

In Re: Feda Hossein and ors.

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Court : Kolkata

Decided On : Jul-16-1876

Reported in : (1876)ILR1Cal432

Judge : Markby, J.

Appellant : In Re: Feda Hossein and ors.

Judgement :

Markby, J.

1. This, it will be observed, is not an application in the form required by Act VI of 1874, and it has been stated that the petition was so drawn expressly in order to raise the question whether the provisions of that Act were binding.
2. I may say at once that no case for granting special leave to appeal has been made out.
3. An attempt was also made to obtain, upon this petition, a certificate under Act VI of 1874, that a substantial question of law was involved in the case; and I was asked to grant this certificate, should I think that Act to be binding. But it was subsequently admitted that upon this petition, this alternative course could not be pursued.

4. The question therefore which remains is, whether the petitioners in spite of Act VI of 1874 have a right of appeal, simply upon the ground that the property is above the value of Rs. 10,000. There is no doubt that the petitioners would have had that right prior to the passing of Act VI of 1874, and the petitioners contend that the Governor-General in Council had no power to deprive them of that right by legislation. Questions of this kind are of great importance, and if there is any doubt, as there must sometimes be, about the validity of an Act of a Legislature, the powers of which are not supreme, it is extremely desirable that the doubt should be at once fully discovered. If the doubt is unfounded, the sooner it is removed the better. I do not, therefore, regret that this question has been raised, and especially as I have had the advantage of a very able argument to assist me in coming to a conclusion.

5. The line of argument taken on behalf of the petitioner in order to establish that I am bound to admit this appeal is as follows: The 39th clause of the Letters Patent of 1865 (it is said) gives an appeal to the Privy Council provided the sum or matter at issue is of the amount or value of not less than Rs. 10,000. These Letters Patent were issued by Her Majesty under the provisions of the 24 & 25 Vict., c. 104. By Section 9 of that Act, each of the High Courts established under that Act is bound to exercise 'all such powers and authority for and in relation to the administration of justice...as Her Majesty may by such Letters Patent grant and direct.' The admission of an appeal to the Privy Council is a power in relation to the administration of justice, and as the Letters Patent give an appeal as of right, when the value is Rs. 10,000, the admission of this appeal is a power which this Court is commanded by the Act to exercise. And although by Act VI of 1874 the Governor-General of India has directed otherwise, this cannot nullify the directions contained in the Imperial Act, because the Governor-General in Council is expressly prohibited by Section 22 of 24 & 25 Vict., c. 67, from making any law or regulation which shall repeal or in any way affect the provisions of that Act or of any Act passed in that Session of Parliament. Both Acts were passed in the same Session of Parliament, and therefore both Acts, as well as the Letters Patent, are to be read, for this purpose, as if Act VI of 1874 had never passed. This is the argument for the petitioners.

6. To this argument the following objections are taken by Mr. Woodroffe and Mr. Evans who appeared on behalf of the defendants in the suit to oppose the granting of this petition. 1.--That the provisions contained in the Letters Patent are not any of them provisions of the 24 & 25 Vict., c. 104, and are therefore not at all within the restriction contained in Section 22 of 24 & 25 Vict., c. 672.--That by the express words of Section 9 of 24 and 25 Vict., c. 104, any power or authority thereby reserved to the High Courts is made subject to the legislative powers of the Governor-General in Council. 3.--That the Letters Patent confer no power on this Court to admit an appeal to the Privy Council. 4.--That the 24 & 25 Vict., c. 104, confers on Her Majesty no power to give an appeal to herself in her Privy Council, and that in so far as she has done so by the Letters Patent, it must be in virtue of her prerogative or of some previous Act of Parliament, and that for this reason also, the restriction contained in Section 22 of 24 & 25 Vict., c. 67, does not apply.

7. It is most convenient to deal with the two last objections first, and I will consider them together. I think it desirable to call to mind what the position of a Judge of this Court is, when sitting here to admit an appeal to the Privy Council. I am speaking of appeals from the decisions of this Court on its appellate side. The position of a Judge admitting an appeal from the decision of this Court in its original jurisdiction may be the same, but the history of the matter is different, and I do not wish to embarrass the case by unnecessary considerations. A Judge sitting here to admit appeals from the decisions of this Court on the appellate side has in the majority of cases no independent authority whatsoever. The case has been finally heard and determined by a Division Bench of this Court, which in theory of law is a decision of the High Court. All that a Judge of this Court can in most cases do after that, is to assist the parties in bringing their appeal before the Privy Council. Of course, an Act of the Imperial Parliament, or a provision of the Letters Patent, issued in pursuance of an Act of Parliament or an order issued by Her Majesty in Council, might confer upon this Court, or a Judge of this Court, not only power to admit or reject an appeal, but might make the right to appeal dependent upon that admission or rejection. But if that has been done in any case whatever, it is certainly only in some one or more of the cases in which this Court has power to declare that the case is a fit one for appeal: and this class of cases is now out of

consideration. Moreover, whether the Governor-General in Council has or has not the power to restrict by legislation the right of appeal to the Privy Council, he has never yet thought fit to do so. In all legislation upon the subject, including Act VI of 1874, full and unqualified exercise of the sovereign's pleasure in the admission or rejection' of appeals has been preserved. The question before me therefore does not touch the right of appeal at all; it only touches the proceedings of this Court in forwarding the appeal.

8. The appeal to the Privy Council from the Court of Sudder Dewanny Adawlut (which this Court on its appellate side represents) was granted by the 21 Geo. III, c. 70. Probably it exists independently of that statute--*Salik Ram v. Azim Ali Beg* 8 Moore's I.A. 274. But as Mr. Ritchie clearly points out in an opinion quoted at length in the report to which I have just referred, the Courts here have no power to admit or allow an appeal unless expressly authorized to do so by competent authority. I am very glad to find an opinion I had myself formed supported by that of so able and experienced a lawyer. The power to admit an appeal was (as far as I am aware) first conferred upon the Sudder Dewanny Adawlut by Reg. XVI of 1797, Section 2[1]; certain restrictions were placed upon the exercise of that power by the orders of Her Majesty in Council of 10th April 1838, passed in pursuance of 3 & 4 Will. IV, c. 41; and the practice of the Court in the admission of appeals has also been regulated by certain rules of the Court itself, made by the Sudder Dewanny Adawlut on the 17th December 1858, and by this Court on the 30th of July 1870. But there is nothing whatever in 24 & 25 Vict., c. 67, which would prevent the Governor-General in Council altering or repealing any of those provisions.

9. It is argued that the words 'subject always to such rules and orders as are now in force' in Clause 39 of the Letters Patent, incorporates those provisions into the Letters Patent, and so removes them from the sphere of legislation by the Governor-General in Council. I shall hereafter state other reasons why I do not think this to be the case. Apart from other considerations I think the contention is well founded that Clause 39 of the Letters Patent was not inserted in pursuance of the 24 & 25 Vict., c. 104. The Queen was only empowered by this Act to establish by Letters Patent a High Court of Judicature at Port William in Bengal, and similar

Courts elsewhere in India. The power contained in 13 Geo. III, c. 63, to give by the Letters Patent a right of appeal to the Privy Council, is not repeated in 24 & 25 Vict., c. 104, and I do not see in the later Act any words from which such a power could be inferred. I do not say that these provisions in the Letters Patent are therefore invalid, all I say is that they do not rest for their authority upon 24 & 25 Vict., c. 104. This is further shewn by the unlimited power reserved to Her Majesty by Clause 39 to alter the provisions of that clause at any future time, which would be contrary to Section 17 of the 24 & 25 Vict., c. 104, if she were acting in pursuance of that statute. I consider, therefore, that even if all the other propositions upon which the argument for the petitioners is founded are correct, still it is not established that the admission of an appeal to the Privy Council is one of those powers which this Court is by the first part of Section 9 of 24 & 25, Vict., c. 104, commanded to exercise. I think its existence is entirely independent both of that Act and of the Letters Patent.

10. I think it right, however, not to leave the rest of the argument unnoticed, which bears upon the general construction of the 24 & 25 Vict., c. 104, and the 24 & 25 Vict., c. 67. I agree with a good deal that Mr. Kennedy has said upon this subject, though I do not put exactly the construction upon these two Acts which he contends for. I understand him to argue that no powers which the Letters Patent profess to confer upon this Court can be touched by the Governor-General of India in Council whether they be new or old. Mr. Kennedy admits that this is contrary to the ruling in *Queen v. Meares* 14 B.L.R. 106 which he considers to lay down that the Governor-General of India in Council has unlimited legislative authority in regard to all the provisions of the Letters Patent. This has I believe been generally considered to be the result of the reasoning in the decision of *Queen v. Meares* 14 B.L.R. 106 and had I been able to accept that reasoning in its entirety, there would have been no necessity for me to do anything more than to express my assent to it and upon the authority of this case to overrule any contrary contention. But though I fully concur in that decision I have considerable difficulty in accepting the reasoning by which it is supported if it really goes to that extent. And as I am compelled to refer to *Queen v. Meares* 14 B.L.R. 106 it is, 'I think, better that I should state frankly wherein that difficulty consists.

11. In order to do this it is necessary that I should state my own view of the 24 & 25 Vict., c. 104, It seems to me to have been the intention of the framers of that Act to make it clear by the Act itself what were the future powers of the Indian Legislature in relation to the High Courts. There are three sections in which reference is made to legislation in India, the 9th (in the second clause) the 11th and the 13th. The two first preserve to the Governor-General of India in Council and to him alone the same legislative powers as he had before. The last confers a new power on the High Court and confers a new power on the Governor-General in Council and on him alone to legislate in respect of it. It would therefore seem that Parliament had signified in what respects the High Court should be subject to legislative authority in India, and what that legislative authority should be. And it is not unimportant to observe that this (with the insignificant exception contained in Section 13) is precisely the legislative authority which existed before the Act was passed.

12. But if we accept the reasoning in the decision of *Queen v. Meares* 14 B.L.R. 106 to the extent to which it has been pressed, we shall find that the legislative authority over the High Courts in India is wholly different from that indicated by 24 & 25 Vict., c. 104, and from what it was before, and that it has been changed, not directly, as we should expect if any change were intended, but indirectly. It is said in *Queen v. Meares* 14 B.L.R. 106 that the meaning of the words any provisions of 'any Act passed in the present Session of Parliament or hereafter to be passed' in Section 22 of 24 & 25 Vict, c. 67, is 'provisions in the Act (i.e., 24 & 25 Vict., c. 104) itself, and does not include provisions in the Letters Patent. If that means that under the words of Section 22 itself all the provisions in the Letters Patent can be altered by the Governor-General in Council, and that for this purpose it is not necessary to resort to chapter 104 at all, then it would seem, that not only the Governor-General in Council, but the Governors of the other Presidencies in Council, and the Lieutenant-Governor of Bengal in Council, may legislate for the High Courts. For if Section 22 contains no restriction in this respect, neither does Section 42. Surely if that had been intended, Sections 9 and 11 would not have contained provisions which in that case would have been not only unnecessary, but positively misleading. If that had been the intention, either 24 and 25 Vict., c. 104, would have been wholly silent about legislation in India, leaving that matter as

it stood under c. 67; or else wherever the Council of the Governor-General was mentioned the other Councils would have been mentioned also; and the words 'subject and without prejudice to &c.;' in the second part of Section 9 would have been made to govern the whole clause.

13. I admit the force of the observation in *Queen v. Meares* 14 B.L.R. 106 that it could not have been intended that the powers of the Court if inserted in the Letters Patent should be beyond the reach of the Governor-General in Council, whilst the same powers, if not inserted in the Letters Patent, should be subject to his legislative control. But it seems to me that it is not necessary in order to avoid this result to hold that Section 22 of 24 and 25 Vict., c. 67, does not contain any prohibition against interfering with the provisions of the Letters Patent. That section must be read with Sections 9 and 11 of the 24 and 25 Vict., c. 104. By the express words of Section 9 of 24 and 25 Vict., c. 104, 'save as by such Letters Patent may be otherwise directed' the former powers are reserved to this Court by the Act, provided the Letters Patent do not interfere with them, and as to all these powers the Governor-General in Council is expressly empowered to legislate. I think we hold these former powers under the Act, and not under the Letters Patent, and that the Act itself has rendered them subject to the legislative control of the Governor-General in Council. If (as was possible) Her Majesty had not chosen to confer any new power or authority on the High Court, they would then have remained in all respects subject as before to the legislative control of the Governor-General in Council. On the other hand, if she chose (as indeed was actually done) to leave all the old authority substantially as it was with some slight changes, in that case the control of the Governor-General in Council is to some extent curtailed. The line appears to me to be drawn exactly as a Supreme Legislature might be expected to draw it. Whatever is left untouched by the Letters Patent to be thereafter issued, the Indian Legislature may deal with as before; but whatever Her Majesty may chose to alter or create, that the Legislature must not interfere with. This was necessary even though the changes to be introduced by Her Majesty might turn out to be few and trivial, because otherwise Parliament would have been delegating at the same moment to two separate persons, Her Majesty in Council and the Governor-General in Council, co-ordinate authority to deal with the very same subject-matter, a condition of things clearly to be avoided.

When the old powers of the abolished Courts were merely repeated in the Letters Patent, it was, of course, understood by Her Majesty that these were subject to be altered by the Governor-General in Council, and very likely it is because this is done to so very large an extent, that the legislative powers of the Governor-General in Council are in the 44th clause of the Letters Patent expressly recognized.

14. I repeat that this view does not touch the decision of *Queen v. Meares* 14 B.L.R. 106; it only affects the reasoning by which it is supported. In the view that I take of the matter, the provision of the Letters Patent there in question being one which left the jurisdiction of this Court exactly where it was before, it was by the second clause of Section 9 expressly made subject to the legislative control of the Governor-General of India in Council.

15. On the other hand, it seems to me scarcely likely that if Parliament had intended that the Provincial Councils should have full power to legislate for the High Courts, it would have excluded those Councils from the control of these Courts in so insignificant a matter as the exercise of the powers of the Court by single Judges or Division Benches, which is an express provision of the Act itself (Section 13), and therefore can only be touched by the Governor-General in Council, who is alone mentioned in that section.

16. A strong argument against any construction of the Acts of Parliament of 1861 which would place the High Courts under the control of the Provincial Legislatures appears to me to be afforded by the Act passed ten years afterwards (34 and 35 Vict., c. 34). That Act recites that it is expedient that the power of making laws and regulations conferred on Governors of Presidencies in India in Council should in certain respects be extended, and then proceeds to enact that the Provincial Legislatures may confer jurisdiction over European British subjects upon Magistrates in certain cases. This, as is pointed out, in *Queen v. Meares* 14 B.L.R. 106 is inconsistent with the Governor-General in Council not having the like power. It is equally inconsistent with the Provincial Legislature having previously had such general authority as, it has been said, results from the construction of the Acts adopted by the reasoning in *Queen v. Meares* 14 B.L.R. 106.

17. But though I cannot go the length of holding that the powers of the High Court in India are subject to the legislative control of all the Provincial Councils, or of the Governor-General in Council in all respects, I am still of opinion, that they are to a considerable extent subject to the legislative control of the Governor-General in Council, not under c. 67, Section 22, but under c. 104, Sections 9 and 11. Mr. Kennedy's argument, therefore, in my opinion, fails on the second objection taken to it by the defendants, though not on the first. Even if the power to admit an appeal were conferred by the Letters Patent, it is not a new power, and it has therefore in my opinion been made by Parliament expressly subject to the legislative control of the Governor-General in Council, but not of any other legislative authority in India.

18. It was argued against this view of the legislative authority of the Governor-General in Council, that it is indicated by a comparison of the phraseology of Section 22 of the 24 and 25 Vict., c. 67, with the phraseology of the 3 and 4 Will. IV, c. 85, Section 43, that the High Courts were not to be subject to any legislative authority in India. The difference in the two sections is, that whilst the former Act expressly declares all Courts to be so subject, in the latter Act these words are omitted. I do not think that it is a sound method of construing Acts of Parliament to control the effects of general powers which are conferred, because special powers are not conferred. To confer any special powers was in this case wholly unnecessary, and the Legislature may well have thought when passing the second Act that it was a mere waste of words to do so. Nor indeed does this argument, even if sound, affect my view of the matter, for the power of the Governor-General in Council to legislate for the High Courts rests in my opinion not on the 24 and 25 Vict., c. 67, but on the 24 and 25 Vict., c. 104.

19. For all these reasons it seems to me that this application must be rejected with costs.

[1]

[Section 2: All persons desirous of appealing from a judgment of the Court of Sudder

Dewanny Adawlut to the King in Council, under the authority

Petitions of appeal to for this purpose contained in the 21st section of the Statute 21,

the King in Council shall George III, Cap. LXX are required to present their petition of

be presented to the Sudder appeal to the Court of Sudder Dewanny Adawlut, either them-

Dewanny Adawlut within selves or through one of the authorised pleaders of that Court,

six months; and such duly empowered to make such petition in their behalf, within six

appeal to be admitted, pro- calendar months from the date on which the judgment appealed

vided the judgment appeal- against may have been passed; and provided also the judgment

ed against shall exclusive appealed against shall, exclusive of costs of suit, be of the value

of costs be 5,000 sterling. of five thousand pounds (to be calculated as hereinafter ment-

ioned) the Court of Sudder Dewanny Adawlut are to admit the

appeal, and proceed upon it as directed in the following sections, of this regulation under the

several restrictions therein prescribed.]