

1934.
 COMMISSIONER OF
 INCOME-TAX,
 BIHAR AND
 ORISSA,
 v.
 MAHARANI
 LAKSHMIBATI
 SAHEBA.
 AGARWALA,
 J.

raise the issues necessary for the determination of the questions of fact which arise under section 14(1). For this reason the question now raised does not arise "out of the appellate order". An impartible estate may or may not be self-acquired property. Even assuming that the assessee is a member of an undivided family the estate is impartible and the facts necessary for the determination of the question referred are not before us because the assessee did not raise the proper issues before the tribunals of fact. I would, therefore, answer the question referred to us in the affirmative. The Commissioner of Income-tax is entitled to the costs of this reference. Hearing fee five gold mohurs.

COURTNEY TERRELL, C.J.—I agree.

Order accordingly.

APPELLATE CRIMINAL.

Before Courtney Terrell, C. J. and Agarwala, J.

1934.
 October 31.

RAHMAN

v.

KING-EMPEROR.*

Privy Council Appeal—Criminal appellate jurisdiction—Code of Criminal Procedure, 1898 (Act V of 1898), sections 307 and 374—confirmation of death sentence by High Court—Judge and Jury, disagreement between—reference to High Court—conviction and sentence—High Court, whether exercises criminal appellate jurisdiction in such cases—application for leave to appeal, whether should be made direct to the Privy Council—High Court, power of, to grant certificate—Letters Patent of the Patna High Court—clause 33, scope of.

Clause 33 of the Letters Patent of the Patna High Court lays down :—

"And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Patna made in the exercise

* Privy Council Appeals nos. 24 and 25 of 1934. In the matter of an application for leave to appeal to His Majesty in Council.

of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 18th clause of these presents by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our Heirs or Successors in Council, provided the said High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but 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 Province of Bihar and Orissa ”.

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Held, that the clause must be strictly construed, and that the right of appeal is limited to the two classes of cases mentioned therein, an appeal beyond those cases being incompetent.

Barendra Kumar Ghosh v. The King-Emperor(1), followed.

Where the High Court confirms the sentence on a reference made by a court of Sessions under section 374 of the Code of Criminal Procedure, 1898, or where the Judge disagreeing with the verdict of the jury refers the case to the High Court which convicts and sentences the accused on such reference, the jurisdiction exercised by the High Court is of an appellate character and the order or sentence can in no sense be said to be made “ in the exercise of original criminal jurisdiction ”.

In such cases, where there is no right of appeal granted by the Letters Patent or by the Privy Council Act, the aggrieved person must proceed direct, without an intermediate application to the High Court for leave or certificate, to His Majesty in Council for leave to present his case.

Rash Behari Lal v. King-Emperor(2), referred to.

Applications for leave to appeal to His Majesty in Council.

The facts of the case material to this report are stated in the judgment of Courtney Terrell, C. J.

M. N. Pal and Qazi Nazrul Hosan, for the petitioners.

Assistant Government Advocate, for the Crown.

(1) (1924) L. R. 52 I. A. 40.

(2) (1933) I. L. R. 12 Pat. 811; L. R. 60 I. A. 354.

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COURTNEY TERRELL, C. J.—These are two applications made on behalf of five persons who have been sentenced to death in respect of a murder. Four of the applicants were convicted by the Sessions Judge on the verdict of the jury and were sentenced by him to death. The matter of their conviction and sentence came before this Court by way of the usual reference and by way of appeal. In the case of the fifth the jury by a majority acquitted the accused man. The Judge, however, disagreed with the verdict and referred the case to the High Court. The High Court in his case accepted the reference, convicted that individual of complicity in the murder and sentenced him to death.

The present applications are for the grant of a certificate by this Court that the case is a fit and proper one for consideration by His Majesty in Council by way of appeal.

Now it is clear that His Majesty in Council under the royal prerogative has the right to entertain appeals from criminal judgments in any part of His Majesty's dominions and it is the right of the subject who is aggrieved by such conviction and sentence to approach His Majesty in Council with a view to his case being heard. It is, however, a very different question whether this Court has, in the circumstances of a criminal appellate decision, the right or power to certify that the matter is fit to be heard by His Majesty in Council. The matter of appeals to His Majesty in Council from decisions of this Court is limited by the Letters Patent under which our jurisdiction is exercised. Clause 31 of those Letters Patent refers to civil appeals only; the matter of criminal appeals is dealt with by clause 33 and the wording of that clause is very precise and must be strictly construed. In the first place there is granted an appeal from any judgment, order or sentence of the High Court of Judicature at Patna "made in the exercise of original criminal jurisdiction".

Now the cases of these petitioners do not come under the exercise of original criminal jurisdiction. In the case of the four persons who were convicted by the jury and sentenced to death by the Judge, it is manifest that, notwithstanding the necessary reference to the High Court for confirmation of the sentence, the jurisdiction exercised by the High Court was of an appellate character and can in no sense be said to be of an original nature. It is urged, however, that in the case of the person who was acquitted by the jury and whose case was referred to the High Court by the Judge, the High Court in sentencing him to death exercised original jurisdiction. This argument is hardly worthy of serious attention. The accused person is not in the circumstances brought before the Court nor are the witnesses heard by the Court and moreover it is incumbent upon the Court in exercising its jurisdiction in such cases to pay weight to the verdict of the jury and to the opinion of the Judge as well as to the evidence which was recorded in the lower Court. In paying attention to these matters, it is obvious that this Court has not exercised original criminal jurisdiction but is exercising jurisdiction by way of appeal. Similarly it might have been argued, if there had been any weight in such argument, that in the case of a person who has been acquitted by the jury but whose case is brought on appeal by the Government before the Court, the Court in convicting such a person and passing sentence was exercising original criminal jurisdiction. It is clear that in neither case has the original criminal jurisdiction been exercised: in both cases the jurisdiction is of an appellate character. The second class of cases in which leave to appeal to His Majesty in Council is granted by clause 33 of the Letters Patent is when a point or points of law have been reserved for the opinion of the said High Court in the manner provided by the 18th clause of the Letters Patent. It could not be argued that this case came under that class.

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Now a precisely similar clause was construed by their Lordships of the Privy Council in *Barendra Kumar Ghosh v. The King-Emperor*⁽¹⁾ and the passage in question is at page 57 where the decision is given by Lord Sumner. In that case their Lordships were considering clause 41 of the Letters Patent of 1865 of the Calcutta High Court, and, in construing that decision, they pointed out that under the section which corresponds, as I have said, to clause 33 of our Letters Patent, an appeal is limited and the right must be strictly construed and is given in the two cases to which I have made reference and beyond those cases any appeal is incompetent. It follows, therefore, that there being no right of appeal granted by the Letters Patent, and certainly no right of appeal under the Privy Council Act, the petitioners, who desire to appeal, must have recourse to the prerogative and approach His Majesty in Council direct for leave to present their case. We know of no case before the High Courts in India in which their Lordships have directed that in such a case, that is to say, where an appeal is presented for the exercise of the royal prerogative either leave or a certificate from the tribunal which passed the appellate decision has been required as a preliminary step. In such cases, and in one recent case in particular from this High Court [I refer to the case of *Rash Behari Lal v. King-Emperor*⁽²⁾] the appellant proceeds direct, without an intermediate application to this Court, to His Majesty in Council and there obtains leave to present his case. It is open to the petitioners here to take the same course. It is not necessary in the circumstances to go into any of the questions which are raised in the petitions of appeal. These applications are accordingly dismissed.

AGARWALA, J.—I agree.

Applications dismissed.

(1) (1924) L. R. 52 Ind. A. 40.

(2) (1933) I. L. R. 13 Pat. 811; L. R. 60 I. A. 354.