Before Mr. Justice Phear.

1869. *Aug.* 23.

GOBARDHAN BARMONO *v.* SRIMATI MUNUN BIBI AND ANOTHER.

Petition of Appeal to Privy Council—Diligence in Filing.

In the case of a petition of appeal to the Privy Council being filed, due diligence must be shown in transmitting the appeal to the Privy Council, otherwise on the application of the respondent, the High Court has the power to strike the petition off the file.

THIS was an application to have a petition of appeal to the Privy Council struck off the file.

Mr. *Graham*, for the respondent, said that a decree in this suit was made in favor of the plaintiff, the now appellant, on the 6th August 1869; that this decree was reversed on appeal on the 19th of September in the same year, and a petition of appeal to the Privy Council was filed on the 13th March 1868, and that since that time no steps had been taken to transmit the petition of appeal to the Privy Council on the ground that due diligence in endeavouring to transmit the petition of appeal to the Privy Council had not been shown. Mr. Graham asked the Court to have the petition struck off the file.

Mr. *Marindin*, for the appellant, asked the Court to grant the appellant three months' further time to transmit the petition of appeal as his client had been for a long time ill and unable to attend to business.

PHEAR, J.—I think, I have power to make the order asked for by Mr. Graham. The 39th clause of the Letters Patent gives the power to appeal, subject to existing and future rules and orders made by the Privy Council. As far as I can make out, no rules of the Privy Council have any bearing on the action of this Court; neither have we any rules on this side of the Court, excepting one or two with regard to security; and the only practice we have is that laid down by clause 30 of the Charter of 1774, and I think the directions of that clause are still in force. The 9th section of the High Court Act keeps alive all powers,

1869

GOBARDHAN BARMONO v. SRIMATI MUNUN BIBI.

authorities, and jurisdiction in the High Court, which were in any manner vested in the Supreme Court, except so far as they might be affected or modified by the Letters Patent granted to the Court. Now the existing Letters Patent prescribe nothing. They simply give the right to appeal, and the 1st clause of these Letters, while they revoke the previous Letters Patent with respect to appeals make the limitation: "We revoke Letters of the 14th May except so far as the Letters Patent of the 14th, George III., dated 26th March 1774, establishing a Supreme Court of Judicature at Fort William in Bengal, were revoked or determined thereby." The 44th section of the first Letters Patent only revokes so much of the Letters Patent of George III. as were inconsistent with the new Act and Letters Patent; every thing else remained in force. It seems to me therefore that the 30th section of the Charter of 1794 is still directory in this Court with regard to appeals to the Privy Council. Now that section gives very clearly, I think, a certain discretion to this Court in regard to entertaining appeals. The right to appeal is conditional on the appellant praying the Supreme Court for leave to appeal, and in doing so, before the appeal shall be allowed, security shall be given to the satisfaction of the Court; and on that being done, the Supreme Court shall allow the appeal, with this proviso imposed by section 33, that the petition to appeal shall be passed within six months. Now the result of that seems to be that the High Court, on an appeal being preferred, must satisfy itself that the petition was preferred within six months; that proper security has been given; that the amount is such as to entitle the petitioner to appeal; or that, for some other good reasons, the petitioner ought to be allowed to appeal; and finally, in order that he may have the benefit of the judicial discretion of this Court, that he has proceeded with due diligence; the alternative to this would be that as long as he files his petition within the six months, he would have any length of time to suit his convenience to come into Court to ask to have his petition allowed. Practically this would amount to giving an unlimited period within which petition of appeal might be preferred, because, merely the filing of a petition within six months would be done, as a matter of course by every one, and

1869

GOBARDHAN BARMONO v. SRIMATI MUNUN BIBI

would in reality reduce the period of limitation of six months to a nullity. If therefore the petitioner were now coming before the Court to ask to have his petition allowed, I think it would be perfectly competent to the Court to disallow it on the ground of delay in prosecuting the appeal, supposing the Court were to arrive at the conclusion that there was nothing to justify the delay. The only question then remaining is, whether the respondent can, in the event of the petitioners being guilty of this delay, himself put the Court in action for the purpose of getting the petition disallowed. I cannot find any decision on this point in any of our reports. A rather remarkable case is to be found in *Woomes Chunder Paul Chowdhry* v. *Isser Chunder Paul Chowdhry* (1), which appears at first sight to be in point. There the petitioner in appeal had got the petition allowed, and six months afterwards the respondent obtained a rule calling upon the appellant to show cause why it should not be discharged for want of prosecution. The Court concurred in thinking the respondent premature, following the case of *Gordon* v. *Lowther* (2); they were of opinion that twelve months was a proper limit, and as six months had not elapsed they discharged the rule.

It appears to me very clear that in that case the Court was bound to discharge the rule, but not for the reasons assigned by them. After the decision of the Supreme Court, the matter was out of the hands of the Court, and it had no jurisdiction to interfere. Singularly, the case of *Gordon* v. *Lowther*, upon which their opinion was founded, shews exactly the reverse, as far as it shews anything, for there the appeal of Gordon had been allowed in the Colonies, and the respondent Lowther, in order to get the petition of appeal dismissed, was obliged to come before the Privy Council. He transmitted the record and proceedings of the Colonial Court, and thereon got the appeal dismissed for want of prosecution within 12 months.

But I do think the practice and rule of the Privy Council is of some value to me in guiding me to a conclusion in the present case.

(1) Morton's Rep., 59. (2) 2 Ld. Raymond, 1447.

If the Privy Council think that the interests of justice require that a definite period of twelve months should be sufficient to put an end to the appellant's right of appeal after it is perfected, I think certainly it may be inferred that the interests of justice require some period to be put to an appellant's right to carry on his proceedings in the lower Courts. It would be a great hardship to a suitor who has had his right declared by the highest Court of the Colonies that he is still to be subject to have a petition of appeal hanging over his head, and the possibility of appeal kept alive for any indefinite time at the pleasure of the appellant. Such a state of things is calculated, in a very great degree, to depreciate the value of the proprietor's right which he has successfully asserted, and if he cannot get rid of it by himself taking the initiative here, I think it follows that he cannot get rid of it at all, for the Privy Council would not take cognizance of the proceedings of this Court which were only in an inchoate state. It is for this Court to take care of its own proceedings. I have thus come to the conclusion that the application Mr. Graham has made on behalf of the respondent is one I can entertain and deal with; and I think there is no doubt what my order must be if I act only on the materials before this Court. I think an opportunity should be afforded to Mr. Marindin's client to show what has been the cause of the delay. Possibly he did not come into Court fully prepared. The petition of appeal must be dismissed with costs, unless good reason for the delay be shewn.

Attorney for the appellant: Mr. *Fink.*

Attorneys for the respondent: Messrs. *Judge and Gangooly.*