(1878) 06 PRI CK 0001

Privy Council

Case No: None

The Empress		APPELLANT
	Vs	
Burah and another		RESPONDENT

Date of Decision: June 5, 1878

Citation: (1879) 4 ILRPC 172

Hon'ble Judges: Selborne, J. W. Colvile, B. Peacock, M. E. Smith, R. P. Collier, JJ.

Judgement

Selborne, J.

1. This appeal has been brought tinder the following circumstances:

2. In the year 1869 the Indian Legislature passed an Act (No. XXII of 1869), purporting (1) to remove a district called the Garo Hills from the jurisdiction of the Courts of civil and criminal judicature, and from the control of the offices of revenue, constituted by the Regulations of the Bengal Code and the Acts passed by any Legislature then or theretofore established in British India, and from the law prescribed for such Courts and offices by such Regulations and Acts; and (2) to vest the administration of civil and criminal justice within the same territory in such officers as the Lieutenant-Governor of Bengal might, for the purpose of tribunals of first instance, or of reference and appeal, from time to time appoint. This Act was to come into operation on such day, as the Lieutenant-Governor of Bengal should, by notification in the Calcutta Gazette, direct. By the 9th section, the Lieutenant-Governor was empowered "from time to time, by notification in the Calcutta Gazette," to extend, mutatis mutandis, all or any of the provisions contained in the other sections to the Jaintia Hills, the Naga Hills, and such portion of the Khasi Hills as might, for the time being, form part of British India," being, as their Lordships understand, a mountainous district, conterminous towards the east with the Garo Hills.

3. The Lieutenant-Governor of Bengal, by notification in the manner prescribed by this Act, fixed the time at which it should come into operation in the Garo Hills; and

afterwards, by another notification, published in the Calcutta Gazette on the 14th October 1871, he extended all its provisions to the district of the Khasi and Jaintia Hills, declaring the administration of civil and criminal justice within that district to he vested in the Commissioner of Assam, subject to the general direction and control of the Lieutenant-Governor; and adding, that the Commissioner should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of the district: provided that no sentence of death should be carried out without the sanction of the Lieutenant-Governor, and that it should be competent for the Lieutenant-Governor to call for the record of any criminal or civil case, and to pass thereon such orders as to him might seem fit; and that the Deputy Commissioner of the district, and his assistants, the native chiefs and officers, and the subordinate officers of Government, should exercise the same powers as they had hitherto exercised, until otherwise directed.

4. Under this Act and these notifications one Burah (the respondent here), and another person since deceased, wore, in the year 1876, tried by the Deputy Commissioner of the Khasi and Jaintia Hills upon a charge of murder committed within that hill territory. They wore convicted and sentenced to death, hut on the 23rd April 1876 the sentence was commuted by the Chief Commissioner of Assam to transportation for life. On the 9th July 1876 they presented a petition of appeal to the High Court at Calcutta; and a majority of the Judges of that Court (four against three) decided, after argument in Full Bench, that the case fell within their appellate jurisdiction; and they sent for the record of the proceedings with a view to an adjudication thereon. From that decision the present appeal has, by special leave, been brought.

5. The ground on which the majority of the High Court assumed jurisdiction was that the 9th section of the Act of 1869, purporting to authorise the Lieutenant-Governor of Bengal to extend the Act of 1869 to the Khasi and Jaintia Hills, was in excess of the legislative powers of the Governor-General in Council.

6. In the argument before their Lordships, the jurisdiction of the High Court was sought to be supported, not on that ground only, but on two others also, viz., (1) that the Act of 1869 did not, according to its true construction, exclude the jurisdiction of the High Court as to the Garo Hills, and, therefore, could not do so as to the Khasi and Jaintia Hills, assuming them to have been brought within its operation; and (2) that the whole Act of 1869 (at least so far as it might affect the jurisdiction of the High Court), and not Section 9 only, was void and ultra vires of the Indian Legislature. The latter of those arguments had been urged unsuccessfully before the High Court at Calcutta; but the former was not presented to that Court, and was first suggested, at the hearing before their Lordships, by the Junior Counsel for the respondent.

7. Their Lordships will first deal with that argument.

8. It was founded on the proposition that the 4th section of Act XXII of 1869 purports to remove the Garo Hills, not from the jurisdiction of the High Court established by Her Majesty''s Letters Patent under the authority of Imperial Statutes, hut only from that of the local Courts constituted by the Regulations of the Bengal Code or by Acts of the Indian Legislature; and, therefore, that even if the jurisdiction of those local Courts was effectually taken away, and others (constituted by the appointment of the Lieutenant-Governor of Bengal) substituted for them, the appellate jurisdiction of the High Court remained.

9. Assuming (but not deciding) that "the Courts of civil and criminal judicature" mentioned in the 4th section of the Act of 1869 were only the Courts of original jurisdiction established under the Indian Regulations and Acts, their Lordships think that the supposed consequence does not follow. It may be possible that, under the terms of the 8th and 9th sections of the High Courts Act (24 and 25 Vict., c. 104), together with the 27th and 28th sections of the Royal Letters Patent (28th December 1865, under which the Calcutta High Court is constituted), appeals might have gone to that Court from criminal tribunals of first instance established by the Lieutenant-Governor of Bengal in the Garo or the Khasi and Jaintia Hills, if Act XXII of 1869 had made no other provision for such appeals. But the 5th section of that Act distinctly authorized the Lieutenant-Governor to appoint tribunals, not of first instance only, hut also of "Inference and Appeal"; and, by the notification now in question, he has done so, giving the powers of the High Court to the Commissioner of Assam, with an ultimate controlling authority to himself. Unless, therefore, the whole Act of 1869, or the 9th section of that Act, was void, as being in excess of the legislative powers of the Governor-General-in Council, the jurisdiction of the High Court has been excluded.

10. The next question is whether the whole Act of 1869 is void? It is said to be so, because the jurisdiction of the High Court was established by the Act of the Imperial Parliament already referred to (24 and 25 Vict., c. 104), which passed in the same Session with the Indian Councils Act; and because by Section 22 of the Indian Councils Act (24 and 25 Vict., c. 67), the power of the Governor-General in Council "to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force, or hereafter to be in force, in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places or things whatever within the said territories, is qualified by certain conditions, one of which is that the Governor-General shall not have the power of making any laws or regulations which shall repeal, or in any way affect, any of the provisions of any Act passed in this present Session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty''s Indian territories, or the inhabitants thereof." None of the other conditions expressed in the Act apply to this case.

11. The question, therefore, is whether an exercise of the legislative power of the Governor-General in Council, purporting to exclude the jurisdiction of the High Court within these particular districts, is inconsistent with any of the provisions of 24 and 25 Vict., c. 104?

12. Now it appears to their Lordships, from the express terms of the Act 24 and 25 Vict., c. 104, that (unless there should be anything to the contrary in the Letters Patent under which the High Court is established) the exercise of jurisdiction in any part of Her Majesty''s Indian territories by the High. Courts was meant to be subject to, and not to be exclusive of, the general legislative power of the Governor-General in Council, as to "all Courts of Justice whatever."

13. By the 1st section of that Act, Her Majesty was authorized, by Letters Patent, "to erect and establish a High Court of Judicature for the Bengal division of the Presidency of Fort William," and others at Madras and Bombay. The next six sections relate to the qualifications, tenure of office, and emoluments, &c., of the Judges of such Courts. The 8th section abolishes, from the date of their establishment, the previously existing Supreme and Sudder Courts in the several Presidencies. The material provisions as to jurisdiction are contained in the 9th, 11th, and 12th sections. The 10th and 18th may be laid out of the case, because they were both repealed by a subsequent Act of 1865 (28 and 29 Vict., c. 15). But, as some argument was founded on the 18th, it may be fit here to observe that, by that section, Her Majesty was empowered to make Orders in Council transferring any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts, "and generally to alter and determine the territorial limits of the said several Courts," and that the same power was, in substance, conferred upon the Governor-General of India in Council not in his legislative, but in his executive, capacity by the Repealing Act of 1865.

14. The 9th section of 24 and 25 Vict., c. 104, expressly says that each of the High Courts shall, within its own Presidency, have such civil, criminal, and other jurisdiction "as Her Majesty may, by Her Letters Patent, grant and direct"; and that, "save as by such letters Patent may be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council," the High Court in each Presidency shall have all the jurisdiction of the former Supreme and Sudder Courts abolished by Section 8. The authority of the Indian Legislature over the jurisdiction of the High Courts (so far, at all events, as the exercise of that authority might be consistent with Her Majesty''s Letters Patent) is here distinctly recognized.

15. The 11th section is similar in of feet. It enacts that, after the establishment of the High Courts, every provision in any Act of Parliament, Order in Council, Charter, or Act of the Legislature of India which had been applicable to the Supreme Courts of Bengal, Madras, and Bombay, shall be applicable to the High Courts, as far as may be consistent with that Act itself and the Letters Patent to be issued under it, "and

subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General of India in Council." The 12th section contains nothing of importance to the present question.

16. The Act of 1865 (under which the Calcutta Letters Patent of the 28th December 1865 were actually issued) concludes with an express saving of "the power of the Governor-General in Council at meetings for the purpose of making laws and regulations."

17. Lastly, by the Letters Patent of the 28th December 1865 (Clause 44), it is "ordained and declared 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."

18. So far, therefore, from being in contravention of any of the provisions of the Statute 24 and 25 Vict., c. 104, or of the Letters Patent issued under that Statute (as altered by the Act of 1865), their Lordships find that such an exercise of legislative authority by the Governor-General in Council, as might remove any place or territory from the jurisdiction of the High Court at Calcutta, is expressly contemplated and authorised both by those Statutes and by the Letters Patent themselves. Their Lordships, under those circumstances, agree with the High Court, that Act No. XXIII of 1869 was, in its general scope, within the legislative power of the Governor-General in Council; and they are therefore brought to the consideration of the more limited question, whether, consistently with that view, the 9th section of that Act ought nevertheless to be held void and of no effect.

19. The ground of the decision to that effect of the majority of the Judges of the High Court was that the 9th section was not legislation, but was a delegation of legislative power. In the loading judgment of Mr. Justice Markby, the principles of the doctrine of agency are relied on; and the Indian Legislature seems to be regarded as, in effect, an agent or delegate, acting under a mandate from the Imperial Parliament, which must in all cases be executed directly by itself.

20. Their Lordships cannot but observe that if the principle thus suggested were correct, and justified the conclusion drawn from it, they would be unable to follow the distinction made by the majority of the Judges between the power conferred upon the Lieutenant-Governor of Bengal by the 2nd and that conferred on him by the 9th section. If, by the 9th section, it is left to the Lieutenant-Governor to determine whether the Act, or any part of it, shall be applied to a certain district, by the 2nd section it is also left to him to determine at what time that Act shall take effect as law anywhere. Legislation, which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may, with quite as much reason, be called incomplete, as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the

external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem, a fortiori, to be an act of legislation to bring the law originally into operation by fixing the time for its commencement.

21. But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it; and it can, of course, do nothing beyond the limits which circumscribes these powers. But, when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

22. Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority a now legislative power, not created or authorized by the Councils Act. Nothing of that kind has in their Lordships'' opinion been done or attempted in the present case. What has been done is this. The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under now Courts and offices, to be appointed by, and responsible to, the Lieutenant-Governor of Bengal, leaving it to the Lieutenant-Governor to say at what time that change shall take place; and also enabling him not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative authority, "in the other territories subject to his government." The legislature determined that so far a certain change should take place; but that it was expedient to leave the time and the manner of carrying it into effect to the discretion of the Lieutenant-Governor; and also that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor. This having been done as to the Garo Hills, what was done as

to the Khasi and Jaintia Hills? The Legislature decided that it was fit and proper that the adjoining district of the Khasi and Jaintia Hills should also be removed from the jurisdiction of the existing Courts, and brought under the same provisions with the Garo Hills, not necessarily and at all events, but if and when the Lieutenant-Governor should think it desirable to do so; and that it was also possible that it might be expedient that not all, but some only, of those provisions should be applied to that adjoining district. And accordingly the Legislature entrusted, for those purposes also, a discretionary power to the Lieutenant-Governor.

23. Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (No. XXII of 1869) itself. The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may (in their Lordships'' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it. Many important instances of such legislation in India are mentioned in the opinions of the Chief Justice of Bengal, and of the other two learned Judges who agreed with him in this case. Among them are the great Codes of Civil and of Criminal Procedure (Acts VIII of 1859, XXIII of 1861, and XXV of 1861).

24. By Section 385 of the Code of Civil Procedure it is provided that "this Act shall not take effect in any part of the territories not subject to the general Regulations of Bengal, Madras, and Bombay, until the same shall be extended thereto by the Governor-General in Council" (not in his legislative capacity), "or by the Local Government to which such territory is subordinate, and notified in the Gazette." Section 445, in the Code of Criminal Procedure is precisely similar, And by Section 391 of Act XXIII of 1861, when any such extension as that authorized by Section 385 of the Act of 1859 is made, it may, with the previous sanction of the Governor-General in Council (not in his legislative capacity), be declared to be "subject to any restriction, limitation, or proviso which the Local Government may think proper." If their Lordships were to adopt the view of the majority of the High Court they would (unless distinctions were made on grounds beyond the

competency of the judicial office) be casting doubt upon the validity of a long course of legislation, appropriate as far as they can judge, to the peculiar circumstances of India great part of which belongs to the period antecedent to the year 1861, and must therefore (as Sir Richard Garth well observed) he presumed to have been known to, and in the view of, the Imperial Parliament, when the Councils Act of that year was passed. For such doubt their Lordships are unable to discover any foundation, either in the affirmative or in the negative words of that Act.

25. Their Lordships will, therefore, humbly advise Her Majesty that the appeal in the present case should be allowed, and the judgment of the High Court reversed.