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MOHAMED SIDDIQ v. MOHAMED AHMED AND 1 ANOTHER.

DOYLE, J.

where the jurisdiction of the Court is fettered only by the fact that leave to sue must be given by the Court itself, such waiver cures the defect created by omission to apply for leave.

The same principle has been affirmed in *Ganesh Narain Sahi Deo* v. *Manik Lal Chandra and others* (1). It commends itself as based on a sound legal concept as well as on practical commonsense.

The objection is not upheld; the case proceeds.

APPELLATE CIVIL.

Before Sir Henry Pratt, Kt., Officiating Chief Justice, and Mr. Justice Ormiston.

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Aug. 9.

MA KYWAY
v.
MA MI LAY AND ANOTHER.*

Provident Funds Act (XIX of 1925), s. 5—Declaration under the Act a testamentary disposition—Personal law contrary to disposition, effect of—Retrospective effect of statute.

A Burman Buddhist, an employee of the Burma Railways, was a subscriber to the Railway Provident Fund. By his declaration made in September 1924, he nominated his sister to receive the Provident Fund amount on his death. The Act (IX of 1899) then in force did not contain provisions that enabled a person to override his personal law as to dispositions. The Provident Funds Act, XIX of 1925, came into force on the 1st of April 1926. It applied to the Burma Railways Provident Fund. The subscriber made no fresh declaration and died in February 1928. His widow who was his sole heir under Burmese Buddhist law claimed the money according to the personal law of the deceased.

Held, confirming the decision of the Original Side, that the provisions of section 5 of the Provident Funds Act, XIX of 1925, enabled a Burman Buddhist to make a valid nomination, though such nomination, being in the nature of a testamentary disposition, is prohibited by his personal law.

Held, reversing the decision of the Original Side, that no fresh nomination was necessary by the deceased under the new Act, and that it was valid as against the widow.

Ba Han for the appellant.

Leong for the 1st respondent.

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(1) (1923) 1 Pat. L.R. 318.

*Civil First Appeal No. 131 of 1928 against the judgment of the Original Side in Civil Regular No. 146 of 1928.

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The facts of the case, the effect of the new Provident Funds Act of 1925 and the reasons which led to a decision in favour of the widow on the Original Side are set out in the judgment of the learned trial Judge which is as follows :—

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May 28.

CHARI, J.—The facts of this case are that Ma Mi Lay, the plaintiff, is admitted to be the widow and, under the Burmese Buddhist law, the sole heir of the deceased, Maung Po Hla.

Maung Po Hla was an employee of the Burma Railways and, as such, a subscriber to the Railways Provident Fund. He died on the 24th of February, 1928, and the question has arisen as to whether the money is to be paid to the plaintiff, who is his widow, or to the 2nd defendant, Ma Kyway, who is his sister and nominee appointed by him under the rules of the Fund.

Under clause 4 of the Provident Funds Act, XIX of 1925, when a sum of money, or the balance thereof, vests in a dependent to whom it is payable under the rules of the Fund, he is the person to be first paid, and the nominee only takes any sum which is not payable to the dependent.

In the Burma Railways Provident Fund Rules, rule 19 (*a*) does not make the sum of money standing to the credit of the deceased member payable to the widow or relatives but only gives to the Committee a discretion to pay it to the widow or relatives, if no Probate of the Will, or Letters or Administration, or Succession Certificate, specifiying such money, is produced to the Manager.

If, therefore, neither under the rules, nor under the Act, the widow gets any right to preferential payment, the question arises whether the nomination of

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his sister made by the depositor deprives the widow of her right under the Burmese Buddhist law.

It is admitted that the depositor was a Burman Buddhist, and that, as such, his widow gets an undoubted right to succeed to his estate.

A Burman Buddhist cannot make a will, and in the case of *Ma Nu* v. *Ma Kun* (1) a Bench of this Court held that the nomination of a person for payment of the money in a Provident Fund on the death of the subscriber was a testamentary disposition, and invalid where the subscriber was a Burman Buddhist.

It is argued on behalf of the 2nd defendant that the ruling in *Ma Nu's* case (1), is no longer law, on account of the provisions contained in section 5 of the new Provident Funds Act. That section enacts as follows :—

> "Subject to the provisions of this Act, but otherwise notwithstanding anything contained in any law for the time being in force or any disposition, whether testamentary or otherwise, by a subscriber to, * * * any nomination, duly made in accordance with the rules of the Fund, * * * , shall be deemed to confer such right absolutely, until such nomination is varied by another nomination."

It is argued on behalf of the nominee, the sister, that the effect of this provision of law is to enable a Burman Buddhist to make a nomination, though such a nomination, being in the nature of a testamentary disposition, is prohibited by his personal law.

The learned advocate for the plaintiff contends that the words : "contained in any law for the time being in force," refer to the statutory law and not to the personal law of the parties. It seems to me

(1) (1924) 2 Ran. 388.

that the words do clearly provide that, in spite of any prohibition in the personal law of the person making the nomination, such a nomination is valid.

I may incidentally remark, though I cannot utilize it for the purpose of construing the section, that, in the correspondence, the attention of the Government of India was drawn to *Ma Nu's* case (1), and the disability of a Burman Buddhist to make a will. It may be presumed that that fact was in the mind of the Legislature when section 5 of the Provident Funds Act was enacted.

This, however, does not dispose of the case, because of the time when the nomination was made. This specific point was not raised by the learned advocate for the plaintiff, but I am bound to deal with it.

In respect of the Provident Funds Act, XIX of 1925, the Governor-General in Council appointed the 1st of April, 1926, as the day on which it should come into force, *vide* Notification No. F. 555—24, dated the 8th of December, 1925.

The nomination in this case was made by a declaration dated the 27th of September, 1924. There has not been any fresh nomination after the new Provident Funds Act came into force, and the question arises whether the new Act could have retrospective effect, so as to make that nomination legal.

It is settled law that an enactment, which takes away, or impairs, vested rights, or creates new obligations, or imposes new duties, or attaches new disabilities in respect of past transactions, must be presumed to be intended by the Legislature not to have a retrospective operation. (Maxwell on the Interpretation of Statutes, sixth edition, page 383, *et seq.*).

(1) (1294) 2 Ran. 388.

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It is unnecessary to refer to all the rulings on the point, and I shall only draw attention to the very recent ruling in the case of *Nepra* v. *Sayer Pramanik* (1), where even a declaratory Act was held not to have any restrospective operation.

It may indeed be urged in this case that the effect of the new Act was not to create a disability but to remove an existing disability, namely, the disability of a Burman Buddhist to make a testamentary disposition. Even in such a case the English rulings cited in Maxwell show that a statute will not be construed as having a restrospective effect. But, where the existence of a disability creates rights in other people, and where such rights will be taken away by allowing an Act to have a retrospective operation, it is clear that a statute cannot be construed as having such an operation, unless the Legislature in explicit terms says so.

On the day when the nomination was made by the husband, such a nomination was clearly beyond his capacity and illegal. The wife had a right, whether enforceable immediately, or at a future time, is immaterial, to ignore that nomination and to claim the money bequeathed to another person as her own. Of that right she cannot be divested, unless the Act in clear terms enacts to that effect.

I, therefore, hold that the nomination of the husband of the 27th September, 1924, is an invalid nomination; that the ruling in *Ma Nu's* case (2), applies to that nomination; and that it is not validated by the removal of the disability of the husband by the later Act.

I, therefore, hold that the plaintiff is entitled to the money in the hands of the Agent, Burma Railways Provident Fund, standing in the name of the

(1) (1927) 55 Cal. 67. (2) (1924) 2 Ran. 388.

deceased, Maung Po Hla. There will be a declaration accordingly.

* * * * *

The nominee appealed against the decision. Their Lordships agreed with the learned trial Judge as to the effect of section 5 of the Provident Funds Act of 1925, but disagreed with him on the question of fresh nomination. The judgment is as follows :—

PRATT, C.J., and ORMISTON, J.—Maung Po Hla deceased was an employee of the Burma Railways and a subscriber to the Railways Provident Fund. He nominated his sister Ma Kywe as his beneficiary. His wife, and sole heir under the Burmese Buddhist law, Ma Mi Le sued for recovery of the sum standing in her husband's name at his death and obtained a decree.

In the diary of the 11th May 1928 the learned Judge on the Original Side recorded "the point for decision is whether the Provident Funds Act override the personal law of Maung Po Hla to the extent of enabling him to direct his money to be paid to his sister."

The Judge found that the effect of section 5 of the Provident Funds Act, 1925, was that a nomination is valid in spite of any prohibition in the personal law of the person making the nomination.

We agree that there can be no doubt of the correctness of this construction.

The provisions of section 5 are perfectly clear and definite, and on this finding the suit by the wife should have been dismissed. The learned Judge has, however, held that as the nomination of the sister was made by a declaration, dated the 27th September, 1924, before the Act came into force, it was invalid. He considered that the Act was not

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intended to have a retrospective force and a fresh nomination was required.

This was a point not taken in argument and the Court was not justified in coming to a decision on this ground without hearing the advocates on the point.

We find ourselves quite unable to accept the reasoning of the learned trial Judge. The effect of the new Act was clearly to render valid a nomination which was previously invalid as contravening the provisions of the Burmese Buddhist law.

It is not a question of retrospective effect, since the declarant did not die till after the Act came into force.

No fresh nomination was necessary. The nominee is entitled to the money. We set aside the decree of the Original Side and direct that the suit be dismissed. Appellant will have costs in the suit and appeal. Advocate's fee three gold mohurs.