

(1914) 05 CAL CK 0011
In the Calcutta High Court

Syed Abdullah Hossain Chowdhury

APPELLANT

Vs

Ananda Chandra Roy and Another

RESPONDENT

Date of Decision : 05-05-1914

Acts Referred:

Citation : AIR 1914 Cal 679 : 24 Ind. Cas. 273

Hon'ble Judges : Lawrence Jenkins, C.J; Woodroffe, J

Bench : Division Bench

Judgement

1. This is an application by one who desires to appeal to His Majesty in Council for a certificate that as regards amount or value and nature the case, fulfils the requirements of Section 110 of the Civil Procedure Code.

2. It is conceded that if the application is within time a certificate ought to issue : it is, however, contended that the appeal is not within the period of six calendar months prescribed by the Order in Council of 1838. To this it is answered that the application is within six months from the date of the decree appealed from if, in computing the period of limitation, the time requisite for obtaining a copy of the decree is excluded.

3. The Order in Council does not expressly allow this inclusion, but the Limitation Act of 1908, Section 12, purports to direct it. The question for our decision is whether it was within the competence of the Indian Legislature to enact this provision. The Governor-General in Council has power at legislative meetings to make laws for all Courts within British India subject to certain exceptions, and among them is this, that he cannot make any law repealing or affecting any provision of the Government of India Act 1858 (24 and 25 Vict. C. 67, Section 22.)

4. Section 64, of the Government of India Act, 1858, provides that all Acts and provisions now in force under Charter or otherwise concerning India shall subject to the provisions of this Act continue in force and be construed as referring to the Secretary of State in Council in the place of the said Company and the Court of

Directors and Court of Proprietors thereof.

5. Therefore, it is contended, Section 12 of the Limitation Act, so far as it relates to an application for leave to appeal to His Majesty in Council, was beyond the powers of the Indian Legislature.

6. This section is not the first instance in which the Indian Legislature has made provisions which purport to modify the absolute terms of the order of 1838.

7. Thus by the Privy Council Appeals Act, 1874, it was provided that application by any one desiring to appeal to Her Majesty in Council must ordinarily be made within six months from the date of the decree : but if that period expired when the Court was closed, the application might be made on the day the Court re-opened. (See Section 8).

8. The Bill which afterwards became this Act is said to have been submitted to and approved by the Judicial Committee (see note in Whitley Stoke's Anglo-Indian Codes, Volume 11, page 435).

9. I have looked further into this and found a statement by Mr. Arthur Hobhouse, as he then was, that fully bears out this note. Addressing the Governor-General's Council he said : The Bill was now put into a shape which was acceptable to the Judicial Committee of the Privy Council. The Secretary of State had been in correspondence with the Judicial Committee at our desire and they had approved of the Bill as it stood."

10. This provision was repeated in the Codes of 1877 and 1882 (see Section 599), and though the section in the Code of 1882 was repealed in 1887 that was not, as I understand, by reason of any doubt as to the competence of the Indian Legislature.

11. By the Limitation Act of 1877 it was provided that an application for the admission of an appeal to Her Majesty in Council should be presented within six months from the date of the decree appealed against (Article 177).

12. Though an opinion was once expressed that this provision was repealed by the Code of 1882 [Fazul-un-nissa Begam v. Mulo 6 A. 250 : A.W.N. (1884) 71.], no doubt seems ever to have been entertained as to the power of the Indian Legislature to deal with this subject [Lakshmanan v. Peryasami 10 M. 373. : Anderson v. Periasami 15 M. 169. : In the matter of the petition of Sitaram Kesho 15 A. 14 : A.W.N. (1892) 152. : Thurai Rajah v. Jainil-abdeen Rowthan 18 M. 484. : Moroba Ramchandra v. Ghanasham Nilkant Nadkarni 19 B. 301.]. Prior to 1874 the more general view in this Court seems to have been that when the time for appealing expired in vacation the Petition could not be presented on the day the Court re-opened [Tamvaco v. Skinner 1 B.L.R. (O.C.) 39.]. But I find that it has now become the established practice to receive an application made on the day the Court re-opens though beyond the prescribed six months, and this has been in reliance on Section 8 of the Privy Council Appeals Act, 1874, and of the provisions that have taken its place in the Code and the Limitation Acts. It is true

that neither the 2nd clause of Section 5 nor the 2nd paragraph of Section 12 of the Limitation Act of 1877 has been applied to an application for leave to appeal to His Majesty in Council, that is, because an application for that purpose did not come within the terms of either section. The Limitation Act of 1908 has been extended to such an application. I do not rely on the decision in *Eastern Mortgage and Agency Co., Limited v. Purna Chandra Sarbagna* 15 Ind. Cas. 497 : 39 C. 510. as showing that this extension was valid, as the objection to the powers of the Indian Legislature was not advanced in that case. This is the first occasion on which the point has been taken.

13. But if Section 8 of the Privy Council Act of 1874 was within the competence of the Indian Legislature, I think Section 12 of the Limitation Act of 1908 must equally have been within its powers and I have shown that there is strong reason for thinking that Section 8 was valid legislation.

The Court's power to deal with applications for leave to appeal rests primarily on Clause 39 of the Letters Patent, which ordains that any person may appeal to the Privy Council in the cases there mentioned : "Subject always to such rules and orders as are now in force or may from time to time be made respecting appeals to ourselves in Council from the Courts of the said Presidency : except so far as the said existing rules under orders are hereby varied and subject also to such further rules and orders as he may with the advice of our Privy Council hereafter make in that behalf.

14. Clause 44 of the Letters Patent is in these terms : -

And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council exercised at meetings for the purpose of making laws and regulations and may be in all respects amended and altered thereby.

15. Apart from Section 64 of the Government of India Act, 1858, there would seem to be no bar to the Legislation under consideration. Even if it be that Legislation regarding the admission of appeals affects the prerogative of the Crown [See *Moti Chand v. Ganga Prasad Singh* 4 Bom.L.R. 159 : 6 C.W.N. 362 : 24 A. 174 : 29 I. A. 40 at p. 42.], still it would not be deemed invalid by reason of that only, though subject to the power of disallowance by the Crown. Nor do I think the enactment of Section 12 of the Limitation Act, 1908, so far as it relates to applications for leave to appeal to His Majesty in Council, is forbidden by Section 64 of the Government of India Act, 1858.

16. The whole section must be read, and it must be borne in mind that it is a part of an Act dealing with the transfer to the Crown of the Government of India.

17. The conclusion then to which I come is that Section 12 of the Limitation Act of 1908 was within the legislative powers of the Government of India, and that the present application is within time. A certificate must, therefore, issue that as regards amount or value and nature the case fulfils the requirements of Section

110 of the Code.

18. The respondent must bear the costs of this application which we assess at three gold mohurs.