

1934
 IN THE
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 RAJENDRA
 CHANDRA
 SEN GUPTA

the Judge of a principal civil court of original jurisdiction. A Judge of the Allahabad High Court is not such a Judge, but a District Judge is. An application for grant of the succession certificate cannot therefore be made to the High Court.

APPELLATE CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and
 Mr. Justice Bajpai*

1934
 May, 4

GURMUKH RAI (APPLICANT) *v.* SECRETARY OF STATE
 FOR INDIA (OPPOSITE PARTY)*

Income-tax Act (XI of 1922), sections 66(3) and 66A—Order of High Court refusing to require the Commissioner to state and refer a case—Not a judgment “on a reference”—Appeal to Privy Council—Civil Procedure Code, section 109—Letters Patent, clauses 30, 35—Limitation Act (IX of 1908), section 12(2)—Time requisite for obtaining copy—Copy of judgment filed but not of decree or order.

An order of the High Court dismissing an application under section 66(3) of the Income-tax Act, praying that the Commissioner of Income-tax be required to state a case and refer it to the High Court, is not a judgment on a reference within the meaning of section 66A(2) of the Act and no appeal lies from it to the Privy Council.

Under the provisions of section 66A(2) of the Income-tax Act the right of appeal to the Privy Council is restricted to cases of appeals from any judgment of the High Court delivered on a reference made under section 66, in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council. Before the case can be certified to be a fit one for appeal, there must be a judgment of the High Court delivered on a reference made under section 66. But the stage of a reference made to the High Court does not arrive at all when the High Court declines to require the Commissioner to state the case and refer it.

The provisions of clause 30 of the Letters Patent, conferring a right of appeal to the Privy Council in certain circumstances, must be deemed, by virtue of clause 35, to have been superseded by similar provisions contained in sections 109 and 110 of the Civil Procedure Code, and these latter provisions must now be

*Application No. 7 of 1934, for leave to appeal to His Majesty in Council.

deemed to have been superseded by those contained in section 66A of the Income-tax Act, for the purposes of that Act.

Where the applicant for leave to appeal to His Majesty in Council from an order of the High Court applied for and obtained certified copies of the judgment and of the formal order, but filed only the former with his application and not the latter, it was *held* that under section 12(2) of the Limitation Act he was entitled to the exclusion of the time requisite for obtaining a copy of the order appealed from, but not of the whole time requisite for obtaining the copy of the judgment that was pronounced.

Messrs. *Muhammad Ismail* and *K. Masud Hasan*, for the applicant.

Mr. *K. Verma*, for the opposite party.

SULAIMAN, C.J., and BAJPAI, J.:—This is an application for leave to appeal to His Majesty in Council from an order of the High Court, dated the 8th of December, 1933, dismissing an application filed by the applicant under section 66, sub-section (3) of the Indian Income-tax Act praying that the Commissioner be required to state the case and to refer it to the High Court. It appears that the applicant had applied to the Commissioner of Income-tax to review the proceedings under section 33 of the Income-tax Act and praying that if he did not feel inclined to interfere with the previous order he might refer to the High Court the question of law raised in the application; but the Commissioner passed an order dated the 23rd of January, 1933, refusing to interfere and declined to refer the case.

A preliminary objection is taken that an appeal does not at all lie. We are of opinion that this objection has force.

Under clause 30 of the Letters Patent of this High Court a right of appeal was given to the Privy Council in certain circumstances. But clause 35 expressly provided that the provisions of the Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council. The provisions of clause 30 must therefore be deemed to have been superseded by similar

1934

GURMUKH
RAI
P.
SECRETARY
OF STATE
FOR INDIA

1934

GURMUKH
RAI
v.
SECRETARY
OF STATE
FOR INDIA

provisions contained in sections 109 and 110 of the Code of Civil Procedure. Under section 109, an appeal lies from any decree or final order passed on appeal by a High Court, from any decree or final order passed by a High Court in the exercise of original civil jurisdiction, and from any decree or order when certified to be a fit case for appeal, subject to the conditions laid down in section 110. It was therefore necessary under the Code that there must be either a decree or final order or a decree or order certified to have been passed in a case fit for appeal.

In the case of *Tata Iron & Steel Co. v. Chief Revenue Authority of Bombay* (1) their Lordships of the Privy Council laid down that the decision of a High Court upon a case stated and referred to the Court by the Chief Revenue Authority under section 51 of the Indian Income-tax Act, 1918, was merely advisory and therefore not a final judgment, decree or order within the meaning of clause 39 of the Letters Patent. The opinion expressed by the High Court on such a reference was stated to be only advisory, made by the Court in the exercise of its consultative jurisdiction. The result was that no appeal could lie to their Lordships of the Privy Council from the opinion expressed by the High Court on a reference.

By the Indian Income-tax Amendment Act of 1926, section 66A was specially added to section 66, which, among other matters, contained a provision that an appeal shall lie to His Majesty from any judgment of the High Court delivered on "reference" made under section 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council.

In the case of *Delhi Cloth and General Mills Co. v. Income-tax Commissioner, Delhi* (2), their Lordships of the Privy Council laid down that the right of appeal given by the new section was confined to a case which the High Court certifies to be a fit one for appeal to His

(1) (1923) 47 Bom., 724.

(2) (1927) I.L.R., 9 Lah., 284.

1934

GURMUKH
RAI
P.
SECRETARY
OF STATE
FOR INDIA

Majesty in Council, and that the fact that these words were textually the same as the concluding words of section 109(c) of the Code of Civil Procedure coupled with the carefully limited referential words to the Code of Civil Procedure in sub-section (3), suffice, in their Lordships' judgment, to exclude from any right of appeal cases which fall within the requirements of section 110 of the Code, and are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council. Their Lordships did not agree with the contention that the reference to the Code of Civil Procedure was made in terms sufficiently comprehensive to include within the class of appealable cases all that are defined in the provisions incorporated by reference. The words of qualification, "so far as may be", in sub-section (3) are apt to confine the statutory right of appeal to the cases described in sub-section (2) of section 66A of the Income-tax Act. It is clear therefore that the provisions under the Code of Civil Procedure conferring a right of appeal must now be deemed to have been superseded by those contained in section 66A.

No doubt in the case of *Mian Feroz Shah v. Commissioner of Income-tax, Punjab* (1) their Lordships, on an appeal from an order of the High Court refusing to require the Commissioner to state the case, went into the merits of the case; but their Lordships took care to state that as the appeal failed on the merits it became unnecessary for their Lordships to deal with the objection to its competence which was considered to be a serious one. That case therefore cannot be taken to be an authority for the contention that an appeal lies.

Examining the words of section 66A(2) it is quite clear that the right of appeal is restricted to cases of appeals from any judgment of the High Court delivered on a reference made under section 66, in any case which the High Court certifies to be a fit one for appeal to

1934

GURMUKH
RAI
v.
SECRETARY
OF STATE
FOR INDIA

His Majesty in Council. Before the case can be certified to be a fit one for appeal, it is necessary that there must be a judgment of the High Court delivered on a reference made under section 66. Now under sub-sections (1) and (2) of section 66 the High Court has to deliver a judgment on the reference made to it. But so far as sub-section (3) is concerned, the High Court, if not satisfied with the correctness of the Commissioner's decision, can only require the Commissioner to state the case and to refer it. There is therefore no reference to the High Court so long as the Commissioner has not stated the case and referred it when required by the High Court. The stage of a reference accordingly does not arrive at all when the High Court declines to require the Commissioner to state the case and refer it. We must therefore hold that the order passed by the High Court declining to call upon the Commissioner to state the case and refer it was not a judgment at all "on a reference" within the meaning of section 66A, sub-section (2), so as to allow a right of appeal to His Majesty in Council. There is no other provision under which an appeal would lie. We are fortified in this view by the judgment of the learned CHIEF JUSTICE of the Rangoon High Court in *E. M. Chettyar Firm v. Commissioner of Income-tax* (1), with whose conclusion we agree.

The dismissal of this application will of course in no way debar the applicant from applying to their Lordships of the Privy Council for special leave, as section 66A, sub-section (5) specifically preserves the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise, howsoever.

The learned advocate for the respondent urges before us that even if an appeal had lain the present application would be barred by time because it was filed more than 90 days from the 8th of December, 1933.

(1) (1930) I.L.R., 8 Rang., 435.

The learned advocate for the applicant urges that he is entitled to extension of time. His contention is that the time requisite for obtaining a copy of the order should be excluded under section 12, sub-section (2) of the Indian Limitation Act.

1934
GURMUKH
RAI
v.
SECRETARY
OF STATE
FOR INDIA

It appears that the applicant applied for a copy of the judgment on the 28th of February, 1934, and obtained it on the 8th of March, 1934. The formal order prepared by this Court's office was ready on the 28th of February, 1934. The applicant's counsel applied for copies of both the judgment and the decree. The copy of the judgment was delivered to him on the 8th of March, 1934, and the copy of the decree on the 22nd of March, 1934, as shown by the High Court register. The applicant, however, has produced only the copy of the judgment and not the copy of the decree. Under section 12, sub-section (2) of the Limitation Act the applicant is entitled to the exclusion of the time requisite for obtaining a copy of the decree or order appealed from, but not of the whole time requisite for obtaining the copy of the judgment that was pronounced. Although there is a defect, we are satisfied that the time elapsed between the application for the copy of the decree and the date when the copy was given to him, if excluded, would make the present application within time.

We accordingly dismiss the application with costs on the ground that no appeal lies; and we assess the cost of the Crown counsel at Rs.150. The necessary certificate of fees should be filed within one month.