

on his application in this behalf to the person from whose possession it came into the hands of the officer impounding it, or as such person may direct."

In *Lachmi Narayan Agarwalla v. Braja Mohan Singh* (1) their Lordships observed: "It is clear to their Lordships that the proviso (a) of section 35 of the Indian Stamp Act, 1899, is of equal ambit with the body of the section, and that just as an instrument cannot be acted upon, that is to say, nothing can be recovered under it unless it has a proper stamp, so the proviso provides that if there is not a proper stamp it may be put on afterwards on payment of a penalty and the instrument then becomes effective."

It was the duty of the learned Judge to have received these documents in evidence after the deficiency in the stamp duty and the penalty had been paid up. It is therefore ordered that the appeal be allowed with costs, the decree of the lower court be set aside, the documents be admitted in evidence and the case be sent back to the lower court to admit it under its original number and to dispose of it in accordance with law.

### FULL BENCH

*Before Sir John Thom, Chief Justice, Mr. Justice Rachhpal Singh, Mr. Justice Collister, Mr. Justice Allsop and Mr. Justice Ganga Nath*

BISHNATH SINGH AND OTHERS (DEFENDANTS) *v.* BALWANT RAO NAIK KALIA AND OTHERS (PLAINTIFFS)\*

*Civil Procedure Code, order XLV, rule 7—Privy Council Rules, 1920, rule 9—Security and deposit for costs and expenses of appeal to Privy Council—Power to extend time beyond the statutory period for such security and deposit—Jurisdiction—Discretion of court—Civil Procedure Code, section 112(1)(b).*

The High Court has power under rule 9 of the Privy Council Rules, 1920, to extend the period allowed for furnishing the security and making the deposit required by

1939

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SHIVA  
PRASAD  
*v.*  
SHAMBHU  
NATH

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1939  
February,

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\*Application No. 4 of 1937, for leave to appeal to His Majesty in Council.

(1) (1924) I.L.R. 4 Pat. 34(37).

1939

BISENATH  
SINGH  
v.  
BALWANT  
RAO NAIK  
KALIA

order XLV, rule 7 of the Civil Procedure Code, beyond the periods mentioned therein.

On the one hand, order XLV, rule 7 of the Civil Procedure Code restricts the discretion of the High Court in extending the time within which the security must be furnished and the deposit made, but, on the other hand, the concluding portion of rule 9 of the Privy Council Rules certainly confers upon the High Court a very wide discretion in the matter; and by the provisions of section 112(1)(b) of the Civil Procedure Code the Privy Council Rule must prevail over the provision of the Civil Procedure Code.

No doubt the discretion with which the High Court is vested by the said rule of the Privy Council should be exercised only in exceptional circumstances and where an extension of time beyond the time specified in order XLV, rule 7 is clearly supported by considerations of justice and equity.

*Bahadur Lal v. Judges of the High Court at Allahabad* (1), overruled.

Mr. *B. S. Shastri*, for the applicants.

Messrs. *S. N. Gupta* and *Satyā Narain Prasad*, for the opposite parties.

THOM, C.J., RACHHPAL SINGH, COLLISTER, ALLSOP and GANGA NATH, JJ.:—The question which has been referred to us may be stated thus: “In an appeal to His Majesty in Council has the Court power to extend the time for furnishing the security and making the deposit required by order XLV, rule 7 of the Civil Procedure Code beyond the period mentioned therein?”

Order XLV, rule 7 enjoins that “Where the certificate is granted, the applicant shall, within ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow, from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—(a) furnish security in cash or in Government securities for the costs of the respondent, and (b) deposit the amount required to defray the expenses of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record . . . .”

Order XLV, rule 7 was subject to an amendment by Act XXVI of 1920. This amendment substituted the words "within ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow" for the words "within six months".

1939

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BISHNATH  
SINGH  
v.  
BALWANT  
RAO NAIK  
KALIA

The object of the amendment was to expedite appeals to the Privy Council by the restriction of the Court's discretion in granting extensions of time within which to comply with the provisions of the rule in regard to the furnishing of security, etc. Prior to 1920 the Courts, it appears, had been liberal in the exercise of their discretion. The Privy Council had recognized that the Courts had such a discretion: See *Burjore and Bhawani Pershad v. Bhagana* (1).

The amendment of the rule came into force on the 1st January, 1921, at the same time as certain rules which were framed by the Privy Council. These rules, it is apparent from the preamble, were intended to prevent delays in the making or hearing of appeals in His Majesty's Privy Council.

Rule 9 of the Privy Council Rules is as follows: "Where an appellant, having obtained a certificate for the admission of an appeal, fails to furnish the security or make the deposit required (or apply with due diligence to the Court for an order admitting the appeal), the Court may, on its own motion or on an application in that behalf made by the respondent, cancel the certificate for the admission of the appeal, and may give such directions as to the costs of the appeal and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires."

Now it will be observed that this rule authorises the High Courts in India, where the appellant has failed to furnish the security or make the deposit required, to cancel the certificate for the admission of the appeal.

1939

BISHNATH  
SINGH  
v.  
BALWANT  
RAO NAIK  
KALLA

No such sanction was or is provided by order XLV, rule 7. It is further to be observed that rule 9 allows the High Courts a certain discretion. If the appellant has failed to furnish the security or make the deposit within the specified period the Court may "give such directions as to the costs of the appeal and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires." This discretion conferred by the closing words of the rule is undoubtedly a very wide one.

Now by order XLV, rule 7, as amended, the discretion of the High Court to extend the time within which the security must be furnished or the deposit made has been limited. Beyond a certain period the Court has no discretion at all. That the legislature intended to limit the discretion of the Court in the matter of extending the time is, in our judgment, abundantly plain. The argument that the restriction of the discretion refers only to the period of sixty days from the date of the decree complained of and not to the six weeks from the date of the certificate must fail. Such an interpretation would manifestly defeat the clear intention of the amendment.

The position, therefore, is that there is a provision in the Code of Civil Procedure which restricts the discretion of the Court in extending the time within which the security must be furnished and the deposit made on the one hand, and a rule of the Privy Council which confers upon the Court a very wide discretion upon the other.

Now section 112(1)(b) of the Civil Procedure Code enacts that nothing contained in the Code shall be deemed "to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee."

In *Bahadur Lal v. Judges of the High Court at Allahabad* (1) it was held by MUKERJI, A.C.J., and KING, J., (NIAMAT-ULLAH, J., dissenting), that the Court had no discretion under rule 9 of the Privy Council Rules to extend the period prescribed by order XLV, rule 7. A Full Bench of the Madras High Court in *Ramayya v. Lakshmayya* (2) held that the High Courts in India had power under rule 9 to extend the period allowed for furnishing the security and making the deposit required by order XLV, rule 7 of the Civil Procedure Code. Further a Full Bench of the Bombay High Court in *Nilkanth Balwant v. Satchidanand Vidya Narsinha* (3) held that in virtue of rule 9 the High Courts had such a discretion. In the course of his judgment in that case MARTEN, C.J., observed that there was no inconsistency between order XLV, rule 7 of the Civil Procedure Code and rule 9 of the Privy Council Rules and that the Privy Council Rules must prevail by virtue of the provisions of section 112. Benches of the Rangoon, Calcutta, Patna and Lahore High Courts and of the Oudh Court have taken the opposite view. In our judgment the provisions of rule 9 which are wide and general in their terms do confer upon the High Courts a discretion to extend the time prescribed by order XLV, rule 7 of the Civil Procedure Code, a discretion however which is only to be used in exceptional circumstances. It will be observed that the power conferred by the rule to cancel the certificate is not mandatory. The Court may on its own motion or on an application in that behalf made by the respondent cancel the certificate for the admission of the appeal. It is clear, in our view, that the intention of the framers of the rule was to leave a discretion with the High Courts in regard to the order to be passed upon failure by the appellant to furnish the security or make the deposit within the time specified by the

1939

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 BISHNATH  
SINGH  
v.  
BALWANT  
RAO NAIK  
KALIA

(1) (1933) I.L.R. 55 All. 432.

(2) I.L.R. [1938] Mad. 1007.

(3) (1927) I.L.R. 51 Bom. 430.

1939

BISHNATH  
SINGH  
v.  
BALWANT  
RAO NATH  
KALIA

Civil Procedure Code. Nothing could be wider in import than the provision—"or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires."

It must be apparent that if the High Courts were left with no discretion in the matter injustice would not infrequently result. If for example the appellant within the time prescribed in good faith furnished a security which *prima facie* was sufficient but which after prolonged investigation was found insufficient a cancellation of his certificate without affording him the opportunity of furnishing additional security would be manifestly unjust.

We do not doubt however that it was the intention of the framers of the rule that the discretion with which the High Courts are thereby vested should be exercised only in exceptional circumstances and where an extension of time beyond the time specified in order XLV, rule 7 is clearly supported by considerations of justice and equity.

In the result we hold that this Court has power under rule 9 of the Privy Council Rules to extend the period allowed for furnishing the security and making the deposit required by order XLV, rule 7 of the Civil Procedure Code, beyond the periods mentioned therein.

## REVISIONAL CIVIL

*Before Sir John Thom, Chief Justice*

1939

QABUL SINGH (APPLICANT) v. JAI PRAKASH (OPPOSITE PARTY)\*

January, 16  
February, 8

*Provincial Small Cause Courts Act (IX of 1887), section 17, proviso—Application to set aside ex parte decree—Mode of filing security—Substantial compliance with provisions of section.*

An application to set aside an *ex parte* decree passed by a court of small causes was made on 29th May, 1936, and security was deposited on 2nd June, 1936, both these dates being

\*Civil Revision No. 195 of 1938.