

MANU/BH/0055/1926

Equivalent Citation: AIR1926Pat305, (1926) ILR 5 PAT 595, 96Ind. Cas.791, 96Ind. Cas.791

IN THE HIGH COURT OF PATNA

Decided On: 27.04.1926

Appellants:**Krishnaballabh Sahay**

Vs.

Respondent:**His Excellency Sir Henry Wheeler, K.C.S.I., K.C.I.E. Governor of Bihar and Orissa**

Hon'ble Judges/Coram:

Thomas Fredrick Dawson Miller , C.J., Jwala Prasad and John Bucknill , JJ.

JUDGMENT

Thomas Fredrick Dawson Miller, C.J.

1. In this case the Court is moved on behalf of Mr. Krishnaballabh Sahay, a member of the Bihar and Orissa Legislative Council, to issue a writ of mandamus to His Excellency the Governor of Bihar and Orissa requiring him under Section 72D of the Government of India Act, 1919, to submit to the vote of the Legislative Council of Bihar and Orissa in the form of demands for grants, proposals for the appropriation of certain items of the provincial revenues forming part of the Civil Budget Estimate for the current year. The items in question are three in number, namely, (a) a sum of Rs. 65,000 the estimated tour expenses of the Governor and his staff, (b) a sum of Rs. 10,000 the estimated traveling allowance of the members of the Governor's Executive Council, and, (c) a sum of Rs. 10,000 the estimated, travelling allowance of the Inspector-General of Police. We are further asked to issue a writ of mandamus to the Governor of Bihar and Orissa, the two members of his Executive Council and the Inspector-General of Police, directing them "to secure such legal sanctions and authority for the proposed appropriation as may under the law be deemed necessary". We are further moved to issue a writ of injunction restraining the same parties from using any portion of the revenue of the Province for the purposes aforesaid "until proper legal sanction and authority deemed necessary under the law have been obtained therefor."

2. It appears from the petition of the applicant that in submitting the Budget Estimate for the current year the Local Government; has treated the items in question as "non-voted", that is to say, items the appropriation of which is not subject to the control or sanction of the Legislative Council. The case made on behalf of the petitioner is two-fold. First he contends that the items of expenditure mentioned are of the class commonly described as "voted" items, that is to say, items the expenditure of which can only be sanctioned by the vote of the Legislative Council of the Province, and not "non-voted" as they are described in the Budget Estimate. By reason of these items being withheld from the vote of the Legislative Council the petitioner complains that his right as a member of the Council to exercise control over the proposed appropriation of this part of the revenue has been infringed. In the second place he contends that even if the Local Government is right in treating the items in question as "non-voted" neither the Governor nor the other parties named have obtained the necessary sanction which would authorise them to appropriate the sums in question to the purposes proposed. We are not told what the necessary legal sanction is and

as I understand the argument it follows that if the items in question have in fact been properly treated as "non-voted" still neither the Governor nor anybody else has obtained any authority under the Government of India Act to appropriate and spend the same.

3. A preliminary objection was taken by the Government Advocate, who appears for the opposite party, that this Court has no power to issue a writ of mandamus; and although I am by no means satisfied that we have such power, it is not necessary definitely to determine the question for assuming, without deciding, that we can issue in proper cases a writ of Mandamus I think the application fails on the merits.

4. Under the Government of India Act the Province of Bihar and Orissa, as in the case of other Presidencies and Provinces, is governed, in relation to Reserved subject, by the Governor in Council and in relation to Transferred subjects, save as otherwise provided, by the Governor acting with Ministers appointed under the Act, and all orders and other proceedings of a Governor's Province shall be expressed to be made by the Governor of the Province, and shall be authenticated as the Governor may, by rule, direct, and orders and proceedings so authenticated shall not be called in question in any legal proceedings on the ground that they were not duly made by the Government of the Province. This will appear from a perusal of Sections 46 and 49 of the Act.

5. Under Section 72D of the Act proposals for the appropriation of the revenues of the Province can only be made on the recommendation of the Governor communicated to the Legislative Council. That section contains provisions which shall have effect with respect to business and, procedure, in Governor's Legislative Councils. Sub-section (2) provides as follows:

(2) The estimated annual expenditure and revenue of the Province shall be laid in the form of a statement before the Council in each year and the proposals of the Local Government for the appropriation of provincial revenues and other moneys in any year shall be submitted to the vote of the Council in the form of demands for grants. The Council may assent, or refuse its assent, to a demand, or may reduce the amount therein referred to either by a reduction of the whole grant or by the omission or reduction of any of the items of expenditure of which the grant is composed.

6. Then follow certain provisos which are not material to the present case except the, last which provides, as already stated, that no proposal for the appropriation of revenue shall be made except on the recommendation of the Governor. Sub-section (3) sets out certain heads of expenditure which, are exceptions to the general, provisions of Sub-section (2) and need not be submitted to the Council. This sub section as it existed before the amending Act of 1925, 15 & 16 Geo. V, Ch. 83, provided as follows:

(3) Nothing in the foregoing sub-section shall require proposals to be submitted to the Council relating to the following heads of expenditure:

(i) contributions payable by the Local Government to the Governor-General in Council; and

(ii) interest and sinking fund charges

on loans; and

(iii) expenditure of which the amount is prescribed by or under any law; and

(iv) salaries and pensions of persons appointed by or with the approval of His Majesty or by the Secretary of State in Council; and

(v) salaries of Judges of the High Court of the Province and of the Advocate-General.

7. The only clause of the above sub-section which is material to the present discussion is Clause (iv).

8. Sub-Section (4) is also of importance. It provides, as follows:

(4) If any question arises whether any proposed appropriation of moneys does or does not relate to the above heads of expenditure, the decision of the Governor shall be final.

9. In addition to the salaries and pensions mentioned in sub-s. (3)(iv) allowances are given to the, Governor and other Government Officers to cover the actual travelling expenses incurred by them in travelling in the interests of the public service. These are provided for under the Civil Service Regulations and the Fundamental Rules which have statutory sanction. In so far as they are payable out of the provincial Budget such allowances have always hitherto been submitted to the vote of the Legislative Council of the Province since the Reforms came into existence in 1919, for they are not included in the term "salaries" or any other of the exempted heads of expenditure mentioned in Sub-section (3) of Section 72D. By the Amending Act of 1925, however, Sub-section (3) of Section 72D of the principal Act has been amended. Suction 1(3) of the Amending Act of 1925 enacts that the following provision shall be added at the end of Sub-section (3) of Section 72D of the Act of 1919:

For the purposes of this sub-section, the expression 'salaries and pensions' includes remuneration, allowances, gratuities, any contributions (whether by way of interest or otherwise) out of the revenues of India to any provident fund or family pension fund, and any other payments or emoluments payable to or on account of a person in respect of his office.

10. In consequence of this amendment the tour and traveling allowances of the Government Officers named have been treated by the Local Government in the Budget of the current year as heads of expenditure which need not be submitted to the Legislative Council.

11. The first question then is whether the Governor's tour allowance and the traveling-allowances of the other officers named come within the amendment. In my opinion they are clearly covered by the words of the Amending Act and the Local Government was justified in withdrawing them from the vote of the Legislative Council and treating them as "non-voted" items. It was argued that the tour allowance of the Governor and the traveling allowances of the other officers were not payments to or on account of a person in respect of his office but I am unable to accede to this argument. The allowances are payable to Government Officers only to cover the actual traveling expenses incurred by them when traveling in the interests of the public service, in other words, in performing a part of the duties incumbent upon them by reason of their office. But in any case, if any question arises whether any proposed appropriation of moneys does or does not relate to the heads of

expenditure mentioned in Sub-section (3) the Governor's decision on the matter is final as provided under sub Section (4) and cannot be called in question. Even if we thought, which is by no means the case, that the Governor's decision on the matter was erroneous I consider that it cannot be questioned in a Court of law. It was argued that his decision was only to be considered final for the purposes of the business and procedure in the Legislative Council and that it was not final for all purposes, but the business and procedure of the Legislative Council is the only question with which we are concerned in this matter and if the items in question were, by the decision of the Governor, withdrawn from the vote of the Legislative Council the Council can have no right to require them to be submitted and there has been no infringement of the right claimed by the petitioner. The first point raised by the applicant, therefore fails.

12. The second point raises a question whether the Local Government has legal sanction to appropriate these items of revenue for the purposes of tour and traveling expenses. To determine his question it is necessary to consider certain sections of the Act in some detail. The scheme of the Government of India Act appears to be that, except as otherwise provided in the Act and the rules made thereunder, the control of the revenues of India shall rest with the Secretary of State or the Secretary of State in Council who have the right to delegate, in certain cases, to various officers or bodies the powers so conferred.

13. Section 2(1) vests in the Secretary of State, subject to the provisions of the Act, all the powers and duties relating to the Government of India and the revenues of India formerly exercised or performed by the East India Company or the Court of Directors or Court of Proprietors before 1858 and sub Section (2) provides as follows:

(2) In particular, the Secretary of State, may subject to the provisions of this Act or rules made thereunder, superintend, direct and control all acts, operations and concerns which relate to the Government or revenues of India, and all grants of salaries, gratuities and allowances, and all other payments and charges, out of or on the revenues of India.

14. This control may be relaxed by rules properly framed for the purpose and a grant or appropriation of revenue may be made, in accordance with the provisions and restrictions prescribed by the Secretary of State in Council, Sections, 19A and 21 are in this connection important and the material portions may be quoted.

15. They are as follows:

19A. The Secretary of State in Council may, notwithstanding anything in this Act, by rule regulate and restrict the exercise of the powers of superintendence, direction and control, vested in the Secretary of State and the Secretary of State in Council by this. Act, or otherwise, in such manner as may appear necessary or expedient in order to give effect to the purposes of the Government of India Act, 1919.

15. The rest of the section provides for obtaining the sanction of both Houses of Parliament to proposed rules relating to subjects other than Transferred subjects and for giving either House of Parliament an opportunity of annulling rules when made relating to Transferred subjects.

16. Section 21 reads as follows:

21. Subject to the provisions of this Act, and rules made thereunder, the expenditure of the revenues of India, both in British India and elsewhere, shall be subject to the control of the Secretary of State in Council, and no grant or appropriation of any part of those revenues, or of any other property coming into the possession of the Secretary of State in Council by virtue of the Government of India Act, 1858, or this Act, shall be made without the concurrence of a majority of votes at a meeting Of the Council of India:

Provided that a grant or appropriation made in accordance with provisions or restrictions prescribed by the Secretary of State in Council with the concurrence of a majority of votes at a meeting of the Council shall be deemed to be made with the concurrence of a majority of such votes.

17. From these sections it seems clear that, subject to the provisions of the Act which in certain cases require the vote of the Provincial Legislative Council in provincial subjects before an appropriation of revenue can legally be made, the Secretary of State in Council may, by a majority of votes, prescribe the manner in which the grants and appropriations may be made by Local Governments and when made they shall be deemed to be made with the sanction of the Secretary of State in Council. The object of these provisions was, no doubt, to facilitate the expenditure of the revenue by avoiding the cumbersome procedure of applying for sanction for appropriation of the revenues in ordinary matters of routine in carrying on the Government of the different Presidencies and Provinces of India.

18. Various resolutions have from time to time been passed and various rules have been formulated by the Secretary of State in Council under these and other sections of the Act with a view to facilitating the routine work of the appropriation of the revenue, and careful restrictions in all important matter have been imposed upon the powers delegated to the Governor in Council. The only resolution on the subject which I need refer to is No. 1449-E.A. dated the 29th September, 1922, published in the Gazette of India of the 7th October, 1922. The first clause of the resolution runs as follows:

His Majesty's Secretary of State for India in Council has been pleased to make the rules appended to this resolution, defining the classes of expenditure on Reserved provincial subjects which a Governor in Council may not sanction without the previous consent of the Secretary of State in Council. These rules supersede all previous rules of a similar nature and, subject to their observance, orders regarding specific cases of expenditure passed by the Secretary of State in Council or the Governor-General in Council under regulations previously in force will no longer be binding.

19. It should be pointed out that the subjects now under discussion are Reserved provincial subjects. The second and third clauses of the resolution are not material. Clause 4 is as follows:

Subject to the observance of these rules and to the provisions of Section 72D of the Government of India Act, the Governor in Council has full power to sanction expenditure upon Reserved provincial subjects and, with the previous consent of his Finance Department, to delegate such power upon such conditions as he may think fit to any officer subordinate to him. Any sanction given under this rule will remain valid for the specified period for

which it is given, subject, in the case of voted expenditure, to the voting of supply in each year.

20. Then follow certain rules enumerating the cases in which a Governor in Council must obtain the previous sanction of the Secretary of State in Council before incurring expenditure on Reserved provincial subjects out of the revenues of India. These rules need not be referred to in detail. It is sufficient to say that they in no way limit the powers of the Governor in Council to sanction the expenditure which is now called in question. It is clear, in my opinion, upon a perusal of the Statute and the resolution and rules referred to that the action of the opposite party which is called in question in the present proceedings is regular and constitutional, and no cause has been shown why the Court should exercise its powers of mandamus, assuming such powers are within its competence.

21. Moreover, I am of opinion that even if this Court possesses the power which it is asked to exercise, Section 110 of the Government of India Act is a complete bar to the exercise of such power in the present instance. The section provides that, amongst other persons, each Governor and each of the members of the Executive Council of a Governor shall not-

(a) be subject to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity only, nor

(b) be liable to be arrested or imprisoned in any suit or proceeding in any High Court acting in the exercise of its original jurisdiction; nor

(c) be subject to the original criminal jurisdiction of any High Court in respect of any offence not being treason or felony.

22. It was argued that although Section 110 might take away the jurisdiction of the Court with regard to acts already done it did not deprive the Court of the right to restrain acts in contemplation, namely, the future expenditure of the items of revenue in question. The future expenditure, however, is a matter already counselled or ordered by the Governor and it would be contrary to the spirit and intention of the enactment to hold that the Court had power to prevent the doing of an act which, when done, it would have no power to call in question.

23. In my opinion this application should be dismissed with costs. We fix the hearing fee at 25 gold mohurs.

Jwala Prasad, J.

24. This is an application purporting to have been made in the "extraordinary and ordinary jurisdictions" of this Court. The applicant is a tax-payer from the Municipal area of the town of Hazaribagh and is a non-official member of the Bihar and Orissa Legislative Council and is aggrieved by the omission of the Local Government to submit to the vote of the aforesaid Legislative Council under the form of "demands for grants" their proposals for the appropriation of the provincial revenues towards certain expenditures mentioned in the Civil Budget. Estimate for the year 1926-27. These items are: (1) tour expenditure of His Excellency the Governor of Bihar and Orissa, opposite party No. 1, (2) travelling allowances of the Hon'ble Members of the Executive Council of the Government of Bihar and Orissa, opposite party Nos. 2 and 3 and (3) the traveling allowances of the Inspector-General of Police, opposite party

No. 4. The detailed amounts are mentioned in the application.

25. It is said that these items of expenditure are illegally described in the Budget Estimate as "non-voted" and that without any legal or lawful justification, they were excluded from the vote of the Council; as a result of this the petitioner complains that he has been deprived of his right as a member of the Legislative Council of exercising such rights and control over the revenues of the Province of Bihar and Orissa and over expenditures on account of the administration of the Province of Bihar and Orissa as he is entitled to under the law to exercise, and that he is in duty bound to claim the same for his constituency. He further complains that he has suffered an injury to his rights as a tax-paying citizen of this Province of getting all proposals for the expenditure of the revenues of this Province scrutinised by the elected representatives of, the people. He says that on discovering that the aforesaid items were described as "non-voted" items, he sent, on the 15th February, 1926, notice of a motion for a nominal reduction in the amount of provision for the tour expenses of the opposite party No. 1 with a view to test whether the said omissions were deliberate or due to inadvertence, but that his motion was disallowed on the ground that it related to a non-voted item of expenditure. He apprehends that the opposite party would appropriate the aforesaid sums, as the entries in the Budget Estimate show, "without any legal sanction or authority." Upon these allegations he asks this Court.

(1) to issue a writ of mandamus to the opposite party No. 1, the Governor of the Province, to submit or cause to be submitted under Section 72D of the Government of India Act, 1919, the proposals of the Government for the appropriation of the provincial revenues for the tour expenses and the traveling allowances of the opposite party Nos. 1 to 4 to the vote of the Bihar and Orissa Legislative Council in the form of demands for grants;

(2) to issue a writ of mandamus on the opposite party Nos. 1 to 4 to secure such 'legal sanction and authority' for the appropriation of the aforesaid sums as may, under the law, be deemed necessary; and

(3) to issue writ of injunction restraining the opposite party from using any portion of the revenues of the Province for the aforesaid purposes until such legal sanction or authority deemed necessary under the law has been obtained therefor.

26. The question is to be decided entirely upon the construction of the Government of India Act (9 & 10 Geo. V, Ch. 101) as amended in 1925 by Act 15 & 16 Geo. V, Ch. 83.

27. The Government of India Act has made provisions for the classification of subjects, in relation to the functions of Government as "central" and "provincial" Subjects, and for the transfer from among the "provincial" subjects of subjects to the administration of the Governors of the Provinces acting with Ministers appointed under the Act, and the subjects not so transferred are called "Reserved subjects." The three Presidencies and the several Provinces including the Province of Bihar and Orissa are to be governed in relation to "Reserved subjects" by a Governor in Council and in relation to "Transferred subjects" by the Governor acting with the Ministers appointed under the Act (Section 46). Provision has also been made under the Act for the allocation of revenues or other moneys to the Provincial Governments; Section 45(a)(b). Under Section 72D(2) the estimated annual expenditure and revenue of the

Province "shall be laid" in the form of a statement before the Council in each year, and the proposals of the Local Government for the appropriation of provincial revenues and other moneys in any year "shall be submitted to the vote of the Council in the, form of demands for grants." The Council "may assent, or refuse its assent" to a demand, or may reduce the amount therein referred to either by a reduction of the whole grant or by the omission or reduction of any of the items of expenditure of which the grant is composed Under the first part of this clause the entire estimate of the annual expenditure of revenue called the Civil Budget Estimate is to be laid before the Council. But all the items of expenditure are not subject to the assent of the Council and are, therefore, not liable to be submitted to its vote. Such items are called "non votable" items. They are governed by the rules laid down by the Secretary of State in Council in whom vests the superintendence, direction and control of Jill acts, operations and concerns which relate to the Government or revenues of India, and all grants of salaries, gratuities and allowances, and all other payments and charges, put of or on the revenues of India (Section 2, Clause 2). The revenues of India are received for and in the name of His Majesty and are to be applied for the purpose of the Government of India (Section 20). The Secretary of State has and performs all the power and duties relating to the Government or revenues of India as used to be exercised or performed by the East India Company, the Court of Directors, etc., mentioned in Section 2. In order to facilitate the Government of India, the powers of the Secretary of State have, by rules of devolution, been delegated to the Governor-General in India and to the several Governors in Council of the Presidencies and the Provinces, and these Local Governments have also control over the revenues and other moneys allocated to them Clause (3) of Section 72D exempts certain proposals for the appropriation of provincial revenues from having to be submitted to the vote of the Council. That clause runs as follows:

Nothing in the foregoing sub-section shall require proposals to be submitted to the Council relating to the following heads of expenditure.

28. Among those heads are "salaries and pensions of persons appointed by or with the approval of His Majesty in Council or by the Secretary of State in Council." This is what, was originally contained in the Government of India Act, 1919. The tour expenses and the traveling allowances. of the Governor of the Province and other officers were not included in the items which were not to be submitted to the Legislative Council and hence such items used to be included in the proposals of the Local Government and used to be submitted to the vote of the Council in the form of demands for grants.

29. Clause (3) has, however, been amended now by the Government of India (Civil Service) Act, 1925 (15 & 16 Geo. V, Ch, 83) and to sub Section 3 the following proviso has been added:

For the purposes of this sub-section the expression, 'salaries and pensions' includes remuneration, allowances, gratuities, any contributions (whether by way of interest or otherwise) out of the revenues of India to any provident fund or family pension fund, and any other payments or emoluments payable to or on account of a person in respect of his office.

30. The words "payments or emoluments payable to or on account of a person in respect of his office" would certainly include the tour expenses and the traveling allowances of the Governor and the members of his Council and the Inspector-

General of Police.

31. The original Section 3 has undergone a further important amendment and that is, that not only "salaries and pensions" of officers [mentioned in Clauses 4 and 5 of the original Sub-section (3)] but also "salaries and pensions" payable to the dependants of these officers will not be required to, be submitted to the Council.

32. It was, however, urged that the items in question would increase the amount which they are entitled to get under Section 85 of the Act read with the Second Schedule and consequently these items are not "lawful expenditure" and they are not entitled to appropriate the same from the provincial revenues, No doubt, under Section 85 these officers are only entitled to be paid out of the revenues of India such salaries, not exceeding in any case the maximum, as are specified "in that behalf in Schedule II of the Act. Sub Section 3 of that section says: "The remuneration payable to a person under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein," The proviso to the-section makes Sub-section 3 inapplicable to the allowances or other forms of profit and advantage which may have been sanctioned for such persons by the Secretary of State in Council. In other words, the traveling allowance and other advantages would be over and above the salary fixed by Section 85 read with Schedule II of the Act.

33. There is, therefore, no force in this contention.

34. Assuming for the sake of argument that the "tour expenses" and "the traveling allowances" the items in dispute in the present case were not exempted from being submitted to the vote of the Council, even then the question cannot be raised before us. It appertains exclusively to the jurisdiction of the Governor. Clause (4) of Section 72D runs as follows:

If any question arises whether any proposed appropriation of moneys does or does not relate to the above heads of expenditure, the decision of the Governor shall be final.

35. The question with respect to the disputed items was before the Governor on two occasions: first, when the Civil Budget Estimate was prepared and laid before the Council and these items were not included in the proposals for the appropriation of public revenues to be submitted to the vote of the Council, and, secondly, when the petitioner sent notice of motion for a nominal reduction in the amount of the provision for the tour expenses of the Governor. The Governor then disallowed the motion upon the ground that it related to non-voted items of expenditure. Thus the petitioner directly raised, the dispute as to whether, the disputed items would be exempted from the vote of the Council under Clause 3 of Section 72D. This dispute became the subject-matter of the decision of the Governor and under Clause 4 of this section his decision has become final and it cannot now be re-opened.

36. The petitioner farther submits that the decision was final only "with respect to business and procedure in Governors' Legislative Councils" as stated in Clause (1) of Section 72D and its finality is gone when the matter has come to this Court. But his prayer is to set aside that decision with a view that the disputed items be submitted to the vote of the Council. Hence the question raised relates to the business and procedure in the Council. This Court, therefore, has no jurisdiction to destroy the finality of the decision of the Governor.

37. Again the act of the Governor in the matter in question is not subject to the jurisdiction of the High Court under Section 110A, of the Act. This provision in Section 110 dates back to the time of the Supreme Court of Judicature at Fort William in Bengal (vide Sections land 2 of the East India Company, 1780, 21 Geo. III, Ch. 70) under which the Governor-General in Council of Bengal was not subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal for or by reason of any act or order, or any other matter or thing whatsoever counselled, ordered or done by them in their public capacity and acting as Governor-General in Council." This provision remained unaffected under the subsequent Statutes and was extended to apply to the acts and orders of Governors and Lieutenant Governors and Members of their Councils. It has been re-affirmed in the present Government of India Act, 1919

38. The first prayer asking for a writ of mandamus upon the Governor for submitting the proposals for the appropriation of the items in question to the Council must, therefore, be disallowed.

39. The second relief seeking for a writ of mandamus on the opposite party to secure a legal sanction and authority for the proposed, appropriation seems to be equally barred by the provisions under the Government of India Act. The tour expenses and the traveling allowances of the opposite party relating to the Reserved subjects and-being excluded from the jurisdiction of the Legislative Council must be controlled by the Secretary of State in India and Governed by the rules framed by him. It has not been at all shown that the appropriation of these items has, in any way, infringed the rules laid down by the Secretary of State in Council or is beyond the authority of the Local Government under the powers vested in them by the rules of devolution, for ought we know the appropriation in question is within the power of the Local Government under the rules framed by the Secretary of State for India in Council, and it is not within our province to examine these items and to say whether or not they are within the authority vested in the Local Government. It may, be mentioned that no Municipal Court has any jurisdiction to question, control or interfere with the appropriation of the revenue of India by the Local Government provided it is for the purpose of the Government of India The appropriation will be an act of State which essentially concerns the exercise of Sovereign power; *Salaman v. Secretary of State for India* (1906) 1 K.B. 613 : 75 L.J.K.B. 418 . p>

40. The last prayer is to issue a writ of injunction restraining the opposite party from using any portion of the revenue of the Province for the aforesaid purposes until legal sanction and authority are obtained But no injunction can be granted independently of any suit having been brought. Therefore, this prayer is also, not within the jurisdiction of the Court to grant.

41. The application, therefore, must fail with respect to all the reliefs sought. Hence it is not necessary to decide as to whether this Court has power to issue a writ of mandamus.

42. It may, however, be mentioned that mandamus or a command is a high prerogative writ of a most extensive remedial nature. In form it is a command issued in the King's name from the King's Bench Division of the High Court only, and addressed to any person, Corporation or inferior Court of Judicature requiring them to do something therein specified which appertains to their office and which the Court holds to be consonant to right and justice. It is used principally for public purposes and to enforce the performance of public rights or duties. It enforces, however, some

private rights when they are withheld by public officers. The issuing of this writ being part of the original jurisdiction of the Court of the King's Bench is a matter within the exclusive cognizance of and is assigned to the King's Bench Division of the High Court (Jurisdiction Act, 1873, Section 31). It is a general rule that this writ is only to be issued where a party has no other specific remedy. The jurisdiction is altogether in the discretion of the Court.

43. Section 40 of the East India Company Act, 1772 (13 Geo. III, Ch. 63) empowered His Majesty's Court of King's Bench to "award a writ or writs of mandamus, requiring the Chief Justice and Judges of the Supreme Court of Judicature for that time being, or the Judges of the Mayor's Court at Madras, Bombay or Bencoolen, as the case may require, and are hereby respectively authorised and required accordingly to hold a Court with all convenient speed, for the examination of witnesses, and receiving such proofs concerning the matters charged in such indictments or informations respectively laid or exhibited in the said Court of King's Bench for misdemeanour or offences committed in India.

44. Similarly, Section 44 empowered His Majesty's Courts at Westminster to award writs of mandamus to Supreme Court of Judicature-for the time being or the Judges is the Mayor's Court at Madras, Bombay or Bencoolen for the examination of witnesses hi respect of civil suits filed in the said Mayor's Courts at Westminster (vide also Section 3, 42 Geo. III, Ch. 85 to the same effect).

45. The Indian High Courts Act of 1861 empowered the Crown to establish, by Letters Patent, High Courts at Calcutta, Madras and Bombay in which the Supreme Courts as well as the Sadar Diwani Adalat and the Sadar Nizamat Adalat were all merged, the jurisdiction and powers of the abolished Courts being transferred to the new, High Courts. Later, other High Courts were established, such as Allahabad, Patna and Lahore. These High Courts have appellate jurisdiction over the subordinate Courts and extraordinary original jurisdiction in certain matters; but they have not got the ordinary original jurisdiction of the Supreme Courts, which was inherited by the High Courts of Calcutta, Madras and Bombay. The right to issue or award writ of mandamus, which might have existed in the Supreme Courts, was, therefore, not inherited by the High Courts, other than Calcutta, Madras and Bombay, inasmuch as that right appertains exclusively to the Original Side of the King's Bench. This is the reason why Section 45 of the Specific Relief Act gives power only to the High Courts of Calcutta, Bombay and Madras (and Rangoon has since been added) in their original jurisdiction, to issue write of mandamus upon public officers, and Corporations with respect to their public duties when there is no specific remedy available to the injured person. Section 50 expressly lays down that the High Court shall not have power to issue a writ of mandamus. Therefore, there is nothing to show that the power to award a writ of mandamus as the prerogative right of the Crown, which was conferred upon the King's Bench, was in its entirety conferred upon the Indian High Courts except in the form and to the extent provided for in Section 45 of the Specific Relief Act. There is no case showing that a writ of mandamus was ever awarded by any High Court, except as provided for in Section 45 which does not apply to the Patna High Court established in 1916 or the Allahabad High Court established in 1866. It is noticeable that the latter Court had come into existence long before the Specific Relief Act was enacted still it is not included in Section 45 of the Act as having the power to issue writ of mandamus. These later High Courts have not inherited all the powers of the Supreme Courts on their Original Side vide their respective Letters Patent. The point, however, need, not be pursued further for, as already observed, no definite decision on this point is necessary in this

case.

46. Another reason why the application must fail is that even if this Court were to issue any writ of mandamus or injunction, there is no power in the Court to enforce it, and it seems to me that it is meaningless to have a power and to pass an order without having the power to enforce it. As against opposite party Nos. 1 to 3 there is the statutory bar to the High Court having jurisdiction over them with respect to acts done by them in their official capacity. This bar is in existence from the earliest time.

47. For these reasons I agree with, the order proposed by the learned Chief Justice.

John Bucknill, J.

48. This was an application made to this Court by Mr. Krishnaballabh Sahay of Hazaribagh. It is of a very unusual character. It is directed against His Excellency the Governor of this Province; the Hon'ble Mr. Sachidananda Sinha a member of the Executive Council of this Province; the Hon'ble Mr. E.L.L. Hammond also a member of the Executive Council of this Province and the Inspector-General of Police of this Province; they are all stated to be resident at Patna.

49. The circumstances under which this application is made may shortly be explained as follows: They are set out at length in the petition. The petitioner is represented as being a law-abiding subject of His Majesty the King-Emperor, a tax-payer in the Municipal area of the town of Hazaribagh and a non-official member of the Bihar and Orissa Legislative Council. In the first capacity he claims all privileges belonging to a subject of His Majesty and such protection as he may be entitled to by law. In his second capacity he claims to enjoy the right of representation in the Legislative Council of this Province as constituted under the Government of India Act, 1919. In his third capacity he claims to have the power of exercising certain rights of control over the revenues of the Province and over their expenditure. He recites that, under the provisions of the Government of India Act, 1919, the first three respondents are charged with the duty and responsibilities of carrying on the administration of what, are known as the "Reserved" departments of the Government of this Province and that the 4th respondent is the administrative head of one of the "Reserved" departments known as the Police Department. He further recites that on the 15th of February of this year the 2nd respondent who is the, Finance Member of the Government of this Province presented the "Civil Budget Estimate" for the year 19-0-27 to the Legislative Council of the Province. His complaint is that in this Budget, instead of including certain sums to be submitted to the vote of the Legislative Council, these sums were included as non-votable (the phrase used is non-voted) and in consequence were thus, not submitted to the Legislative Council of or its vote, approval or grant. The specific items to which the applicant draws attention are (a) a sum of Rs. 65,000 on account of the tour expenses of the 1st respondent; (6) a sum of Rs. 10,000 for the travelling allowances of the 2nd and the 3rd respondents and (c) the sum of Rs. 10,000 for the travelling allowances of the 4th respondent and certain other persons, in his department. The applicant maintains that he has suffered by this exclusion of these sums from the category of monies as to the grant of which the Legislative Council is entitled to vote, that he has suffered an injury to his right as a member of the Legislative Council of the Province to exercise control over the proposed appropriation of these sums from the revenues of the Province and that he has also as a tax-paying citizen suffered injury to his right to have the expenditure of these monies scrutinized and voted upon by the members of the Legislative Council. The applicant states that on the 26th February last he gave notice to the proper

authority that he would move for a reduction, in the amount of the provision made for the tour expenses of the 1st respondent with a view to testing whether the placing of these Sums in the non-votable category was permissible; but that this motion was disallowed on the ground that it related to a non-votable item of expenditure. That the petitioner maintains that he has no other remedy and has, therefore, applied to this Court for the following reliefs:

(1) A writ of mandamus against the 1st respondent ordering the 1st respondent to submit to the vote of the Provincial Council the question of the appropriation of the monies to which I. have above referred,

(2) for a writ of mandamus on the four respondents ordering them to secure such legal sanctions and authority for the proposed appropriation as under the law may be necessary,

(3) for a writ of injunction restraining the respondents from using any part of the revenues for the purposes of the above named appropriations until proper sanction has been obtained.

50. The applicant also prayed for an interim injunction to the same effect as detailed in his third prayer from the date of his application up till the final hearing and disposal thereof.

51. Since the institution of the Reforms under the Government of India Act, 1919, and up till the Budget of this year, items of expenditure such as the three to which specific reference has been made above were, we are informed, as a matter of fact, included in the votable portion of the, Budget which was submitted to the vote of the Provincial Legislative Council. This year, however, these and other items of similar character were placed in the non-votable portion of the Budget and this was done because, as the result of recommendations of what is known as the Lee Commission, the law respective to what parts of the revenues were votable or non-votable was altered.

52. By Section 72D of the Government of India Act, 1919, it was provided that in Governors' Legislative Councils the estimated annual expenditure and revenue of the Province should be laid in the form of a statement before the Council in each year and that the proposals of the Local Government for the appropriation of provincial revenues and other monies in any year should be submitted to the vote of the (Council in the form of demands, for grants. The Council might assent or refuse its assent to a demand or might reduce the amount therein referred to either by a reduction of the whole grant or by the omission or reduction of any of the items of expenditure of which the grant was composed. Under the Scheme of the Government of India Act, 1919, certain subjects of administration were handed over to the control of the Governors and Ministers; these were called "Transferred" subjects. Other subjects rested under the control of the Governor and Executive Councillors. These were called "Reserved" subjects. If assent of a demand relating to a "Reserved" subject was refused by the Legislative Council, the Governor could certify that the expenditure was essential for the discharge of his responsibilities in connection with the subject. No proposal for the appropriation of any revenue could in any case. If made except on the recommendation of the Governor. Presumably with regard to refusal of a demand for a grant in connection with a "Transferred" subject the decision of the Council was (subject to certain emergency powers of the Governor) substantially final. But, in addition to the distinction which was drawn between the

effective powers of the Legislative Council relative to "Transferred" and "Reserved" subjects, there, were also, by Sub-section (3) of Section 72D of the Government of India Act, 1919, certain heads of expenditure in connection with which no proposals need be submitted at all to the Council; that is to say, that upon these heads of expenditure the Council has no power to vote; these items were consequently termed non-voted. In the Government of India Act, 1919, they consisted of several heads, namely:

- (i) contributions payable by the Local Government to the Governor-General in Council;
- (ii) interest and sinking fund charges on loans;
- (iii) expenditure of which the amount is prescribed by or under any law;
- (iv) salaries and pensions of persons appointed by or with the approval of His Majesty or by the Secretary of State in Council; and
- (v) salaries of Judges of the High Court in the Province and of the Advocate-General.

Now this sub-section was materially altered by the provisions of Section 1 of the Government of India (Civil Service) Act, 1925. Sub-clause (iv) and (v) were deleted and in their place was substituted a Sub-clause (iv) reading thus:

- (a) Salaries and pensions payable to or to the dependants of persons appointed by or with the approval of His Majesty or by the Secretary of State in Council;
- (b) Judges of the High Court of the Province;
- (c) the Advocate-General;
- (d) persons appointed before the first day of April, 1924, by the Governor-General in Council or by a Local Government to services or posts classified by rules under this Act as superior services or posts; and
- (v) sums payable to any person who is or has been in the civil service of the Crown in India under any order of the Secretary of State in Council, or the Governor General in Council or of a Governor, made upon an appeal made to him in pursuance of rules made under this Act.

53. This Sub-section (3) then had added to it the following provision of definition: "For the purposes of this sub-section the expression 'salaries and pensions' includes remuneration, allowances, gratuities, airy contributions (whether by way of interest or otherwise) out of the revenues of India to any provident fund or family pension fund and any other payments or emoluments payable to or on account of a person in respect of his office".

54. It is by virtue of this provision of definition that the items of tour and traveling allowances have been placed in this year's Budget in the non-votable list. In the Government of India Act, 1919, (and not in any way altered by the amendment of

1925) Sub-section (4) of Section 72D reads thus. "If any question arises whether any proposed appropriation of moneys does or does not relate to the above heads of expenditure, the decision of the Governor shall be final".

55. Now the learned Vakil who has appeared for the applicant has suggested that these tour and traveling allowances do not fall within this provision of definition. It is difficult to understand how it can seriously be suggested that these items of tour, and traveling allowances to these respondents are not payments payable to them or on their account in respect of their offices. In any case, even if that was not so, by Sub-section (4) of Section 72D (just quoted above) the decision of the Governor on this question must be regarded as final; and again, a part even from the provisions of Sub-section (4) of Section 72D, the provisions of Clause (a) of Section 110 Sub-section (1) of the Government of India Act, 1919, would appear effectually to prevent the High Court from making any order against the Governor in respect of his having thought fit to place these tour and travelling allowances in the non-votable portion of the Budget. The material parts of Sub-section (1) of Section 110 of the Government of India Act, 1919, read thus: "The Governor-General, each Governor Lieutenant Governor and Chief Commissioner and each of the members of the Executive Council of the Governor-General or of a Governor or Lieutenant Governor and a Minister appointed under this Act shall not

(a) be subject to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them, in his public capacity only.

56. There is No doubt that it was in his public capacity as Governor that the 1st respondent ordered these tour and, traveling expenses to be placed in the non-votable portion of the Budget and it would not appear to me that he is in any way amenable to this Court in respect of such action.

57. Now it is quite true that this application is declared to be made to this Court in its extraordinary civil jurisdiction, but it is admitted by the learned Vakil who has appeared for the applicant that the issue of a writ of mandamus or an order prohibiting any one from doing anything, if such could be effected at all, is done by this Court in its ordinary original civil jurisdiction.

58. The learned Vakil, however, further contends that, even assuming that this Court is of the opinion that these tour and travelling allowances rightly fall within the provision of definition added to Section 72D by the Act of 1925 or that, whether right or wrong, the Governor has power to take such a step without this Court being able to exercise any control over such action still, he (the Governor) has no power to order the disbursement of any such sums as the law at present stands. It is not made very clear to me by the learned Vakil who appeared for the applicant in what way he proposes that the Governor should obtain this authority to disburse these sums; but he suggests that a vote of the Legislature would be effective to enable him to do so or that possibly a further Act of the Imperial Parliament might be necessary. The learned Vakil has put forward two reasons why he contends that the Governor has no authority to make any disbursement of these tour and travelling allowances. In the first place with regard to the Rs. 65,000 appropriated to the tour and travelling allowances of the Governor himself, the learned Vakil points to Section 85 of the Government of India Act, 1919. He contends that under that there are fixed as payable to, amongst other persons, the Governor of this Province a salary not exceeding the maximum specified (which in this case amounts to Rs. 1,00,000 per

annum) and that, if the tour and travelling expenses are to be included in the expression "salaries and pensions" in the provision of definition added to Section 72D of the Act of 1919 by the Act of 1925, then the maximum salary payable under Section 85 of the Act is exceeded by Rs. 65,000; or in other words the Rs. 65,000 must be paid out of the salary of Rs. 1,00,000 the maximum payable by way of salary to the Governor under Section 85 of the Act. There are two fallacies in this argument, in the first place the word "includes" in the provision of definition added by the Act of 1925. does not mean (as I read it) more than to indicate what for the purposes of these action (that is to say whether the sums can be included in the non-votable portion of the Budget) is comprised in the meaning of the word "salaries and pensions." It does not exclude the operation of the other portions of the Act upon the incidents connected with "salaries or pensions." It is necessary to look at Sub-section (3) of Section 85 with its proviso. This sub-section reads. "The remuneration payable to a person under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein; provided that nothing in this sub-section shall apply to the allowances or other forms of profit and advantage which may have been sanctioned for such persons by the Secretary of State in Council." In my view travelling allowances clearly fall within this proviso. The argument, therefore, that Section 85 operates in such a manner that travelling allowances of a Governor must come out of his salary as fixed by Section 85 falls to the ground; if it did not the position would indeed be an absurdity."

59. The second reason which the learned Vakil put forward for his contention that the Governor cannot order disbursement of any of these tour and travelling allowances appropriated for himself is that no such tour and travelling allowances have been sanctioned by the Secretary of State in Council. I think that it may be convenient here to state that the Court is informed at the Bar that the procedure adopted with regard to the fixation of the quantum of travelling allowance is somewhat as follows. The Governor's staff and the heads of different departments put forward, when preparing their annual estimates of what they contemplate will be the expenses of administering their departments, an approximate estimate of what would be required for their travelling expenses. These are considered by the Governor in Council and if passed, entered in the Budget. Then when an official travels he submits to the Accountant, General through the head of his department a bill for his travelling expenses and if passed by the Accountant-General an order is given to him to receive, the sum from the Treasury. It is clear that under the various provisions of the sections of the Act quoted by my Lord the Chief Justice that it is within the power of the Secretary of State in Council to prescribe payment of expenses of the nature under discussion by rule or regulation or in other expedient manner.

60. Now in notification No 1449 E.A. dated Simla, the 29th September, 1922, (vide Gazette of India, October 7, 1922, page 1916) it is stated that His Majesty's Secretary of State for India in Council had been pleased to make certain Resolutions and Rules with regard to expenditure by a Governor-in-Council on Reserved provincial subjects. The rules set out numerous instances in which a previous sanction of the Secretary of State in Council has to be obtained by a Governor before he can authorise expenditure upon various subjects. The 4th section of the Resolution states that subject to the observance of these rules and of the provisions of 9. 72D of the Government of India Act, the Governor in Council has full power to sanction expenditure upon reserved provincial subjects with the previous consent of his Finance Department and to delegate such power upon such conditions that he may think fit to any officers subordinate to him. Now, if as has already been expressed in

my view to be the case, these tour and travelling expenses can properly be placed in the category of the non votable portion of the Budget, this Resolution (which was ordered to be published and which was published in the Gazette of India) obviously gives the Governor in Council power to sanction the disbursement, as occasion may arise, of these sums which are appropriated for these tour and travelling necessities. In practice, of course, to each head of department is delegated the putting forward for sanction by the Accountant-General of the travelling expenses of the officers of the department as occasion arises and as and when travel actually takes place.

61. The whole application would, therefore, appear to have been dealt with and concluded by the above observation.

62. It is true that, upon the assumption that this Court might have agreed with the contentions put forward by the applicant an interesting but now purely academic discussion was initiated as to whether this Court has any power to issue a mandamus. I do not think that it would be profitable or desirable now to express, any final view upon this question. I am not sure that prior to the Indian Specific Relief Act (Act I of 1877) the High Court of Calcutta had itself power to issue a mandamus but at any rate by Chapter VIII of that Act the position with regard thereto appears to have been very materially altered. Section 50 of the Act declares that neither the High-Court nor any Judge thereof is hereafter to issue any writ of mandamus and by Sections 45 and 55 procedure which may be in lieu of mandamus and by way of prohibition or injunction is provided. As a matter of fact Section 45 of the Act only refers to the High Courts of Judicature at Calcutta, Madras and Bombay (and by a later addition Rangoon) all of which Courts possessed considerable original jurisdiction. As is, of course, well-known, the Letters Patent constituting the High Court of Judicature at Patna were only issued on the 9th of February, 1916.

63. It was suggested by the learned Vakil for the applicant that this High Court had inherited from the Calcutta High Court much of its inherent jurisdiction including a right to issue a mandamus. In the circumstances of the present application, I am content to leave the matter there. When the occasion arises the question can perhaps be further discussed with advantage, but it is noticeable to observe that even by Section 45 of the Specific Relief Act none of the High Courts therein mentioned can make any order binding on a Governor. It would be father curious if the High Court of Patna was in law endowed with greater powers than the High Court of Calcutta from which it was in 1916 territorially; separated.

64. Summarising, therefore, my conclusions, I am of the opinion (a) that the tour and travelling allowances mentioned in the applicant's petition are rightly capable of inclusion in the non-votable portion of the Budget, (b) that the Governor's decision on such a question is final, (c) that the High Court has no jurisdiction over the Governor in connection with such a matter or any original jurisdiction over the Governor or the Executive Councillors in connection with anything counselled, ordered or don't by any of them in their public capacity; (d) that the maximum salary fixed by Section 85 of the Government of, India Act for the Governor of the Province does not include tour and travelling allowances; (e) that the Secretary of State in Council has sanctioned the disbursement by the Governor (and fey officers to whom he has delegated his authority) tour and travelling allowances subject, of course, to the consent of his Finance Department. I recognise, however, that the withdrawal from the control or vote of the Legislative Council of such large sums as in the aggregate these tour, travelling and other allowances make up is a matter upon which members of the Council and the members of the tax-paying community also may feel

that they have a grievance; but that is not a question with which this Court is in any way concerned. The law with regard to the matter is, in my view perfectly clear and the only duty of this Court is to interpret it.

65. I agree, therefore, that this application should be rejected.

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