FULL BENCH (CIVIL).

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Mya Bu, and Mr. Justice Baguley.

1936

Jan. 13.

HARGULAL

v.

ABDUL GANY HAJEE ISHAQ AND ANOTHER.*

Judgment written by an ex-judge—Pronouncement of the judgment by successor in office—Validity of the judgment—Judge on leave and retired judge—No distinction—Civil Procedure Code (Act V of 1908), O. 20, r. 2.

Even after a Judge has ceased to have jurisdiction because he has retired or has proceeded on leave or has been transferred from the Court in which a trial was held he is entitled, having heard the evidence, to write and sign a judgment in the case, and his successor in his discretion may pronounce the judgment in his stead. Order XX, r. 2 of the Civil Procedure Code provides that a Judge may pronounce a judgment written but not pronounced by his predecessor, and it makes no difference whether the latter is on leave or has retired.

Baramdeo Pande v. *Debidatt Singh*, I.L.R. 53 All. 133 ; *Basant Bihari* v. *Secretary of State for India*, I.L.R. 35 All. 368 ; *Ex parte Campbell*, 5 Ch. App. 503 ; *Girjashankar* v. *Gopalji*, I.L.R. 30 Bom. 241 ; *Lilawati Kunwar* v. *Chote Singh*, I.L.R. 42 All. 362 ; *Parbatti* v *Bhikun*, 8 Ben. L.R. App. 98 ; *Satyendra Nath Ray* v. *Ghatwalin*, I.L.R. 35 Cal. 756 ; *Srimotya* v. *Loknath*, 5 Pat. L.J. 147 ; *Sundar Kuar* v. *Chandreshwar*, I L.R. 34 Cal. 293—*referred to.*

Maung Ba v. *Maung Ye*, 4 U.B.R. 171—*distinguished.*

Hay (with him *Carlos*) for the respondent. Order 20, r. 2, of the Civil Procedure Code permits a judgment to be pronounced by a judge though it was written by his predecessor. The judgment in this case therefore was validly pronounced. All the authorities on this point, both before and after the enactment of s. 199 of the Civil Procedure Code of 1882 (the counterpart of the present Order 20, r. 2) have taken the view that judgments thus pronounced are valid, and the Legislature therefore must be deemed to have adopted the view of the law enunciated in the authorities. There is no distinction

* Civil Reference No. 18 of 1935 arising out of Civil Misc. Appeal No. 94 of 1935 of this Court.

between a judgment written by a judge on leave and pronounced by his successor and a judgment written by a judge who has retired.

Musammat Parbatti v. *Musammat Bhikun* (1) ; *Sundar Kuar* v. *Chandreswhar* (2) ; *Satyendra* v. *Kasturi Kumari* (3) ; *Girjashankar* v. *Gopalji* (4) ; *Basant Bihari* v. *The Secretary of State for India in Council* (5) ; *Lilawati Kunwar* v. *Chote Singh* (6) ; *Baramdeo* v. *Debidatt* (7) ; *Srimotya Lakhiama Jin* v. *Loknath Das* (8) ; *Ex parte Campbell. In re Cathcart* (9).

A contrary view seems to have been taken in *Maung Ba* v. *Maung Ye* (10) ; but there the judge who pronounced the judgment held no judicial post at the time he pronounced it.

Williams for the applicant. This case may be distinguished from the cases cited above by reason of the fact that section 9 of the Rangoon Small Cause Courts Act gives power to the officiating judge to perform his duties only up to the return of the permanent judge.

PAGE, C.J.—In this case the question propounded is :

" Whether a judgment written by an ex-Judge after he ceased to be a Judge is valid as a judgment which may be pronounced by his successor-in-office under Order XX, rule 2 of the Civil Procedure Code."

The judgment in question was written by the Officiating 2nd Judge of the Rangoon Small Cause Court after he had ceased to have jurisdiction to act as such Judge. The judgment was subsequently delivered by his successor as 2nd Judge of the

(1) 8 Ben. L.R. 98.
(2) I.L.R. 34 Cal. 293.
(3) I.L.R. 35 Cal. 756.
(4) I.L.R. 30 Bom. 241.
(5) I.L.R. 35 All. 368.
(6) I.L.R. 42 All. 362.
(7) I.L.R. 53 All. 133.
(8) 5 Pat. L.J. 147.
(9) 5 Ch. Ap. 703, 706.
(10) 4 U.B.R. 171.

1936

HARGULAL v. ABDUL GANY HAJEE ISHAQ.

PAGE, C.J.

Small Cause Court. It follows from section 23 of the Rangoon Small Cause Courts Act (VII of 1920) that Order XX, rule 2, applies to the Court of Small Causes. Order XX, rule 2, is in the following terms :

"A Judge may pronounce a judgment written but not pronounced by his predecessor."

Now, if the matter had been *res integra* I should have been disposed to think that a judgment which could be pronounced by the successor-in-office of an ex-Judge must have been written and signed by the ex-Judge before he became *functus officio*, because after a person had ceased to be a Judge of the particular Court in which the trial was held he had no further jurisdiction to act in connection with the affairs of that Court by way of writing a judgment or otherwise. It appears, however, that there has been a *consensus* of judicial authority in favour of the view that even after a Judge has ceased to have any jurisdiction in a Court because he has retired or has proceeded on leave or has been transferred from the Court in which the trial was held he is entitled having heard the evidence to write and sign a judgment, and that his successor in his discretion may pronounce the judgment in his stead.

In 1872 in *Mussamat Parbatti and others* v. *Mussamat Bhikun and others* (1) it appears that a judgment had been written by the Officiating Subordinate Judge of Patna after he had been relieved of that office, and that he had handed his written judgment to the Subordinate Judge of Patna who succeeded him. Thereafter the succeeding Judge delivered the judgment that had been

(1) 8 Ben. L.R., Appendix, page 98.

written and handed to him by his predecessor. Jackson and Markby JJ. held that the judgment so pronounced was valid and unimpeachable. That case was determined under the Civil Procedure Code of 1859 (Act VIII of 1859) in which no provision was inserted in the sense of Order XX, rule 2 of the Code of 1908.

Under section 199 of the Civil Procedure Code of 1882 (Act XIV of 1882) a Judge might pronounce a judgment written by his predecessor but not pronounced. In 1905 Jenkins C.J. and Batty J. in *Girjashankar Narsiram* v. *Gopalji Gulabbhai* (1) observed :

"To his first objection that the judgment was illegal, inasmuch as it was written by Mr. Mathuradas after he had been transferred from Broach, a complete answer is furnished by section 199 of the Code of Civil Procedure."

In Sundar Kuar v. *Chandreshwar Prasad Narain Singh* (2) Harington and Geidt JJ. stated that :

"Two objections have been taken to the judgment on behalf of the appellant : the first is that there is in fact no judgment, because the learned Judge who heard the case had taken leave before he put his judgment into writing, and had it read by his successor in office. We do not think that objection is well-founded. Section 199 of the Code of Civil Procedure provides that a Judge may pronounce a judgment written by his predecessor, but not pronounced. This judgment was written by the predecessor of the Judge who pronounced it. It seems to us that he comes within the words of section 199, and we do not think it right to accede to the argument of the appellant, who asks us to place a limited construction on that section, and to say that the judgment should be written by the Judge before he had taken leave or left the post which he was occupying when he heard the case. Our attention was drawn to certain cases, of which only one seems to be directly in point, namely, *Mussamut Parbutty* v. *Mussamut Higgin* (3), and that case supports the view

(1) (1905) I.L.R. 30 Bom. 241. (2) (1907) I.L.R. 34 Cal. 293.
(3) 17 W.R. 475.

1936

HARGULAL v. ABDUL GANY HAJEE ISHAQ.

PAGE, C.J.

which we express. We think that the objection is ill-founded, and that the Judge was entitled, having heard the evidence, to write his judgment and to send it to his successor for delivery under the provisions of section 199 of the Civil Procedure Code."

In 1908 in *Satyendra Nath Ray Chaudhuri* v. *Kasturi Kumari Ghatwalin* (1) a Full Bench of the Calcutta High Court took the same view of the meaning and effect of section 199 of the Code of 1882. Maclean C.J. observed :

"The question submitted to the Full Bench is whether the judgment, referred to in section 199 of the Civil Procedure Code, which can be pronounced by a judge's successor, is one which must be written by the Judge while holding office as judge, or whether it may be one written after he has ceased to exercise jurisdiction in the place where the cause of action in the suit to which the judgment relates, arose, owing to his transfer or proceeding on leave.

* * * *

The question seems to me to depend entirely upon the construction of section 199 of the Code of Civil Procedure. It is a very short section, and, in my judgment, its construction is not susceptible of any real difficulty. * * * * In this case the suit was heard by Mr. Thomson when he was Subordinate Judge of Deoghur, and he was subsequently transferred to Dumka and ceased to be Subordinate Judge of Deoghur on the 17th January 1905. On that date he recorded the following order 'Defendants refuse to argue or to file written argument. I am making over charge today and all the parties want me to write the judgment ; so the record must be sent to Dumka, to which place I am going on transfer.' I regret Mr. Thomson took ten months to write his judgment. He however did write it, and sent it to his successor at Deoghur to deliver and he did deliver it. It is urged that this is illegal and that section 199 does not justify such a procedure. In my opinion it does. There is nothing in that section which indicates directly or indirectly that the judgment of the judge who is leaving the Court must be written by him before he has left."

(1) (1908) I.L.R. 35 Cal. 756.

In 1908 a new Code of Civil Procedure was passed, and Order XX, rule 2, forms part of that Code. In *Ex parte Campbell. In re Cathcart* (1) James L.J. laid down that,

"where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them."

Now, the terms of Order XX, rule 2, are for all practical purposes identical with those of section 199 of the Code of 1882. It may well be therefore that the Legislature intended that Order XX, rule 2, should receive the same construction as the Courts had placed upon section 199 of the earlier Code. And that is the view which has been taken by the Courts in India since the Code of 1908 was enacted.

In 1913 in *Basant Bihari Ghoshal* v. *The Secretary of State for India in Council* (2) a Bench of the Allahabad High Court, Richards C.J. and Banerji J., stated that

"it has been contended that the judgment of the court below and the decree founded thereon are bad because the judgment was written by Mr. Tute after he had ceased to be the District Judge of Allahabad. The judgment, no doubt, was so written and it was delivered by his successor. We think the mere fact that Mr. Tute had ceased to be the District Judge when he wrote the judgment is not sufficient to vitiate the judgment. Order XX, rule 2, provides that a Judge may pronounce a judgment written but not pronounced by his predecessor."

The same view was taken by the Allahabad High Court in *Lilawati Kunwar* v. *Chote Singh and others* (3) and *Baramdeo Pande* v. *Debidatt Singh and others* (4). In the latter case the judgment had

(1) L.R. 5 Ch. App. 703 at p. 706.
(2) (1913) I.L.R. 35 All. 368.
(3) (1920) I.L.R. 42 All. 362.
(4) (1930) I.L.R. 53 All. 133.

1936

HARGULAL v. ABDUL GANY HAJEE ISHAQ.

PAGE, C.J.

been written by a District Judge after he had retired from office, but the learned Judges who tried that case were of the opinion that that fact made no difference, Mukerji and Bannet JJ. observing,

"some attempt has been made to draw a distinction between a judgment written after a Judge had retired and a judgment written while a Judge is on leave. It is true that when a Judge is on leave he will, on return from leave, take over charge again of his judicial office, but during the period that he is on leave he does not possess any judicial powers or functions or jurisdiction. We can see no distinction drawn between the writing of a judgment while a Judge is on leave and the writing of a judgment by a Judge who has gone on retirement."

In 1920 in *Srimotya Lakhiama Jin* v. *Loknath Das* (1) the Patna High Court placed the same construction upon Order XX, rule 2.

As there is a *concensus* of opinion upon this subject in several High Courts in India, and as it is of importance that practice and procedure so far as possible should be uniform throughout British India, we are not disposed to place a different construction upon Order XX, rule 2, from that put upon it by the Calcutta, Bombay, Allahabad and Patna High Courts.

Maung Ba and another v. *Maung Ye* (2) can be supported on the ground that at the time when Mr. Sheehy purported to pronounce judgment in the case then under consideration he was not only not the successor of the learned Judge who had heard the evidence but he was not a Judge.

It has to be borne in mind, of course, that under Order XX, rule 2, it is not necessarily incumbent upon the successor of the Judge who wrote the judgment after he had ceased to be a judge of

(1) 5 Pat. L.J. 147. (2) (1922) 4 U.B.R. 171.

the Court in which the trial was held to pronounce the judgment that had been written by his predecessor. He has a discretion in the matter, and if he is in doubt as to the correctness of the judgment that has been written by his predecessor he ought either to act in accordance with the provisions of Order XVIII, rule 15 or to hear the case *de novo*.

For these reasons we answer the question propounded in the affirmative.

MYA BU, J.—I agree.

BAGULEY, J.—I agree.

APPELLATE CRIMINAL.

Before Mr. Justice Dunkley.

NGA THA E AND ANOTHER
v.
KING-EMPEROR.*

Prevention of Crime (Young Offenders) Act (Burma Act III of 1930), ss. 13, 25 (1)—Appeal against order for detention in Borstal School—Order for detention not a sentence of imprisonment—Order for any period appealable to Court of Session—Appeal to the High Court—Criminal Procedure Code (Act V of 1898), s. 408 (b).

It is provided by s. 13 of the Prevention of Crime (Young Offenders) Act that in respect of any order passed by a magistrate under Part II of the Act (which includes an order for detention in a Borstal School) an appeal shall lie to the Court of Session. An order of detention in a Borstal School is not a sentence of imprisonment, and against such an order for any period passed by a magistrate there is a right of appeal to the local Court of Session. The only circumstance in which the appeal against such an order will lie to the High Court is under proviso (*b*) to s. 408 of the Criminal Procedure Code when a co-accused, who has been tried together with the juvenile affected by the order, has been sentenced to imprisonment for a term exceeding four years.

---

* Criminal Appeal No. 1683 of 1935 from the order of the 2nd Add. Sp. Power Magistrate of Tharrawaddy in Trial No. 81 of 1935.