, obviously, the plaintiff-respondents cannot be permitted to proceed with the trial of a fresh suit on the same cause of action and against the same defendants. The learned District Judge of Maubin was apparently under the impression that it was for the defendant-appellant to apply to the Assistant Judge, Maubin, to stay the proceedings in the subsequent suits. The provisions of secton 10 of the Civil Procedure Code are mandatory and the Courts are bound to stay a subsequent suit if a former suit is pending irrespective of whether any of the parties makes an application for stay or not.

Civil Regular No. 2 of 1942 of the Subdivisional Court of Maubin was admittedly pending at the time of the evacuation and *prima facie* is still pending at the present day. But the learned Counsel for the defendant-appellant argues that with the withdrawal of the British in 1942 and the setting up of the Japanese Military Administration all pending cases prior to the evacuation must be deemed to have lapsed. According to the learned Counsel these cases could only be revived in accordance with Act VI of 1305 B.E. promulgated by the then "Government of Independent Burma" with the approval of the Commander-in-Chief of the Japanese Armed Forces. All cases not revived in accordance with that Act are said to have lapsed. If what the learned Counsel says be true then, no pending cases of the pre-evacuation period may be revived or reconstructed at the present day. But strangely enough, numerous cases of that period are being reconstructed or revived in all grades of Courts throughout Burma and as far as I am aware no objection has ever been taken that these revivals or reconstructions are barred by Act VI of 1305 B.E. In the first place if Act VI of 1305 B.E. was a valid one,

H.C. 1948

MAUNG THIT MAUNG v. MAUNG TIN AND THREE OTHERS.

U THAUNG SEIN, J.

that is to say, if it was within the competence of the Commander-in-Chief of the Japanese Armed Forces to issue such legislation then it ceased to have any legal effect from the date of the restoration of the Civil Government in 1945. Now, lost records may be reconstructed at any time by the Courts concerned in exercise of the inherent powers under section 151 of the Code of Civil Procedure and there is no time limit. If after the restoration of the Civil Government the plaintiff had applied to the Assistant Judge, Maubin, for the reconstruction of Civil Suit No. 2 of 1942 of the Subdivisional Court of Maubin which has presumably been lost, I do not see what other alternative could have been open to the learned Assistant Judge except to allow the application. It would have been futile for the defendant-appellant to plead that as the plaintiff-respondents had failed to exercise the option to revive it in accordance with Act VI of 1305 B.E. during the Japanese regime, they can no longer be permitted to reconstruct the lost record.

There can be no doubt that Act VI of 1305 B.E. was in operation during the Japanese occupation period and that the plaintiff-respondents could not have revived the pending suit Civil Regular No. 2 of 1942 of the Subdivisional Court of Maubin except by the method provided therein. The question is whether it was within the competence of the Commander-in-Chief of the Japanese Armed Forces to enact the above legislation. It has been clearly explained in *The King* v. *Maung Hmin and three* (1) that an occupant must obviously establish and maintain Courts of justice and so long as those Courts are constituted in accordance with the Municipal Law of the occupied country they are validly constituted Courts and if the law

(1) (1946) Ran. 1.

administered by these Courts is the Municipal Law of the occupied country their decisions are valid and binding on the lawful Government and the inhabitants of the country and should be given effect to. On the other hand, if the enemy occupant sets up Courts of his own which are not constituted in accordance with the ordinary law of the occupied country and did not administer that law such Courts have no legal status and their decisions are null and void.

Now, the Commander-in-Chief had issued Military Ordinance No. 6 of 1943 which continued the old Courts and administered the law that was in force prior to the evacuation. Such being the case all the pending cases in those Courts could have been revived or continued and no special legislation was necessary for the purpose. The Commander-in-Chief of the Japanese Armed Forces had no right whatsoever to fix any time limit within which those pending cases should be revived or reconstructed as this would have had the effect of extinguishing or destroying the rights and claims of those litigants who had evacuated out of Burma. An occupying power has no right whatsoever to destroy the rights of any citizen for redress in the Civil Courts. In my opinion, the Commander-in-Chief of the Japanese Armed Forces exceeded his powers when he enacted Act No. VI of 1305 B.E. which was clearly *ultra vires*.

On the whole the correct course for the plaintiff-respondents to have adopted was to apply to the learned Assistant Judge of Maubin for reconstruction of Civil Regular Suit No. 2 of 1942 of the Subdivisional Court of Maubin and not to proceed with the hearing of the subsequent suit. Section 10 of the Code of Civil Procedure clearly lays down that the subsequent suit must be stayed and the learned Assistant Judge erred in deciding it finally. This appeal is accordingly

H.C. 1948

MAUNG THIT MAUNG v. MAUNG TIN AND THREE OTHERS.

U THAUNG SEIN, J.

allowed with costs. The judgments and decrees of both the lower Courts are set aside and Civil Regular Suit No. 4 of 1946 of the Court of the Assistant Judge, Maubin, will be stayed pending the decision of Civil Regular Suit No. 2 of 1942 of the Subdivisional Court of Maubin.