

## APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Sen.*

1935.

July 31.

R. K. BANERJEE

v.

ALAGAMMA ACHI.\*

*Appeal to His Majesty in Council—Application to be made within 90 days from date of judgment—Exclusion of time requisite for obtaining copy of judgment—Appellate Side Rules (Civil) of the High Court, rule 50—Limitation Act (IX of 1908), s. 12 (3), art. 179.*

It is necessary on an application for leave to appeal to His Majesty in Council that a copy of the judgment from which it is sought to appeal should be before the Court; and s. 12, sub-section 3, of the Limitation Act permits the time requisite for obtaining a copy of the judgment to be excluded from the 90 days within which the application must be presented.

*Mahabir Prasad v. Jamuna Singh*, I.L.R. 1 Pat. 429; *In re The Secretary of State for India in Council*, I.L.R. 48 Mad. 939—referred to.

*Aiyangar* for the applicant.

*Tambi* for the respondent.

PAGE, C.J.—This is an application for leave to appeal to His Majesty in Council. A preliminary objection has been taken that the application is out of time. Under article 179 of the First Schedule to the Limitation Act an application for leave to appeal to His Majesty in Council must be brought within 90 days from the date of the decree from which it is sought to appeal. In the present case the decree was signed on the 19th of February 1935, the judgment having been delivered on the 1st February, 1935. By Order 20 rule 7 the date of the decree shall be the date of the judgment. It follows, therefore, that in order to be within time the present application must have been filed within 90 days from the 1st of February, 1935. The appli-

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\* Civil Misc. Application No. 49 of 1935 arising out of Civil Misc. Appeal No. 68 of 1934 of this Court.

cation was in fact presented on the 23rd of May, 1935, that is to say, 111 days after the date of the judgment. *Primâ facie*, therefore, it is barred by limitation.

It is common ground, however, that 22 days was "the time requisite for obtaining a copy of the judgment", and if that period is excluded from 111 days the appeal will be in time.

Under rule 56 of the Appellate Side Rules (Civil)

"applications to the Court for leave to appeal to His Majesty in Council shall be made within 90 days of the decree or order to be appealed from, subject to the provisions of sections 4, 5 and 12 of the Indian Limitation Act, 1908."

The learned advocate for the respondent contends that, although section 12 sub-sections 1 and 2 apply to an application for leave to appeal to His Majesty in Council, section 12 sub-section 3 does not apply to such an application. In my opinion the preliminary objection fails.

It is of great importance, indeed it is necessary, on an application for leave to appeal to His Majesty in Council that a copy of the judgment from which it is sought to appeal should be before the Court; and in my opinion section 12 sub-section 3 permits the time requisite for obtaining a copy of the judgment to be excluded from the 90 days within which the application must be presented. The view that we take upon this matter is in consonance with that expressed by the High Court of Patna in *Mahabir Prasad Tewari v. Jamuna Singh* (1) and the High Court of Madras in *In re The Secretary of State for India in Council* (2).

On the merits, in our opinion, the application must succeed. It is conceded by the learned advocate for

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R. K.  
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(1) (1922) I.L.R. 1 Pat. 429.

(2) (1925) I.L.R. 48 Mad. 939.

1935 . the respondent that the amount or value of the  
 R. K. subject-matter in the trial Court and also involved in  
 BANERJEE the appeal to His Majesty in Council is over  
 v. Rs. 10,000, and as the decree from which it is  
 ALAGAMMA sought to appeal has reversed the decision of the  
 ACHL trial Court a certificate granting leave to appeal to  
 PAGE, C.J. His Majesty in Council will issue.

SEN, J.—I agree.

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## APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.*

### GOWRI SINGH

v.

### BOKKA VENKANNA.\*

1935  
 Aug. 14.

*Malicious prosecution, Suit for—Filing of a complaint—Dismissal of complaint by magistrate—"Prosecution" of a person—Issue of process essential—Criminal Procedure Code (Act V of 1898), Ch. XVI, s. 203, Ch. XVII.*

Where a magistrate, on receipt of a complaint, sends the case for investigation by a police officer, and on his report refuses to issue process and dismisses the complaint under s. 203 of the Code of Criminal Procedure, the person against whom the complaint was made cannot maintain a suit for damages for malicious prosecution against the complainant.

Until process has issued the person of whose conduct complaint has been made is not an accused person, nor is he being prosecuted.

*Golap Jan v. Bholanath, I.L.R. 38 Cal. 880—followed.*

*Ali Muhammad v. Zakir Ali, I.L.R. 53 All. 771; DeRosario v Gulab Chand, I.L.R. 37 Cal. 358; K. Meeran Sahib v. Ratnavathi, I.L.R. 37 Mad. 181; Nagendra Nath v. Basanti Das, I.L.R. 57 Cal. 25; P. S. Reddy v. K. Reddy, I.L.R. 49 Mad. 315; Subhag v. Nand Lal, I.L.R. 8 Pat. 285; Yates v. The Queen, (1835) 14 Q.B.D. 648—referred to.*

*Bishun Persad v. Phulman Singh, 19 C.W.N. 935; Crowley v. Reilly, 17 C.W.N. 554—distinguished.*

*Ahmedbhai v. Framji, I.L.R. 28 Bom. 226; Imperatrix v. Lakshman, I.L.R. 2 Bom. 481—dissented from.*

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\* Civil First Appeal No. 47 of 1935 from the judgment of this Court on the Original Side in Civil Regular No. 500 of 1934.