

(1920) 02 CAL CK 0002
In the Calcutta High Court

Srimati Anilbala Chowdhurani

APPELLANT

Vs

Dhirendra Nath Saha Choudhury and Another

RESPONDENT

Date of Decision : 25-02-1920

Acts Referred:

Lunacy Act, 1912 — Section 37, 62

Citation : 57 Ind. Cas. 768

Hon'ble Judges : Teunon, J;Beachcroft, J

Bench : Division Bench

Judgement

Teunon, J.—This appeal arises out of an application u/s 62 of the Indian Lunacy Act, 1912, to the District Judge of Pabna.

2. The jurisdiction of the High Court (i.e., Sections 37 and 62 of the Act) excludes the jurisdiction of the District Court and the question in the appeal, as in the Court of first instance, is whether the person alleged to be a lunatic, one Dhirendra Nath Shaha Chowdhuri, is a person subject to the jurisdiction of the High Court of Calcutta and, therefore, not subject to the jurisdiction of the District Court of Pabna.

3. The ancestors of the respondent Dhirendra were residents of Parsadanga in the District of Pabna. There was a separation in 1900 and at the partition which then took place, Gobinda, the grandfather of the respondents, Dhirendra and his brother Surendra, took no share in the family dwelling house, though he reserved for himself what is described as an Athohala of three rooms (a record room and two office rooms) for the purposes of an office or Cutchery. Gobinda then removed to his house at Halkhola in Calcutta, carried on business and acquired much property there. He died there without returning to Parsadanga or Pabna in the year 1913. Thus for the last 13 years of his life Gobinda was a permanent resident of Calcutta. His son Harendra, the father of the respondents, died there and his grandsons the respondents lived with him in Calcutta till his own death in 1913.

4. The petitioner in the case is Anilbala, the wife of Dhirendra. She is the daughter of a medical practitioner living in the town of Pabna. She was married to the respondent, Dhirendra, some time in or about the year 1909. The marriage took place in Calcutta and she lived with Dhirendra in the family house in Calcutta, until in March 1917 she took him away with her to her father's house in Pabna. Thence sometime in the end of May or beginning of June he was removed by his brother, Surendra, first to Surendra's Basa or lodgings in Pabna and thence to the Cutchery at Parsadanga, where he was on the 14th August when the application out of which this appeal arises was made. On the following day he was removed or taken to Calcutta by his brother's officers.

5. The appellant's contention is that the residence of the alleged lunatic from some date in March to the 14th August, first under the care or custody of his wife at Pabna and then in the custody of his brother, Surendra, first at Pabna and then for some 35 days at Parsadanga, is sufficient to give the District Court jurisdiction.

6. On the other hand it is clear that since 1900 his home and business have been in Calcutta, that when he and his brother go to their "Cutchery" at Parsadanga to look after their properties there, as they (or more particularly the brother) have apparently been in the habit of doing once a year, they leave their wives, families and house-hold servants in the Calcutta house. In fact in the Basa or lodging in Pabna and in their two office rooms in Parsadanga there is no place for their women and children. On these facts it is dear that the respondent, Dhirendra, is ordinarily resident in the town of Calcutta.

7. It may be taken as now settled law (and I do not think it necessary for the purpose of this case to enter into any elaborate examination of the Letters Patent of this Court or the Charter of the Supreme Court) that the original jurisdiction of this Court and of the Supreme Court and the jurisdiction over infants and lunatics extends and extended to all persons (European and Indian) resident in Calcutta and to all British born subjects throughout the Presidency, Now on the case for the petitioner her husband is incapable of managing himself and his affairs. His removal from Calcutta to her father's house was clearly her doing for purposes of her own, and the subsequent removal from her care or custody to the lodgings in Pabna and to the office room's at Parsadanga was similarly the brother's doing and for his purposes.

8. Such a removal, in my opinion, is not sufficient to oust the jurisdiction of the High Court of Calcutta over this "inhabitant of Calcutta" where he has his home, his place of business, his family and his servants.

9. In my opinion, therefore, the present proceedings should have been taken in Calcutta on the original side of this Court and I should, therefore, dismiss this appeal.

Beachcroft, J.

10. An application was made by the appellant to the District Judge of Pabna to declare her husband, Dharendra Nath Saha Chowdhuri, to be of unsound mind and to appoint her guardian of his person and property. The learned Judge has found that the ancestral home of the Chowdhuris is at Parsadanga in the District of Pabna that they are known as the Saha Chowdhuris of Parsadanga and have always liked to describe themselves as such, that in deeds and solemn documents they have always described their residence as Parsadanga and that even in papers filed after the application made to him they have described themselves as men of Parsadanga. He has further found that for some years Dharendra has lived 9 or 10 months every year in Calcutta, where he and his brother have a house, and two or three months at Pabna and Parsadanga. He has also found that in March 1917 the appellant took her husband to Pabna and he was in that District till the 14th August 1917, on which date the application was made. Immediately afterwards Dharendra's brother took him away to Calcutta. None of these findings has been questioned. The learned Judge has dismissed the application on the ground that u/s 62 of the Indian Lunacy Act (IV of 1912) he has no jurisdiction to deal with it, being of opinion that the High Court alone has jurisdiction as the alleged lunatic dwells mainly in Calcutta subject to the jurisdiction of the High Court" and that under the section quoted there cannot be concurrent jurisdiction.

11. Now on the findings of the learned Judge it is clear that for a part of the year Dharendra may be said to be ordinarily resident in Pabna, It is also clear from the wording of Section 62 that residence of the most temporary character in a particular District is sufficient to give a District Judge jurisdiction, provided that the alleged lunatic is not subject to the jurisdiction of the High Court. The decision of the appeal then turns on the question whether at the time of the application Dharendra was subject to the jurisdiction of this Court.

12. In support of the learned Judge's order it is argued not only that the High Court has jurisdiction over the alleged lunatic throughout the year because it admittedly has so far a part of the year, but that under Clause 17 of the Letters Patent this Court has jurisdiction over the alleged lunatic irrespective of the fact that he lives in Calcutta for a part of the year. The latter argument raises a question of very great difficulty and it is obvious that if it is upheld, it is sufficient not only to make the first argument unnecessary, but the further effect will follow that no District Court in Bengal, Bihar and Orissa has or ever had any jurisdiction to take proceedings in case of alleged lunacy.

13. Clause 17 of the Letters Patent runs: "And we do further ordain, that the said High Court of Judicature at Port William in Bengal shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, within the Bengal Division of the Presidency of Fort William as that which was vested in the said High Court immediately before the publication of these presents." This gives the Court the same power within the Bengal Division of the Presidency of Port William as were given by Clause 16 of the Letters Patent of

1862 to the Court "whether within or without" that area, and to see what those powers were we have to refer back to the Charter of the Supreme Court.

14. Section 25 of the Supreme Court Charter is as follows: "And we do hereby authorize and empower the said Supreme Court of Judicature, at Fort William in Bengal, to appoint guardians and keepers for infants and their estates, according to the order and course observed in that part of Great Britain called England, and also guardians and keepers of the persons and estates of natural fools, and of such as are, or shall be deprived of their understanding or reason, by the act of God, so as to be unable to govern themselves and their estates, which we hereby authorize and empower the said Supreme Court of Judicature at Port William in Bengal to enquire here and determine by inspection of the person, or by such other ways and means by which the truth may best be discovered and known." The clause is framed in the widest terms. It is admitted on all hands that the Supreme Court had jurisdiction in the case of European British subjects throughout the Bengal Presidency, The question is whether the jurisdiction extended to the case of natives of this country living outside the limits of the ordinary original civil jurisdiction of the Court, in other words, roughly speaking, of the town of Calcutta.

15. It will be convenient before examining the Charter itself to see whether any light is thrown on the question either by subsequent legislation or by judicial decisions.

16. In 1858 two Acts of the Governor-General in Council were passed for the protection of lunatics and their estates, Act XXXIV, which regulated the proceedings in the case of persons subject to the jurisdiction of Courts established by Royal Charter, and Act XXXV, which provided for the oases of persons not subject to the jurisdiction of the Supreme Courts. The present Act IV of 1912, which is a consolidating Act, embodies generally speaking the provisions of those two Acts. In none of them was any definition or limitation of the jurisdiction of the Supreme Courts attempted. This may possibly have been due to the fact that the extent of that jurisdiction has always been uncertain and to a reluctance on the part of the Legislature to make any enactment which might interfere with it.

17. It was argued for the respondent that Section 43 of the present Act, which occurs in the chapter relating to proceedings in presidency towns, shows that the jurisdiction of the High Court is not confined to the cases of persons living within the town of Calcutta, but though framed in general terms, that section could be construed as applying only to the case of European British subjects over whom the Court admittedly has jurisdiction throughout the Presidency. Such an interpretation would not violate any canon of construction, for, though the section is framed in the widest terms, its application must obviously be limited to the same extent as the jurisdiction. That section corresponds with Section 8 of Act XXXV of 1358.

18. Similarly no conclusion as to this Court's jurisdiction over natives of India can be drawn from the wording of Section 62 itself. That would be begging the question. If the jurisdiction outside Calcutta did not extend to natives of India, then the exception in Section 62 would apply only to European British subjects, but to cover them some such words as are used would be necessary. The use of general terms may be explained on the theory to which I have already referred, viz., uncertainty as to the extent of the Supreme Court's jurisdiction and reluctance to interfere with it.

19. But there is one section of Act XXXIV of 1858 which, it might be said, suggests that the Court's jurisdiction over natives of this country was not limited to such as resided within its local limits; I refer to Section 6. That section can have no application to Europeans and when read with Section 4, might be taken to support the view that the Court had jurisdiction over Indians living outside the town of Calcutta. But if Section 4 were meant merely to provide a limit within which Europeans could be called on to attend personally, I do not think it would be sound to infer, from the fact that Section 6 also makes that limit applicable to Indians, that there must have been Indians up to the limit of 20 miles over whom the Court had jurisdiction.

20. There is then no provision in any of the three Acts which indicates the extent of the jurisdiction of the Supreme Court.

21. Of judicial decisions there is little. In *Sarish Chunier Singh*, In the matter of 21 C. 206 : 10 Ind. Dec. (N.S.) 770 Sale, J., refused to appoint a guardian of the person and property of an infant, who was not a European British subject, who was living outside the limits of the ordinary civil jurisdiction of the Court. Clause 17 of the Letters Patent gives the same jurisdiction in the cases of infants as of lunatics. The learned Judge said: "I am not aware of any instance in which the Court has exercised that jurisdiction in the case of an infant residing outside the ordinary original civil jurisdiction of this Court, who is other than a European British subject." He did not in terms hold that the Court had no jurisdiction in the case, for he held for other reasons that he would not be justified in proceeding under the Charter to make the appointment asked for.

22. In *Fakir-ud-din Mohamed Chowdhuri*, In the matter of 2 C.W.N. (83) notes the same learned Judge, held that this Court had jurisdiction in the case of a minor who ordinarily resided in the District of Barisal, on the ground that when the application was made the minor was living within the local limits of the ordinary civil jurisdiction of the Court. This case does not throw any light on the question now under discussion, as it was not necessary to decide the wider question of the Court's general jurisdiction under Clause 17 ; though it has a bearing on the other question, whether jurisdiction depends on ordinary residence.

23. Now while the point has never been expressly decided by this Court, it was the subject of discussion in the Allahabad High Court, [*Jaundha Kuar v. Court of*

Wards 4 A. 159 : A.W.N. (1881) 172 : 2 Ind. Dec. (N.S.) 770], Section 12 of whose Charter gives the Court the same powers as are exercised by this Court with respect to the persons and estates of infants, idiots and lunatics. The learned Judges, having made enquiries as to the practice in this Court in matters of lunacy as regards natives of India, came to the conclusion on an examination of the Charter of the Supreme Court and the present Charter that the practice was correct and they held that u/s 12 of its Charter the Allahabad Court had no original jurisdiction in matters of lunacy. Unfortunately this case also cannot be regarded as authoritative, for though Stuart, C.J., expressed the opinion on an examination of the Charter that the practice of this Court was correct, the decision as to the Allahabad Court's want of jurisdiction was based on the fact that that Court's jurisdiction u/s 12 of its Charter was expressly qualified by the words in that section "subject to the provisions of any laws or regulations now in force," the effect of those words being to deprive the Court of jurisdiction by reason of the existence of Act XXXV of 1858.

24. So far then we get assistance neither from subsequent legislation nor from judicial decision. We have, however, this much to start with, that the practice of this Court has been not to exercise jurisdiction in the case of natives of India outside the limits of the ordinary original civil jurisdiction, alongside of which District Judges have been exercising jurisdiction outside those limits for over 60 years, since the passing of Act XXXV of 1858. No doubt the maxim *cursus curi est lex curi* applies only to matters of procedure and previous failures to exercise jurisdiction would not justify another failure if the jurisdiction were shown to exist, but it will be necessary to make out a very strong case before I am prepared to hold that the practice on the original side of this Court for so many years has been wrong and that for over half a century District Judges have been dealing with matters of lunacy and making orders regarding the care of their persons and property without jurisdiction, a jurisdiction which so far as I am aware has never hitherto been questioned.

25. Unfortunately we have not had the assistance of any detailed argument on the provisions of the Supreme Court Charter beyond a reference to Clause 25 itself and, when the question involved is one of such great difficulty as the extent of the jurisdiction of the Supreme Court has always been admitted to be, it would perhaps be sufficient to say that no argument has been addressed to us which would justify a departure from the long-established practice of the Court. And possibly that would be the safest course when, to support the theory that the Charter gave the Supreme Court jurisdiction over natives of India outside the ordinary original civil jurisdiction, it would be necessary to examine historically, and that without assistance from the Bar, the extent to which sovereign powers had been acquired by 1774 so as to justify the claim to legislation in respect of persons other than European British subjects living outside the town of Calcutta. But in view of the first part of respondents' argument examination of the Charter becomes necessary.

26. Reference to Clauses 13, 22, 26, 23 of the Charter seems to point to this that the civil, ecclesiastical and admiralty jurisdiction was to be exercised only over European British subjects, persons in the employ of the Company or of subjects of the King, or (Clause 13) in oases in which one of the parties was a European British subject. I do not think the assumption that the jurisdiction conferred by Clause 25 was limited in the same way a violent one. Some light seems to be thrown on the matter by the provisions of Stat. 21 George III, Chapter 70, Sections 9, 10 and 11, which suggest that the jurisdiction of the Supreme Court over natives of India was due to their connection with the company or with European British subjects and consequently was limited to those oases in which such connection existed.

27. Consequently the conclusion at which I have arrived is that the jurisdiction of this Court under Clause 17 of the present Charter is in the case of natives of India confined to those living within the ordinary original civil jurisdiction.

28. There remains then the other point, whether the Court has jurisdiction in a case where the lunatic is actually living outside the ordinary original civil jurisdiction though for the greater part of the year he ordinarily resides within it. Clause 25 of the Supreme Court Charter says nothing about residence. It was attempted to support the view of the District Judge by analogy with Clause 12 of the present Charter on the ground that the alleged lunatic has property in Calcutta. The situation of his property has nothing to do with the matter. Even though the District Judge may only proceed u/s 62 of the Lunacy Act in oases in which the alleged lunatic is possessed of property, it is not a condition that that property must be within the District Judge's jurisdiction. The words in Section 62 "not subject to the jurisdiction of any of the Courts mentioned in Section 37" mean, with reference to this Presidency, not subject to the jurisdiction of the High Court under the provisions of the Charter of the Supreme Court and the subsequent Charters of this Court. I have already expressed the opinion that that jurisdiction did not extend to natives of India when living outside the ordinary original civil jurisdiction. While, therefore, a native of India is residing outside that jurisdiction, the Charter does not, in my opinion, give jurisdiction over him even though he may live in Calcutta for the greater part of the year.- I do not think the use of the word "inhabitants" in Stat. 21 Geo. III Chap. 70, Section 17, indicates anything to the contrary. In terms that section refers to "actions and, suits against inhabitants of the city of Calcutta," words which would hardly cover oases referred to in Clause 25 of the Supreme Court Charter, But Section 17 did not give jurisdiction over the "inhabitants" of Calcutta for the first time. The Court already had it. In my opinion, however, it had it in the case of natives of India only while the subject was actually residing in Calcutta. For to use the words of Sir Elijah Impey, whose knowledge of contemporaneous facts cannot be lightly ignored, "Their submission was voluntary, and if they disliked the laws they had only to cross a ditch and were no longer subject to them" (Smoult and Ryam, page 67). Ordinary residence is not the test, and the cases to which the learned District Judge refers and which dealt with the meaning of the word

"dwell" in Act VIII of 1859 and in the Letters Patent of the Bombay and Madras High Courts do not, in my opinion, help in the elucidation of the question before us. Nor indeed does the learned Judge use them for the purpose of his decision, which is based on the view that the High Court and the District Court cannot both have jurisdiction over the same person.

29. In my view, therefore, it follows that u/s 62 of the Act the District Judge had jurisdiction at the time the application was made and he had that jurisdiction irrespective of whether or not the alleged lunatic could be said to ordinarily reside in the Pabra District for a part of the year. In my opinion the appeal should be allowed and the case remanded to the District Judge to be dealt with on the merits. I would make no order for costs in this Court.

30. In the result this appeal is dismissed. We make no order as to costs.