
(1887) 05 AHC CK 0009
In the Allahabad High Court

Lal Singh and Others

APPELLANT

Vs

Ghansham Singh

RESPONDENT

Date of Decision : 11-05-1887

Acts Referred:

Citation : (1887) ILR (All) 625

Hon'ble Judges : Tyrrell, J;Straight, J;Mahmood, J;John Edge, J;Brodhurst, J

Bench : Full Bench

Final Decision : Disposed Of

Judgement

Mahmood, J.—The fact that Her Majesty has omitted for several years to fill up a vacancy does not alter the constitution of the Court or make it illegal; nor does it amount to altering Section 2 of the Letters Patent. If your argument is correct, supposing a Judge were to die, the whole working of the Court would be brought to a standstill until his successor could be appointed.

2. To comply with the provisions of Section 2, the vacancy must be filled up within a reasonable time. Otherwise the executive could at pleasure alter the constitution of the Court, and even reduce the Court to a single Judge. This cannot have been intended. Section 7 of the Act prescribes the procedure to be followed when a vacancy occurs, but the powers given by the section have not been exercised. The vacancy now in question occurred in 1873.

Tyrrell, J.

3. Probably it was inconsequence of the transfer of jurisdiction in rent cases to the Board of Revenue. It was thought that this would greatly reduce the work of this Court; but that work has, from other causes, been much increased.

4. My argument does not involve the result that a Judge by taking leave alters the constitution of the Court. He is still a member of the Court, and there is no vacancy. Again, I do not dispute that the Court as a body may direct that any of their number may constitute a Full Bench or dispose of any particular class of

cases.

Tyrrell, J.

5. Section 2 of the Letters Patent merely fixes the maximum number of the Judges.

John Edge, Kt., C.J.

6. Section 7 of the Act certainly contemplates the possibility of the Court consisting of a Chief Justice and four Judges, where the Chief Justice dies and a puisne Judge is appointed to officiate as Chief Justice. In such a case the Act does not say that the puisne Judge's place is to be filled up, but only that "it shall be lawful" for the Governor-General in Council to fill it up.

Straight, J.

7. I think that the word "shall" in Section 2 of the Letters Patent is permissive, not imperative. It leaves a discretion to the Crown.

8. "Shall" ought to be construed as imperative, unless there is something in the context to make it merely permissive. If a statute said that a jury "shall" consist of nine persons, a case could not be tried by six. If the Crown, by leaving the vacancy unfilled, diminishes the Court as constituted by the Letters Patent, it evades the limitation of Section 17 of the Act as to revoking the Letters Patent within three years. This period having elapsed without such revocation, the Crown is bound by law to fill up the vacancy.

John Edge, Kt., C.J.

9. The words in Section 2 of the Letters Patent "until further or other provision shall be made by us or our heirs and successors in that behalf" keep alive the powers of the Crown in respect of the constitution of the Court. The exercise of the Crown's power under that section does not appear to me to be affected by Section 17 of the Act. Such an exercise is not "revoking" the provisions of the Letters Patent within the meaning of Section 17. "Revoking" means revoking the authority given by the Letters Patent.

10. The words "further or other provision" are qualified by the words "in accordance with the said recited Act." Section 17 of the Act prescribes the only mode in which the powers conferred by Section 2 of the Letters Patent can be exercised. There is no other provision prescribing any other mode.

John Edge, Kt., C.J.

11. How do you read the words in Section 16 of the Act, "such number of Judges... as Her Majesty from time to time may think fit to appoint"?

12. That also must be read subject to Section 17. "Appoint" does not mean "nominate," hue "declare"--see Letters Patent, Section 2 ("appoint and ordain") and Section 4 ("grant, ordain, and appoint"). If the exercise of this power

involves alteration of any provision of the Letters Patent, the Crown can only issue new Letters Patent for the purpose, and can only do so within three years after the establishment of the Court. Of course, the same result might be attained by legislation either in England or by the Governor-General in Council: Letters Patent, Section 35. *Damodar Gordhan v. Deoram Kamji* I.L. R. I, A. 102: I. L. R. I Bom. 367 shows that where Parliament has prescribed a particular mode of exercising a particular power, all other modes are impliedly forbidden.

Brodhurst, J.

13. In Section 2 of the Letters Patent granted to the Calcutta High Court in 1862 and revoked in 1865, it is said that the Court shall consist of a Chief Justice and thirteen Judges. The section then goes on to appoint a Chief Justice and twelve Judges only. So that the Letters Patent themselves fix the number of Judges, but abstain from making a complete appointment. According to your argument, those actually appointed could not sit or do the work of the Court.

Mahmood, J.

14. The weak part of your argument as regards Section 2 of the Letters Patent appears to me to be, first, that I think the Crown is not bound to fill up a vacancy within any specified time; and secondly, that even if it is so bound and acts illegally in not filling up the vacancy, it does not follow that the constitution of the Court is vitiated, so as to deprive the remaining Judges of all jurisdiction. That must depend upon the construction of the Act and Letters Patent, and there is nothing in either one or the other to suggest any such intention.

15. If so, the executive might legally reduce the Court to a single Judge. I submit that vacancies must be filled up, and though no limit of time is expressly provided, a reasonable time must be understood.

Tyrrell, J.

16. Your argument involves the consequence that the appeal was admitted by a Judge who was incompetent to admit it.

John Edge, Kt., C.J.

17. And that we are incompetent to give you a decree.

18. Yes, but the appeal was at all events properly presented. I have a right to object to its being heard except by the Court constituted under the High; Courts Act and Letters Patent.

19. Mr. G. E. A. Boss, for the Respondent.--The effect of the argument for the appellants is that the appeal cannot be disposed of and the lower Court's decree must stand. I am not concerned to dispute this.

John Edge, Kt., C.J.

20. A preliminary objection was raised to the hearing of this appeal by the

learned Pandit. It was that this Court, such as it is, was not competent to transact the business of a High Court of Judicature for the North-Western Provinces, and that, in fact, it was not legally constituted. In support of that contention, he relied upon Section 2 of the Letters Patent creating this Court. That section is as follows:

And We do hereby appoint and ordain that the said High Court of Judicature for the North-Western Provinces shall, until further or other provision shall be made by Us, or Our heirs and successors in that behalf, in accordance with the said recited Act, consist of a Chief Justice and five Judges, the first Chief Justice being Walter Morgan, Esquire, and the five Judges being Alexander Boss, Esquire; William Edwards, Esquire; William Roberts, Esquire; Francis Boyle Pearson, Esquire, and Charles Arthur Turner, Esquire, being respectively qualified as in the said Act declared.

21. His contention on that section was that as long as the Court did not consist of a Chief Justice and five puisne Judges, the Court did not in fact exist, and consequently the Judges who had been appointed were not competent to exercise any of the functions assigned to the High Court of Judicature of these Provinces.

22. It appears that from 1866 until 1868, the High Court was in fact constituted of a Chief Justice and five puisne Judges. From 1868, I think, down to the present time, there have never been actually five Judges, in addition to the Chief Justice, as the working strength of the Court. What I mean is this, that leaving out of question the Judges who may have been on furlough or leave, and counting the Judges who may have been officiating, there never have been actually five Judges in addition to a Chief Justice. The result, therefore, of that contention of the learned Pandit, would be that all the decisions of this Court since 1868, which have been passed, both in civil and criminal cases, have been extra-judicial and inoperative. Another result of that contention would be this, that even if this Court consisted of a Chief Justice and five puisne Judges, on the death of one of those five Judges, or if one of them was on leave, there being no officiating Judge, the jurisdiction of this Court would cease, and be absolutely determined, until another Judge was appointed, whether permanently or officiating. This is the result to which the argument of the learned Pandit reduces itself.

23. We may take an example: Suppose a Judge proceeds on his furlough, there being no officiating Judge appointed in his place; there is nothing to compel the Sovereign to appoint an officiating Judge in the place of a puisne Judge being absent from the duties of the Court. And as an extreme example, suppose that he is going to England round the Cape of Good Hope or by way of America, the ship by which he sailed is never heard of; and the necessary presumption would be that the Judge had died. If the arguments of the learned Pandit are correct, the result is this: The proceedings of this Court would be lawful up to the death of that Judge, because, though on leave, he would still be a Judge of the High

Court. But it also will result from his arguments that, on the death of that Judge, this Court would cease to have jurisdiction to proceed with the judicial business of these Provinces. I should like to see how that difficulty could be met. There might be no possible means of knowing when the Judge actually died, and what was the date when this Court ceased to have jurisdiction to exercise its judicial functions. The result would be that for months the decisions of this Court might be passed not by a lawfully constituted Court, but by a body of gentlemen sitting here extra judicially. It is quite clear that under 7 of 24 and 25 Vic, Clause 104, this Court can never be left without either an actual or an officiating Chief Justice, and it is also clear from the wording of that section that it would not be compulsory to appoint a puisne Judge in the place of a puisne Judge who either might be on furlough, or absent, or dead, or might have resigned. The words used are: "It shall be lawful for the Governor-General in Council or Governor in Council, as the case may be, to appoint a person...to act as a Judge of the said High Court." These words "shall be lawful" do not indicate that it was intended that it was compulsory to fill up the post of a puisne Judge.

24. Under these circumstances, am I to infer that it was intended that by Section 2 of the Letters Patent, if the Crown did not fill up the vacancy created by the death, retirement, or otherwise of a puisne Judge, the whole judicial powers vested in us should cease to exist? I cannot come to such a conclusion as that.

25. In conclusion, I can only say that, whatever may be the true interpretation of Section 7 of the Charter Act with reference to the duty of the Crown to make provision for a vacancy in the office of a Judge, it seems to me, while, by Section 2 of the Letters Patent, our Court is constituted to be a Court of six Judges, no omission on the part of the Crown to fill up a vacancy u/s 7 of the Act amongst the puisne Judges can operate to discharge or to suspend the jurisdiction and functions of the Chief Justice and subsisting Judges of the Court. I may also add that it is not for me to pass any judgment on the acts of the Crown, but it appears to me that the work of this Court would be more advantageously carried on with the full number of Judges contemplated by the Charter. I am consequently of opinion that the objection raised by the learned Pandit must be overruled, and I hold that this Court has jurisdiction to hear this appeal.

Straight, J.

26. I am of the same opinion.

Brodhurst, J.

27. In this case Mr. Ajudhia Nath, the learned pleader for the plaintiffs appellants, has taken a preliminary objection which is to the following effect, namely: That, Her Majesty by Letters Patent, dated the 17th March 1866, under the Great Seal of the United Kingdom, erected and established a High Court of Judicature for the North-Western Provinces of the Bengal Presidency; that, u/s 2 of the Letters Patent, Her Majesty appointed and ordained that the said High Court "shall, until further or other provision shall be made by Us or Our heirs and

successors in that behalf, in accordance with the said recited Act" (an Act for establishing High Courts of Judicature in India), "consist of a Chief Justice and five Judges;" that a Chief Justice and five Judges named in the same section were appointed and sat for some time; that at other times since 1866 the Court has consisted sometimes of a Chief Justice and three Judges, and that it now consists of a Chief Justice and four Judges; that whenever the Court has, owing to the promotion, retirement, or death of any Chief Justice or Judge, or from any other cause, consisted of less than a Chief Justice and five Judges, its constitution has been illegal, and that every judgment and order passed by it under such circumstances has necessarily been also illegal.

28. The High Court of these Provinces was established twenty-one years ago. The Court has not consisted of a Chief Justice and five Judges since October 1868, so that, if Mr. Ajudhia Nath's contention is correct, only a very small proportion of the business of the Court, since its first establishment, has been legally disposed of.

29. The whole of Section 2 of the Letters Patent for the Noth-Western Provinces, excluding, of course, the description of the Court and the names of the Chief Justice and Judges, is contained word for word in Section 2 of the Letters Patent constituting a High Court of Judicature for the Bengal Division of the Presidency of Fort William. u/s 2 of the Letters Patent of 1862, Her Majesty appointed and ordained that the said High Court "shall, until further or other provision shall be made by Us or Our heirs and successors in that behalf, in accordance with the recited Act, consist of a Chief Justice and thirteen Judges." But immediately afterwards, in the same section, the names of only a Chief Justice and twelve Judges are mentioned. The Letters Patent of the 14th May 1862, apparently were not revoked until the 28th December 1865. If Mr. Ajudhia Nath's argument is correct, the High Court at Calcutta was, as I pointed out at the hearing of the case, not properly constituted until a thirteenth puisne Judge was appointed to it, and it follows that the legal advisers of Her Majesty and the eminent Chief Justice and the twelve learned Judges who took their seats in the Calcutta Court in 1862 were apparently unable to detect the gross blunder made in Section 2 of their Letters Patent.

30. If the learned pleader's argument is sound, the illegal judgments and orders passed by the different High Courts in India during the twenty-five years must amount to tens of thousands.

31. This fact alone should be sufficient to cause us to hesitate in deciding that we ourselves, our predecessors, and the learned Chief Justices and Judges of the other High Courts in India have, during many past years, been deciding all cases, of every description, in an illegal manner; that we are not a properly constituted Court, and that we must now forbear from disposing of any kind of business until a fifth puisne Judge has been duly appointed to the Court.

32. With regard to the legal aspect of the case, I think that a reference merely to

Section 7 of the Royal Charter Act, or the Act of Parliament for establishing High Courts of Judicature in India, will show the unsoundness of the learned pleader's arguments. Section 7 is as follows:

Upon the happening of a vacancy in the office of Chief Justice, and during any absence of a Chief Justice, the Governor-General in Council, or Governor in Council, as the case may be, shall appoint one of the Judges of the same High Court to perform the duties of Chief Justice of the said Court until some person has been appointed by Her Majesty to the office of Chief Justice of the same Court, and has entered on the discharge of the duties of such office, or until the Chief Justice has returned from such absence; and upon the happening of a vacancy in the office of any other Judge of any such High Court, and during any absence of any such Judge, or on the appointment of any such Judge to act as Chief Justice, it shall be lawful for the Governor-General in Council, or Governor in Council, as the case may be, to appoint a person with such qualifications as are required in persons to be appointed to the High Court to act as a Judge of the said High Court, and the person so appointed shall be authorized to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court, and has entered on the discharge of the duties of such office, or until the absent Judge has returned from such absence, or until the Governor-General in Council as aforesaid shall see cause to cancel the appointment of such acting Judge.

33. From this it is evident that when the office of Chief Justice becomes vacant on a Chief Justice leaving his Court on promotion or otherwise, a Judge of the same Court must be appointed by the Governor-General in Council or other properly constituted authority to act in the office of Chief Justice until some person has been appointed by Her Majesty to the office of Chief Justice and has entered on the discharge of the duties of such office, and that a successor to the Judge who has been appointed to officiate as Chief Justice or to any other Judge who may have left the Court on promotion or from other cause, may be temporarily appointed, but need not necessarily be so, and that, even if appointed, the appointment of such acting Judge may be cancelled if the Governor-General in Council or other constituted authority sees cause to do so.

34. For the reasons above stated, I am of opinion that the learned pleader's preliminary plea is not valid, and I concur in overruling it.

Tyrrell, J.

35. I entirely agree with the opinions expressed by the learned Chief Justice and my learned brother BRODHURST.

Mahmood, J.

36. I have arrived at the same conclusion, and it would scarcely be necessary for me to deliver a separate judgment but for the fact that I happen to be the only member of this Bench who does not hold a patent from the Crown, (since the

above judgment was delivered, MAHMOOD, J., has received a patent), and I look upon it as my duty to recognize this circumstance as requiring me to justify the constitution of this Court and my position therein with reference to the action of the local Government in appointing me, His Honour the Lieutenant-Governor being the authority contemplated by Section 7 of 24 and 25 Vic, Clause 104, read with Section 19 of the same enactment.

37. It seems to me perfectly clear that if the argument of the learned Pandit is sound, my appointment is invalid, and I must be regarded as a private individual without any authority to exercise any judicial functions in connection with the lives, liberties, and property of my fellow-beings as a Judge of this Court. The authority under which I sit here is the order of His Honour the Lieutenant-Governor, which I hold in my hand, and which runs as follows:

No. 803/11-412-93-24 of 1887. Notification, Appointment Department, N.-W. P. and Oudh. Dated the 24th February 1887. Appointment. In exercise of the powers conferred upon him by the Act of Parliament, 24 and 25 Vic, Clause 104, the Hon^{ble} the Lieutenant-Governor and Chief Commissioner has been pleased to appoint Mr. Saiyid Mahmood, Barrister-at-Law, District Judge of Rae Bareilly, to act as Puisne Judge of the High Court of Judicature for the N.-W. Provinces, on the retirement of the Hon^{ble} R.C. Oldfield, until further orders. By order, etc. (Sd.) J. Woodburn, Chief Secretary to Government, N.-W. Provinces and Oudh.

38. This notification was published in the official Gazette of the local Government dated the 26th February 1887, and we can take judicial notice of it under Clause (7) of Section 57 of the Evidence Act (I of 1872). Moreover, the notification was sent to me personally under the signature of the Chief Secretary to the Local Government; and the argument of the learned Pandit involves the full length of the contention that, because the constitution of the Court is illegal, therefore no power was vested in the local Government to appoint me to act as a Judge of this Court. In order to dispose of this contention, it is necessary to consider the legal authority under which this Court was originally established, the constitution provided therefor, and the power created by the law in connection with the filling up of vacancies among the Judges.

39. I may take it as a well-established proposition of law that, under the British constitution, an Act of Parliament was necessary to empower Her Majesty to establish a High Court such as this. Such power was conferred by what has been called the Charter Act, the statute 24 and 25 Vic, Clause 104. The enactment was primarily intended to apply only to the Presidency High Courts, but Section 16 of the statute gave special power to Her Majesty in the following terms:

It shall be lawful to Her Majesty, if at any time hereafter Her Majesty see fit so to do, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in India not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number

of other Judges, with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinbefore mentioned, as Her Majesty may from time to time think fit and appoint, and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any such jurisdiction, powers, and authority as under this Act is authorized to be conferred on or will be vested in the High Court to be established in any Presidency hereinbefore mentioned, and subject to the directions of such Letters Patent. All the provisions of this Act having reference to the High Court established in any such Presidency, and to the Chief Justice and other Judges of such Court, and to the Governor-General or Governor of the Presidency in which a High Court is established, shall, as far as circumstances may permit, be applicable to the High Court established in the said territories, and to the Chief Justice and other Judges thereof, and to the person administering the government of the said territories.

40. In the exercise of the power conferred by this section Her Majesty, by Her Royal Letters Patent dated the 17th of March 1866, established this High Court, and by Section 2 of the said Letters Patent Her Majesty ordained that the constitution of the Court shall consist of a Chief Justice and five Judges. The first Chief Justice and Judges appointed are named in the section, and we are all naturally familiar with their names, and their judgments have always been held to be authoritative and valid. The first appointment of the Judges of this Court being fully in conformity with Section 2 of the Letters Patent as to the constitution of the Court, the question does not arise whether or not the Court was originally properly constituted. Indeed, the learned Pandit's argument does not necessitate our considering the hypothetical question whether this Court would have been properly constituted if the original appointments of Judges were less than the number mentioned in Section 2 of the Letters Patent.

41. But the question that does arise is whether in case of death, resignation, removal, etc., which, by causing a vacancy, would reduce the number of Judges, there is any authority to maintain that either the Crown or the Government is bound to fill up the vacancy within any definite period. The learned Pandit fully realized the importance of this question, and the argument which he addressed to us amounts to a contention that because by Section 17 of 24 and 25 Vic, Clause 104, Her Majesty's power to alter the constitution of the High Courts is limited to a specific period of three years (which was extended to the 1st January 1866, by Section 1 of 28 Vic., Clause 15), therefore Her Majesty as well as the Government, in omitting to appoint a sixth Judge to this Court, has committed a fraud upon the statute.

42. Now, in the first place, as to Section 17 of the statute, I am not prepared to hold that these provisions are in any manner applicable to the points now before us; because Her Majesty has not altered the constitution of this Court nor has she exceeded the limitation mentioned in that section, modified as it has been by Section 1 of 28 Vic, Clause 15. The section is not, therefore, applicable to

omissions to fill up vacancies caused by accidents such as those to which I have referred. But even if it were so, from such knowledge of the English constitutional law as I may claim, I am not aware of any such plea being raised as asking Her Majesty's Judges to hold that Her Majesty, under whose especial delegation we are exercising judicial functions, has committed a fraud upon the statute. Nor am I aware of any ease in which a writ of mandamus has been issued against the Sovereign in connection with the exercise of the Royal prerogative.

43. The real question, then, resolves itself into this: a vacancy having occurred in the Court reducing the number of Judges originally appointed u/s 2 of the Letters Patent, whether the omission by Her Majesty and the local Government to fill up the vacancy has vitiated the constitution of this Court, so as to deprive it of its authority as the highest Court of Justice of these Provinces. I have already said that the action of the Crown in omitting to fill up any vacancy, being a matter relating to the exercise of the Royal prerogative, cannot form the subject of adjudication by us; but so far as the Government is concerned, the terms of Section 7 of the statute 24 and 25 Vic, Clause 104, require consideration, and I am all the more anxious to interpret that section, because it is by virtue of that provision that I am at present acting as a Judge of this Court, a vacancy having occurred in consequence of the retirement of Mr. Justice OLDFIELD, and Government having filled up that vacancy by appointing me under the power conferred upon it by that section.

44. Now, in the first place, there is not in that section, nor, indeed, anywhere else in the statute, any legislative provision requiring Her Majesty to fill up a vacancy among the Judges within any specified period. What the section says is that "upon the happening of a vacancy in the office of Chief Justice," the Government "shall appoint one of the Judges of the same High Court to perform the duties of Chief Justice of the said Court until some person has been appointed by Her Majesty to the office of Chief Justice." Then the section goes on to say that "upon the happening of a vacancy in the office of any other Judge of any such High Court...it shall be lawful" for the Government "to appoint a person, with such qualifications as are required in persons to be appointed to the High Court, to act as a Judge of the said High Court, and the person so appointed shall be authorized to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court, and has entered on the discharge of the duties of such office, or until the absent Judge has returned from such absence, or until the Governor-General in Council, or Governor in Council, as aforesaid, shall see cause to cancel the appointment of such acting Judge.

45. Now it is very important to note that whilst in connection with the appointment of Chief Justices the statute employs the expression "shall appoint," the same section, in connection with the appointment of puisne Judges, uses the phrase "it shall be lawful" for the Government to fill up the vacancy. The change

in the language is remarkable, and I understand it to be a well-known rule of construing statutes that when in one and the same section which relates to any special purpose two expressions of such different meanings are employed, the Legislature must betaken to have intended a distinction. This being so, the phrase "it shall be lawful" cannot be held to mean that it was imperative upon the Government to fill up any vacancy in the office of a puisne Judge of this High Court. Nor is there any limitation of time within which the Government is required to fill up a vacancy, if it chooses to exercise the power conferred upon it by Section 7 of the statute. It seems to me, therefore, clear that neither the Crown nor the Government is bound to fill up a vacancy in the office of a puisne Judge within any specified period, and, so far as the statute is concerned, the Government may leave any number of vacancies in the office of a puisne Judge unfilled for any period, be it a day, a week, a month, a year or more. My interpretation of the section therefore goes the full length of holding that even if the Crown and the Government in the exercise of their statutory powers omitted to fill up vacancies in this Court and left the Court with a Chief Justice and only one puisne Judge, the Court would still continue to possess the judicial authority which it now possesses in connection with the lives, liberties and property of Her Majesty's subjects within the jurisdiction of this Court. On the other hand, if the Government does, as a matter of fact, exercise the power u/s 7 of the statute, as it has done in my case, my appointment is legally valid, and I can exercise all the powers and perform all the duties of a Judge of this Court "until some person has been appointed by Her Majesty to the office of Judge of the same Court," or the Government "shall see cause to cancel the appointment." Further, the word "until" does not, as used in the section, convey to my mind any definite period of limitation, nor is there any other limitation imposed upon the exercise of the power, beyond the restriction that the person appointed should possess such qualifications as are prescribed in Section 2 of the statute, of which the first clause lays down that "Barristers of not less than five years" standing" are eligible for such appointments, and, so far as I am concerned, I fall under that category, because Section 19 of the statute expressly provides that members of the English Bar are included within the term "Barrister" as used in the statute. My appointment by His Honor the Lieutenant-Governor was therefore not illegal, and so long as Her Majesty does not appoint a person to take my place on the Bench, and so long as the Government does not see cause to cancel my appointment, I hold that I am authorized by the law to exercise the functions of a puisne Judge of this Court, and my presence on the Bench of this Court cannot therefore operate to vitiate its constitutional power as the highest judicial tribunal in these Provinces.

46. That any such contingency should have occurred as renders it necessary for us to consider the subtle argument addressed to us by the learned Pandit, and whether such a state of things is desirable with reference to the public feeling as to the validity of the constitutional authority of this Court, are matters which do not lie within my province as a Judge of this Court to consider, and I therefore

decline to express any opinion thereon.

47. I concur with the learned Chief Justice in overruling the preliminary objection raised by the learned Pandit. 48. Mr. G. E. A. Boss, for the Respondent.--I also have a preliminary objection. This purports to be a reference u/s 575 of the Civil Procedure Code. No legal reference, however, was or could have been made, PETHERAM, C. J., and BHODHURST, J., having, on the 12th November 1885, actually delivered their judgments on the appeal. Under the second paragraph of Section 575, there being no majority concurring in a reversal of the first Court's decree, that decree necessarily stood affirmed. The appellant's only remedy was to appeal u/s 10 of the Letters Patent: this, however, he has not done.

Brodhurst, J.

49. I think the reference was made under a misapprehension. As far as I recollect, the opinions of PETHERAM, C.J., and myself were delivered in open Court, and were at that time intended to have effect as judgments disposing of the appeal. The decretal orders at the end of each judgment are such as are never inserted in references u/s 575.

50. The Hon. Pandit Ajudhia Nath, for the Appellants, in reply.--The objection is too late: it should have been raised on the application of the respondent for review of judgment, ante, p. 61. In the next place, I submit that this reference was not made u/s 575 of the Civil Procedure Code. That section is not mentioned in the referring order. The words are, "We refer the case to the Full Bench for disposal." Even if the reference was u/s 575, the delivery of judgments on the appeal is not inconsistent with that section: Rule II of Order of Court dated 30th March 1878, at p. 74 of Mr. Harvey James's collection. "The Judges so differing shall each record his judgment on the appeal, and the Judge or Judges desiring that the appeal be referred shall record an opinion to that effect."

Mahmood, J.

referred to Rohilkhand and Kumaun Bank, Limited v. Row I. L. B. 6 All 468.

52. In that case the order of reference was in precisely the same form as here. Each opinion or judgment ended with a proposed decretal order; the reference was then made u/s 575, and its validity was never questioned on this ground.

53. In the next place, I submit that PETHERAM, C.J.'s written opinion was not a judgment disposing of the appeal. It was not signed or dated, which would have been necessary u/s 574.

Mahmood, J.

54. That section would not apply to a judgment of the High Court: Section 633 and Sundar Bibi v. Bisheshar Nath, ante, p. 93.

55. That case only relates to the question how far the High Court Judges are bound to set forth the points at issue and their reasons for the decision: it does

not touch the application of the last paragraph of Section 574 to the judgments of the High Court. Again, in the present case, notice was not issued to the parties u/s 571, which would have been necessary if judgment in the usual sense was to be delivered.

56. Mr. G.E.A. Boss, for the Respondent, was not called upon to reply.

John Edge, Kt., C.J.

57. In this case a preliminary point is raised, that the order of reference is ultra vires. Our brother BRODHURST informs us that the judgments of Sir COMER PETHERAM and himself were delivered, and that the order of reference was drawn up after the judgments had been delivered. Sir COMER PETHBBAM and my brother BBODHURST, having delivered their judgments as judgments and without any reservation, could not make an order u/s 575 of the Code of Civil Procedure. Under these circumstances the order was ultra vires, and we cannot entertain this reference. That order being ultra vires it must be set aside, and the judgment will be drawn up as if no such order had been made. There will be no order made as to costs.

Straight, J.

I concur.

Brodhurst, J.

58. The judgments of Sir COMER PETHERAM and myself in Second Appeal No 1468 of 1884 were written to have effect as judgments, and a fair copy of each of them was made in the office. My judgment thus copied out was signed and dated by myself on the 12th November 1885, and, to the best of my recollection and belief, the judgments were pronounced in open Court.

59. As I concurred in the judgment of the Lower Appellate Court, my judgment would prevail; and it is obvious that the reference to the Full Bench that was made on the 12th November 1885, though with my concurrence, was not at my suggestion.

60. The judgments were not withdrawn from the record, but remained with it; and when the case came before the Full Bench, they were referred to and were treated as judgments. There was no difference between Sir COMER PETHERAM and myself on a point of law, and the reference to the Full Bench does not purport to have been made u/s 575 of the Civil Procedure Code.

61. After the application for review of the Full Bench judgment had been granted, it occurred to me that the reference to the Full Bench that was made on the 12th November 1885, was not in accordance with any provision of the law, and I communicated that opinion to my learned colleagues before the preliminary objection was taken.

62. As I now consider that the reference to the Full Bench was, under the

circumstances above mentioned, illegal, I concur with the learned Chief Justice that the order must be reversed.

Tyrrell, J.

63. I concur with the learned Chief Justice.

Mahmood, J.

64. I concur with the learned Chief Justice, and if the objection were a mere matter of formality, I should have regarded it as unimportant, and would have added nothing to what has fallen from the learned Chief Justice. But the objection raised by Mr. Boss is not a pure matter of technical formality, because the procedure followed under the rules of this Court in appeals u/s 10 of the Letters Patent is essentially different from the rules applicable to references u/s 575 of the Civil Procedure Code. The rules regulating the disposal of appeals u/s 10 of the Letters Patent are contained in page 72 of the printed volume of the rules of this Court, and the question as to their validity has been decided in the affirmative by the majority of a Bench of three Judges in Muhammad Allahdad Khan v. Muhammad Ismail Khan, Weekly Notes, 1887, p. 199, whilst the rules governing references u/s 575 of the CPC appear at page 74 of the printed volume of rules, and are materially different from the rules relating to appeals u/s 10 of the Letters Patent. Pandit Ajudhia Nath has argued that the present case must be regarded as a valid reference, u/s 575 of the Civil Procedure Code, because PETHERAM, C.J., and my brother BRODHURST, in recording their judgments, the one decreeing the appeal and the other dismissing it, only acted in conformity with Rule II of the rules regulating references u/s 575 of the Civil Procedure Code, and that the present case, therefore, is only the subject of a reference under that section. The effect of the rule was considered by a Bench of three Judges in Rohilkhand and Kumaun Bank, Limited v. Bow I. L. R. All. 468 where, with the concurrence of Straight and DUTHOIT, JJ., I said: "It seems to us that the word judgment as used in that rule must not be understood in its strict sense, but merely as an expression of opinion containing reasons for a contemplated or proposed judgment. For if we are to regard the opinions recorded by the referring Judges as judgments in the strict sense of the term, it may often be that the appeal heard by them would be disposed of ipso facto, by reason of those judgments under the penultimate paragraph of Section 575 itself. And in such cases, no appeal being pending, it could not be referred to other Judges u/s 575, for that section clearly contemplates pending appeals, and not appeals already determined and disposed of."

65. In the present case we have been assured by my brother BRODHURST that the judgments which he and PETHERAM, C.J., recorded were delivered from the Bench as judgments of the Court, and this being so, consistently with the views which I expressed in the case already cited, those learned Judges ceased to be possessed of the case, and could, therefore, make no reference u/s 575 of the Civil Procedure Code. Indeed, under the provisions of that section, the decree

made by my brother BRODHURST prevailed, and the order which referred the ease to us was, therefore, ultra vires, and the proper remedy open to the appellant was to have preferred an appeal u/s 10 of the Letters Patent. The remedy may still be open to him, but I express no opinion as to how far such a remedy will be affected by the question of limitation.