
(1874) 08 CAL CK 0001

Calcutta High Court

Case No: Criminal Appeal No. 101 of 1874

Queen

APPELLANT

Vs

Gerald Meares

RESPONDENT

Date of Decision: Aug. 13, 1874

Judgement

Morris, J.

In the view which I take on the merits, it is unnecessary for me to say more on the question of jurisdiction that has been raised than that, in my opinion, the Magistrate had jurisdiction to try the case.

Sir Richard Couch, Kt., C.J.

Before giving my opinion as to whether the conviction ought to be reversed, I will dispose of the question of the jurisdiction of the Magistrate.

2. By the Indian Councils Act, 1861 (24 & 25 Vict., c. 67), s. 22, it is provided that "the Governor General in Council shall have power at meetings for the purpose of making laws and regulations, and subject to the provisions therein contained, to make laws and regulations for repealing, amending, or altering any laws or regulations whatever then in force, or thereafter to be in force in the Indian territories then 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 and things whatever within the said territories, and for all servants of the Government of India within the dominion of Princes and States in alliance with Her Majesty."

3. These words are as general as they can well be, and undoubtedly gave to the Legislative Council of the Governor General power to make laws for all Courts of Justice, including the High Court, and for all persons, whether British or native. It is then provided that the Governor General in Council should not have the power of making any laws or regulations which shall repeal, or in any way affect any of the provisions of that Act or any provisions of certain other Acts which are named, or of any Act passed in that session of

Parliament, or there" after to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof.

4. Now the Act for establishing the High Courts was passed in the same session of Parliament; and the question is whether the provisions in the new Criminal Procedure Code giving jurisdiction to Magistrates over European British subjects come within the words "affecting the provision of any Act" passed in the session of Parliament in which the Indian Councils Act was passed. The 9th section of 24 & 25 Vict., c. 104, the Act for establishing High Courts of Judicature in India, provides that "each of the High Courts to be established under the Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may, by Letters Patent, grant and direct, subject, however, to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency towns as may be prescribed thereby; and 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 to be established in each Presidency shall have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the Act at the time of the abolition of such last mentioned Courts." Accordingly to the grammatical construction of this section, the words "subject and "without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council" apply to the provision that the High Court shall have and exercise the jurisdiction of the Supreme Court which was abolished under the Act. They do not apply to the former part of the section. The question then arises, whether the provisions in the Letters, Patent as to the jurisdiction of the High Court are to be considered as provisions of the Act" and therefore coming within the proviso which I have read, that the Governor General in Council should not have the powers of making any laws or regulations which should repeal, or in any way affect, any of its provisions. Now the Letters Patent which were issued after the passing of this Act, provide in the 21st clause that the High Court shall, in respect of all persons beyond the limits of its ordinary original civil jurisdiction, have the jurisdiction which the Supreme Court at Calcutta then had. The Letters Patent did so more than would have been done by the latter part of s. 9, if they had been silent as to the jurisdiction beyond the local limits of the ordinary original jurisdiction.

5. If Her Majesty had said nothing about the jurisdiction beyond those limits, the jurisdiction of the High Court over European British subjects would have been given by the Act by the words which say that the High Court shall have and exercise all jurisdiction which was vested in the abolished Courts.; and by the very words of s. 9, if that had been the case, the jurisdiction over European British subjects would have been subject to the legislative powers of the Governor General in Council. It appears to me to be unlikely that

the Legislature intended that if the jurisdiction was given by the Letters Patent, it should not be subject to the legislative powers of the Governor General in Council, and could only be altered by an Act of the Imperial Legislature but if the Letters Patent omitted to mention it, and it was given by the High Courts Act itself, that it should be subject to those, legislative powers. That appears to me to be unlikely still if we gather from the Act that this was the intention, and it appears plainly to be so, we should be obliged to give effect to it. After consideration of this question, I think that the meaning of the words "any provisions of any Act passed in the present session of Parliament, or hereafter to be passed," is provisions in the Act itself. For instance, there is the qualification of the Judges of the High Court. The Governor General in Council has not power to make an alteration in that. There is an express provision of the Act upon the subject. So also in s. 15, there is a provision giving to the High Court superintendence over the Courts which are subject to its appellate jurisdiction. That again is a provision in the Act which cannot be affected or altered by the Governor General in Council. But I am of opinion that the words "provisions in the Act" do not apply to what is not in the Act itself, but only in the Letters Patent which the Act authorizes to be issued, and which can only be said to be a "provision of the Act" by relation--by what is rather a forced construction, namely, that as the section says that the Courts shall have all the jurisdiction which shall be given by the Letter Patent, whatever is given by them, becomes fixed, and is in the same state as if the words in the Letters Patent had been in the Act itself. I think that was not the intention of the Legislature, and what has occurred subsequently confirms me in that opinion. By s. 42 of the Indian Councils Act, power to make laws and regulations was given to the Governors in Council of the other two Presidencies, and it was provided that they should not "have the power of making any laws or regulations, which shall in any way affect any of the provisions of that Act, or of any other Act of Parliament in force or thereafter to be in force in such Presidency." The difference with respect to them being that they cannot pass an Act, which will affect any Act of the English Legislature in force in India, whereas the Governor General in Council can do so.

6. Two of the Judges of the High Court at Bombay, in the case of *Queen v. Reay* 7 Bom. H.C. Rep., Cr., 6, held that the Legislative Council of Bombay had not power to confer criminal jurisdiction upon Magistrates in the mofussil over British-born subjects. One of them considered that the jurisdiction over British-born subjects was given exclusively first to the Recorder's Court, and through that to the Supreme Court, by 87 Geo, III, c. 142, a. 10 and he held that the Act of the Bombay Legislative Council affected the provisions of that Act. The other learned Judge, Sir Charles Sergeant, appears to have rested his decision upon the ground that the Act of the Bombay Legislative Council affected the provisions of the High Court's Act. But they both agreed in holding that the Act of the Bombay Legislative Council was void. Upon this an Act was passed by the Legislative Council of the Governor General (Act XXII of 1870). In that it is recited that "the Governors of the Presidencies of Fort St. George and Bombay in Council, and the Lieutenant-Governor of Bengal in Council have severally passed divers Acts purporting to apply generally to all persons within the local extent of the said Acts," and "that doubts

have been raised as to the validity of such Acts in so far as they affect to render European British subjects liable to be convicted and punished by tribunals other than the High Courts of Judicature at Fort William, Madras and Bombay, and "for the purpose of removing such doubts," it is enacted as follows:--"Every such Act passed by the Governor of the Presidency of Madras in Council or by the Governor of the Presidency of Bombay in Council, or by the Lieutenant-Governor of Bengal in Council shall, so far as regards the liability of European British" subjects to be convicted and punished thereunder, be and be deemed to have been as valid as if it had been passed by the Governor General of India in Council at a meeting for the purpose of making laws and regulations." The Legislative Council of India, doubts having arisen in consequence of the decision of the Bombay High Court as to the power of the local Legislature to make European British subjects liable to be convicted and punished by other tribunals than the High Courts, by declaring those Acts to be as valid as if they had been passed by the Governor General in Council, assumes that it has the power to subject British subjects to a jurisdiction other than that of the High Courts. This having been done, but there befog skill a difficulty as to the further exercise of the power by the Local Legislatures, Act XXII of 1870 only making valid Acts which had been passed, an Act of the Imperial Legislature was passed, namely, the 34 & 35 Vict., c. 34. This recites that "it is expedient that the power of making laws and regulations conferred on Governors of Presidencies in India in Council by the Indian Councils Act, 34 & 35 Vict., c. 67, s. 42, should in certain respects be extended," and it provides in the 1st section that "no law or regulation heretofore made or hereafter to be made by any Governor or Lieutenant-Governor in Council in India in manner prescribed by the aforesaid Act shall be invalid only by reason that it confers on Magistrates, being Justices of the Peace, the same jurisdiction over European British subjects, as such Governor or Lieutenant-Governor in Council, by Regulations made as aforesaid could have lawfully conferred or could lawfully confer on Magistrates in the exercise of authority over natives in the like cases." Now if it had been supposed by the Imperial Legislature, that the Legislative Council of the Governor General had not the power which it had to alter or affect the jurisdiction over European British subjects, we should expect to find it conferred by this Act, because it cannot be supposed that the Imperial Legislature would give to the Governors in Council of Madras and Bombay a power which it did not intend the Governor General in Council to have. But not only is this not done, but the Act XXII of 1870 of the Governor General in Council is noticed in s. 3, and its validity is recognized by its being provided that the Governors of Madras and Bombay and the Lieutenant Governor of Bengal in Council shall have power to repeal or amend any of the Acts declared by it to be valid. So there is in this Act, 34 & 35 Vict., c. 34, to my mind a clear recognition of the existence of the power of the Governor general of India in Council to subject European British subjects to a jurisdiction other than that of the High Courts. It appears to me to be a Legislative exposition of the meaning of the words in the Indian Councils Act "provisions of the Act or of any Act hereafter to be passed."

7. I am therefore of opinion that there was powers to make the provisions in the new Code of Criminal Procedure relating to European British subjects. An allusion was made

in the course of the argument to a clause in the second Letters Patent of this Court issued in 1865 by which her Majesty declared that the provisions of that Charter are subject to the legislative powers of the Governor General in Council. It appears to me as I intimated in the course of the argument that this is only a declaration what the law was inserted perhaps for the purpose of clearly showing that the jurisdiction was subject to the Indian Legislature. If the decision of the question depended upon whether Her Majesty had power to make this provision, and to subject the provisions in the Letters Patent to the legislative powers of the Governor General, there would be much greater difficulty in it. But my judgment is not founded upon that. I think it is no more than a declaration of what was the state of the law, and what it would have been whether that clause had not been in the Letters Patent.