

APPELLATE CIVIL.

Before Mr. Justice Coutts Trotter.

H. MAHOMED ISHACK SAHIB, APPELLANT,

1922,
March 10.

v.

MAHOMED MOJDEEN AND ANOTHER, RESPONDENTS. *

Court Fees Act (VII of 1870), ss. 3 and 5—Charter Act 23 and 24 Vict., Ch. 104, s. 15—High Court's power to make rules for imposition of court fees on Original Side—Memorandum of Appeal against order of Judge on Original Side—Reference by Taxing Officer—Jurisdiction—Stamp leviable—Final order—Original Side Fees Rules, Appendix II, Article 36.

The High Court can make rules for the imposition and collection of court fees in proceedings on the Original Side of the Court, by virtue of the power to make regulations for its procedure conferred by section 15 of the Charter Act. Such fees are fees payable to the clerks and officers of the Court within the meaning of section 3 of the Court Fees Act, and a dispute regarding the same falls within section 5 of that Act.

The court fee leviable on a Memorandum of Appeal against a final order passed by a single Judge sitting on the Original Side is Rs. 100 under Article 36 of the said Appendix.

REFERENCE under section 5 of the Court Fees Act in an Appeal preferred against the order of Mr. Justice PHILLIPS passed in the exercise of the ordinary Original Civil Jurisdiction of the High Court in Original Petition No. 117 of 1912.

An application was made to PHILLIPS, J., on the ordinary Original Side of the High Court to set aside an order, dated 3rd May 1921, appointing one Mahomed Ishack Sahib, guardian of the person and property of Muhammad Hussain Sahib, a minor. His Lordship set aside the order as prayed for, and appointed C. Abdur Rahiman Sahib, guardian of the property during the

* Stamp Register No. 17341 of 1921.

MAHOMED
ISHACK
SAHIB
v.
MAHOMED
MOIDEEN.

minority of Muhammad Hussain Sahib, and appointed Mahomed Moideen, the guardian of his person. Against this order Mahommed Ishack Sahib appealed.

The Memorandum of Appeal was stamped by the vakil for appellant with a stamp of Rs. 100. The office were of opinion that the proper fee leviable was Rs. 150 on the ground that it was a final judgment. The matter was referred to the Chief Justice who directed the matter to be heard by His Lordship Mr. Justice **COUTTS TROTTER**.

K. Raja Ayyar for the appellant.

The Advocate-General (C. P. Ramaswami Ayyar) on behalf of Government.

JUDGMENT.

**COUTTS
TROTTER, J.**

COUTTS TROTTER, J.—This matter has been referred to me by the Chief Justice purporting to act under the provisions of section 5 of the Court Fees Act VII of 1870. That section runs as follows: "When any difference arises between the officer whose duty it is to see that any fee is paid under this chapter and any suitor or attorney as to the necessity of paying a fee or the amount thereof, the question shall be referred to the Taxing Officer, except when the question is, in his opinion one of general importance, in which case he shall refer it to the final decision of the Chief Justice or of such Judge as the Chief Justice shall appoint on this behalf." I have given the material words.

The question arose out of an appeal from a determination of my brother **PHILLIPS, J.** I need not say more about its nature for my purpose, and the contention of the applicant (the would-be appellant) was that the sum payable by him to file his Memorandum of Appeal was Rs. 100 under Article 36 of Appendix II to the Original Side rules which draws up a list of Court fees to be levied by the Registrar, High Court. The

contention of the Registrar was that the proper fee was Rs. 150 on the footing that this was a Memorandum of Appeal from a final judgment.

Objection is taken that the supposed jurisdiction under section 5 of the Court Fees Act does not exist, and that I am not competent to go into this matter. It arises in this way. In the mufassal Courts, ad valorem fees are levied and Statutes regulate the amount of fees including this Court Fees Act in question which has a long Schedule of ad valorem fees to be paid in various cases. It is conceded that the Schedules and subsidiary parts of the other chapters of the Court Fees Act have no application to the High Court in the exercise of its ordinary Civil Jurisdiction. Section 4 cannot apply, because that is in terms confined to the extraordinary Original Civil Jurisdiction, that is to say, cases transferred by the High Courts and other cases. Therefore this Memorandum of Appeal is clearly not within the purview of section 4. The learned Advocate-General says nor is it within the purview of section 3, and the way he puts it, as I understand it, is this. He says it is not a fee payable for the time being to the clerks and officers of the High Courts established by Letters Patent by virtue of the power conferred by 24 and 25 Victoria, Chapter 104, section 15. That section is a very long one defining certain powers of the Chartered High Courts and the material portion of it is as follows :

“ Each of the High Courts established under this Act shall have power to make and issue general rules for regulating the practice and proceedings of such Courts . . . and also to settle tables of fees to be allowed to the Sheriffs, Attorneys and all clerks and officers of Courts.”

It is said by the Advocate-General that the words of section 3 of the Court Fees Act must be controlled by reference to section 15 of the High Courts Charter Act. I entirely agree, and the only question

MAHOMED
ISHACK
SAHIB
v.
MAHOMED
MOIDZEN.
—
COURTS
TROTTER, J.

MAHOMED
ISHACK
SAHIB
v.
MAHOMED
MOIDFEN.
—
COUTTS
TROTTER, J.

which arises is to what extent the true construction of that Act narrows the apparent scope of the Court Fees Act. It is, I think, reasonably clear that that part of section 15 of the High Courts Charter Act which speaks of settling fees to be allowed to Sheriffs, Attorneys, and all clerks and officers of the Court will not cover this case because, as the Advocate-General pointed out, section 3 of the Court Fees Act clearly points to the fee which is to be taken by the officer as a perquisite, as until recent years we all know they were. Therefore the fee payable for the time being to all clerks and officers of the High Court under section 3 of the Court Fees Act cannot be covered by those words of the High Courts Charter Act. It has always been maintained that the power under which fees are levied on the Original Side of the High Court was derived from the general powers to issue general rules for regulating the practice and procedure of the Courts. It is argued, and I think it is rightly argued, that the power to make regulations for procedure necessarily includes imposition of fees and the collection of them, and the Court can collect the fees only through its proper officers. If that be right, then the fee leviable on an appeal is the fee payable for the time being to the officers of the High Court by virtue of the High Courts Charter Act directly.

Now, it is said that there are two obstacles to that. The first is that no fee is paid but only a document is presented with a stamp of certain value on it. The second is that the money is not paid to the officers but is paid to the Crown. I think it is clearly a fallacious argument and one that the Act obviously deals with; because by section 25 of the Act, all fees referred to in section 3, or chargeable under the Court Fees Act should be collected by stamps. In my opinion, when a person tenders a stamped document to the Registrar of this

Court and asks him to enter his appeal, it is clear that he is, within the meaning of this Act, paying a fee to an officer of the High Court, and in taking that fee, the High Court is acting by virtue of the general powers conferred upon it by section 15 of the High Courts Charter Act.

I am therefore of opinion that it is my duty to try this question on the merits and I must overrule the preliminary objection that under this Statute I have no jurisdiction to try it.

I now come to the merits. What I have to decide is whether this is a Memorandum of Appeal from a final judgment (Article 35) or whether it is a Memorandum of Appeal from any other judgment or order (Article 36). There can be no doubt, I take it, that without going into the cases which were cited, no one would describe in ordinary language this, that we have here, as anything but an order. It lacks all the characteristics of a judgment which were pointed out in cases such as *Ex parte Ghinery*(1), and *Onslow v. Commissioners of Inland Revenue*(2), and many other cases that have been cited; and the proceedings in which it was passed lack all the characteristics of an action or suit. If any one were asked whether this was a judgment or order, he would certainly say it is an order. Equally I think there is no doubt, and again I think it unnecessary for me to refer to cases cited, that this if tested by the distinction as to whether it was final or interlocutory, would be classed as final. So that I put the two cross lines of division side by side and to the question whether this is a judgment or an order, the answer that I give unhesitatingly is, it is an order: I then ask myself, is it final or interlocutory? I find that it decides finally the rights of the parties as to the matters which arise for

MAHOMED
ISHACK
SAHIB
v.
MAHOMED
MOIDEN.
—
COUTTS
TROTTER, J.

(1) (1884) 12 Q.B.D., 842.

(2) (1890) 25 Q.B.D., 465.

MAHOMED
 ISHACK
 SARIK

v.

MAHOMED
 MOIDEEN.

COURTS
 TROTTER, J.

determination. Therefore I say it is final. It is therefore a final order.

Now, says Mr. Advocate-General, by section 15 of the Letters Patent, the right of appeal is given only in the case of a judgment of one Judge of the Court or of the Division Bench and that no right of appeal is given against orders, except one or two that are specially excepted and which are quite different from the Order in question in this case. It may of course have been the intention of the framers of the Letters Patent that there should be no appeal in the case of an order of a single Judge to two of his brother Judges. I think that question is altogether outside the scope of this reference to me, and goes to the merits of the appeal. I express no opinion on it; I merely assume for the purposes of the present point that an appeal lies; it will be open on the hearing of the appeal to argue otherwise. The question to be solved here is what is the amount of fees that has to be paid on a Memorandum of Appeal and not whether an appeal lies or not. That is a matter which will arise in other proceedings in this Court.

I now look to the Articles in Appendix II of the Original Side rules. I am asked to construe them in this way. I am asked to say that *per incuriam* the draftsman of Article No. 35 omitted to add the words "or order" after "final judgment" and I am asked to come to that result by this method of construction, namely, that in "appeal from any other judgment or order" in Article 36, the adjective "other" governs not merely "judgment" but also "order"; then thereupon arises the irresistible inference that as an "other order" must be distinguished from the one that has gone before that, there must be appended to the word "judgment" in Article 35, by implication, the words "or order" meaning "or final order." We have now a complete distinction between a

“final judgment” and “order” namely, if it is a final judgment the fee payable on it is Rs. 150 and if it is an interlocutory or non-final judgment or order, it is to be Rs. 100. I cannot put any such unnatural construction upon the words and I think I must take the Articles as meaning that an appeal against a final judgment should be taxed with a fee of Rs. 150 and an appeal against something else which is obviously of much less importance and much less likely to involve a prolonged inquiry, namely, appeals against interlocutory judgments or orders whether final or interlocutory should be taxed with a fee of Rs. 100. This seems to be perfectly intelligible and I have no doubt as to what the framers intended, although as regards the right of appeal, I am personally not in the least affected by the argument that if they had looked at section 15 of the Letters Patent, they would have seen that they were creating the difficulty which I am now asked to solve. I think that the Articles are quite plain and that it would be improper for me to try to make them harmonise with the older versions of the Articles which deal with this case. The Articles are apparently plain and they make a distinction between a final judgment on the one hand and an interlocutory judgment or an order which is not a judgment on the other.

I must therefore answer this reference by saying that in my opinion, the fee payable on the Memorandum of Appeal is Rs. 100. The excess fee paid Rs. 50 must be refunded.

The Government Solicitor on behalf of Government.

M.H.H.

MAHOMED
ISHACK
SAHIB
v.
MAHOMED
MOIDKEN.
—
COURTS
TROTTER, J.