

(1940) 03 FED CK 0001

In the Federal Court

Lachmeshwar Prasad Shukul and Ors.

APPELLANT

Vs

Girdhari Lal Chauduri and Ors.

RESPONDENT

Date of Decision : 05-03-1940

Acts Referred:

Citation : AIR 1940 FC 26

Hon'ble Judges : Justice Maurice Gwyer, Justice Shah Sulaiman, Justice Srinivasa Varadhachariar

Bench : Full Bench

Judgement

Gwyer, C.J.—This is an application under Order 37, Federal Court Rules, for leave to be excused from compliance with the requirements

of certain of the rules. The applicants were the defendants in the proceedings below and desire to appeal to the Federal Court from a decree

obtained against them for a substantial amount in the Court of the Subordinate Judge, Muzaffarpur, and upheld on appeal (with certain

modifications) by the High Court at Patna on 19th December 1938. As in other cases which have recently been before this Court, the defendants

had relied upon provisions of the Bihar Money-lenders Act, 1938, but the High Court, following an earlier decision of their own, held that those

provisions were void as being repugnant to an existing Indian law. A certificate under Section 205(1), Constitution Act, was granted; and, the

formal decree having been drawn up on 13th March 1939, the applicants petitioned the High Court to have their appeal to this Court ""admitted

under the provisions of Order 45, Civil P.C., which has been extended, with appropriate modifications and adaptations, to appeals to the Federal

Court by the Government of India (Adaptation of Indian Laws) Order, 1937. Order 45, Rule 7, as adapted, requires an appellant (inter alia),

before his appeal can be ""admitted"", to deposit within a specified period the amount required to defray the expense of printing the record of the suit. In the present case the sum required (Rs. 253-3-0) had not been deposited before 27th May 1939, the date on which the period expired. On

1st September the applicants filed an application for an extension of the time for making the deposit, alleging absence of means as a reason for the

delay. A Full Bench of the High Court See AIR 1939 Pat 667 (FB) heard this application with two others of the same kind, and by a majority held

that they had power to extend the time. In the other two cases an extension was granted, but in the case of the present applicants it was refused on

the ground that no application had been made until long after the time for making the deposit had expired and no explanation given for the delay

except a vague statement that there was difficulty in obtaining the money.

2. In these circumstances the applicants applied ex parte to this Court asking to be ""excused from compliance with the rules of the Federal Court

and for an enlargement of time so that they might take steps to get the records transmitted to the Federal Court. It appeared to us that an important

question was raised by the application and we therefore directed that the application should be renewed after notice had been given to the

respondents. We pointed out however that we had no power to entertain any appeal from the refusal of the High Court to extend the time for

receiving the deposit, and that, even if we had, we should be slow to interfere with the exercise by the High Court of its discretion in a matter of

this kind. We also refused to entertain any application which did not specify the rules from the requirements of which the applicants desired to be

excused; and counsel then stated that he asked to be excused from compliance with the requirements of Order 10, Rules 1, 2 and 3. By a

regrettable error on the part of officers of the Court the amended petition served upon the respondents was made to appear as an application

under Order 37, Rules 1, 2 and 3, instead of an application to be excused from compliance with Order 10, Rules 1, 2 and 3. No point however

was made of this at the subsequent hearing and neither counsel for the respondents nor anyone else was left in any doubt as to the precise nature of

the application.

3. When the application was heard on 14th February, the respondents were also

represented. Counsel for the applicants gave an explanation of the delay in making the deposit which was not wholly consistent with the account apparently given to the High Court, and I think it right to remind litigants that, if they ask for the indulgence of this Court, it is necessary for them to show the utmost good faith and to make a complete disclosure of all relevant facts. But whether the delay was due to want of means, or to negligence, or to some genuine mistake with regard to payment into Court during vacation, the consequences to the applicants are serious enough. It was admitted that the facts of the case did not differ in any material respect from those of other cases which have been before us recently from Patna and in which the Bihar Money-lenders (Regulation of Transactions) Act, 1939, became law after the judgment of the High Court had been pronounced; and it was urged on behalf of the applicants that, unless they are able to bring their appeal before this Court, they cannot claim the benefit of the Act of 1939 and are likely to suffer serious loss. But under the provisions of Order 45 of the Code, they cannot have their appeal admitted until the deposit is made; and until the appeal is admitted they cannot, under Rules 1, 2 and 3 of Order 10 of the Federal Court Rules, get the record transmitted to this Court or even printed ; and the time for lodging their appeal in this Court cannot even begin to run. Counsel for the respondents was content to argue that, as the letter of the law had been broken, the applicants must take the consequences, and he contended that the circumstances were not such as to entitle the applicants to any indulgence at the hands of the Court.

4. I should be unwilling, if it can be avoided, to allow a not very serious default in a matter of procedure wholly to deprive the applicants of the benefits conferred by the new Bihar Act of 1939. I agree that rules of Court are framed to be kept and not to be broken; but they are framed for the purpose of assisting justice and not for the purpose of enabling it to be defeated. If, therefore, a strict adherence to the rules is likely to deprive a litigant of advantages which the Provincial Legislature clearly intended to give him, then in my opinion the Court may properly exercise the dispensing power conferred by Order 37, in order that substantial justice may be done. It is however necessary to examine carefully the provisions of the rules, in order to see what this Court has or has not power to do,

premising that it can only excuse compliance with its own rules and cannot excuse compliance with rules of a High Court and still less with the provisions of a statute.

5. By Section 205(1), Constitution Act, if a High Court certifies that a case before it involves a substantial question of law as to the interpretation

of the Act or any order in Council made thereunder, an appeal lies to this Court: (1) on the ground that that question has been wrongly decided,

(2) on any ground on which an appeal would have lain to the Judicial Committee without special leave if no certificate had been given, and (3) with

the leave of the Federal Court on any other ground. Of these, (2) clearly refers to Sections 109 and 110 of the Code, where the cases in which an

appeal lies to the Judicial Committee without special leave are set out. When Parliament determined to give a right of appeal to the Federal Court

on what may be described as constitutional questions, it would have been plainly impossible, if other issues arose in the case, to allow the case to

be appealed in part to the Federal Court and in part to the Judicial Committee; and accordingly, Section 205 provides that if a constitutional

question has arisen in a case, the whole case becomes appealable to the Federal Court, even though other issues are also involved. By Section

214(1) of the Act, the Federal Court is empowered to make rules for regulating generally its practice and procedure; and it might be thought from

this that the Court would be in a position to control from first to last the conduct of appeals which may be brought before it. But, as I have said,

Order 45 of the Code, which regulates the procedure in appeals from a High Court to the Judicial Committee, has been extended with the

necessary adaptations and modifications to appeals from High Courts to the Federal Court by the Government of India (Adaptation of Indian

Laws) Order, 1937. It is for this reason that it has become necessary for litigants who desire to appeal to the Federal Court to go through the

process of getting their appeals "admitted" in the High Court) before they can lodge their petition of appeal; and they cannot get their appeal

"admitted", until they have filed a petition in the High Court in the manner prescribed by Order 45 and have deposited a sum sufficient; to cover the

cost of having the record printed. It is difficult to say why it should have been thought necessary thus to fetter this Court; but the result is that a

good part of the preliminary proceedings connected with an appeal are removed from its control and put under the control of the High Court.

Whether the provisions of Order 45, in their application to Federal Court appeals, can be amended by this Court as High Courts are able to

amend them under Section 122 of the Code, it is not necessary now to determine. The Court clearly has no power to do so under Section 122,

but a question may arise as to the effect of the opening words of Section 109, as extended by Section 111-A. It seems to have been forgotten that

the Court does not possess any such overriding powers as are conferred on the Judicial Committee by Section 24, Judicial Committee Act, 1833,

by Section 1, Judicial Committee Act, 1844, or by Section 112 of the Code.

6. There is nothing in Chap. 1 of Part 9 of the Constitution Act to suggest that Parliament did not intend the Federal Court to have the amplest

power over its own procedure; and I do not know why the High Courts have been given power to prevent a litigant who has already been granted

a certificate under Section 205 (1) of the Act from prosecuting his appeal to this Court. It ought surely to be the exclusive prerogative of this Court

to decide whether a litigant has done anything which forfeits his right to prosecute his appeal. In saying this however I must not be taken as

criticising in any way the law as they found it; and as I have already said this Court has no power or wish to excuse anyone from compliance with

rules applicable to the High Court alone.

7. Order 10, Rule 1 of the Federal Court Rules, provides that an appellant shall, subject to the provisions of the Code and of any rules made by

the High Court relating to appeals to the Federal Court, take all necessary steps to have the record prepared in the High Court and transmitted to

the Federal Court; Rule 2 of Order 10 is consequential on Rule 1. Rule 3 provides that within sixty days of the admission of the appeal by the High

Court, the appellant shall lodge in the Federal Court his petition of appeal, containing a concise statement of the facts of the case, of the grounds of

appeal, and of the arguments and authorities upon which he proposes to rely at the hearing. If his appeal cannot be admitted, it would seem that the

sixty days can never begin to run, and therefore that the appeal can never be lodged ; and thus a would-be appellant can be deprived of a right

which Parliament clearly intended that he should have. In these circumstances I

am of opinion that if the justice of the case requires it; we are entitled to excuse the applicants from compliance with so much of Order 10 as requires them (1) to have the record prepared and printed in the High Court, and (2) to lodge their petition of appeal in the Federal Court within sixty days of the admission of the appeal by the High Court, and I am of opinion that the applicants in the present case ought to be so excused. I do not think that the absence of any admission of the appeal by the High Court is a statutory bar to the prosecution of the appeal before this Court. The provisions of Order 45 of the Code are procedural provisions only, and I am not prepared to hold that non-compliance with them in the High Court necessarily ousts the jurisdiction of this Court, if a certificate under Section 205(1), Constitution Act, has once been given.

8. The effect of the order which I propose is that the applicants will be at liberty to lodge their petition of appeal in this Court within such time as this Court may consider reasonable, which I think should be fixed as twenty-eight days from the date of our order. Since they have come here to ask for an indulgence, and have no one but themselves to blame for having been compelled to do so, they must pay the costs of this application as between agent and client in any event.

Sulaiman, J.

9. This is an application for being excused from the compliance with the rules of the Federal Court and for the enlargement of time. The date of the High Court's decree and the certificate was 19th December 1938, and yet it was not till 1st September 1939, that an attempt was made to offer (not tender) the amount involved, which was only Rs. 253-3-0. The learned Chief Justice, with whom Fazl Ali J. agreed, held that the High Court has power to extend the time, but that there were no cogent reasons for the exercise of the discretion. Agarwala J. has held that no such power exists. If the question were merely one of discretion, this Court even though a superior Court, would not disagree with the High Court's refusal to exercise it in favour of the applicants. There would be no revisional power for interference with the order. And even if there were an appeal, we should not interfere with the non-exercise of a mere discretion by the High Court, unless some question of principle were involved. But unfortunately the difficulty is far more fundamental.

10. Power to "adapt" the existing Indian laws by Order in Council has been conferred by Section 293 of the Act, but is confined to bringing the provisions of those laws "into accord" with those of the Act and in particular into accord with those which re-constitute under different names, governments and authorities and prescribe the distribution of certain powers. But the Section gives no power to legislate afresh. The Federal Court was not a re-constituted Court at all, but an altogether new Court, and there were no previously existing laws relating to it which must necessarily be brought into accord with the Government of India Act. On the other hand, some adaptation was necessary when in cases fulfilling the requirements of Section 205 direct appeals to the Privy Council, with or without leave, were abolished. But there was no absolute necessity to make the whole of Order 45, Civil P.C., applicable to Federal Court appeals, even where the only ground taken is a constitutional one. The Federal Court could under Section 214 of the Act and Section 109, Civil P.C., frame its own rules for regulating practice and procedure, and the High Courts also could under Section 122, Civil P.C., subject to the procedure prescribed in Part 10, annul, alter or add to the rules in Order 45, Civil P.C., so far as the procedure in their own Courts was concerned and so long as it was not in conflict with any rule framed by the Federal Court. To remove any possible doubt as to the adaptation of Indian Laws Order, and indeed in deference to it, the Federal Court by Order 9, Rule 1 made Order 45, Civil P.C, "as modified and adapted" by that Order in Council, applicable to Federal Court appeals also, so that Order 45 may not be deemed to have been excluded by virtue of Order 1, Rule 5, Federal Court Rules.

11. The difference of opinion in the High Court is caused by the circumstance that "'Code'" is defined in Order 1, Rule 2, F.C.R., as meaning "the Civil Procedure Code, 1908, as amended or modified by any Order in Council or by or under any Central Act"; while Order 9, Rule 1 applies, the provisions of Order 45 of the Code, "as modified and adapted by the Government of India (Adaptation of Indian Laws) Order, 1937". But all the definitions in Rule 2 of the Federal Court are subject to the governing condition "'unless the context otherwise requires.'" The term "'Code," though defined, must be taken along with the context where it occurs, and cannot be taken out of it. Further, the Privy Council Rules do not

profess to amend or modify the provisions of Order 45 of the Code, although it must be conceded that they can by implication amend or modify

them if they indirectly do so. On the other hand, the Government of India (Adaptation of Indian Laws) Order, 1937, professedly modifies them,

and is admittedly the latest Order in Council for this purpose. Rule 17 has been actually added to Order 45, and lays down in express terms that,

with a few particular amendments introduced by it the provisions of this Order shall apply in relation to appeals to the Federal Court as they apply

in relation to appeals to His Majesty in Council.

12. This Order does not make the provisions of the Privy Council Rules, which are professedly supplementary, but may in some cases conflict with

Order 45, applicable to Federal Court appeals. Nor does it even make Order 45, as deemed to have been amended by the Privy Council Rules,

applicable to such appeals. That appears to be the reason why in Order 9 of the Federal Court Rules the reference is only to the latest Order in

Council embodying the Adaptation of Indian laws, and not to any earlier Order in Council. It is to give effect to the mandatory provisions of the

latest Order in Council that the reference to the Adaptation of Indian Laws Order was made in the Rule. Had there been a different intention, the

Rule could have simply said "any Order in Council".

13. There can be no doubt that wherever in the Rules the word "Code" has been used by itself, without any qualifications, it must convoy the

meaning given to it by the definition. But in Order 9, Rule 1, that word has not been used by itself, but is qualified by the expression "as modified

by the Government of India (Adaptation of Indian Laws) Order, 1937". The context indicates that it is intended to have a restricted meaning. If in

this Rule also the word "Code" were to include all modifications and amendments by any Order in Council, the reference to the Adaptation of

Indian Laws Order would be wholly superfluous and redundant. The definition of the term "Code", which occurs in other Orders as well, is

undoubtedly wider, but in this particular context it is subject to the qualification attached to it. The applicant's duty (as distinct from the High

Court's power) to have the record prepared in the High Court and transmitted to the Federal Court, which can take place only after the

admission of the appeal (as the heading of the Order also indicates), is expressly

made subject to the provisions of the Code and rules of the High Court under Order 10, Rule 1, Federal Court Rules.

14. There are several considerations which show that the provisions in the Privy Council Rules were never intended to be applicable to appeals to

the Federal Court, A comparison of the provisions relating to the appeals to the Federal Court with the provisions relating to the appeals to their

Lordships of the Privy Council will show that, although the Federal Court Rules are to a great extent modelled on the Privy Council Rules, they

contain parallel provisions intended to be sufficient in themselves and certainly independent of the provisions in the Privy Council Rules. They are

obviously not wholly comprehensive; at the same time they cannot be regarded as supplemented by the provisions of the Privy Council Rules that

exist for the purposes of Privy Council appeals. Had it been intended to incorporate all the provisions of the latter kind, one would have expected

to find an express mention of it in Order 9. The intention appears to be to incorporate the provisions of the Code of Civil Procedure, as modified

and adapted by the Adaptation of Indian Laws Order, and supplement them by the Rules framed by the Federal Court itself, irrespective of the

Rules which had been framed for the appeals to their Lordships of the Privy Council. It would be easy to quote numerous provisions in the Federal

Court Rules which do not correspond exactly to the Privy Council Rules. If Order 45, as impliedly amended by the Privy Council Rules, were

made applicable to the Federal Court appeals, there would inevitably be a considerable conflict in many matters. I therefore feel bound to hold that

Rule 9 of the Privy Council Rules dated 9th February 1920 has not impliedly been made applicable to Federal Court appeals on account of its

being covered by the wider definition of "Code", though not included in the context of Order 9, Rule 1.

15. Rule 17 added to by the Adaptation of Laws Order lays down that if only a constitutional question is raised in the grounds, the petition need

not pray for the "certificate" mentioned in Rule 3 and that "like proceedings shall be had thereon as if such a certificate had been given, etc." An

examination of the Rules in this order makes it quite clear that the "certificate" mentioned in Rs. 6 and 7 is the certificate referred to in Rule 3, and

not the certificate contemplated by Section 205 of the Act. Thus, the words "or

within six weeks from the grant of the certificate, whichever is the later date"" in Rule 7, would be meaningless if no certificate is applied for under Rule 3, and in that case all references to such "certificate" and also security must be deemed to be omitted by necessary implication. Rule 17 does not how-ever remove the incompleteness of the order as it stood before the amendment. When Act 26 of 1920 limited the extended period in Rule 7 to one ""not exceeding sixty days,"" it was overlooked that Order 45 itself did not confer any power on Courts to revoke the certificate if, before the admission of the appeal, the costs are not deposited. The words ""such order"" in Rule 11 prima facie refer to that in Rule 12. Order 45, Rule 17, does not improve matters in this respect. It is the Privy Council Rule 9, which empowers the Court ""to make such further or other order, as in the opinion of the Court, the justice of the case requires. But the Federal Court has not yet made any rule corresponding to Rule 9 of the Privy Council Rules. The position would therefore be one of a deadlock if there were no other way open.

16. The Federal Court was quite conscious of the fact that the first set of Rules framed by it could by no means be comprehensive or exhaustive. It was clearly anticipated that there would be many matters of detail, relating to practice and procedure, which may not be directly covered by any of the Rules. Powers were accordingly deliberately reserved to meet such a contingency. Order 37, Rule 1, provides:

The Court may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these Rules, and may give such directions in matters of practice and procedure as it shall consider just and expedient.

17. The two parts of the Rule, although included in the same Rule, are really separate and distinct. The first deals with the exemption of the parties from compliance with any of the requirements which have been expressly laid down in the Federal Court Rules. The second reserves general power to give direction in matters of practice and procedure as considered just and expedient, ft follows that in all cases where the Rules are silent, this last provision can appropriately be resorted to. But, of course, that would not entitle us to excuse compliance with the Rules of the Code, made applicable by the Adaptation Order.

18. The present is a stage where the certificate has been granted and an application for leave is still pending, but the High Court, has refused to

extend the time for depositing the printing costs and the appeal has not yet been declared to be admitted, nor can it be admitted so long as the High

Court's order stands. There is no provision empowering the High Court to revoke the certificate or dismiss the application unless an inherent

jurisdiction can be invoked. We have no power to make any order which would bind the High Court to act in any particular manner. All that we

can do to help the applicants is to excuse them from compliance with Order 10, Rule 2, Federal Court Rules, and give necessary directions.

Yaradachariar, J.

19. As we have not been asked to examine the correctness of the order of the High Court, we have not heard arguments on the question on which

there was a difference of opinion in that Court, viz., the applicability of Rule 9 of the Privy Council Rules to appeals to this Court. I therefore

refrain from expressing any opinion on that question. I am in agreement with the observations of my Lord as to the probable intention of the

Constitution Act with reference to the powers of this Court to regulate the procedure governing appeals to this Court as well as the difficulty

caused by the language employed in Rule 17 added to Order 45, Civil P.C., by the Adaptation of Indian Laws Order, 1937; but I express no

opinion on the question mooted in his judgment as to whether the opening words of Section 109, Civil P.C., read with Section 111-A empower

this Court suitably to modify the provisions of Order 45, Civil P.C. I agree with my learned brother that the literal application of the language of

Rule 7 of Order 45, Civil P.C., to appeals to this Court will lead to anomalous results, in cases in which the appeals are preferred on a certificate

under Section 205, Constitution Act, and not on a certificate under Order 45, Rule 3, Civil P.C., and I do not feel sure that the provisions of

Order 37, Rule 1, Federal Court Rules, will be found sufficient to obviate anomaly or hardship in all cases. So far as the present application is

concerned, it seems possible to grant the indulgence prayed for, without unduly stretching the scope of that rule. I accordingly concur in the order

proposed by my Lord.

20. The order of the Court is that the applicants are excused from compliance

with so much of Order 10, Rules 1, 2 and 3, Federal Court Rules, as requires them (1) to have the record prepared and printed in the High Court, and (2) to lodge their petition of appeal in the Federal Court within 60 days of the admission of the appeal by the High Court; and they will be at liberty to lodge their petition of appeal in this Court within 28 days of the date of our order. ""We propose to direct the Registrar to communicate with the High Court at Patna informing it of the order which we have made, and it may be that in the circumstances the High Court will be willing to give the applicants facilities for getting the record printed and transmitted to this Court on payment of the proper charges. This however is a matter entirely for the High Court, and it would not be right for us to say anything further with regard to it. The applicants must furnish this Court within 28 days with copies of the record, and if there are any difficulties with regard to the printing of it, there will be liberty to apply in Chambers. The applicants must pay the costs in any event of this application as between agent and client.