

(1961) 02 CAL CK 0002

In the Calcutta High Court

Case No : Appeal No. 167 of 1957 (Supreme Court matter)

Manickchand Durgaprasad

APPELLANT

Vs

Pratabmull Rameswar and Another

RESPONDENT

Date of Decision : 20-02-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 45 Rule 5, Order 45 Rule 7
Constitution of India, 1950 — Article 133
Privy Council Rules, 1920 — Rule 9
Supreme Court Rules, 1950 — Order 12 Rule 3

Citation : AIR 1961 Cal 483 : (1961) 1 CALLT 422 : (1962) 1 ILR (Cal) 132

Hon'ble Judges : S.C. Lahiri, C.J.;R.S. Bachawat, J;G.K. Mitter, J

Bench : Full Bench

Advocate : E.R. Meyer and G. Chakravartty, for the Appellant;G.P. Kar, R.C. Deb and Salil K. Roy Chowdhury, for the Respondent

Judgement

Lahiri, C.J.—The facts leading up to this Reference are as follows. The respondent, Pratabmull Rameswar, filed a suit against the petitioner for the recovery of a sum of Rs. 87,000/- as damages under the circumstances stated in the plaint. The suit was dismissed by a single Judge sitting on the Original Side by a Judgment dated January 25, 1957. Against that decree the respondent tiled an appeal which was heard by a Division Bench. By a judgment dated February 19, 1960, the Division Bench reversed the judgment and decree of the Court of first instance and decreed the respondent's suit. Against the decree of the Division Bench the petitioner filed an application for a certificate under Article 133 of the Constitution, and by an order dated September 12, 1960, a certificate was granted in favour of the petitioner. Under Order XLV, Rule 7 of the CPC the petitioner was required to furnish security within a period of six weeks from the date of the certificate or within a period of ninety days from the date of the decree complained of, which period could be extended by the Court for a maximum period of sixty days, whichever was the later date. As the decree complained of was passed on February 19, 1960, the later date contemplated by

Order XLV, Rule 7 was the date on which the period of six weeks from the grant of the certificate expired. This period of six weeks therefore expired on October 26, 1960, on which date the Court was closed for the Annual Vacation. The Court reopened on November 15, 1960, but the petitioner could not make the deposit on the reopening day. On November 23, 1960, the petitioner took out a Notice of Motion for an order that the delay in depositing the amount of security for costs be condoned under Rules 5 and 6 of Chapter XXXIIIA of the Original Side Rules. This Notice of Motion was made returnable on November 28, 1960 and it came up for hearing on December 12, 1960. The Division Bench which had to deal with the Notice of Motion was confronted with conflicting decisions on the question as to whether the Court had jurisdiction to extend the time limited by Order XLV, Rule 7. So far as this Court is concerned it has been held in a series of decisions that the Court has no power to extend the time fixed by Order XLV, Rule 7 of the Code of Civil Procedure, but most of the other High Courts of India have taken a different view and have held either that the Court has power under Order XLV, Rule 7 itself to extend the time fixed by Order XLV, Rule 7 or that it has such power under Order XII, Rule 3 of the Supreme Court Rules which is a substantial reproduction of Rule 9 framed by an Order of His Majesty in Council in the year 1920. The Division Bench which dealt with the Notice of Motion was inclined to think that the decisions of this Court to the effect that the Court is powerless to extend the time fixed by Order XLV, Rule 7 were wrong, and upon that view it referred the following questions to the Full Bench:

1. Has the Court power under Order XII, Rule 3 of the Supreme Court Rules to extend the time limited by Order XLV, Rule 7 of the Code of Civil Procedure?
2. Has the Court power under Chapter XXXIIIA, Rule 5 of the Original Side Rules to extend the time limited by Order XLV, Rule 7 of the Code of Civil Procedure?
3. Were the cases of Raj Kumar Govind Narain Singh and Others Vs. Shamlal Singh and Others ; Bipin Behari Ray and Others Vs. Rakhal Krishna Hazra and Others, and Akimuddin Chaudhury v. Fateh Chand ILR (1941) Cal 299 correctly decided?

2. At the time of the argument before us Mr. Meyer appearing for the petitioner contended, in the first place, that apart from Order XII, Rule 3 of the Supreme Court Rules, the Court has power under Order XLV, Rule 7 of the CPC itself to extend the time. In support of this proposition he relied upon a Full Bench decision of this Court in *In re: Soorj mukhi Koer* ILR 2 Cal 272, which was approved by the Privy Council in the case of *Burjore and Bhawani Pershad v. Bhagana* ILR 10 Cal 557. The decision of the Full Bench of this Court was given u/s 11 of Act VI of 1874 which was an Act to consolidate and amend the law relating to appeals to Privy Council from decrees and orders of Civil Courts. Section 11 of that Act was in the following terms:

"If the certificate be granted, the applicant shall, within six months from the date of the decree complained of, or within six weeks from the grant of the certificate,

whichever is the later date,

(a) give security for the costs of the respondent, and * * * "

The Full Bench of this Court held in ILR 2 Cal 272 that the requirements of Section 11 as to the deposit of costs were not absolutely imperative. In the case of ILR 10 Cal 557 (PC), the Privy Council had to consider the words of Section 602 of the CPC of 1877 which were very similar to the language of Section 11 of Act VI of 1874, and with regard to the decision of the Full Bench of this Court their Lordships made the following observations:

"Their Lordships have to say that they concur in the view which was taken by the Full Bench of the Court in Calcutta, that the words in the Act which have been quoted relating to the giving of security are directory only; although not to be departed from without cogent reasons...". Section 602 of the Code of 1877 was reproduced as Section 602 of the Code of 1882, and it was replaced by Order XLV, Rule 7 of the CPC of 1908. The language of Order XLV, Rule 7 of the Code of 1908 was the same as that of Section 602 of the Code of 1882 up to the year 1920 when there was an amendment by Act XXVI of 1920.

3. It is unnecessary to set out the language of Section 602 of the Codes of 1877 or of 1882 or of Order XLV, Rule 7 as it stood prior to the amendment of 1920 because the language is the same as that of Section 11 of Act VI of 1874. u/s 602 of the Code of 1882 it was held by a decision of three Judges of this Court in the case of Roy Jotindra Nath Chowdhury and Others Vs. Rai Prasanna Kumar Banerjee Bahadur and others , that the Court has power to extend time provided by that section. In this case this Court followed the decision of the Privy Council in Burjore's case ILR 10 Cal 557 (PC). It may therefore be taken for granted that the decision of the Privy Council was good law under the Code of 1882 as well as under Order XLV, Rule 7 as it stood prior to the amendment of 1920. The question is whether the decision of the Privy Council is good law even after the amendment of Order XLV, Rule 7 by Act XXVI of 1920. The changes effected by the amendment are two. In the first place, the amendment has curtailed the period of six months from the date of the decree to a period of ninety days. In the second place, it has conferred upon the Court the power to extend time beyond the period of ninety days up to a maximum period of sixty days upon good cause shown. The amendment, however, has left the period of six weeks from the date of the grant of the certificate untouched. Upon this state of things Mr. Meyer contends that when the Legislature has not limited the power of extending time beyond the period of six weeks from the grant of the certificate as it has done in respect of the period of ninety days from the date of the decree, the power of the Court to extend time beyond six weeks from the grant of the certificate is unlimited upon the authority of the Privy Council decision. In other words, the argument is that the effect of the Privy Council decision is lost by legislative amendment only in respect of the period of ninety days from the date of the decree, but not in respect of the period of six weeks from the date of the grant of the certificate and that the provision of Order XLV, Rule 7 remains

directory in respect of the second alternative. On behalf of the respondents Mr. Kar contends that at the time of the amendment in the year 1920 the Legislature applied its mind to the question of extension and gave the Court power to extend time up to a maximum period of sixty days under the first alternative without saving anything with regard to the second and, therefore, the Legislature has impliedly taken away power of the Court to extend time under the second alternative; and, therefore, the decision of the Privy Council in *Burjore's case* ILR 10 Cal 557 (PC) stands completely superseded in respect of both the alternatives. For the reasons which I am going to state presently it is not necessary to express any opinion on the merits of these two rival contentions.

4. In the first place, the question as to whether the Court has power under Order XLV, Rule 7 itself to extend time beyond the limits provided by that rule has not been referred to the Full Bench. But even apart from that there is a stronger reason why it is not necessary to decide that question and that is this. Simultaneously with the amendment of Order XLV, Rule 7 by Act XXVI of 1920 by an Order in Council, Rule 9 of the Privy Council Rules was introduced. That rule runs as follows:

"Where an appellant, having obtained a certificate for the admission of an Appeal, fails to furnish the security or make the deposit required (or apply with due diligence to the Court for an Order admitting the Appeal), the Court may, on its own motion or on an application in that behalf made by the Respondent, cancel the certificate for the admission of the Appeal, and may give such directions as to the cost of the Appeal and the security entered into by the Appellant as the Court shall think fit, or make such further or other Order in the premises as, in the opinion of the Court, the justice of the case requires".

After the abolition of the Privy Council appeals in our Country this rule has been substantially reproduced by Order XII, Rule 3 of the Supreme Court Rules. According to Section 112(I)(b) of the Code of Civil Procedure.

"nothing contained in this Code shall be deemed to interfere with any rules made by the Supreme Court ? ? " for the presentation of appeals to that Court, or their conduct before that Court". Rule 9 of the Privy Council Rules as well as Order XII, Rule 3 of the Supreme Court Rules control the provision of Order XLV, Rule 7 of the Code of Civil Procedure. Whether the provision of Order XLV, Rule 7 be directory or mandatory it is in either case governed by Order XII, Rule 3 of the Supreme Court Rules which is the successor of Rule 9 of the Privy Council Rules. The question whether the effect of the decision of the Privy Council in *Burjore's case* ILR 10 Cal 557 (PC) has been completely lost as a result of the amendment of Order XLV, Rule 7 in the year 1920, therefore, is of academic interest and need not be decided. In the ultimate analysis, the question whether the Court has or has no power to extend time will have to be decided upon a true interpretation of Order XII, Rule 3 of the Supreme Court Rules. Upon the arguments advanced before us as well as upon the authorities cited before us there are three possible views on the question as to whether the Court has

power to extend time limited by Order XLV, Rule 7 (1) The Court has no power to extend the time either under Order XLV, Rule 7 or under Rule 9 of the Privy Council Rules substituted by Order XII, Rule 3 of the Supreme Court Rules; (2) the Court has power both under Order XLV, Rule 7 and also under Order XII, Rule 3 of the Supreme Court Rules to extend the time; and (3) the Court has no power to extend the time under Order XLV, Rule 7 of the Code of Civil Procedure, but has such power under Order XII, Rule 3 of the Supreme Court Rules.

5. The first proposition referred to above is supported by a series of decisions of this Court beginning with the decision in the case of Raj Kumar Govind Narain Singh and Others Vs. Shamlal Singh and Others , decided by Rankin, C. J. and C. C. Ghosh, J. Although that decision was given as far back as December 6, 1926, it was reported in the year 1934-35. That was a case where on the failure of the holder of a certificate for appeal to the Privy Council the respondent made an application for cancellation of the certificate on the ground . that the holder of the certificate had failed to furnish security within the time provided for by Order XLV, Rule 7 of the Code of Civil Procedure. Rankin, C. J., cancelled the certificate on the prayer of the respondent and towards the end of his judgment pointed out that though the case was somewhat hard

"(his is a question of jurisdiction. ... It does not seem to me possible to maintain that the Court, in its discretion under Rule 9 of the Order (Order of His Majesty in Council), made on the 9th day of February, 1920, could refuse the application made by the respondent".

This observation in the judgment of Rankin, C. J., is the foundation of a series of decisions to the effect that the Court has no power to extend time either under Order XLV, Rule 7 or under Rule 9 of the Privy Council Rules Mr. Meyer appearing for the petitioner contends that even in this judgment Rankin, C.J. is recognising the fact that under Rule 9 of the Privy Council Rules the Court has a discretion in the matter of cancelling or not cancelling the certificate on the failure of the proposed appellant to Privy Council to furnish security within time. But it seems to me that his Lordship held that the question was not a question of discretion but a question of jurisdiction. In any view of the matter, there is hardly any doubt that the above observation of Rankin, C. J., is not his; considered judgment upon an interpretation of Rule 9 of the Privy Council Rules, but a parenthetical expression of opinion. On an examination of the language of Rule 9 of the Privy Council Rules, it will appear that on the failure of the proposed appellant to furnish security within time, the Court was authorised on its own motion or on application in that behalf to "cancel the certificate for the admission of the Appeal" and to

"give such directions as to the cost of the Appeal and the security entered into by the Appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires". The point that requires decision on an interpretation of this rule is whether the Court is authorised under the last alternative of Rule 9 of the Privy Council Rules

to extend time. The clause which authorises the Court to make such further or other order as the justice of case might require is, according to the petitioner, an alternative to the power vested in the Court to cancel the certificate.. According to the respondent the last clause is not an alternative to the power of cancelling the certificate, but to the power of giving directions as to the costs of the appeal and security. It seems to me that there can be no alternative to an order for costs or security. I The Court either makes an order for costs or does not make it or it directs either of the parties to pay the costs of the successful party, and there can be no alternative to such an order. It seems to me therefore that the last alternative in the rule is an alternative to the power of cancelling the certificate. Read in that light, (he true meaning of the rule is that on the failure of the appellant to furnish security within time, the Court may either cancel the security or make such further or other order as the justice of the case might require. This power, in my opinion, includes the power to extend time for security upon good cause shown or, to use the words of the Privy Council in *Burjore's* case ILR 10 Cal 557 "for cogent reasons". With all respect that is due to a Judge of the eminence of Sir George Rankin, I hold that the observation made by him in the case of *Raj Kumar Govind Narain Singh and Others Vs. Shamlal Singh and Others* is not based on a correct interpretation of Rule 9 of the Privy Council Rules. The decision in *Raj Kumar Govind Narain Singh and Others Vs. Shamlal Singh and Others* was followed by *Derbyshire. C.J. and Mukherjea. J.* in the case of 44 CWN 920: ILR (1941) 1 Cal 299 . In this case it was pointed out that the decision in *Raj Kumar Govind Narain Singh and Others Vs. Shamlal Singh and Others* was in conflict with the Full Bench decision of the Bombay High Court in the case of *Nilkant Balwant Natu Vs. Shri Sachidanand Vidya Narsimha Bharati, . Derbyshire, C. J.,* however, observed that although he had great respect for the Full Bench decision of the Bombay High Court, he was bound to give effect to the decision of the Division Bench of this Court in *Raj Kumar Govind Narain Singh and Others Vs. Shamlal Singh and Others* . No additional reason was given by his Lordship for following the decision of Sir George Rankin in *Raj Kumar Govind Narain Singh and Others Vs. Shamlal Singh and Others* . The question again came up for consideration before a Bench consisting of *Harries, C. J. and Banerjee, J.,* in the case of *Bipin Behari Ray and Others Vs. Rakhal Krishna Hazra and Others, .* In that case *Harries, C. J.,* pointed out in the opening paragraphs of the judgment that although as a judge of the Patna High Court his Lordship has taken the view that the Court has jurisdiction to extend time as the Chief Justice of this Court his Lordship was bound to follow the trend of decisions of this Court to the effect that the Court has no power to extend time. It appears from the judgment that his Lordship was pressed to refer the question to a Full Bench, but he rejected that prayer with the following observations;

"A Full Bench decision affirming a long line of decisions of this Court would only make matters worse".

From this it appears that although *Harries, C.J.,* was not inclined to agree with the view of *Rankin, C. J.,* in *Raj Kumar Govind Narain Singh and Others Vs.*

Shamlal Singh and Others he was bound to follow it as a judge of this Court. The next case in which the question again fell for consideration is the case of Purnendu Nath Tagore v. Radhakanta Jew 54 CWN 479. Here again Harries, C. J., felt pressed by the authorities of this Court to hold that the Court has no power to extend time either under Order XLV, Rule 7 of the CPC or under Order XII, Rule 3 of the Supreme Court Rules beyond the limits prescribed by Order XLV, Rule 7, but still his Lordship had held on an interpretation of Order XII, Rule 3 of the Supreme Court Rules that the Court had jurisdiction to alter the form of the security which had been tendered within the time prescribed by Order XLV, Rule 7, but which was found to be defective. In another case between the same parties reported in Purnendu Nath Tagore and Others Vs. Sree Sree Radha Kanta Jew and Others, Harries, C. J. made the following observation:

" notwithstanding the proviso to Rule 7. Order 45, the Rule 9 prescribed by the Privy Council prevails u/s 112 and the High Court has jurisdiction not only to extend the time for making the deposit and for furnishing the security, hut also to change the form of security in a fit case".

The observation in this case appears to indicate that his Lordship was inclined to hold that the Court has power to extend time both for making the deposit and for furnishing the security. But, with great respect, I must point out that the decision in the case reported Purnendu Nath Tagore and Others Vs. Sree Sree Radha Kanta Jew and Others, is not in conformity with the observations made in the case reported at page 479 (of Cal WN). The last reported case in which the point was considered is the case of Narayandas Bhagwandas Madhavdas Vs. The State of West Bengal, , decided by Chakravartti, C. J., and Das Gupta, J. In this case Chakravartti, C. J. points out that al- though other High Courts have taken a different view, this Court has consistently held that there is no discretion in the Court to extend the time limited by Order XLV, Rule 7 of the Code of Civil Procedure, but, nevertheless, his Lordship extended the time fixed by Chapter VI, Rule 28(3) of the Appellate Side Rules relating to appeals to the Supreme Court; the relevant portion of which is in the following terms:

" the applicant shall deposit a lump sum of Rs. 400/- within the time limited by Order XLV, Rule 7, of the Code of Civil Procedure, on account of the cost of the preparation of complete Parts I and II of the paper-book".

It is difficult to appreciate the reason how, it the Court has no power to extend time limited by Order XLV, Rule 7, it has that power when Order XLV, Rule 7 is incorporated in the body of the Rules framed by this Court and it seems to me that in this case the Court was really attempting to relieve a litigant against the hardship resulting from the narrow construction of Order XLV, Rule 7 of the CPC and Order XII, Rule 3 of the Supreme Court Rules. However that may be it appears that the foundation of all the subsequent five reported cases is the observation of Sir George Rankin in Raj Kumar Govind Narain Singh's ease, 39 Cal WN 651 which I have already considered; and as I have already held that the observation of Rankin, C. J. in that case is not based upon a correct

interpretation of Rule 9 of the Privy Council Rules, which was the predecessor of Order XII, Rule 3, of the present Supreme Court Rules, it follows as a corollary that all the subsequent cases which are based upon Raj Kumar Govind Narain Singh and Others Vs. Shamlal Singh and Others , were not also correctly decided.

6. In support of the second proposition that the Court has power both under Order XLV, Rule 7 of the CPC and also under Order XII, Rule 3 of the Supreme Court Rules to extend the time fixed by Order XLV, Rule 7, Mr. Meyer has cited three Full Bench judgments of the different High Courts in India. The first one is a judgment of a Full Bench of the Lahore High Court in the case of Diwan Ghulam Rasul v. Ghulam Qutab-ud-Din AIR 1942 Lah 147. In that case the Full Bench has held that the Court has power both under Order XLV, Rule 7 of the CPC read with Rule 9 of the Privy Council Rules to extend the time fixed by Order XLV, Rule 7. To the same effect is the decision of the Full Bench of the Nagpur High Court in the case of AIR 1952 302 (Nagpur) . The Andhra High Court also takes the same view in a Full Bench decision in the case of Thota Pichaiah v. Narasimhacharyulu AIR 1956 AP 120.

7. The third proposition that the Court has no power to extend time under Order XLV, Rule 7 of the Code of Civil Procedure, but has such power under Rule 9 of the Privy Council Rules or Order XII, Rule 3 of the Supreme Court Rules, is supported by four Full Bench decisions of some other High Courts of this country. The first one is the decision of a Full Bench of the Madras High Court in the case of M. Ramayyia v. V. Lakshmayya ILR (1938) Mad 1007 : (AIR 1938 Mad 796). In this case a Full Bench of the Madras High Court held that the effect of the amendment of Order XLV, Rule 7, by Act XXVI of 1920 was to limit the discretion of the Court in granting further time to a maximum period of sixty days beyond the ninety days which the applicant has as of right and if that provision stood alone, the Court would have no discretion to grant time beyond the further period of sixty days. But Rule 9 of the Privy Council Rules leaves discretion in the Court to extend the time and by reason of Section 112 of the Code that rule must prevail over Order XLV, Rule 7. The same view was taken by a Full Bench of the Allahabad High Court in the case of M. Ramayyia v. V. Lakshmayya ILR (1938) Mad 1007 : (AIR 1938 Mad 796 Bishnath Singh and Others Vs. Collector in Charge of Court of Wards Estate of Sri Ram Chandra Naik Kaliya, . A Full Bench decision of the Patna High Court presided over by Harries, C. J., took the same view in the case of Lachmeshwar Prasad v. Girdhari Lal ILR 19 Pat 123: (AIR 1939 Pat 667). The Court points out that under Order XLV, Rule 7 as it now stands the Court has no power to grant further time beyond the periods specified in that rule, but Rule 9 of the Privy Council Rules gives the Court in Privy Council matters a power in proper cases to extend time. In Rangoon Rule 9 of the Privy Council Rules was incorporated as a part of the First Schedule of the CPC under Order 52. Rule 66. A Full Bench of the Rangoon High Court has held in the case of Ismail Piperdi v. Momin Bibi AIR 1940 Rang 12 that the High Court has power under Rule 9 of the Privy Council Rules for cogent reasons to extend the time for furnishing security beyond that which was allowed by Order XLV, Rule 7 of the

Code of Cml Procedure, and the Court has the same power under Order 52 Rule 66.

8. In the case of Nilkant Balwant Nattu Vs. Shri Sachidanand Vidya Narsimha Bharati, , there was a difference of opinion between two Judges of a Division Bench on the question whether the Court had power under Order XLV, Rule 7 of the Code of Civil Procedure, independently of Rule 9 of the Privy Council Rules, to extend the time prescribed by Order XLV, Rule 7 and also whether the Court had such power under Rule 9 of the Privy Council Rules. Shah, J., was of the opinion that the Court had power under both the provisions to extend the time. As Fawcett, J. held the contrary view both under Order XLV, Rule 7 of the CPC and under Rule 9 of the Privy Council Rules, the two questions were referred to the Full Bench. Marten, C. J. in delivering the judgment of the Full Bench held that the Court had power to extend time under Rule 9 of the Privy Council Rules and in that view of the matter it was not necessary to express any opinion on the true construction of Order XLV, Rule 7 as amended by Act XXVI of 1920,

9. A review of the authorities therefore will show that there are as many as eight Full Bench decisions of the different High Courts of our country in support of the view that the Court has power either under Order XLV, Rule 7 of the CPC or under Order XII, Rule 3 of the Supreme Court Rules or under both to extend the time fixed by Order XLV, Rule 7, and this Court is alone in its view that the Court has no such power under either of the above provisions. It is true that Order XII, Rule 3 of the Supreme Court Rules does not confer any right upon the appellant to apply for extension of time, but it would be preposterous to suggest that the Court can extend time upon the respondent's application for cancellation of the certificate but not upon the appellant's application for extension. In any case, the Court can extend time of its own motion when sufficient grounds are placed before it by the appellant's application.

10. For the reasons which I have already given I hold that the decisions of this Court as to the true scope and effect of Rule 9 of the Privy Council Rules, which is now substituted by Order XII, Rule 3 of the Supreme Court Rules, are not correct. As I have already said, it is not necessary for us in this Reference to decide the question as to whether the Court has power under Order XLV, Rule 7, independently of Order XII, Rule 3 of the Supreme Court Rules to extend the time. I agree with the opinion of Marten C. J., of the Bombay High Court that in view of the fact that the Court has power to extend time under Order XII, Rule 3 of the Supreme Court Rules, it is unnecessary to consider the question whether the Court has the same power under Order XLV, Rule 7 itself.

11. As a result of this discussion it follows that question No. 1 referred to the Full Bench must be answered in the affirmative and that question No. 3 should be answered in the negative.

12. It now remains for me to consider question No. 2 which relates to the power of the Court to extend time under Chapter XXXIIIA, Rule 5 of the Original Side

Rules, That rule is in these terms:

"Where such a certificate (meaning a certificate of fitness for appeal to the Supreme Court) is granted, the appellant shall, within the time prescribed by law or within such further time as may be granted by the Appellate Court, find security for the payment of costs, ordinarily to the extent of Rs. 4,000, and"

On a plain interpretation of this rule it is clear that it expressly confers upon the Court the power to extend time beyond the period prescribed by law. As I read this rule, the period prescribed by law means the period prescribed by Order XLV, Rule 7 of the Code of Civil Procedure. The "further time" which the Appellate Court is expressly empowered to grant is in addition to "the time prescribed by Order XLV, Rule 7. The question that has been argued before us is whether the Court has, in the exercise of its rule making power, any jurisdiction to add to the provisions of Order XLV, Rule 7. The rules under Chapter XXXIIIA were presumably framed in exercise of the powers conferred upon this Court by Clause 37 of the Letters Patent which empowers this Court

"to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction respectively".

There is a proviso which lays down that in making the rules the "High Court shall be guided as far as possible, by the provisions of the Code of Civil Procedure". Mr. Kar appearing for the respondent contends that this rule making power is only in respect of suits and proceedings which are pending before a Judge sitting on the Original Side and this rule making power does not extend to the making of any rules regulating procedure in appeals or any proceedings relating to appeals in the Supreme Court. I cannot accept this argument of Mr. Kar as sound.

Under this clause the ambit of rule making power is very wide. The phrase "including proceedings in its Admiralty, Vice-Admiralty," etc., is merely descriptive of proceedings in civil cases which may be brought before the High Court, I am not prepared to hold that the rule making power conferred by Clause 37 of the Letters Patent is confined to the making of rules relating to suits and proceedings instituted or initiated on the Original Side. An application for a certificate under Article 133 of the Constitution, is, in my opinion, a proceeding in a Civil Case brought before this Court and the High Court has power to frame rules relating to such an application. It is true that in Ormond's Original Side Rules, 4th Edition (1940), at page Ixxxviii of the Introduction there is a passage which runs thus:

"The words "in civil cases which may be brought before the said High Court" do not make it altogether clear whether the original jurisdiction only of the court is referred to or whether a power is also being given to regulate proceedings in civil cases which come before the Court in its appellate jurisdiction, (The prevailing

opinion appears to have been, however, that the power under Clause 37 is restricted to the making of Rules for operation on the Original Side of the Court only.)"

The portion within brackets is the subject-matter of controversy before us. It appears that no authority is cited by Ormond in support of the proposition within brackets. He merely refers to the prevailing opinion on the matter. On the other hand, it has been held in the case of *Hirabai Gendalal Vs. Bhagirath Ramchandra and Company*, that the rules framed under Clause 37 of the Letters Patent are not confined in their application to suits and proceedings on the Original Side only. I accordingly hold that the rules framed by the High Court under Chapter XXXIIIA of the Original Side Rules are within the rule making powers of this Court under Clause 37 of the Letters Patent.

13. There is still a further question and that is whether the rules framed under Clause 37 of the Letters Patent can add anything to what has been provided for by the CPC or, if there is any inconsistency between the rules framed under Clause 37 of the Letters Patent and the provision of the Code of Civil Procedure, which one is to prevail? So far as the present matter is concerned Rule 5 of chapter XXXIIIA of the Original Side Rules merely adds to the period prescribed by "Order XLV, Rule 7 of the CPC by authorising the Appellate Court to grant time beyond what is prescribed by law. The restriction upon the power of the Court as contained in the proviso to Clause 37 of the Letters Patent is that the rules framed under that clause should, "as far as possible" be in conformity with the provisions of the Code of Civil Procedure. This restriction as the phrase "as far as possible" indicates is merely directory. The provisions of the CPC are intended for the purpose of guidance of this Court in framing rules under Clause 37 of the Letters Patent. Consequently, if any rule framed by the High Court under Clause 37 be inconsistent with or confers any additional power besides what is granted by the Code of Civil Procedure, the rule framed under Clause 37 will prevail over the corresponding provisions of the Code of Civil Procedure. This is the view which has been taken of the true effect of a rule framed under Clause 37 of the Letters Patent by the Bombay High Court in the case of *Hirabai Gendalal Vs. Bhagirath Ramchandra and Company*, and also by this Court in the case of *In Re: Ram Dayal De*, . I accordingly hold that Rule 5 of Chapter XXXIIIA of the Original Side Rules authorises the Appellate Court to extend time beyond the limits provided for by Order XLV, Rule 7 of the Code of Civil Procedure. The effect of Chapter XXXIIIA, Rule 5 of the Original Side Rules was not considered in any of the cases decided by this Court, because all those cases arose out of Appellate Side matters and did not require any consideration of Chapter XXXIIIA, Rule 5 of the Original Side Rules. The second question referred to the Full Bench should therefore in my opinion, be also answered in the affirmative.

14. I accordingly answer questions 1 and 2 In the affirmative, and question No. 3 in the negative;

15. In view of the fact that there was a uniform body of decisions of this Court in

favour of the respondent with which we have expressed our dissent in our judgment, I would direct that the parties to this Reference to pay and bear their own costs up to this stage.

16. Let the application be now placed before the Division Bench for consideration on the merits.

Bachawat, J.

17. I agree with the answers given by my. Lord.

18. The appellant who has obtained a certificate from the High Court as to value or fitness for appeal under Article 133 of the Constitution is required by Order 45 Rule 7 of the CPC 1908 to furnish security for the costs of the respondent and to deposit the amount needed for the expense of preparation and transmission of the records within the time specified in that rule. If the appellant fails to furnish the security within time, the Court will not declare the appeal admitted under Order 45 Rule 9 C. P. C. 1908; nevertheless in spite of the default, the certificate granted by the Court remains in force and is not automatically cancelled without a further order of the Court. The Order for cancellation of the certificate may be made under Order 12 Rule 3 of the Supreme Court Rules 1950. Under that rule in such a case the Court may cancel the certificate and give other directions incidental on such cancellation. But the Court is not bound to cancel the certificate. In lieu of cancelling it, the Court may make Such further or other order as the justice of the case requires. If the justice of the case so requires, the Court may make an order extending the time to furnish the security.

19. The power under Order 12 Rule 3 of the Supreme Court Rules, 1950, "to make such further or other order as the justice of the "case requires" is a power to be exercised in lieu of the power to cancel the certificate and to give directions as to the costs of the appeal and the security entered into by the appellant. The power "to make such further or other order as the justice of the case requires" is not a power to give directions consequential on the cancellation of the certificate. The directions which are necessary upon the cancellation of the certificate are directions with regard to the costs of the appeal and with regard to the security entered into by the appellant. The power to give such consequential directions is expressly given by the rule.

20. The general power to make a just order in a case where the appellant has failed to furnish the security conferred by Order 12 Rule 3 of the Supreme Court Rules, 1950 is in no way controlled by the provisions of Order 45 Rule 7 of the Civil Procedure Code, 1908. by Section 112 of the Civil Procedure Code, 1908 nothing in the Code is deemed to interfere with the provisions of the Rules of the Supreme Court 1950. As a matter of fact Order 45 rule 7 of the CPC 1908 does not purport to interfere with the provisions of Order 12 Rule 3 of the Supreme Court Rules, Older 45 Rule 7 of the Civil Procedure Code, 1908 has a long ancestry. It was preceded by Section 11 of the Privy Council Appeal Act VI of 1874, Section 602 of the Civil Procedure Code, Act X of 1877 and Section 602 of

the Civil Procedure Code, Act XIV of 1882. In ILR 2 Cal 272, a Bench of three Judges of this Court decided that the requirements of Section 11 of the Privy Council Appeal Act VI of 1874 as to the deposit of costs were not absolutely imperative and that the Court had some discretion to modify its provisions and to extend the" time for giving the security. This decision was approved by the Privy Council in the case of ILR 11 I. A. 7 : ILR 10 Cal 557. The Privy Council decided that the words in Section 602 of the Civil Procedure Code, Act X of 1877 relating to the giving of security were directory only, although not to be departed from without cogent reason and that the court in its discretion could extend the time. Following the Privy Council decision, a Bench of three Judges of this court decided in the case of Roy Jotindra Nath Chowdhury and Others Vs. Rai Prasanna Kumar Banerjee Bahadur and others , that the court had similar power u/s 602 of the CPC (Act XIV of 1882) to extend the time. The provisions of Order 45 Rule 7 of the Civil Procedure Code, 1908 as it stood before its amendment by Act XXVI of 1920 were similar to those of Section 602 of the CPC 1882. The amending Act XXVI of 1920 as also an order of the King in Council dated February 9, 1920 promulgating the Privy Council Rules of 1920 came into force on January 1, 1921. Rule 9 of the Privy Council Rules, 1920 gave power to the High Court similar to the power now conferred upon it by Order 12 Rule 3 of the Rules of the Supreme Court, 1950. Act XXVI of 1920 amended the provision of Order 45 Rule 7 of the Civil Procedure Code, 1908 by substituting the words "ninety days or cause shown allow" in place of the words "six months"". The object of the amendment of Order 45 Rule 7 of the Civil Procedure Code, 1908 was to minimize delays in the disposal of appeals to the Privy Council. The amended Order 45 Rule 7 Sub-rule 1 of the Civil Procedure Code, 1908 empowers the court to extend the period of ninety days mentioned in the first part of the Sub-rule for a further period not exceeding sixty days, but it does not confer any power to extend the period of six weeks mentioned in the second part of the Sub-rule. But the Privy Council Rules of 1920 came into force simultaneously and Rule 9 of those rules conferred general power upon the court to make such order as the justice of the case requires in a case where the appellant fails to furnish security. Having regard to the general power so conferred it was not necessary to make a specific provision in Sub-rule 1 of Rule 7 of Order 45 of the Civil Procedure Code, 1908 giving power to the court to extend the time mentioned in the second part of the Sub-rule. It was intended that the lime limit specified in Order 415 Rule 7 must normally be adhered to, but that in exceptional cases the court might under its general power conferred by Rule 9 of the Privy Council Rules, 1920, extend the time. Order 12 Rule 3 of the Supreme Court Rules 1950 substantially reproduces the provisions of Rule 9 of the Privy Council Rules 1920.

21. Order 12 Rule 3 of the Rules of the Supreme Court does not give a substantive right to the appellant who has failed to furnish the security to apply for extension of time. Such an appellant is entirely at the mercy of the court. The court may exercise its powers under that rule on an application made by the

respondent, or of its own motion if no such application is made. In this case there is no application by the respondent for the cancellation of the certificate, nevertheless the court may of its motion act under the rule.

22. The contention of Mr. Kar that Order 12 Rule 3 read with the definition of "Court" in Rule 2 of Order 1 of the Supreme Court Rules, 1950 confers power upon the Supreme Court and not upon the High Court is baseless. The expression "that Court" in Rule 3 of Order 12 quite clearly refers to the last antecedent "High Court".

23. Though the Court has some discretion under Order 12 Rule 3 of the Supreme Court Rules 1950 to extend the time to furnish the security, the court must exercise this discretion judicially. In the exercise of its discretion the court ought not to extend the time lightly and without cogent reason.

24. In the instant case the appellant to the Supreme Court seeks to appeal to the Supreme Court from a judgment passed by this court on appeal from a judgment passed on the Original Side. The matter is therefore governed by Chapter XXXIIIA of the Rules of the Original Side. By Rule 5 of Chapter XXXIIIA the Court may allow further time for giving the security. The court is competent to frame that rule. The rules in Chapter XXXIIIA of the rules on the Original Side were made by this court in the exercise of its powers under Clause 37 of the Letters Patent. By that clause the High Court has power

"to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the High Court, including proceedings in its Admiralty, Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction respectively.""

Proceedings relating to the grant of a certificate of appeal to the Supreme Court are proceedings in a civil case brought before the High Court. The suggestion that the expression "all proceedings in civil cases which may be brought before the said High Court" should be given an ejusdem generis construction and should be limited to original civil proceedings, such as proceedings brought in the Admiralty, Vice-Admiralty, Testamentary, Intestate and Matrimonial jurisdiction, is baseless. There is no warrant for giving such construction. The court is empowered to make rules with regard to all proceedings in civil cases brought before it. The proceedings expressly mentioned are illustrative and not restrictive. No authority is cited in support of the statement at page LXXXVIII of the introduction to the Rules of the Original Side, 4th Edition edited by Mr. E. C. Ormond that

"the prevailing opinion appears to have been however, that the power under Clause 37 is restricted to the making of Rules for operation of the Original Side of the Court only".

Under Clause 37 of the Letters Patent this court can make rules regulating its procedure in the Original as also the Appellate Side of the court, see Hirabai

Gendalal Vs. Bhagirath Ramchandra and Company, . In making rules the court is to be guided as far as possible by the provisions of the CPC but if there is an inconsistency between the rules framed under Clause 37 of the Letters Patent and rules in the Civil Procedure Code, the former must prevail, see In Re: Ram Dayal De, .

G.K. Mitter, J.

25. I agree with the views expressed by My Lord the Chief Justice and I have nothing to add.