

Privy Council Appeal No. 105 of 1938

Bengal Appeal No. 70 of 1937

Errol Mackay and others - - - - - *Appellants*

v.

Oswald Forbes - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM
IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 10TH NOVEMBER, 1939

Present at the Hearing:

LORD THANKERTON

SIR GEORGE RANKIN

SIR PHILIP MACDONELL

[*Delivered by* LORD THANKERTON]

This is an appeal from a judgment and order of the High Court of Judicature at Fort William in Bengal, in its civil appellate jurisdiction, dated the 11th April, 1938, which allowed in part the appeal of the present respondent from the judgment and order of the said High Court, in its original jurisdiction, made by Panckridge J. on the 22nd July, 1937.

The respondent raises a preliminary point as to the jurisdiction of this Board to entertain this appeal in view of the provisions of section 205 of the Government of India Act, 1935, which provides as follows:—

“ 205.—(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or withhold a certificate accordingly.

“ (2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave.”

This section imposes on the High Court the duty of considering and determining in every case, as part of its judgment, decree or final order, the giving or withholding of the certificate. On such determination the jurisdiction to entertain an appeal from such judgment, decree or final order depends, and, manifestly, such determination, whether it involves the granting or withholding of a certificate, should be recorded, not only for the information of the parties, but—a matter of equal importance—also for the certification of this Board and the Federal Court as to their jurisdiction to entertain an appeal. No such record appears in the present case, nor is there anything to suggest that the matter was considered by the High Court Bench which delivered the judgment and order of the 11th April, 1938. The same is true of the High Court Bench which certified this case as a fit one for appeal to His Majesty in Council on the 15th June, 1938, and which was differently constituted. But, as their Lordships have already indicated, the statutory duty fell to be discharged by the Bench which delivered the judgment and order of the 11th April, 1938.

In the present suit the appellants seek an order for appointment of the Official Trustee of Bengal to be trustee of the estate of one Alexander John Forbes deceased under the provisions of section 10 of the Official Trustees Act (Act II of 1913), or, alternatively, for appointment of the said Official Trustee under section 35 of the Indian Trustees Act, 1866. The estate of the deceased consisted partly of immoveable property situate outside the Division of Bengal.

The Official Trustees Act, 1913, was amended by the Government of India (Adaptation of Indian Laws) Order, 1937, which was made by virtue of section 293 of the Government of India Act, 1935, and came into force on the 1st April, 1937. The present writ of summons was taken out on the 5th May, 1937. Panckridge J., who made the order of the 22nd July, 1937, did not consider the Order in Council of 1937, but it was fully considered by the Appellate Bench (Costello and Lort-Williams JJ.), and it will be sufficient to quote some short passages from their judgment:—

“ We are quite satisfied that had the attention of the learned Judge been drawn to the alteration effected by means of the Order in Council his decision would in all probability have been otherwise than what it was. . . . The question whether the Court can appoint the Official Trustee of Bengal as trustee over properties outside the Province seems to depend upon the provisions of section 3 as amended by the Order in Council and section 10 of the Official Trustees Act. . . . In other words, we think that under the provisions of the Act as it now stands this Court is not entitled to stretch its arms, if I may use the expression, beyond the territorial limits of its jurisdiction. The result is that we think that the order made by Mr. Justice Panckridge cannot stand in so far as it relates to any property not lying or not situate within the territorial jurisdiction of the Court. Mr. Banerji sought to argue that there is ample power in the Court under the general provisions of the Indian Trustees Act. I do not think it necessary to consider that aspect of the matter. This petition was essentially and primarily concerned with the appointment of the Official Trustee as such and the matter is one which quite clearly falls to be decided under the provisions of the Official Trustees Act and that Act alone.”

Section 205 of the Government of India Act is not referred to in the judgment. Counsel for the appellants suggested that the Court may have considered this section and decided to withhold a certificate, though that decision is not expressed. The passages quoted above make this unlikely and in the absence of a certificate their Lordships think that the appeal should be dismissed with costs. If, however, the High Court should hereafter make an order withholding a certificate under section 205, the appellants are to be at liberty to apply to His Majesty in Council to have the present appeal restored. Their Lordships will humbly advise His Majesty accordingly.

With reference to the costs of a petition by the respondent which by the Board's order of the 18th May, 1939, were directed to be paid by him in any event, these will be taxed and set off against the costs that the appellants are by this judgment ordered to pay.

In the Privy Council

ERROL MACKAY AND OTHERS

vs.

OSWALD FORBES

DELIVERED BY LORD THANKERTON

Printed by His Majesty's Stationery Office Press,
POCOCK STREET, S.E.1.

1939