

1938

Present : Hearne J. and Wijeyewardene A.J.

TAMBIAH v. CASIPILLAI.

65—D. C. Jaffna, 45.

*Stamps—Petition for vesting order under section 112 of the Trusts Ordinance—
Ordinance No. 22 of 1909, Schedule B, Part II.*

Where the petitioner claiming to be the hereditary trustee and manager of a Hindu temple petitioned the Court to make a vesting order in his favour in terms of section 112 of the Trusts Ordinance, No. 9 of 1917,—

Held, that the proceedings were chargeable with an *ad valorem* stamp duty as indicated in Schedule B of Part II of the Stamp Ordinance, No. 22 of 1909.

THIS was a petition to the District Court of Jaffna by the petitioner, claiming to be the hereditary manager and trustee, for a vesting order in his favour in terms of section 112 of the Trusts Ordinance. The subject-matter of the petition was valued at Rs. 20,000. The District Judge dismissed the petition and the petitioner appealed. The respondent took a preliminary objection to the appeal on several grounds stated below.

F. A. Hayley, K.C. (with him *H. W. Thambiah*), for respondent, takes preliminary objection.—The appeal should not be entertained for three reasons, viz. :—(1) The petition of appeal and the security bond are both signed by a Proctor whose proxy is unstamped and is, therefore, invalid. (2) The value of the action is Rs. 20,000, and stamps tendered for the Supreme Court decree and for the certificate in appeal should have been for Rs. 30 and Rs. 15 respectively, whereas stamps only for Rs. 40 in all were tendered. (3) The petition of appeal should bear a stamp for Rs. 15 whereas a stamp for only Rs. 10 has been affixed.

The proxy of the appellant's Proctor bears no stamp at all. Under section 36, therefore, of the Stamp Ordinance, No. 22 of 1909, it is invalid and the *ratio decidendi* in *Andam Chetty v. Pana Mohamadu Tamby*¹ is applicable although that case was decided before 1909.

With reference to the second objection, it is important to bear in mind the nature of the proceedings. The appellant is asking for a vesting order under section 112 of the Trusts Ordinance, No. 9 of 1917. The value of the subject-matter is admittedly Rs. 20,000. The documents have, therefore, to be duly and sufficiently stamped under that class. The District Judge was under the impression that proceedings concerning charitable trusts needed no stamps except the ten-rupee stamp required under section 116 (3) of the Trusts Ordinance. That mistaken idea was long ago exposed in *Sathasivam v. Vaithianathan*². It was an action under section 102 of Chapter X of the Trusts Ordinance, and it was held that actions relating to public trusts under Chapter X were chargeable as of the value of Rs. 1,000. The present case, however, is not brought under Chapter X but, admittedly, under section 112, that is under Chapter XI. The ruling in *Sathasivam v. Vaithianathan* (*supra*) has been followed recently in *Saddanatha Kurukkal v. Subramaniam et al.*³

Schedule B, Part II of the Stamp Ordinance gives the value of stamps necessary for the Supreme Court decree, certificate in appeal and the petition of appeal in an action where the subject-matter is valued at Rs. 20,000. Failure to supply the necessary stamps is fatal to the whole appeal—*Sathasivam v. Cadiravel Chetty*⁴ and *Ramalingam Pillai v. Wimalaratne*⁵.

H. V. Perera, K.C. (with him *N. Nadarajah, E. B. Wikramanayake* and *C. J. Ranatunge*), for petitioner, appellant.—This is an application for a vesting order under section 112 of the Trusts Ordinance. Section 101, which is a part of Chapter X, expressly provides for such procedure. A

¹ (1884) 6 S. C. C. 126.

² (1922) 24 N. L. R. 94.

³ (1937) 39 N. L. R. 387.

⁴ (1919) 21 N. L. R. 93.

⁵ (1934) 36 N. L. R. 52.

similar application under section 112 was made in an action brought under section 101 in *Karthigasu Ambalawanar et al. v. Subramaniam Kathiravelu et al.*¹

As regards the value of the stamps necessary for a proceeding under section 112, the scope of section 116 has to be considered. Sub-section (3) of it will, no doubt, not apply to documents other than bare petitions, but sub-section (1) brings in the rules relating to Civil Procedure. Schedule B, Part II of the Stamp Ordinance expressly refers to Chapter XLV of the Civil Procedure Code, dealing with public trusts. Chapter XLV of the Civil Procedure Code is now incorporated in section 101 of the Trusts Ordinance. The provisions of Schedule B, Part II of the Stamp Ordinance would apply not only to actions brought under section 101 of the Trusts Ordinance, but to proceedings under the other sections as well provided that a public trust is the subject-matter of the proceeding. The proviso in section 101 definitely catches up other sections which are not in Chapter X of the Trusts Ordinance. *Sathasivam v. Vaithianathan (supra)* dealt with an action under section 101; the position regarding proceedings under the other sections was not considered. The ruling in that case, however, can be made applicable to proceedings relating to public trusts, brought under other sections.

To sum up, sections 112 and 116 (1) of the Trusts Ordinance have to be read along with section 101. If the class of the present case is accepted as of Rs. 1,000, the stamps which have been supplied for the petition of appeal, &c., are sufficient.

The proxy of the appellant's Proctor has already been acted upon. The fact of authority is not derived from the stamping but from the acting upon it—section 37 of the Stamp Ordinance. The proxy must, no doubt, be stamped, but the absence of the stamp does not make the authority void. This case cannot be worse than *Jayawickreme et al. v. Amarasooriya*², and *Tillekeratne v. Wijesinghe*³.

F. A. Hayley, K.C., in reply.—It is conceded now that the value of the stamps would be insufficient unless the proceeding is of the thousand-rupee class. It is suggested that the relevant provisions of the Stamp Ordinance should be interpreted as meaning that all actions relating to charitable trusts, whether they are brought under Chapter X of the Trusts Ordinance or not, should be computed as of the thousand-rupee class. *Sathasivam v. Vaithianathan (supra)* is, however, a decision to the contrary. It is section 101 alone of the Trusts Ordinance which takes the place of section 639, that is, Chapter XLV of the Civil Procedure Code. The proviso in section 101 is only a protecting and explanatory clause. How a proviso should be treated is dealt with in *Colombo Stores, Ltd. v. Silva*⁴. It should not be interpreted so as to alter the operative effect of the main enactment. The present proceedings can, by no means, be described as one brought under Chapter X of the Trusts Ordinance.

A vesting order under section 112 of the Trusts Ordinance cannot be sought for by petition independently and except in the course of a regular

¹ (1924) 27 N. L. R. 15.

² (1914) 17 N. L. R. 174.

³ (1908) 11 N. L. R. 270.

⁴ (1924) 26 N. L. R. 185.

action brought under sections 101 and 102—*Muthukumar et al v. Vaithy et al*¹; *Karthigasu Ambalawanar et al v. Subramaniam Kathiravela et al* (*supra*).

Cur. adv. vult.

September 23, 1938. HEARNE J.—

The plaintiff claiming to be the hereditary trustee and manager of a Hindu temple petitioned the Court to make a vesting order in his favour in terms of section 112 of the Trusts Ordinance, No. 9 of 1917. His petition was dismissed and he has appealed. The subject-matter of the petition was valued at Rs. 20,000. If it is on the basis of this valuation that the petition of appeal requires to be stamped, it is understamped to the extent of Rs. 5 and similarly the tender of stamps for the S. C. decree and the certificate in appeal falls short by Rs. 5 of the requirements of the Stamp Ordinance. In these circumstances Counsel for the respondent, on a preliminary objection, asked for the appeal to be dismissed.

Schedule B of the Stamp Ordinance (No. 22 of 1909) as resettled in 1919, provided that "actions relating to public charities under Chapter XLV of the Civil Procedure Code shall be charged as of the value of Rs. 1,000". Chapter XLV of the Code had however been repealed in 1917, by the Trusts Ordinance (No. 9 of 1917), and had been re-enacted by certain sections in Chapter X of the Trusts Ordinance. In order to give effect to the intention of the Legislature which had been lost or at least obscured by this inadvertence it was held in *Sathasivam v. Vaithianathan*², that "actions relating to public charities under Chapter X of the Trusts Ordinance are chargeable as of the value of Rs. 1,000". Counsel for the appellant sought to extend the application of that decision to a petition under section 112 of the Trusts Ordinance.

Chapter XLV of the Code made provision for particular proceedings to be taken for certain specified purposes by or with the consent of the Attorney-General and I am unable to give the benefit of the provision in Schedule B of the Stamp Ordinance (*supra*) to a person initiating proceedings under the Trusts Ordinance, unless those proceedings are under one of the sections of the Trusts Ordinance which re-enacted Chapter XLV of the Code, and section 112 is not one of those sections.

It was argued that the proviso in section 101 of the Trusts Ordinance attracted to and in effect incorporated in that section, which is contained in Chapter X, section 112 which is not in Chapter X. I cannot uphold this contention. The proviso referred to is merely a saving clause. It saves actions elsewhere available under the Ordinance.

Counsel for the respondent raised another objection to the constitution of the appeal on the ground that the petition of appeal and security bond had been signed by a Proctor by virtue of a power of attorney which had not been stamped. It is unnecessary to examine this objection.

I would dismiss the appeal with costs.

WILKINSON A.J.—

The present appeal arises in respect of a petition filed by the appellant in the District Court of Jaffna, claiming to be the hereditary manager and trustee of a Hindu temple. He avers that the respondent wrongfully

¹ (1937) 12 C. L. W. 9.

² (1927) 24 N. L. B. 94.

claimed to be the manager of the temple and was preventing him from exercising "his rights as sole manager and trustee of the temple and its temporalities". In paragraph 10 of the petition he sets out the purpose of his petition as follows :—

"In order to enable the petitioner more effectually to manage the said temple and its temporalities it is necessary that a vesting order should be entered in terms of section 112 of Ordinance No. 9 of 1917 vesting the temple, referred to above and the temporalities described in the schedule annexed hereto in the petitioner as sole hereditary manager and trustee".

He values the subject-matter of the petition at Rs. 20,000.

The District Judge held that the dispute between the petitioner and the respondent as regards the managership and the trusteeship should first be settled by a regular action before the petitioner asks for a vesting order under section 112 of the Trusts Ordinance, 1917, and dismissed the application of the petitioner.

The petitioner appeals against this order.

The Counsel for the respondent has raised the following preliminary objections against the appeal being entertained by this Court :—

- (1) The stamps tendered for the decree of this Court and the certificate in appeal are insufficient.
- (2) The petition of appeal is insufficiently stamped.
- (3) The proxy given by the petitioner to his Proctor is not stamped and therefore the petition of appeal and the security bond both of which are signed by the Proctor cannot be acted upon.

I shall deal with the first two objections as in view of the decision I have reached with regard to them, it is not necessary for me to consider the third objection.

"The Property and Trustees' Ordinance, 1871" (Ordinance No. 7 of 1871) provided *inter alia* for the nomination of trustees by District Courts and the vesting of property in such trustees. It further provided that all appeals to the Supreme Court from the orders made under the Ordinance by any District Court "shall be subject to the same rules, regulations and practice as exist with respect to interlocutory appeals from District Courts". This Ordinance was held to be applicable to public charitable trusts. (*Muttiahpillai v. Sanmugam Chetty*¹.)

The Civil Procedure, 1899, enacted in Chapter XLV that in case of any alleged breach of a trust created for public charitable purposes or whenever the direction of the Court was deemed necessary for the administration of any such trust, the Attorney-General or two or more persons interested in the trust with the written consent of the Attorney-General could institute an action for the purpose of obtaining a decree—

- (a) removing any trustee, and if necessary, appointing new trustees,
- (b) vesting any property in the trustee,
- (c) declaring the proportions in which its objects are entitled,
- (d) authorizing the whole or any part of the property to be sold or otherwise dealt with,
- (e) settling a scheme of management, or
- (f) granting any other relief.

¹ (1910) 14 N. L. R. 15.

Ordinance No. 22 of 1909 provides that instruments and documents shall be chargeable with duty of the amount indicated in Schedule B of the Ordinance. Now Schedule B contains in Part II, "the duties on Law Proceedings" and has under the heading "Miscellaneous" the following provision :—

"Actions relating to public charities under Chapter XLV of the Civil Procedure Code shall be charged as of the value of Rs. 1,000".

The position therefore until 1917 (when the Trust Ordinance was passed) was that while actions under Chapter XLV of the Civil Procedure Code were chargeable with stamp duty as actions of the value of Rs. 1,000 other actions in respect of charitable trusts falling for instance under Ordinance No. 7 of 1871 would have been chargeable with an *ad valorem* duty as provided in that portion of Schedule B, Part II of the Stamp Ordinance, 1909, which contained the "Duties on Law Proceedings".

The Trusts Ordinance, No. 9 of 1917, repealed Ordinance No. 7 of 1871, and Chapter XLV of the Civil Procedure Code, 1889. Sections 99 to 109 constituting Chapter X of the Trusts Ordinance, 1917, refer to charitable trusts. The first part of section 101 is a re-enactment with some slight modifications of the provisions of Chapter XLV of the Civil Procedure Code.

Now by virtue of section 10 of the Interpretation Ordinance, No. 21 of 1901, the reference to Chapter XLV of the Civil Procedure Code in the special provision under the heading "Miscellaneous" in Schedule B, Part II of the Stamp Ordinance, 1909, would have been read as a reference to the first paragraph of section 101 of the Trusts Ordinance, 1917. The position then with regard to the duty which actions in respect of public charitable trusts attracted was that actions under the first paragraph of section 101 of the Trusts Ordinance would be charged as of the value of Rs. 1,000 while all other actions in respect of such trusts would be chargeable with an *ad valorem* duty as indicated in Schedule B, Part II of the Stamp Ordinance.

In 1919 and later the Schedule B of the Stamp Ordinance was repealed and re-enacted with some alterations but by an oversight on the part of the draftsman it continued to contain a reference under the heading "Miscellaneous" to actions under Chapter XLV of the Civil Procedure Code, though at that time this Chapter had been repealed by the Trusts Ordinance, 1917.

In this state of the legislation on the subject, this Court decided in *Sathasivam v. Vaithianathan*¹, the question of the stamp duty leviable in respect of proceedings connected with charitable trusts. After considering section 116 of the Trusts Ordinance, Bertram C.J. and Schneider J. held in that case—

- (a) that actions relating to public charities under Chapter X of the Trusts Ordinance was chargeable as of the value of Rs. 1,000,
- (b) that section 116 (3) was a special enactment referring to proceedings of a special nature by petitions under sections 35, 74 and 76 and other sections of the Trusts Ordinance.

¹ (1922) 24 N. L. R. 94.

It may become necessary when the occasion arises to examine more closely the view expressed by the learned Judges in *Sathasivam v. Vaithianathan* (*supra*) that all actions relating to public charities under Chapter X of the Trusts Ordinance are chargeable as of the value of Rs. 1,000. It is not unlikely that the view may be taken that this special provision applies only to actions under the first paragraph of section 101 which was enacted in place of Chapter XLV of the Civil Procedure Code. But as I am of opinion that the present proceedings do not fall under Chapter X of the Trusts Ordinance it is not necessary to pursue this question further. The learned Counsel for the respondent argued that the present proceedings were under Chapter X and referred to the second paragraph of section 101 in support of his argument. This paragraph reads :—

“ Nothing contained in this or the next succeeding section shall be deemed to preclude the trustee or author of any charitable trust from applying to the Court by action or otherwise for such direction or relief as he may be entitled to obtain under the general provisions of this Ordinance, or for the purpose of invoking the assistance of the Court for the better securing of the objects of the trust, or for regulating its administration or the succession to the trusteeship, and upon any such application the Court may make such order as it may deem equitable ”.

This paragraph, it is clear, does not create a new action. It only saves actions available under other provisions of the Ordinance. Such actions would therefore be actions under other provisions of the Ordinance and not under section 101. The present action which contains a specific reference to section 112 and that section alone cannot be regarded as an action under section 101 or any other section of Chapter X but as an action purporting to be under section 112 which falls outside Chapter X.

The present proceedings therefore would be chargeable with *ad valorem* duty and according to the provisions of the Stamp Ordinance, 1909, as amended by Ordinance No. 19 of 1927, the petition of appeal should bear a stamp of Rs. 15 and stamps of the value of Rs. 45 should have been tendered for the judgment of this Court and the certificate in appeal. The petitioner has however affixed only a stamp of Rs. 10 on the petition of appeal and has tendered stamps of the value of Rs. 40 only for the judgment of this Court and the certificate in appeal.

I uphold the first two objections raised by the respondent's Counsel and following the decisions in *Sathasivam v. Cadiravel Chetty*¹ and *Ramalingam Pillai v. Wimalaratne*². I dismiss the appeal with costs.

Appeal dismissed.

¹ (1919) 21 N. L. R. 93.

² (1934) 36 N. L. R. 52.