COURT-FEES ACT REFERENCE.

Before Mr. Justice Leach.

1935

Jan. 17.

MAUNG BA THAW AND OTHERS

v.

M.S.V.M. CHETTIAR.*

Court-fees—Appeal from judgment on Original Side of High Court—Stamp on memorandum of appeal– Court-fees Act (VII of 1870), s. 4—Power of the High Court to levy court-fees—Government of India Act, s. 107 (c)—Indian High Courts Act, 1861 (24 & 25 Vict., c. 104), s. 15—Original Side an integral part of High Court—Letters Patent, cl. 35—High Court notification, dated 29th May 1924—Erroneous preamble in statute—Operative part of statute.

The Court-fees Act, 1870, does not apply to cases coming before the High Court in the exercise of its ordinary original civil jurisdiction, or in the exercise of its jurisdiction as regards appeals from judgments passed in such cases.

The power to levy court-fees on appeals from the Original Side is not conferred by the provisions of s. 107 (c) of the Government of India Act or by s. 15 of the Indian High Courts Act, 1861. The powers conferred by those enactments relate to Courts subordinate to the High Court, and the Original Side of the High Court is not a subordinate Court ; it is an integral part of the High Court.

R.M.V.R.M. Chettyar v. *V.T. Firm*, I.L.R. 12 Ran. 548—*referred to.*

Mahomed Ishack Sahib v. *Mahomed Moideen*, I.L.R. 45 Mad. 849—*considered.*

The High Court has full power to regulate its own procedure. This power is conferred by clause 35 of the Letters Patent. The power to make regulations for procedure necessarily includes the imposition of fees and the collection of them. In the exercise of this power the High Court has issued a notification dated the 29th May 1924, requiring memoranda of appeal from judgments passed on the Original Side to be stamped. The fact that the notification purports to be made pursuant to the provisions of s. 107 (*c*) of the Government of India Act, 1915, does not affect its validity. Preambles and recitals in statutes do not control the operative parts if the latter are clear and unambiguous.

Bentley v. *Rotherham & Kimberworth Local Board of Health*, 4 Ch.D. 588 ; *Crowder* v. *Stewart*, 16 Ch.D. 368 ; *Mogridge* v. *Clapp*, (1892) 3 Ch.D. 382 ; *Powell* v. *Kempton Park Racecourse Co., Ltd.*, (1899) A.C. 143 ; *Salmon* v. *Duncombe*, 11 A.C. 627—*referred to.*

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* Reference arising out of Civil First Appeal No. 132 of 1934 from the judgment of this Court in Civil Regular No. 199 of 1934 on the Original Side.

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E Maung for the appellants. The Court-fees Act, 1870, does not empower the High Court to levy court-fees on memoranda of appeal from the judgments of the Court on its Original Side. *Bhadul Pande* v. *Manni Pande* (1); *Har Dial Shah* v. *Secretary of State for India* (2); *Raghubar Singh* v. *Jethu Mahton* (3). The power of levying fees conferred on the High Court by section 107 (*e*) of the Government of India Act relates to Courts subordinate to the High Court; the Original Side of the High Court is not a subordinate Court. There is no other enactment enabling the High Court to levy court-fees.

LEACH, J.—This is reference by the Taxing Master and raises the important question whether court-fees are payable on appeals from decrees passed by the Court in the exercise of its ordinary original jurisdiction. In Civil Regular Suit No. 199 of 1934 one M.S.V.M. Visvanathan Chettyar obtained a preliminary mortgage decree for Rs. ,603-5-3 and costs against five defendants. Three of the defendants desire to challenge on appeal the correctness of the decision and have submitted a memorandum of appeal. They value their appeal for the purpose of jurisdiction at Rs. 4,000, but have stamped their memorandum of appeal with a stamp of the value of Rs. 2 only. They contend that no court-fee is chargeable on a memorandum of appeal from a decree passed by the Court in the exercise of its ordinary original civil jurisdiction except Rs. 2, the amount required to be paid on the filing of an application. The Taxing Master inclines to the view that this contention is correct, but he has referred the matter to me as the

(1) I.L.R. 44 All. 13. (2) I.L.R. 3 Lah. 420.
(3) I.L.R. 1 Pat. 384.

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Taxing Judge for decision on the ground that it is a question of general public importance. If the law requires the memorandum to be stamped *ad valorem* the proper court-fee would be Rs. 225.

The Court-fees Act, 1870, does not apply to cases coming before this Court in the exercise of its ordinary original civil jurisdiction or in the exercise of its jurisdiction as regards appeals from judgments passed in such cases. The section which imposes fees in respect of High Court cases is section 4 which reads as follows :

> " No document of any of the kinds specified, in the First or Second Schedule to this Act annexed, as chargeable with fees, shall be filed, exhibited, or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction ;
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> or in the exercise of its extraordinary original criminal jurisdiction ;
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> or in the exercise of its jurisdiction as regards appeals from the judgments (other than judgments passed in the exercise of the ordinary original civil jurisdiction of the Court) of one or more judges of the said Court, or of a Division Court ;
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> or in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence ;
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> or in the exercise of its jurisdiction as a Court of reference or revision ;
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> unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

It will be observed that the section makes no reference to cases coming before the Court in the exercise of its ordinary civil jurisdiction and that appeals from judgments passed on the Original Side are expressly excluded from its purview.

Hitherto its has been assumed that the power to levy court-fees on appeals from the Original Side

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of this Court is conferred by the provisions of section 107 (*e*) of the Government of India Act. I will quote the section in full :

"107. Each of the High Courts has superintendence over all Courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say—

(*a*) call for returns ;

(*b*) direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction ;

(*c*) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts ;

(*d*) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts ; and

(*e*) settle tables of fees to be allowed to the sheriffs, attorneys, and all clerks and officers of Courts :

Provided that such rules, forms and tables shall not be inconsistent with the provisions of any law for the time being in force, and shall require the previous approval, in the case of the High Court at Calcutta, of the Governor-General in Council, and in other cases of the Local Government."

The marginal note to the section is as follows : "Powers of the High Court with respect to subordinate Courts." This section corresponds to section 15 of the Indian High Courts Act, 1861, which relates to the High Courts of Calcutta, Madras and Bombay. The wording in section 15 of the Indian High Courts Act is slightly different from the wording of section 107 of the Government of India Act, but the effect is the same. The marginal note to section 15 of the Indian High Courts Act reads : "High Courts to superintend and to frame rules of practice for subordinate Courts."

Court-fees have been levied in this Court in respect of cases coming before the Original Side and appeals arising therefrom under a notification,

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dated the 29th May 1924, the first part of which is as follows :

"Pursuant to the provisions of section 107 (*c*) of the Government of India Act, 1915, and with the previous approval of the Local Government, the High Court of Judicature at Rangoon directs that subject to the exception hereunder mentioned no document of any of the kinds specified in the first or second schedule to the Court-fees Act, 1870, as chargeable with fees, shall be filed, exhibited, or recorded in or shall be received or furnished by any of the Clerks or Officers of the said High Court in any case coming before such Court :

(*a*) In the exercise of its Original Civil or Criminal Jurisdiction, or

(*b*) In the exercise of its jurisdiction as regards appeals from judgments passed in the exercise of its ordinary Original Civil Jurisdiction, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

Then comes the exception, but it is not necessary to set this out as it has no bearing on the case before me.

In the taxation rules of the Calcutta High Court no reference is made to the authority under which the rules are made, except that there is a note that the rules were passed by the Full Court with effect from the 22nd November 1912 and that the sanction of the Governor-General in Council had been conveyed by certain letters of the Home Department. In Madras court-fees are fixed with the sanction of of the Governor in Council, and by virtue "of the powers conferred by the Act for establishing High Courts of Judicature in India, 24 and 25 Victoria, Chapter 104, and the Powers of Attorney Act, 1882, and all other powers hereunto enabling". In Bombay the table of fees is preceded by the following statement :

"Under section 15 of the Statute 24 and 25 Vict., Cap. 104, the Governor-in-Council is pleased to notify that he has sanctioned the following revised table of fees settled by the Honourable the Chief Justice and Judges of Her Majesty's High Court of Judicature at Bombay as the fees to be charged by the Prothonotary, Commissioner for taking Affidavits, Sealer, Judges' Clerks, Interpreters and Translators, Commissioner for taking Accounts and Local Investigator and the Taxing Officer. The revised table will be given effect to from January 1st, 1898."

The notification sanctioning the Bombay scale of fees is published under section 15 of the Indian High Courts Act, but it does not necessarily follow that the Bombay High Court regards its powers as being limited to that section or that they are in fact so limited.

The first question which calls for decision in this reference is whether section 107 of the Government of India Act authorizes the levy of court-fees on appeals from the Original Side. If it does, there is an end to the matter. If it does not, it will be necessary to consider whether the Court can, without reference to the Government of India Act, lawfully insist on court-fees being paid before appeals from the Original Side are admitted.

An examination of section 107 forces me to the conclusion that the section does not authorize the Court to impose court-fees on appeals in cases dealt with by the Court in the exercise of its ordinary civil jurisdiction. The section only refers to Courts which are subordinate to the High Court. The Original Side of this Court is not a subordinate Court; it is an integral part of the High Court itself, as a Full Bench of this Court held in *R.M.V.R.M. Ramaswamy Chettyar* v. *V.T. Firm* (1). The marginal note to section 107

(1) (1934) I.L.R. 12 Ran. 548.

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expressly refers to powers of the High Court with respect to subordinate Courts. It is not necessary, in my opinion, to rely merely on the marginal note in deciding the effect of the section. The wording of the section by itself is sufficiently clear. The marginal note, however, emphasises the fact that the section is intended to apply only in respect of Courts subordinate to the High Court. The answer to the first question is therefore in the negative.

The only reported case which deals with this question is that of *H. Mahomed Ishack Sahib* v. *Mahomed Moideen* (1), which was decided by Sir Murray Coutts Trotter, the late Chief Justice of Madras, when he was sitting as a puisne Judge of the Madras High Court. It was there held that the Madras High Court could 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 Indian High Courts Act, but it is clear from the judgment that the learned Judge who tried the case was not of the opinion that the powers were confined to this section. He observed :

"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 power 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

(1) (1922) I.L.R. 45 Mad. 849.

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."

The learned Judge does not discuss the question whether the Original Side of the Madras High Court is a subordinate Court within the meaning of section 15 of the Indian High Courts Act. It would appear that he assumed that it was. If *R.M.V.R.M. Ramaswamy Chettyar*'s case was rightly decided the assumption was erroneous, as there is no essential difference between section 107 of the Government of India Act and section 15 of the Indian High Courts Act. If I may say so with great respect, I consider that *R.M.V.R.M. Ramaswamy Chettyar*'s case was rightly decided, but in any event it is binding on me.

Sir Murray Coutts Trotter's decision was not, however, based merely on the provisions of section 15 of the Indian High Courts Act. He accepted the broader proposition that the power to make regulations for procedure necessarily includes imposition of fees and the collection of them and I entirely share this view. This Court has full power to regulate its procedure. The power is conferred by clause 35 of the Letters Patent, the relevant portion of which reads as follows :

"35. And we do further ordain that it shall be lawful for the High Court of Judicature at Rangoon from time to time to make rules and orders for the purpose of regulating all proceedings in

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civil cases which may be brought before the said High Court, including procedure in its Admiralty, testamentary, intestate and matrimonial jurisdiction, respectively."

The Court having power to impose and collect fees in connection with the reception of appeals from Original Side decisions it is entitled to say that no appeal shall be filed which is not stamped according to its direction.

There is one other question with which I should perhaps deal and it is this : Does the fact that the notification above referred to purports to be made pursuant to the provisions of section 107 (*e*) of the Government of India Act make any difference as to its legality? In my opinion it does not. It is the operative part of the notification which matters. The operative part directs *inter alia* that a memorandum of appeal from a decree of the Original Side shall not be filed unless the specified court-fee has been paid. Preambles and recitals in statutes do not control the operative parts of the statutes if the operative parts are clear and unambiguous ; *Crowder* v. *Stewart* (1), *Bentley* v. *Rotherham and Kimberworth Local Board of Health* (2), and *Powell* v. *The Kempton Park Racecourse Company, Limited* (3). Moreover, there is the authority of the Privy Council for the statement that where the main object and intention of a statute are clear the draftsman's want of skill or ignorance of law, shall not, except in the case of necessity or the absolute intractability of the language used reduce the statute to a nullity—*Salmon* v. *Duncombe and others* (4). In that case the judgment of the Judicial Committee was delivered by Lord Hobhouse, who observed :

(1) 16 Ch.D. 368.
(2) 4 Ch.D. 588.
(3) (1899) Ap. Ca. 143.
(4) 11 Ap. Ca. 627.

"It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used."

There can be no difference between a statute and a notification in this respect.

In *Mogridge* v. *Clapp* (1) the question arose whether a lessor intended to grant a lease by virtue of the powers conferred by the Settled Land Act, 1882. The lease, though complying with the enabling sections of the Act contained no reference thereto. It was held that the lease could, and did, operate under the Settled Land Act, 1882, notwithstanding that the existence of the statutory power of leasing was not present in the minds of the parties, but was really absent from their minds. This case embodies a well recognized principle of law, namely that where one finds an intention to effect a particular object which can only be effected by a particular power the intention to exercise that power will be presumed unless a contrary intention is clearly manifest.

The Court, in issuing the notification referred to, undoubtedly intended to exercise the powers vested in it. The reference to section 107 of the Government of India Act may be unfortunate, but for the reasons indicated I do not consider that it invalidates the operative parts of the notification.

It was never the intention that appeals from decrees of the Original Side of this Court should escape court-fees, and to my mind it would be wrong to interfere with a practice which has prevailed for many years in the High Courts of India unless it is clearly established that such practice is contrary

(1) (1892) 3 Ch.D. 382.

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to law. I am not convinced that the practice of requiring memoranda of appeal to be stamped in accordance with the notification of the 29th of May 1924 is contrary to law. On the other hand, I consider that there is authority for the practice.

I, therefore, hold that the Court has power to refuse to accept the present appeal until the stamp required by the notification of the 29th of May 1924 has been affixed to the memorandum of appeal. The document will be returned to the appellants to enable them to affix the correct stamp.

ORIGINAL CIVIL.

Before Mr. Justice Leach.

1934

Oct. 4.

MA CHIT MAY

v.

MA SAW SHIN AND OTHERS.*

Burmese customary law—Divorce—Arrangements as regards children and property—Parents' discretion—General custom as to division of property and children—Loss of succession rights—Resumption of filial relationship—Evidence—Ties of affection not enough—Taking back into the family.

On a divorce taking place between a Burmese Buddhist couple the children of the marriage are bound by the arrangements the parents choose to make. The parents have an unfettered discretion to decide how their property shall be divided and with whom the children shall live.

Ma E May v. *Maung Po Mya*, 11 B.L.R. 316 ; *Ma Tin U* v. *Ma Ma Than*, I.L.R. 5 Ran. 359 ; *Ma Yi* v. *Ma Gale*, 6 L.B.R. 167 ; *Mi San Mra Rhi* v. *Mi Than Da U*, 1 L.B.R. 161 ; *Mi Thaik* v. *Mi Tu*, (1872-92) S.J. 184—*referred to.*

On a divorce the general rule is that the daughters live with the mother and the sons with the father, with the result that the daughters lose their right to succeed to their father's property, and the sons to their mother's property.

Ma Tin U v. *Ma Ma Than*, I.L.R. 5 Ran. 359 ; *Mi Thaik* v. *Mi Tu*, (1872-92) S.J. 184—*referred to.*

The lost right may be recovered, but that depends entirely on the will of the parent concerned. A daughter who has lived with her mother since

* Civil Regular Suit No. 56 of 1934.