

APPELLATE CIVIL.

Before Jenkins C., and Woodroffe J.

ABDULLAH HOSSEIN CHOWDHURY

v.

ADMINISTRATOR-GENERAL OF BENGAL.*

1914

May 5.

Leave to appeal to Privy Council—Application—Civil Procedure Code (Act V of 1908) s. 110—Computation of time—Limitation Act (IX of 1908) s. 12, whether ultra vires—Legislative powers of the Governor-General in Council—Order in Council, 1838—Government of India Act, 1858 (21 & 22 Vict. c. 106) s. 64—Indian Councils Act, 1861 (24 & 25 Vict. c. 67)—Letters Patent 1865 ss. 39, 44.

Section 12 of the Limitation Act of 1908 applies to applications for leave to appeal to His Majesty in Council.

Section 12, sub-cl. (2) which enacts that "in computing the period of limitation prescribed for an application for leave to appeal . . . the time requisite for obtaining a copy of the decree . . . appealed from . . . shall be excluded" was within the legislative powers of the Governor-General in Council, not being in contravention of section 64 of the Government of India Act 1858, and is not *ultra vires*.

Eastern Mortgage and Agency Company, Limited v. Purna Chandra Sarbagna (1), *Lakshmanan v. Peryasami* (2), *Anderson v. Periasami* (3), *In re Sita Ram Kesho* (4), *Thurai Rajah v. Jainilabdeen Rowihan* (5), *Moroba Ramchandra v. Ghanasham Nilkant Nadkarni* (6), *Motichand v. Ganga Parshad Singh* (7) referred to.

APPLICATION by the plaintiff, Abdullah Hossein Chowdhury, for leave to appeal to His Majesty in Council from the judgment of Coxe and Ray JJ. (8).

* Application for leave to appeal to His Majesty in Council, No. 85 of 1913.

(1) (1912) I. L. R. 39 Calc. 510. (5) (1895) I. L. R. 18 Mad. 484.

(2) (1887) I. L. R. 10 Mad. 373. (6) (1894) I. L. R. 19 Bom. 301

(3) (1891) I. L. R. 15 Mad. 169. (7) (1901) I. L. R. 24 All. 174 ;

(4) (1892) I. L. R. 15 All. 14. L. R. 29 I. A. 40, 42.

(8) (1913) I. L. R. 41 Calc. 148.

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It was conceded that if the application was within time a certificate should issue. The only question was whether the application was within time. By an order in Council, dated the 10th April 1838, it was declared "that from and after the 31st day of December next, no appeal to Her Majesty, her heirs and successors, in Council, shall be allowed by any of Her Majesty's Supreme Courts of Judicature at Fort William in Bengal unless the petition for that purpose be presented within six calendar months from the day of the date of the judgment, decree or decretal order complained of, and unless the value of the matter in dispute shall amount to the sum of ten thousand Company's rupees at least" See Safford and Wheeler's Privy Council Practice, p. 491.

By section 12, sub. cl. (2) of the Limitation Act of 1908 it was provided that "in computing the period of limitation prescribed for an application for leave to appeal the time requisite for obtaining a copy of the decree appealed from . . . shall be excluded."

The petition for leave was presented more than six calendar months from the date of the decree, but if in computing the period of limitation, the time requisite for obtaining a copy of the decree was excluded, the application was within time. The question was, should such time be excluded in computing the period of limitation and resolved itself into the consideration of whether section 12, sub. cl. (2) of the Limitation Act of 1908 as set out above was *ultra vires* having regard to the declaration contained in the Order in Council of 1838.

Babu Gunada Charan Sen, for the petitioner, applied for leave to appeal to His Majesty in Council.

Mr. B. Chakravarti (with him *Babu Upendra Lal Roy* and *Babu Bhupendra Chandra Guha*), for the opposite party. The application for leave is out of time and ought to be refused. Sections 5 and 12 of the Limitation Act 1908 which purport to extend the time during which such an application must be made, are to that extent *ultra vires*: See Safford and Wheeler's Privy Council Practice, pp. 465-466, p. 476 note (s). The order in Council of the 10th April 1838 is definite in its prohibition. The provisions of the Order in Council of 1838 were revived and confirmed by section 64 of the Government of India Act, 1858 (21 and 22 Vict., c. 106): and by section 22 of the Indian Councils Act, 1861, (24 & 25 Vict., c. 67), it was provided that "the Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect . . . any of the provisions of 21 & 22 Vict., c. 106, entitled An Act for the Better Government of India . . .". Cf. Ilbert's Government of India, 2nd edition, p. 199. It follows that sections 5 and 12 of the Limitation Act (which was passed by the Governor-General in Council) are *ultra vires* so far as they are in conflict with the order in Council of 1838. It cannot be said that the prohibition is an interference with the prerogative of the Crown, to receive any petition. The order prohibits the presentation of an application to the High Court for leave to appeal to His Majesty in Council—it leaves His Majesty in Council unfettered. This distinction is recognised in section 112 of the Code of Civil Procedure.

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers:" *The Queen*

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v. *Burah* (1). The very point involved in this matter was raised in *Gajadhur Pershad v. The Widows of Imam Ali Beg* (2). Under the Limitation Act of 1877, the time within which the application for leave to appeal to the Privy Council, had to be made was six months from the decree: *Moroba Ramchandra v. Ghanasham Nilkant Nadkarni* (3), *In the matter of petition of Sita Ram Kesho* (4), *Jawahir Lal v. Narain Das* (5). The following authorities were also referred to: *Kirkland v. Modee Pestonjee Khoorsedjee* (6), *The East India Company v. Syed Ally* (7), *In the matter of the petition of Feda Hossein* (8), *Alter Kaufman v. Government of Bombay* (9). It is clear from the authorities that section 5 of the Limitation Act of 1877 does not apply to applications for leave to appeal to the Privy Council. The decision in *Eastern Mortgage Agency Co. Ltd. v. Purna Chandra Sarbagna* (10) which was under section 12 of the Limitation Act of 1908, cannot be taken as binding, as the present argument was not advanced or considered in that case. There is no reason why the time requisite for obtaining a copy of the decree should be excluded, as it is not necessary to file a copy of the judgment of the High Court at the time of presenting the petition. It is true it has been the practice to exclude such time, in computing the period of limitation: but the present objection has never before been urged and the matter is one of first impression. The amendments introduced in sections 5 and 12 by the Limitation Act of 1908 have given rise to the present question. Field's Regulations of the Bengal Code p. 139, and Morley's Digest, Vol. I., p. CXXXV, were also referred to.

(1) (1873) L. R. 5 I. A. 178, 193.

(2) (1875) 15 B. L. R. 221.

(3) (1894) I. L. R. 19 Bom. 301.

(4) (1892) I. L. R. 15 All. 14.

(5) (1878) I. L. R. 1 All. 644.

(6) (1843) 3 Moo. I. A. 220.

(7) (1827) 7 Moo. E. I. A. 555.

(8) (1876) I. L. R. 1 Calc. 431.

(9) (1894) I. L. R. 18 Bom. 636.

(10) (1912) I. L. R. 39 Calc. 510.

Babu Gunada Charan Sen, for the petitioner. The Indian Legislature was entirely competent to pass section 12, sub-section (2) of the Limitation Act of 1908. The legislative powers of the Indian Legislature are defined by section 22 of the Indian Councils Act, 1861 (24 & 25 Vict., c. 67). It is true that one of the exceptions provided by that section is the Government of India Act 1858 (21 & 22 Vict., c. 106). But that exception does not operate to affect the matter in issue in the present application. The object of the Government of India Act 1858, as appears from the title, the preamble and the various provisions of the Act, was to regulate the administrative government of India and not to regulate the procedure of the Courts. The object was in particular to provide for the transfer of the government of this country from the East India Company to the Crown and to make the necessary administrative changes for that purpose. Section 64 refers to the Charter granted to the East India Company and the executive and administrative government of India and does not purport to fetter the absolute right of the Indian Legislature to pass any Act relating to the administration of justice, or the procedure of the Courts. The matter is placed beyond doubt by section 11 of the Charter Act of 1861 (24 & 25 Vict., c. 104) which was passed in the same year as the Indian Councils Act which authorised the establishment of the High Courts in India and defined their jurisdiction. By section 11 "all provisions then in force in India of Acts of Parliament, or of any orders of Her Majesty in Council or shall be taken to be applicable to the said High Courts so far as may be consistent with the provisions of this Act and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to

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the matters aforesaid of the Governor-General of India in Council." See also section 9. The Letters Patent of the Calcutta High Court issued in 1865 in pursuance of the Charter Act, by section 39 provides for appeals to the Privy Council and by section 44 provides that "all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council." Notwithstanding the Order in Council of 1838 variations have been introduced in respect of cases falling within the second clause of section 110 of the Code of Civil Procedure. This has presumably been done by virtue of the authority of the Charter Act 1861.

[JENKINS C.J. What is the history of Art. 179 of the Limitation Act of 1908?]

The provision originally appeared in the Privy Council Appeals Act (VI of 1874): section 8 was as follows: "Such application must ordinarily be made within six months from the date of such decree. But if that period expires when the Court is closed, the application may be made on the day that the Court re-opens." This Act was repealed by the Code (Act X of 1877): but section 599 of the Code of 1877 reproduced that provision *verbatim*. Section 599 was repealed by the Limitation Act (XV of 1877), but the same period of limitation namely, six months from the date of the decree appealed against, is prescribed by Art. 177 of the Limitation Act of 1877—and the same period is prescribed by Art 179 of the Limitation Act of 1908. It is to be observed if section 12 of the Limitation Act of 1908 be *ultra vires*, so must section 8 of the Privy Councils Act of 1874 have been *ultra vires*. I rely on *Eastern Mortgage & Agency Co., Ltd. v. Purna Chandra Sarbagna* (1) which was a decision under section 12 of the Limitation

(1) (1912) I. L. R. 39 Calc. 510.

Act of 1908. Although the point involved in the present application was raised in argument in *Gajadhur Pershad v. The Widows of Emam Ali Beg* (1), no decision was come to. The case turned on a question of irregularity. The other authorities cited by the opposite party were decisions under the Limitation Act of 1877 and hence inapplicable.

Mr. Chakravarti, in reply.

Cur. adv. vult.

JENKINS C. J. This is an application by one who desires to appeal to His Majesty in Council for a certificate that as regards amount or value and nature the case fulfils the requirements of section 110 of the Civil Procedure Code.

It is conceded that if the application is within time a certificate ought to issue: it is however contended that the appeal is not within the period of six calendar months prescribed by the Order in Council of 1838. To this it is answered that the application is within six months from the date of the decree appealed from, if, in computing the period of limitation the time requisite for obtaining a copy of the decree is excluded.

The Order in Council does not expressly allow this exclusion; but the Limitation Act of 1908, section 12, purports to direct it. The question for our decision is whether it was within the competence of the Indian Legislature to enact this provision. The Governor-General in Council has power at legislative meetings to make laws for all Courts within British India subject to certain exceptions, and among them is this that he cannot make any law repealing or affecting any provision of the Government of India Act 1858. (*See the Indian Councils Act 24 & 25 Vict., c. 67, s. 22.*)

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Section 64 of the Government of India Act, 1858, provides that all Acts and provisions now in force under Charter or otherwise concerning India shall subject to the provisions of this Act continue in force and be construed as referring to the Secretary of State in Council in the place of the said Company and the Court of Directors and Court of Proprietors thereof.

Therefore, it is contended, section 12 of the Limitation Act so far as it relates to an application for leave to appeal to His Majesty in Council was beyond the powers of the Indian Legislature.

This section is not the first instance in which the Indian Legislature has made provisions which purport to modify the absolute terms of the order of 1838. Thus by the Privy Council Appeals Act, 1874, it was provided that applications by any one desiring to appeal to Her Majesty in Council must *ordinarily* be made within six months from the date of the decree; but if that period expired when the Court was closed the application might be made on the day the Court re-opened (*see* section 8). The Bill which afterwards became this Act is said to have been submitted to and approved by the Judicial Committee (*see* note in Whitley Stoke's Anglo-Indian Codes, Vol. II, page 435).

I have looked further into this, and found a statement by Mr. Arthur Hobhouse, as he then was, which fully bears out this note. Addressing the Governor-General's Council he said, "the Bill was now put into a shape which was acceptable to the Judicial Committee of the Privy Council. The Secretary of State had been in correspondence with the Judicial Committee at our desire and they had approved of the Bill as it stood."

This provision was repeated in the Codes of 1877 and 1882 (*see* section 599), and though the section ?

the Code of 1882 was repealed in 1888 that was not, as I understand, by reason of any doubt as to the competence of the Indian Legislature.

By the Limitation Act of 1877 it was provided that an application for the admission of an appeal to Her Majesty in Council should be presented within six months from the date of the decree appealed against (Article 177).

Though an opinion was once expressed that this provision was repealed by the Code of 1882, *Fazul-un-nissa v. Mulo* (1) no doubt seems ever to have been entertained as to the power of the Indian Legislature to deal with this subject : *Lakshmanan v. Peryasami* (2), *Anderson v. Periasami* (3), *In re Sita Ram Kesho* (4), *Thurai Raiyah v. Jainilabdeen Rowthan* (5), *Moroba Ramchandra v. Ghanasham Nilkant Nadkarni* (6). Prior to 1874 the more general view in this Court seems to have been that when the time for appealing expired in vacation the petition could not be presented on the day the Court re-opened [*Tamvaco v. Skinner* (7)]. But I find that it has now become the established practice to receive an application made on the day the Court re-opens though beyond the prescribed six months, and this has been in reliance on section 8 of the Privy Council Appeals Act 1874 and of the provisions that have taken its place in the Code and the Limitation Acts.

It is true that neither the 2nd clause of section 5 nor the 2nd para. of section 12 of the Limitation Act of 1877 has been applied to an application for leave to appeal to His Majesty in Council, but that is because an application for that purpose did not come

(1) (1834) I. L. R. 6 All. 250.

(4) (1892) I. L. R. 15 All. 14.

(2) (1837) I. L. R. 10 Mad. 373.

(5) (1895) I. L. R. 18 Mad. 484.

(3) (1891) I. L. R. 15 Mad. 169.

(6) (1894) I. L. R. 19 Bom. 301.

(7) (1867) I. B. L. R. (O. C.) 39.

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within the terms of either section. The Limitation Act of 1908 has been extended to such an application. I do not rely on the decision in *Eastern Mortgage and Agency Co., Ltd. v. Purna Chandra Sarbagna* (1), as showing that this extension was valid as the objection to the powers of the Indian Legislature was not advanced in that case. This is the first occasion on which the point has been taken. But if section 8 of the Privy Council Act of 1874 was within the competence of the Indian Legislature, I think section 12 of the Limitation Act of 1908 must equally have been within its powers. And I have shown that there is strong reason for thinking that section 8 was valid legislation.

The Court's power to deal with applications for leave to appeal rests primarily on clause 39 of the Letters Patent, which ordains that any person may appeal to the Privy Council in the cases there mentioned: "Subject always to such rules and orders as are now in force or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the said Presidency; except so far as the said existing rules and orders are hereby varied and subject also to such further rules and orders as We may with the advice of Our Privy Council hereafter make in that behalf."

Clause 44 of the Letters Patent is in these terms:— "And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations, . . . and may be in all respects amended and altered thereby."

Apart from section 64 of the Government of India Act 1858 there would seem to be no bar to the

(1) (1912) I. L. R. 39 Cal. 510.

legislation under consideration. Even if it be that legislation regarding the admission of appeals affects the prerogative of the Crown [see *Moti Chand v. Ganga Parshad Singh* (1)], still it would not be deemed invalid by reason of that only though subject to the power of disallowance by the Crown. Nor do I think the enactment of section 12 of the Limitation Act, 1908, so far as it relates to applications for leave to appeal to His Majesty in Council, is forbidden by section 64 of the Government of India Act, 1858. The whole section must be read, and it must be borne in mind that it is a part of an Act dealing with the transfer to the Crown of the Government of India.

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The conclusion then to which I come is that section 12 of the Limitation Act of 1908 was within the legislative powers of the Government of India, and that the present application is within time. A certificate, must, therefore, issue that as regards amount or value and nature the case fulfils the requirements of section 110 of the Code.

The respondent must bear the costs of this application.

WOODROFFE J. I agree.

J. C.

Certificate granted.

(1) (1901) I. L. R. 24 All. 174; L. R. 29 I. A. 40, 42.