

B. L. R. Vol. V, p. 76.

(Original Civil.)

The 11th January 1870.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Macpherson.

GOBARDHAN BARMONO,

versus

SRIMATI MANI BIBI.

Appeal to Privy Council, Petition of—Delay in Transmission—Power of High Court to strike it off the File.

Until a petition of appeal to the Privy Council presented to the High Court has been admitted and allowed, a party has no right of appeal to the Privy Council. If the petition is allowed to remain on the file of the Court, and is not prosecuted within a reasonable time, the Court has power to order its removal from the file.

THIS was an appeal from the decision of Mr. Justice Phear, refusing an application to strike a petition of appeal to the Privy Council off the file for delay in prosecuting it.

The case on the original hearing is reported in Volume 3, B. L. R., O. C., 126.

Mr. Jackson for the appellant contended that there was no rule that a petition of appeal must be filed within twelve months, after leave to file has been granted; that the application of the respondent should have been made before the Privy Council, and that this Court had no power to entertain it; and further that this appeal ought to be allowed, as it came within the provisions of the 30th Section of the Charter of the Supreme Court, referring to *Woomeschunder Paul Chowdhry v. Issenschunder Paul Chowdhry* (1) and *Gordon v. Lawther* (2).

Mr. Graham (*Mr. Bonnerjee* with him) for the respondent contended that, as the petition had only been filed, and not allowed, it had not gone out of the jurisdiction of this Court, citing, in support of his argument, *Sreemutty Ranees Hurrosoondery Dossee v. Cowar Kistenauth Roy* (3); and further that, as the appellant had taken no steps towards prosecuting the appeal, that the appeal ought to be struck off the file: *Woomeschunder Paul Chowdhry v. Issenschunder Paul Chowdhry* (1), *Sreemutty*

Rahutty Dossee v. Radamauth Sen (1), *St. Louis v. St. Louis* (2). Until the petition of appeal is lodged, the Judicial Committee of the Privy Council have no jurisdiction to entertain any application in an appeal: *Gungadhur Seal v. Sreemutty Radhamoney Dassee* (3).

Mr. Jackson in reply.

The judgment of the Court was delivered by

Peacock, C. J.—I think that the learned Judge had power to dismiss this petition. The petition is not an appeal to Her Majesty in Council, but it is a petition to this Court directed to the Chief Justice and his companion Judges, stating that the petitioner, feeling himself aggrieved is desirous of appealing to Her Majesty in Council. It is an application to this Court that all necessary orders may be made to enable the petitioner to appeal to Her Majesty in Council, and that seems quite in conformity with Section 30 of the Charter of the late Supreme Court, which says that in all cases in which "any person shall find him, her, or themselves, aggrieved by any judgment, decree, order, or rule of the said Supreme Court of Judicature at Fort William in Bengal, it may be lawful for him, and them, to appeal to us, our heirs or successors, in our or their Privy Council, in such manner, and under such restrictions and qualifications, as are hereinafter mentioned,—that is to say, in all judgments, decrees, or decretal orders made by the said Supreme Court of Judicature at Fort William in Bengal, in any civil case, the party and parties against whom, as to whose immediate prejudice the said judgment, decree, or decretal order shall be or tend, may by his or their humble petition, to be preferred for that purpose to the said Supreme Court of Judicature at Fort William in Bengal, pray leave to appeal to us, our heirs or successors in our or their Privy Council, stating in such petition the cause or causes of appeal; and in case such leave to appeal be prayed by the party or parties, it is at once directed to pay any sum of money or to perform any duty, the said Supreme Court of Judicature at Fort William in Bengal shall and is hereby empowered to award that such judgment, decree, or order shall be carried into execution, or that

(1) *Morton's Rep.*, 59, 160.

(2) 2 *Ld. Raym. Rep.*, 1447.

(3) *Fulton's Rep.*, 10.

(1) 6 *Moore's I. A.*, 346.

(2) 1 *Moore's P. C.*, 143.

(3) 9 *Moore's P. C.*, 411.

sufficient security shall be given for the performance of the said judgment, decree, rule, or order, as shall be most expedient to real and substantial justice; provided always that, when the said Supreme Court of Judicature at Fort William in Bengal shall think fit to order the judgment, decree, rule or order, to be executed, security shall be taken from the other party or parties for the due performance of such order or decree, as we, our heirs, or successors, shall think fit to make thereupon; and in all cases, we will and require that security should also be given, to the satisfaction of the said Supreme Court of Judicature at Fort William in Bengal, for the payment of all such costs as the said Supreme Court of Judicature at Fort William in Bengal may think likely to be incurred by the said appeal, and also for the performance of such judgment or order as we, our heirs or successors, shall think fit to give or make thereupon; and upon such order or orders of the said Supreme Court of Judicature at Fort William in Bengal, thereupon made, being performed to their satisfaction, the said Supreme Court of Judicature at Fort William in Bengal shall allow the appeal, and the party or parties so thinking him, her, or themselves aggrieved, shall be at liberty to prefer and prosecute his, her, or their appeal to us, our heirs or successors, in our or their Privy Council, in such manner and form and under such rules as are observed in appeals made to us, from our plantations or colonies, or from our islands of Guernsey, Jersey, Sark, or Alderney." Thus it is not until a petition is presented to this Court upon proper security that the party has a right to prefer his appeal to the Privy Council.

Section 31 applies to a case in which an appeal has been allowed. It says that "in all such cases, the Supreme Court shall certify and transmit, under its seal, to the Privy Council, a true and exact copy of all the evidence, proceedings, judgments, decrees, and orders had or made in such causes appealed," so that it is not until a petition is allowed that the transcript of the record is to be sent to Her Majesty in Council.

By the orders of Her Majesty in Council of 1838, Section 6 (1), it is said that,

(1) Smoult and Ryan's Rules and Orders App. 106.

"in default of the petition of appeal of the appellants being lodged in the Privy Council Office, within three calendar months from the registration of the arrival of the transcripts, or in default of the appellant's case being carried in within one year from the time of such registration, the respondent shall be entitled, in either case, to move to dismiss the appeal for want of prosecution."

It appears to me, therefore, that, until the petition presented to this Court is admitted and allowed, a party has no right to appeal to Her Majesty in Council. If the petition is allowed to remain on the files of the Court, and is not prosecuted within a reasonable time, the Court has the power to order its removal from the files. In this case Mr. Justice Phear has given his reasons for thinking that the petitioner has not shown sufficient grounds for the delay in prosecuting his appeal, or for being allowed to proceed with it now, and I see no reason to differ from the learned Judge in that respect, and, consequently, I think that the present appeal from his judgment ought to be dismissed with costs.

I may also add that, by Section 39 of the recent Charter by which the power to appeal to Her Majesty in Council is allowed, it is to be "subject to such rules and orders as are now in force, or may from time to time be made respecting appeals" to Her Majesty in Council from the Courts in the Presidency.

Attorney for Appellant : *Mr. Fink.*

Attorneys for Respondent : *Messrs. Judge and Gangooly.*