

ORIGINAL CIVIL.

Before Lord-Williams J.

TULSHI CHARAN GOSWAMI

v.

AZIZUL HUQUE.*

1937

April 29.

Ultra vires—Appointment of Governor—Omission to follow some of the statutory procedure and formalities—Government of India Act (5 & 6 Geo. V, c. 61; 6 & 7 Geo. V, c. 37 and 9 & 10 Geo. V, c. 101), ss. 46, 72A, 130—Government of India Act, 1935 (26 Geo. V, c. 42), ss. 2, 3, 4, 46, 48, 49, 50, 51, 52, 53; 60, 62, 65, 87, 321.

Although Sir John Anderson was appointed Governor of Bengal under the Government of India Act of 1919, his functioning in the corresponding office of Governor under the Government of India Act of 1935 is valid by virtue of proviso (b) of s. 321 of the Act of 1935 in spite of the non-observance of the procedure and formalities under the last Act.

MOTION.

This suit was filed by the plaintiff (a member of the Bengal Legislative Assembly formed under the Government of India Act of 1935) against the defendant. The defendant was elected Speaker of that Assembly at a meeting summoned under the authority of Sir John Anderson as Governor of Bengal for that purpose on April 7, 1937. The main contention of the plaintiff was that Sir John Anderson not having obtained the Commission of appointment as Governor of Bengal and also not having taken the oaths under the provisions of the Government of India Act of 1935, Letters Patent and the Instrument of Instructions was not the Governor of Bengal in terms of and/or in accordance with the Government of India Act of 1935. The Assembly was not duly or validly constituted and the election of the defendant as Speaker on April 7, 1937, was illegal, invalid, *ultra vires* the said Act. The plaintiff prayed for declaration to that effect and also for injunction and for

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other reliefs. The present application of the plaintiff was for an *interim* injunction restraining the defendant from acting and/or functioning and/or drawing salary and allowances as Speaker of the Bengal Legislative Assembly pending the hearing of this suit.

S. C. Bose, P. C. Basu and J. C. Gupta for the plaintiff applicant. The present Bengal Legislative Assembly and the office of the Governor of Bengal are creations of the Government of India Act of 1935. But the office of the Governor under the previous Act is somewhat different from that under the new Act. The new Act has curtailed the powers of the Secretary of State, His Majesty having resumed the same. Under the old Act the Governor-General and the Governor were both appointed by warrant under the Royal Sign Manual. That is now changed by the new Act. They are now appointed by Commission under the Royal Sign Manual. The appointment of Commander-in-chief under the new Act is by warrant. The Governor-General and the Governor of a province under the new Act have both new functions and are really new offices under the new Act. The old distinctions of presidencies and provinces have now been removed. Under the old Act the Governor was not a part of the legislature, whereas under the new Act he is a part of the legislature. Here it is admitted that Sir John Anderson did not receive any Commission of appointment under the Royal Sign Manual and also did not take the oaths. Therefore, Sir John Anderson, not having been duly and legally appointed Governor of Bengal under the new Act, his appointing a temporary Speaker for the election of the Speaker of the Assembly, and his summoning the meeting of April 7, 1937, together with the proceedings of that meeting including the election of the defendant as Speaker are illegal and *ultra vires*. The words "without prejudice to any other provisions of this Act" in s. 321 of the new Act do not help the defendant.

If the legislature had intended to do away with the provisions relating to the offices of Governors, the words "notwithstanding anything contained in this Act" would have been inserted instead.

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The Advocate General, Sir Asoka Roy, the Standing Counsel, S. M. Bose and Z. Rahim appearing for the defendant were not called upon to reply.

LORT-WILLIAMS J. This is an application made by Tulshi Charan Goswami, a member of the Bengal Legislative Assembly, in a suit which he has brought against Khan Bahadur M. Azizul Huque, another member of the Bengal Legislative Assembly, for a declaration that the defendant has not been duly and validly elected Speaker of the said Bengal Legislative Assembly and that he was not and is not the Speaker of the said Assembly and was not and is not entitled to act or function as such Speaker; also for an injunction restraining him from so acting or functioning or drawing his salary as such Speaker.

The present application is for a temporary injunction.

The plaintiff's case is founded upon the argument that there was not at the time when the defendant is alleged to have been elected Speaker, and there is not now any person holding the office of Governor of Bengal, that is to say, Sir John Anderson ceased to be Governor of Bengal on April 1, 1937, when certain provisions of the Government of India Act, 1935, came into force, and has not been properly appointed as Governor of Bengal under the provisions of that Act.

That argument is based upon certain sections of that Act to which I will refer.

Section 2(1) provides that all rights, authority and jurisdiction heretofore belonging to His Majesty the King, Emperor of India, which appertain or are incidental to the Government of the territories in India

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for the time being vested in him, and all rights, authority and jurisdiction exercisable by him in or in relation to any other territories in India, are exercisable by His Majesty, except in so far as may be otherwise provided by or under this Act, or as may be otherwise directed by His Majesty: and sub-s. (2) provides that such rights shall include any rights heretofore exercisable by the Secretary of State, the Secretary of State in Council, the Governor-General, the Governor-General in Council, any Governor or any Local Government, whether by delegation from His Majesty or otherwise.

The Act provides for the resumption by His Majesty of such delegated powers and then proceeds to make provision for the future exercise of all those rights, authority and jurisdiction.

Section 3 provides that the Governor-General of India is appointed by His Majesty by a Commission under the Royal Sign Manual, whereas under the old Government of India Act a Governor-General in Council was appointed by Warrant.

Section 4 provides for a Commander-in-chief to be appointed by Warrant under the Royal Sign Manual, thus emphasising a distinction between a Commission and a Warrant.

It is clear therefore that the position and mode of appointment of a Governor-General under the new Act are somewhat different from those under the old Act, and it is admitted that the present Governor-General has been appointed afresh under the new Act by a Commission under the Royal Sign Manual.

Similarly, alterations have been made with regard to the position and mode of appointment of the Governor of a Province.

Section 46 provides for Governor's Provinces including a Province of Bengal. The old Presidencies, with all their glamour and romance, were, presumably,

a source of offence to the neat and tidy official mind, and have been quietly eliminated by a stroke of the pen.

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Section 48 provides that the Governor of a Province is appointed by His Majesty by a Commission under the Royal Sign Manual, and s. 49 provides that the executive authority of a Province shall be exercised on behalf of His Majesty by the Governor, either directly or through officers subordinate to him.

In the old Act, s. 46 provided that the Presidencies of Fort William in Bengal, Fort St. George, and Bombay, and the provinces known as the United Provinces, the Punjab, Bihar and Orissa, the Central Provinces, and Assam, should each be governed, in relation to reserved subjects, by a Governor in Council, and in relation to transferred subjects, by the Governor acting with his Ministers appointed under the Act.

Sections 50 and 51 provide for a Council of Ministers to aid and advise a Governor and s. 52 for certain special responsibilities which are imposed upon him.

It is clear therefore that the position of a Governor of Bengal under the Act of 1935 is different from his position under the old Act.

The office of Governor under the new Act is created by Letters Patent, and the appointment to that office is made by a Commission under the Royal Sign Manual.

Section 53 of the Act of 1935 provides for the issue of certain documents called Instruments of Instructions which may be issued by His Majesty to the Governor of a Province.

It is admitted that Letters Patent have been issued creating the office of Governor of Bengal under the Government of India Act, 1935. It is also admitted that no Commission has been issued under

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the Royal Sign Manual, appointing Sir John Anderson to the office of Governor of Bengal. Further, it is admitted that an Instrument of Instructions passed under the Royal Sign Manual has been issued to the Governor of Bengal, dated March 8, 1937.

This provides *inter alia* that the Governor, with all due solemnity, shall cause the Commission under the Royal Sign Manual appointing him to be read and published in the presence of the Chief Justice for the time being, or, in his absence, any other Judge of the High Court of the Province, namely, this High Court.

Further, that the Governor shall take the oath of allegiance and the oath for the due execution of the office of Governor of Bengal, and for the due and impartial administration of justice, which oaths the Chief Justice for the time being, or, in his absence, any Judge of the High Court shall tender and administer to him.

It is admitted that Sir John Anderson has not caused the Commission to be read nor taken either of these oaths as provided by the Instrument of Instructions.

With regard to the Provincial Legislature, s. 60 provides that there shall be for every Province a Provincial Legislature, which shall consist of His Majesty represented by the Governor, and, in the Province of Bengal, two Chambers.

This also shows that the Governor's position under the new Act is different from his position under the old Act, because under the new Act he is part of the Legislature, whereas, under the old Act s. 72A expressly provided that the Governor was not a member of the Legislature.

Section 62 provides that the Chamber or Chambers of each Provincial Legislature shall be summoned to meet once at least in every year, and gives power

to the Governor from time to time to summon the Chambers or either Chamber to meet at such time and place as he thinks fit. In accordance with the provisions of this section Sir John Anderson summoned the Bengal Legislative Assembly to meet on April 7, 1937.

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Section 65 (1) provides that every Provincial Legislative Assembly shall, as soon as may be, choose two members of the Assembly to be respectively Speaker and Deputy Speaker thereof, and sub-s. (3) provides that while the offices of Speaker and Deputy Speaker are vacant the duties of the office of Speaker shall be performed by such member of the Assembly as the Governor may in his discretion appoint for the purpose.

In accordance with the provisions of this section Sir John Anderson appointed a member of the Assembly, Mr. Eric Studd, to act temporarily as Speaker, and the first meeting of the Legislative Assembly was held on April 7, 1937, at which the defendant was elected Speaker.

On behalf of the applicant it has been contended that none of these acts, either the summoning of the Legislative Assembly, or the appointment of Mr. Eric Studd as temporary Speaker, or the election of the Speaker, was valid, because Sir John Anderson, when he acted as he did, was not the Governor of Bengal within the meaning of the Government of India Act, 1935, not having been appointed to that office in the manner provided.

In my opinion, the answer to the whole of this argument is to be found in s. 321 which is as follows :—

The Government of India Act shall be repealed and the other Acts mentioned in the Tenth Schedule to this Act shall also be repealed to the extent specified in the third column of that Schedule :

Provided that—

(a) Nothing in this section shall affect the preamble to the Government of India Act, 1919 ;

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(b) Without prejudice to any other provisions of this Act, to the provisions of the Government of Burma Act, 1935, and to the provisions of the Interpretation Act, 1889, relating to the effect of repeals, this repeal shall not affect any appointment made under any enactment so repealed to any office, and any such appointment shall have effect as if it were an appointment to the corresponding office under this Act or the Government of Burma Act, 1935.

The meaning of proviso (b) is quite clear, and is to the effect that, without prejudice to any provisions of the Act other than the provision which is made specifically in this section, the repeal effected by the section shall not affect any appointment to any office made under any of the enactments so repealed, including the old Government of India Act, and further it provides that any such appointment, including any appointment made under the provisions of the old Act, shall have effect as if it were an appointment to the corresponding office under the Act of 1935.

It has been contended on behalf of the applicant that the meaning of the section is that it is to apply only without prejudice to the sections to which I have referred which provide for the mode of appointment to the office of Governor of Bengal, but such a construction would, in my opinion, make the section self-contradictory, and cannot have been intended.

Under the old Act, s. 130, being the section which dealt with the question of repeal, provided that the Acts specified in the Schedule were repealed, provided that the repeal should not affect, (b) the validity of any appointment made under any enactment thereby repealed, and it has been contended that the different wording adopted in s. 321 of the new Act shows that the draftsman meant something different to what was provided in s. 130 of the old Act.

I agree that the present section is perhaps not very happily worded, but there are various provisions in other parts of the Act which would have been affected by this section if the first line of proviso (b), namely, "without prejudice to any other provisions of this Act," had not been inserted. And though it might be contended that the first part of the proviso is not very easy to construe, in my opinion, its meaning taken

as a whole and in so far as it affects the question, which I have now to determine, is clear and certain, because of the precise words at the end of the proviso, namely, "any such appointment shall have effect as if it were an appointment to the corresponding office under this Act." Nothing could be clearer than the intention shown by these words.

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Finally, it has been contended that the office of Governor of Bengal created under the provisions of the Government of India Act, 1935, is not an office corresponding to the office of Governor, either in Council or with Ministers, created under the provisions of the old Act.

I cannot agree with this contention. If the words had been "similar" or "the same" office, some weight might have been given to it, but the use of the word "corresponding" in my opinion shows that when the English legislature referred by inference to the office of Governor of Bengal, it intended to refer to the office of Governor of Bengal created by the Government of India Act, 1935, that being an office corresponding to the office of Governor of Bengal under the old Act.

A preliminary point was raised in the affidavit in opposition to the effect that the plaintiff's suit is not maintainable. That contention, I understand, is based *inter alia* upon the provisions of ss. 53 and 87 of the Act, but it is unnecessary for me to deal with this point owing to the conclusion which I have reached on the main question raised on behalf of the applicant.

The effect of that conclusion is that this application must be dismissed with costs.

Application dismissed.

Attorneys for plaintiff: *Mitra & Mitra.*

Attorneys for defendant: *Sanderson & Morgan.*