

CALCUTTA HIGH COURT

Pramatha Nath Mitter

Vs.

Hon'ble the Chief Justice of the High Court

Suit No. 59 of 1961

(P.B. Mukharji, H.K. Bose and D.N. Sinha, JJ.)

31.05.1961

JUDGMENT

P.B. Mukharji, J.

1. An order, in the name of the President, was issued under Section 23-A of the High Court Judges (Conditions of Service) Act 1954, curtailing and reducing the vacations as fixed and determined by all the Judges of this High Court. The dispute, in ultimate analysis, is about ten more working days in the year. This High Court along with three other High Courts of Assam, Orissa and Mysore are the objects of this kind of imposition.

W. 3/7/60-Judl. I

Government of India

Ministry of Home Affairs.

New Delhi-11, the 28th Dec. 1960.

ORDER.

In exercise of the powers conferred by Sub-Section (1) of Section 23-A of the High Court Judges (Conditions of Service) Act, 1954 (28 of 1954), the President is pleased to make the following order, namely :-

1. This order may be called the Calcutta High Court (Vacation) Order, 1960.
2. The vacations of the Calcutta High Court during the year 1961 shall be for the period specified below :-

Eastern Vacation	- From 31st March to 3rd April, 1961 (both days inclusive)	- 4 days
Annual Vacation	- From 9th October to 17th November, 1961 (both days inclusive)	- 40 days
Christmas Vacation	- From 25th December to 31st December 1961 (both days inclusive).	- 7 days

(M. Gopal Menon).

Joint Secretary to the Govt. of India.

To
The General Manager,
Govt. of India Press New Delhi."

2. Three representative members of all the three branches of the legal professions here, an Advocate, a Barrister and a Solicitor, have moved this application under Article 226 of the Constitution, challenging the President's order as unconstitutional, ultra vires and illegal and as an unprecedented executive interference with the internal administration of the High Court to regulate its own vacations and sittings. Application was moved before D.N. Sinha, J., who referred it to a larger Bench. The Chief Justice constituted this Special Bench to determine this application.

3. The petition was publicly advertised under Order 1 Rule 8 of the Civil Procedure Code. Not one single public supporter has come forward to uphold this government interference. The learned Solicitor-General who appeared for the Government described his cause as the "unpopular cause". It is not only unpopular but also against all the expressed opinions of persons concerned or affected. The legal professions who are directly affected are all against it. No member of the legal or other public has lifted his little finger to support such measure or order. The Chief Justices Conferences in India are against it, their view being 200 working days in the year. The public Law Commission of India, who heard and fully considered all available and relevant evidence, was in favour of 200 working days and not 210 days and left to each High Court to arrange its own vacations. (See paragraphs 63 and 64 Vol. I, p. 95 of the 14th Report of the Law Commission on Reform of Judicial Administration). This is, therefore, a universally condemned order which arguments at the Bar described as the infamous Order of executive interference with the internal administration of the High Court. It is unprecedented in the more than a century old history of this Court.

4. No democratic process of law making was respected because neither the Professions affected, nor the Judges, nor the judicial administration, nor the Law Commission which took public evidence, ever accepted or approved this measure. This Court, therefore, has not got the materials to find out who is really responsible for and who is the real initiator of and what his real reasons are for this extraordinary legal measure flouting all Public opinion in a democracy. But Courts and constitutional jurisprudence are powerless to strike down law or order only on the ground that it violates and flouts public opinion or affected or concerned opinion. Jurisprudence has not yet achieved co-relation between law and public opinion through the machinery of the Courts. The result is that disregard of all public or affected opinion does not make the impugned Statute or Order illegal or unconstitutional, but puts law into discredit.

5. An Under secretary of the Government of India (Home), however, has been made to affirm an affidavit and through whose oath the reason for justifying the Order is said to be to clear arrears. This reason has been criticized at the Bar as hollow and false. The High Court of Assam in the Chart annexed to the affidavit has reduced arrears, and yet the Order has been made against it. It is, therefore, argued that the reason put forward is untrue. It is also contended at the Bar that Article 224 of the Constitution makes provision for the appointment of additional judges to clear arrears and not to reduce vacations fixed by the High Courts. It is then contended on behalf of all the branches of legal professions that reduction of vacations of the High Courts will not help arrears to be cleared up in fact, because having regard to the vacation so far had before this Order, legal leave due to Judges was not availed of due to the Judges' regard and sense of public

duty, but if the vacation is so reduced, as to compel due leave to be utilised, then, the loss in judge hours of work will be very much more than the gain by the increase of ten days work in the year. It is, therefore, also criticized that so-called reason for clearing arrears does not stand scrutiny. No formal reason is put forward to suggest that the order is made to bring uniformity of working days in all the High Courts in India. There can be, of course, no such uniformity in this respect because High Courts in India have different and varying number of Judges from 3 or 4 to 25 or more 'in each High Court, with widely different number, volume, type and quality of cases find causes. In fact, that is why clause 37 of the 1774 Charter here of the Supreme Court, which Charter has not been abrogated yet, sensibly provided for "respect to the seasons of the year and the Convenience of suitors" as cogent consideration to appoint "proper terms and law days." But again while in the early days reason was regarded as the soul of law, the modern jurisprudence does not permit a law to be declared illegal or unconstitutional on the ground that it lacks good reasons or any reason at all to support it except what may come in through the constitutional provisions for reasonable restrictions and reasonable classifications under Articles 14 and 19.

6. Bitter comments have been made at the Bar On behalf of the applicants about the manner in which the President's Order was clamped on this Court after the Full Court of all the Judges here had determined, published and printed the Year's Calendar indicating the Vacations. That Calendar was slashed by this impugned Order. It is argued that this public humiliation for this Court could have been avoided if the President's Order was made before this Court decided and published its vacations. But exhibition of power or offensive manner of making and imposing a law does not make it illegal or unconstitutional. Discretion is pot regarded here as part of any valour in law making. Professor Goodhart's moral suasion has not yet complemented the Austinian and Hobbasian theories of law as the superior command of political force.

7. The real attack on this Order is made on legislative competence. In the first place, it is attacked on the ground that the High Court Judges (Conditions of Service) Act 1954 deals with the conditions of service of High Court Judges, and Section 23-A thereof can only mean vacations which such Judges individually may enjoy and claim as part or term of their service. It does not deal with vacations of the High Court as an institution, which is separate from Judges and is not only composed of Judges, but also of the staff, the members of the professions in law and the litigant Public. In other words, the plain issue raised is that vacations of the High Court do not and cannot form conditions of service of High Court Judges, and what could not be done directly is being attempted to be done indirectly by this impugned Order, It is challenged in the petition as colorable legislation. This argument is developed in the following manner.

8. In the first place, reference is made to the Statement of the Objects and Reasons of the High Court Judges (Conditions of Service) Act 1954 and its Amending Act 48 of 1958 which received the President's assent on 17th December, 1958, and was published in the Gazette of India On the following day. This Amending Act introduced Section 23-A of the Act under which the impugned Order was passed. Three main reasons were suggested in the Statement of Objects and Reasons for this Amending Act 1958, which may be briefly classified as (1) for making provisions for service or acting as additional judges to count as service as judges, (2) for pensions of what were known as Part B States Judges, and (3) for "certain minor and clarificatory amendments" as a result of the working of 1954 Act. Section 23-A of this Statute marginally described as "Vacation of High Courts" reads as follows :-

23-A.(1) Every High Court shall have a vacation or vacations for such period or periods as may, from time to time, be fixed by the President, by Order notified in this behalf in the Official Gazette, and every such Order shall have effect notwithstanding anything contained in any other law, rule or order, regulating the Vacation of the High Court.

(2) Every Order made under Sub-Section (1) shall be laid before each House "to the Parliament."

9. From the reference to the Statement of Objects and Reasons of the Original Act, 1954, it is found that Article 221 of the Constitution is mentioned there. It is argued, therefore, at the Bar that Article 221(2) of the Constitution only mentions (1) leave of absence, (2) pensions, and (3) allowances and rights of the 2nd Schedule. "Vacation of High Courts" does not come under any of these three heads. It is neither (1) leave of absence, (2) nor pensions, (3) nor allowances and rights of the 2nd Schedule, Chapters 2, 3 and 4 of the Act of 1954 dividing the subjects as Leave, Pension and Miscellaneous are shown in support of this argument. "Vacations" are to be distinguished from holidays or leave of absence. The argument boils down to this that the Original Act of 1954 dealing with Judges Conditions of Service, and Article 221 of the Constitution it invoked, did not at all have within its contemplation "Vacation of High Courts" as its theme, and such vacation is entirely outside the scope, ambit and declared objects of the Act.

10. In the second place, it is contended that the reason for excluding "Vacation of High Courts" in the Act of 1954 is that Parliament has no legislative power under the Constitution to make any law affecting Vacation of State High Courts which are within the competence of the State Legislatures. This is a far-reaching question of great Constitutional importance. The arguments on this point are marshalled in this way.

11. Article 225 of the Constitution expressly preserves the pre-existing powers at the date of the Constitution, "Jurisdiction", "law administered" and "respective powers of Judges in relation to administration of justice in Court" including powers of Court to regulate "sittings of Court", and expressly makes them subject to (1) provisions of the Constitution, and (2) provision of any law of the "appropriate legislature".

12. The pre-existing powers of this Court, at the date of Constitution and even thereafter until the date of the impugned Order, clearly show that this High Court had the authority to determine what vacations it should have. See Clauses 37 and 38 of Charter of 1774, Clause 37 of the Letters Patent read with the Division Bench decision in *Gur Bux Singh v. Sohonlal Malhotra*¹, and the observations of Banerji, J., at page 129 with whom Harries, C.J., agreed, Chapter III, Rules 1-3 of the Original Side Rules, Section 9 of the High Court Act 1861, Sections 106-8 of the Government of India Act 1915 Section 223 of the Government of India Act, 1935.

13. This pre-existing power of this High Court to regulate its own vacation can be cut down under Article 225 of the Constitution only by (1) the Constitution, and (2) by laws

¹55 Cal WN 127 : (AIR 1952 Cal 542)

of appropriate legislature. The Constitution far from cutting down this Power, preserved it. The question, therefore, is what is the 'appropriate Legislature' which can cut down this power?

14. For this purpose reference is made to the Legislative Lists in the Constitution and Items

therein and the relative Articles of the Constitution. Article 245 makes Parliament's law making power subject to the provisions of the Constitution. The subject-matters of laws to be made by Parliament and State Legislatures are divided under Article 246 in three respective heads of (1) the Union List, (2) State List, and (3) Concurrent List with residuary powers of legislation to Parliament under Article 248 of the Constitution. Item 3 of the State List II of the 7th Schedule of the Constitution provides :-

"Administration of Justice : Constitution and Organization of all Courts, except Supreme Court and the High Court : Officers and servants of the High Court : procedure in rent and revenue Courts : fees taken in all Courts except the Supreme Court."

15. This is then compared with Item 77 of the Union List I which provides :-

"Constitution, Organization jurisdiction and powers of the Supreme Court (including contempt of such Court) and the fees taken therein : Persons entitled to practice before the Supreme Court."

16. This Item 77 of the Union List does not mention "Administration of Justice". It may just as well be on the ground that Articles 131 to 140 of the Constitution may be regarded as so many items for the Supreme Court in its administration of justice.

Again, Item 78 of the Union List I provides :-

"Constitution and Organization of the High Courts except provisions as to Officers and servants of High Courts: Persons entitled to practice before the High Courts."

17. It is then argued that the expression "administration of justice" in Item 3 of State List II includes the powers to regulate Vacation of the High Courts, How long the High Court will remain open without a Vacation, how long it will remain closed for the Vacation, and how justice is to be administered during the Vacation are said to be questions directly concerned with the expression "administration of justice", and as that is a State legislative subject, only the State Legislature of the particular State whose High Court is concerned can make the laws regulating such Vacation. For this purpose reliance is placed on the Supreme Court decision in *State of Bombay v. Narottamdas Jethabhai*², and particularly the observations of Das, J., at p. 120 (of SCR) : (at p. 95 of AIR) where it is said :-

"The words 'administration of justice' may be an expression of wide import and may ordinarily and in the absence of anything indicating any contrary intention, cover and include within its ambit, several things as component Parts of it, namely, the Constitution, Organization of Courts, jurisdiction and Powers and the

²(1951) SCR 51 : AIR 1951 SC 69

laws to be administered by the Courts."

18. Reliance was also placed on the Full Bench decision of the Madras High Court *In re : S.M. Nathaniel*³, on the meaning and construction of the words "administration of justice." and specially the observations there of Rajamannar, C.J., at p. 487.

19. The learned Solicitor-General has Contended that Vacation comes within "Constitution and Organization" and for this purpose could cite nothing better than rely on the Old Bengal and Assam Civil Courts Act, 1887 Chap. 2 with the title "Constitution of Civil Courts" and Sections 14 and 15 appearing under that title, dealing respectively with place of sitting and vacations. That Act, however, does not at all help because it never used the expression "administration of justice" as used in the Constitution today. Where the expression "administration of justice" is used separately from the expressions "Constitutions and Organizations", Vacation is rightly contended to come more appropriately within "administration of justice" than within "Constitution and Organization". How the Court is to be constituted and organized, their constitution and organization in different branches, divisions and jurisdictions do not seem to relate to questions of Vacations of this High Court in the context and background of the other expression used "administration of justice". The Solicitor-General, therefore, also contends that "Vacation" does not come within Article 225 and does not come within the words used in that Article, namely "regulate sittings of Court". He wants to confine "Sittings" only to the question of what Judges should sit singly or in divisions, which seems too narrow an interpretation of the unqualified word "Sittings", and the Sittings are not only of "Judges" but of "Courts" as used in Article 225 of the Constitution. The other obstacle in accepting the Solicitor-Generals contention about the legislative competence of Parliament to make a law like Section 23-A of the High Court Judges (Conditions of Service) Act 1954 to regulate and dictate Vacations of High Courts lies in Item 3 of List II and Item 78 of List I which expressly exclude "Officers and Servants of the High Courts" from the legislative competence of Parliament and grant that power to the State Legislature. This impugned Section 23-A and the purported Order made there under plainly attempt to regulate what Vacations the whole High Courts should have thereby controlling the Vacations of Officers and Servants of the High Court, who are expressly outside the pale of Parliament's legislative capacity. See also Article 229 of the Constitution. It is not realized by the legal advisers of the Government of India that when High Courts Judges are on Vacation, the High Court Offices are not dosed and not only administrative but many judicial duties are Performed by Officers and Servants of the High Courts during such vacation. It is time that some respect and recognition are accorded to the basic principle of the Indian Constitution, that it is not a unitary and centralized Government" of India but a division of powers and functions and only such central control as the Constitution has provided. The States, their legislative, executive and judicial functions are not mere administrative convenience of the Union to be set aside and overcome at every convenient turn. They represent a carefully balanced and constitutionally decentralized and integrated distribution of powers among different constitutionally recognized bodies who must act within their respective spheres marked out by elaborate scheme of carefully chosen legislative entries, in the 7th Schedule of the Constitution. It cannot be too strongly emphasized that under the Constitution,

³ AIR 1949 Mad 481

"administration of justice" is not a Union but a State subject for legislation and it will be an infraction of this Constitution to control such "administration of justice" by the backdoor of "Constitution and Organization" which alone is the Union legislative competence. It is to my mind difficult to bring periodic or annual control of vacations of State High Courts as institutions of justice by the President under Section 23-A. of High Court Judges (Conditions of Service) Act

1954 within either "Constitution" or "Organization" of a State High Court, without entrenching on State legislative sphere of "Administration of Justice". I am aware that legislative entries should not be too punctiliously construed as narrow unbreakable shells but taking even the broadest view there can be no getting away from the fact here that "administration of justice" sensibly and reasonably construed must include "Vacation of High Courts" and is a State Legislative subject and not within Parliament's legislative competence. It is appropriately and rightly so, because the High Court belongs to the State (Art. 214 of the Constitution), the State pays for it and "administration of justice" expenses are charged on the consolidated fund of the State exchequer. (Article 229(3) of the Constitution).

20. But the main opposition of the learned Solicitor-General to this application was on purely technical grounds. His first ground is that the petition is incompetent because of the relief sought and the parties involved. A part of this "ground is that no writ lies against the Chief Justice. His next ground is that no Mandamus can lie because the legal professions have no legal right to claim any Particular Vacation. The Advocate-General appearing for the Chief Justice has mainly supported the Solicitor-General with an added point suggesting bias in the sense that the Judges were interested in the Vacation and, therefore, the Principle that no one should be a judge in his own cause, applied to the determination of this application.

21. It is not necessary to decide that point of bias having regard to the view I have taken about jurisdiction and also specially because (1) this point was not fully argued with its necessary and far reaching implications such as, would the Judges of this Court then have power to determine the validity of many rules and procedures, both in the making and in the administration of which they are interested, or in dealing with the Income-tax Act and its interpretation whose repercussions may be felt by themselves, and by reason of the fact that the interest which disqualifies a Judge under the doctrine that no one should be a Judge in his own cause, is a personal or pecuniary interest in the lis and not institutional interest by virtue of his office as in *Dimes v. Grand Junction Canal Co*⁴, and *Egerton v. Brownlow*⁵, at pp. 96-97 and (2) where the Constitution and the laws impose a statutory and constitutional jurisdiction on the Judges of the High Court, it is debatable how far they can in a body deny that jurisdiction such as Judges reviewing their own decisions and trying contempt of their own orders and the principles discussed in this connection by Black, J., of the American Supreme Court in *Federal Trade Commission v. Cement Institute*⁶, at pp. 700-703.

22. The argument that the legal Professions have no legal right to maintain this application may be disposed of briefly. No doubt that unless there is a legal right in the applicant, no application for Mandamus Can lie. That is settled law. The Rules of tins Court, made under Letters Patent, and the Charter and the Rule-making powers of this

⁴(1852) 3 H.L.C. 759

⁶(1948) 333 U.S. 683 ((92 Law Ed 1010)

⁵(1853) 4 H.L.C. 1

High Court, and Section 8 of the Bar Councils Act, enrolling Advocates and giving them the right to practise (using the expression "entitled as of right to practise in any High Court") before this Court give them the legal right to see that the institution which has enrolled them under statutory powers is carried on and conducted according to law and the Rules made thereunder for purposes of such statutory right to practise. If the law and the Rules framed provide that the High Court has to fix and regulate its Vacation and Sittings according to certain

laws, then if some other authority, say, for example, the Vice-Chancellor of the University who has no legal authority over this Court, starts opening and declaring Vacations for this Court, then I feel the legal professions are entitled to move for Mandamus on the ground that the institution in which their members have enrolled themselves, be run according to law. Certainly their legal right to practise according to law is affected. It is needless to add that Advocates and Solicitors are regarded as Officers of the Court as held in *Lalit Mohan Das v. Advocate-General of Orissa*⁷, and other cases like *Romesh Chandra Basu v. Jadab Ch Mitra*⁸, and In the matter of Attorneys, 29 Cal WN 1047 at P. 1051 : (AIR 1925 Calcutta 964 at pp. 965-966), and as such they have a legal right to see that the Court opens and closes according to law.

23. It is then said that there can be no Writ against the Chief Justice. The two respondents of this application are (1) the Chief Justice of this High Court, and (2) the Union of India represented by the Home Secretary. Reliance was placed on the Full Bench decision of the Patna High Court *In Re Babul Chandra Mitra*⁹, that no Writ lies against the High Court even if the act (There the point was about enrolment of an advocate) is an administrative one. But then the Supreme Court in *Pradyat Kumar Bose v. Chief Justice of the High Court, Calcutta*¹⁰,

"In the view however that we have taken as to the contentions raised before us regarding the validity of the order of dismissal, we do not feel called upon to enter into the discussion relating to the availability of the Writ. We express no opinion on the questions so raised. We consider it, however, desirable to say that our view that the exercise of the power of dismissal of a civil servant in the exercise of administrative power may not necessarily preclude the availability of remedy under Article 226 of the Constitution in an appropriate case. This is a question on which we express no opinion one way or the other in this case."

24. Now although the Supreme Court said it did not want to express any opinion on the question, reliance was placed on its observation :-

"We consider it however desirable to say that our view that the exercise of the power of dismissal of a civil servant in the exercise of administrative power may not necessarily preclude the availability of remedy under Article 226 of the Constitution in an appropriate case."

25. The "view" expressed by the Supreme Court is declaration of law and is binding on all under Article 141 of the Constitution. If a Writ lies against the Chief Justice for

⁷1957 SCR 167 at P. 177 : (AIR 1957 SC 250 at p 254)

⁹ AIR 1952 Patna 309

⁸28 Cal WN 597 at p. 602 : (AIR 1924 Cal 753 at D. 757)

¹⁰(1955) 2 SCR 1331 says at pp. 1351-52 : (AIR 1956 SC 285 at pp. 293-294) :-

administrative act, then the Full Court Resolutions of the 27th January, 1961 (hereby directed to be filed) with the Order of printing the Calendar are also administrative acts and a Writ can lawfully lie according to that "view" which the Supreme Court expressed. No doubt the writ will issue in "an appropriate case" but the question whether a particular case is or is not an appropriate case will depend on the facts of the individual case concerned and no longer on any inherent legal bar. The fact that all the Judges are not made parties does not appear to me to affect the

question, because on the basis that it is an administrative act, the Chief Justice is the administrative head representing the Full Court and the petition has also been publicity advertised under Order 1 Rule 8 and no Judge has come forward to join the application in support to this order, and a Mandamus will lie against the head of the administration; and the Chief Justice has been made a respondent to this application.

26. But then the real technical difficulty arises on the ground that the President's Order was made at New Delhi and the second respondent is not within the jurisdiction of this Court. In *Lt. Col. Khajoor Singh v. Union of India*¹¹, the majority decision holds that (1) Article 226 does not refer to the accrual of the cause of action and to the jurisdiction of the High Court depending on the place where the cause of action accrues being within its territorial jurisdiction observing that "It will, therefore, be not correct to put too much stress on the decision in that case", meaning *Ryots of Garabandho v. Zamindar of Parlakemedi*¹², and (2) the absence of any provision in the Constitution providing that the seat of the Government of India at New Delhi cannot alter the fact, which is common knowledge that the seat of the Government of India is at New Delhi, Subba Rao, J., and Das Gupta, J., dissented from the majority view. Having regard to the majority decision, the impugned Presidential Order having been made at New Delhi and the second Respondent being at New Delhi, this High Court has no jurisdiction to entertain this application under Article 226 of the Constitution, and according to that decision it is only the Punjab High Court within whose territorial jurisdiction New Delhi happens geographically to be placed is the proper Court with jurisdiction. But at the same time I do not know how the Punjab High Court can have any jurisdiction over the Chief Justice of Calcutta High Court who is the first respondent in this application. I, therefore, do not know after this decision, where and in which High Court an application under Article 226 of the Constitution will lie, where there are two respondents, one in New Delhi and the other in Calcutta, The legal situation is then that a constitutional and legal right goes abegging for redress for want of a Court in such a case with two respondents in different territorial jurisdictions, although against the Delhi respondent no writ is formally asked but who has been joined as a party in whose Presence the decision or declaration is sought to be reached. An argument was advanced on behalf of the petitioners that the prior Supreme Court decision in *Thangal Kunju Musaliar v. Venkatachalam Potti*¹³. on this point was not cited in *Lt. Col. Khajoor Singh's case*¹⁴, and that the former took a different view. I am afraid this Court cannot go into that question and the conflict if any between the two the petitioners can only get resolved by the Supreme Court.

27. In that view of the matter, I am bound to hold that this impugned order of dubious constitutional validity and of still more dubious propriety must escape judicial verdict, on

¹¹(1961) 1 SCA 173 : AIR 1961 SC 532

¹³ AIR 1956 SC 246

¹²70 Ind App 129 : (AIR 1943 PC 164)

¹⁴1961-1 SCA 173 : AIR 1961 SC 532

the purely technical ground of jurisdiction as laid down by the majority decision of the Supreme Court in 1961-1 SCA 173 : AIR 1961 Supreme Court 532 cited above.

28. The application, therefore, fails on the ground of jurisdiction and is dismissed. There will be no order as to costs.

Bose, J.

29. The principal question that arises for determination in this case reported under Chapter V

Rules 2, and 3 of the Original Side Rules of this Court is whether the order called the Calcutta High Court Vacation Order 1960 Passed by the President of India on 1st November 1960 under Section 23-A of the High Court Judges (Conditions of Service) Act 1954 (Act 28 of 1954) is valid, or not.

30. It appears that when the High Court Judges (Conditions of Service) Act 1954 was originally passed on 20th May, 1954 there was no provision like Section 23-A in that Act.

31. An analysis of the original provisions of the Act 28 of 1954 indicates that the Act was originally passed for carrying out the purposes of Article 221 of the Constitution and this legislation was based on the model of the Government of India (High Court Judges) Order 1937 passed on 18th March 1937 under Section 221 of the Government of India Act, 1935 and other sections mentioned in the said Order.

32. Section 23-A was introduced in the principal Act 28 of 1954 by the High Court Judges (Conditions of Service) Amendment Act 1958 (Act 46 of 1958) and is as follows :

"Vacation of High Courts.

23A. Every High Court shall have a vacation or vacations for such period or periods as may from time to time be fixed by the President, by order notified in this behalf in the official Gazette, and every such Order shall have effect notwithstanding anything contained in any other law, rule or order regulating the vacation of the High Court.

(2) Every order made under Sub-Section (1) shall be laid before each House of Parliament."

33. It is clear from the terms of this new Section 23A that the object of enacting the section was to arm the President with power to control and regulate the vacations of the High Courts in such manner as he thinks fit though by no stretch of imagination such a provision can be regarded as one having any relation with or any bearing on the questions of salaries or allowances, leave of absence, or pensions of judges which were the principal topics dealt with by the original Act 28 of 1954. The new provision affects not merely the judges of the High Court but the High Court in general. Besides the judges the officers and servants of the High Court, the practitioners in the High Court are also affected. That the judges and the High Court are not synonymous, admits of no doubt. All the judges may be on leave and yet the High Court may remain open for transacting certain kinds of business e.g. for hearing of references before the Registrar or Master, for filing of plaints in Certain matters and for other kinds of business not dealt with by Judges. So under the guise of assuming Power to affect the conditions of the service of the judges the President is by virtue of this Section 23-A clothed with Power to affect the entire High Court and the administration of justice in the High Courts. That the expression "Administration of justice" includes the connotation of regulating the sittings of the Court is made clear by the Constitution itself. Article 225 of the Constitution which preserves the jurisdiction of the existing High Courts and the power of the judges thereof in relation to the administration of justice in the Court including the power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, indicates that regulation of the sittings of the Court is expressly categorised as one of the matters comprehended within the connotation of the expression "Administration of justice" which is a subject mentioned in Entry 3 of the List II of

the Seventh, Schedule to the Constitution and is thus a topic with respect to which the State Legislature alone has exclusive power to legislate under Article 246 of the Constitution, subject to clauses (1) and (2) thereof. Again under Entry 3 of List II it is the State Legislature which has exclusive power to legislate with respect to officers and servants of the High Court. The Union legislature has not been given power to make laws with respect to any of these two subjects. It has been argued by the Solicitor General of India appearing on behalf of the Union of India that under Entry 78 of List I of the Seventh Schedule which deals with "Constitution and organization of the High Courts" the Union Legislature has power to regulate the vacations of the High Court, as such a matter comes within the purview of the expression "Organization". The answer of the petitioners to this Contention is that administration begins where organization ends and so organization does not include the power to regulate the vacations of the High Court. In the case of, AIR L951 SC 69 it has been pointed out by the Supreme Court in construing the expression "Administration of Justice" as occurring in Entry I of List II of Schedule VII of the Government of India Act, 1935 that this expression is of the widest amplitude and Entry No. I confers upon the Provincial Legislature the right to regulate and provide for the whole machinery connected with the administration of justice in the Province, (page 83). It is a complete and self-contained entry. (page 70)

34. Moreover, when Article 225 of the Constitution gives a clear indication that the power in relation to administration of justice includes the power to regulate the sittings of the Court, the Court will not be justified in curtailing the meaning of the same expression occurring in Entry 3 of List II of the Seventh Schedule of the Constitution. In dealing with Entry 14 of Section 92 of the Canadian Constitution (British North America Act) which is worded as follows :

"Administration of Justice in the provinces, including constitution, maintenance and organization of Provincial Courts both of civil and criminal jurisdiction including procedure in civil matters in those Courts."

Lefroy in his book "Canada's Federal System (1913)" at page 540 states :

"Provincial legislatures may regulate the Procedure in civil matters and the sittings of the judges of the Supreme Court of the Province-

In the Thrasher's case (1882) 1 EC (living) 170, the British Columbia Judges held that Section 28 of the British Columbia Local Administration of Justice Act 1881 by which it was provided that the judges of the Supreme Court of the Province should sit as a Full Court as might be by rules of Court appointed, was ultra vires on the ground that the Court was not a Provincial Court within the meaning of Entry No. 14 of Section 92 and that it is over the procedure of such provincial courts alone that No. 14 gives the Provincial legislature jurisdiction. The Supreme Court of Canada however upon the question being referred to it by the Governor-General in Council held that the legislature of British Columbia could make rules to govern the procedure of the Supreme Court of the Province in all civil matters and could delegate this power to the Governor-General in Council, and that the Provincial Act in question was intra vires. Their Lordships unfortunately did not give their reasons for this decision."

35. So the interpretation put by the Canadian Courts on the expression appearing in Entry 14 of

Section 92 of the British North America Act, shows that although the power to regulate the sittings of the Court was not expressly mentioned in Entry 14 it was assumed that such power was comprehended within the expressions used in Entry 14.

36. It was argued that the power to regulate the sittings does not include the power to regulate the non-sittings. But Chapter III of the Rules of the Original Side of this Court, and the Rules embodied in Order 2 of the Supreme Court Rules and Order 63 of the Rules of the Supreme Court in England all show that sittings and non-sittings (i.e. holidays and vacations) are treated and dealt with as allied matters, and as being inextricably mixed up with each other.

37. As pointed out by Gwyer, C.J. in the case of *United Provinces v. Atiqa Begum*¹⁵, the subjects dealt with in the three legislative lists are not always set out with scientific definition but none of the items in the lists is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in it. The learned Chief Justice pointed out specifically that the power to legislate with respect to "collection of rents" included the power to legislate with regard to "remission of rents" the Power to legislate with respect to "Forests" included the power to legislate with respect not only to afforestation but also to 'disafforestation - the power to legislate with respect to "Fisheries" included the Power to regulate the fishing as well as power to prohibit fishing altogether in particular places or at Particular times." Thus it is abundantly clear that the power "to regulate sittings includes the power to regulate the recesses of the sittings or the termination of the 'sittings. This power is given exclusively to the State Legislature under Entry 3 of List II, and is outside the purview of Entry 78 of List I. The expressions "Constitution" and "Organization" as appearing in Entry 78 of List I are no doubt two concepts which are included in the concept of "Administration of Justice" but when these two matters are specifically mentioned in the Union List I it is reasonable to hold that the connotation of the expression "Administration of Justice" is restricted to that extent in Entry 3 of List II and the matters of Constitution and Organization of the High Courts have been taken out of the legislative power of the State Legislature, and barring this slice all the residuary power ay comprehended within the expression "Administration of Justice" is left in the hands of the State Legislature.

38. Now the further question that has been raised is whether the word "organization" in Entry 78 of List I includes the Power of regulating the vacation of the High Courts. It is well known that "however carefully and precisely lists of legislative subjects are defined

¹⁵1940 FCR 110 at Pp. 134-135 : (AIR 1941 FC 16 at p. 25)

it is practically impossible to ensure that they never overlap". But I do not think that there is any overlapping so far as the power of regulating the sittings of High Court or the vacation of the High Court is concerned. The matter of organization of the High Court includes primarily things like the appointment of the Judges, the division into department, making provision and arrangements for the housing of the Courts or in other words matters connected with the giving of final shape to the Court so that it may start functioning. But the matter of its running and management and its actual functioning is entrusted to the State legislature under the Power to legislate with respect to Administration of Justice. Clauses 37 and 38 of the Charter establishing the Supreme Court at Calcutta, Section 9 of the High Court Act, 1861, Sections 106, 108 and 112 of the Government of India Act 1915 and Section 223 of the Government of India Act, 1935 indicate that all along this power to regulate the sittings was in the High Court (See also *B.K. Biswas v. Phanindra Nath*¹⁶, Moreover, as pointed out already Article 225 of the Constitution

gives very clear indication that the power of regulating the sittings of the Court is intended to be included in the power in relation to Administration of Justice. Logically therefore the same Power was not intended to be included in the subject of "organization" as occurring in Item 78 of List I. This appears to be the reasonable interpretation which should be adopted in avoiding overlapping and conflict between Entry 3 of list II and Entry 78 of List I.

39. It was also argued that the Power to regulate the sittings contemplated in Article 225 has reference to sittings of judges either singly or in Division Benches only and not to regulation of sittings of the Court in its entirety. But this argument fails to give effect to the expression "to regulate the sittings of the Court" that is to say - the Court as a whole and further makes the later expression "and of members thereof sitting alone or in Division Court" tautologous. So this argument cannot be accepted.

40. The conclusion therefore is that Parliament had no power to legislate with respect to vacations which falls Properly within the topic Administration of Justice and Section 23-A of the High Court Judges (Conditions of Service) Act 1954 being ultra vires, the Presidential Order based on this section is also invalid.

41. On the question of maintainability of the application elaborate arguments have been addressed by the Solicitor General of India and the learned Advocate General of West Bengal.

42. It is firstly urged that no writ can be issued by this Court against its Own Chief Justice; secondly that all the learned Judges who were parties to the Full Court resolution which gave effect to the Presidential Order and which revised the earlier resolution of the Full Court dated the 2nd December 1960 are not made parties to this application and so the petition is defectively constituted and cannot be heard in their absence. Thirdly the Judges constituting this Special Bench and hearing the application were themselves parties to the Resolution complained of and so cannot properly deal with this application, and fourthly the petitioners have no legal right which can be enforced under Article 226 of the Constitution.

43. In support of the first contention strong reliance is placed on an unreported decision of
¹⁶⁵⁵ Cal WN 107 : (AIR 1951 Cal 401)

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a Special Bench of this Court in the case of *Pradyat Kumar Bose v. Chief Justice of the High Court at Calcutta*¹⁷, where it has been held that no writ can be issued against the Chief Justice by a Bench of the High Court whether the Chief Justice is exercising administrative functions or judicial functions. This case, however, went up in appeal before the Supreme Court and is reported in AIR 1956 Supreme Court 285. Towards the conclusion of its judgment the Supreme Court observed that :

"We consider it however desirable to say that our view that the exercise of power of dismissal of a civil servant is the exercise of administrative power may not necessarily preclude the availability of remedy under Article 226 of the Constitution in an appropriate case. That is a question on which we express no opinion one way or the other in this case."

44. So this Passage seems to suggest that when the action of the Chief Justice is of an administrative nature there may be a remedy available under Article 226 in an appropriate case. But it is also clear that the Supreme Court did not express any opinion on this point one way or the other and kept it absolutely open.

45. Now assuming that in an appropriate case a remedy under Article 226 is available against the action of the Chief Justice of an administrative nature, the further question that arises is whether the present case is such an appropriate case. In my view the only answer possible is an answer in the negative. The petitioners seek cancellation of an individual order of the Chief Justice for revision of the calendar in accordance with the Presidential Order but no such order can be identified by the petitioners. The only order for revision or amendment of the calendar that has been produced before the Court is an order which forms part of the Full Court resolutions dated the 27th January, 1961 and 1st March 1961. There is no separate order of the Chief Justice for such revision of calendar for which the Chief Justice can be proceeded against individually. It is argued that the letter of the Chief Justice dated the 15th March, 1961 contains an admission that there was an order curtailing the vacation of this Court but the Chief Justice was unable to withdraw or modify such order in view of the Presidential order. But unfortunately no such order is available. Unless an order can be identified this Court cannot direct cancellation of an imaginary order. So this is not an appropriate case in which the Chief Justice can be proceeded against individually. The fact that the Chief Justice has not filed any affidavit in opposition in answer to the allegations in paragraphs 36, 38, 45 and 47 of the petition does not improve matters. The Court has to be satisfied that the particular order whose cancellation is sought does exist. The Court cannot order cancellation of a non-existent order. Reference was made to *N. Devasahayam v. State of Madras*¹⁸, at p. 68 and to the case of *Connolly v. Sudder in Dodd's cases on Constitutional Law*¹⁹ at page 178 but it is not necessary to deal with them at any length.

46. The second and third points argued on behalf of the respondents as to the maintainability of the application present a more serious obstacle in the way of the petitioners getting any relief in application. The learned Judges who were parties to the Full Court resolutions dated the 27th January 1961 and 1st March, 1961 have not been

¹⁷ Matter No. 139 of 1952, D/d. 27-10-1953 (Cal) ¹⁹(3rd Ed. 1941)

¹⁸ AIR 1958 Mad 53

made parties and it is an elementary Principle that no adjudication can be made by this Court in their absence. We gave an opportunity to the petitioners to consider the position whether they would make the learned Judges parties to this application. The learned counsel appearing for the petitioners after considering the matter informed this Court that they did not want to adopt that course. In the circumstances there is no other alternative but to hold that the application is defectively constituted and is not maintainable without the learned Judges being made parties to the application.

47. The third point raised presents still greater difficulty. All the learned Judges constituting this Special Bench were Parties to the resolution dated the 1st March 1961 although Sinha, J. was not a party to the Resolution dated the 27th January, 1961. Now it is a basic principle of jurisprudence that no one is allowed to be a Judge in his own cause. A Judge should have no interest in the litigation. The object of the rule is that not merely the scales be held even, it is also that they may not appear to be inclined. Justice must not only be done, it must manifestly be seen

to be done. It is true that if the interest of the Judge is not a pecuniary one but is of any other kind it has to be established that a judge has such a substantial interest in the result of the hearing as to make it wrong for him to act in the matter. The Past conduct of the Judges of this Court including those constituting this Special Bench as evidenced by the resolutions passed from time to time show that the judges have all along been opposed to the curtailment of the Vacation of this Court. In this view of the matter and also in view of the matter that the administration of justice must be kept pure, the judges constituting this Special Bench cannot properly deal with this application. So on the second and third point this petition must fail.

48. It will not be proper to part with these second and third, points without referring to an ancillary argument put forward by Mr. Ranadev Choudhury which has a bearing on these two points. The argument was that clauses 37 and 38 of the Charter and other relevant provisions conferring power on the High Court and its Judges to fix or regulate the vacation or the holidays of the High Court contemplate that in exercising such powers the judges should exercise their individual judgment or discretion and their act done in this respect must be a volitional act; but in giving effect to the Presidential Order at the Full Court meetings the Judges did not act under clauses 37 and 38 of the Charter and the other relevant provisions but were mechanically giving effect to the Presidential Order which had acquired the force of law and which would operate no matter whether the Judges had passed any resolution giving effect to it or not. So there being no scope in the present case for exercise of the discretion or individual judgment of the judges, the judges were not necessary parties nor was this Bench precluded from hearing or dealing with this matter. It is however clear that the real position is otherwise. The Judges at the relevant meetings of the Full Court not only applied their mind to the consideration of the Presidential order but it appears that they asserted their right to regulate the vacation by increasing the number of the stray holidays by seven days at one meeting and by three days instead of seven days at another. So one finds it difficult to resist the conclusion that the Judges in passing the material resolutions did purport to act under the relevant clauses of the Charter and under other relevant provisions empowering them to fix or regulate the vacations or holidays and they did apply some amount of their individual judgment in this respect. So this argument of Mr. Choudhury though ingenious and forceful cannot be accepted.

49. The last point as to the maintainability of the application relates to the question whether the petitioners have a legal right or any locus stand to maintain this application. Now it is well known that an attorney is an officer of this Court. The whole of Chapter II of the Original Side Rules embodies rules relating to the enrolment and conduct of the attorneys and their rights and Privileges. Then again rules 7 to 11 in Chapter V of the Original Side rules show that they are subject to the disciplinary jurisdiction of this Court. They like the Advocates of this Court are practicing the profession of law and in practicing such profession they are entitled to the benefit or amenities of the rules of this Court including the rules in Chapter III. They have a right to see that these rules which have the force of law are observed by this Court. So there can hardly be any room for doubt that Advocates and Attorneys are aggrieved by the Presidential Order. The reduction of the vacation may seriously impair or prejudice their right to practice the profession with efficiency and can be a source of many disadvantages to them. As question of Constitutionality of a Statute can be raised by a person aggrieved by it, the Petitioners are certainly competent to maintain this application. Our attention was drawn to the Bar Councils Act, clauses 10 and 11 of the Charter, clauses 9 and 10 of the Letters Patent, AIR 1957 Supreme Court 250 at p 254; (1938) 1 KB 176 at 190; 28 Cal WN 597 at p 602 : (AIR 1924 Calcutta 753 at p. 757) and 29 Cal WN 1047 at p. 1051 : (AIR 1925 Calcutta 964 at pp. 965-966) and to

Certain other authorities but it is not necessary to prolong this judgment by a detailed discussion of these statutes or cases.

50. So far as respondent No. 2 Union of India is concerned there is no doubt that this Court has no jurisdiction to grant any relief against the said respondent.

51. In view of my findings on the second and third points, as to the maintainability of the application, this petition must fail. The application is accordingly rejected.

52. In conclusion I would like to add that although it would have been more proper not to express any view on the question of constitutional validity of the Presidential Order in view of my findings against the maintainability of this application I have done so as the matter was fully and elaborately argued on both sides and a good deal of time of this Court was taken up by such argument.

Sinha, J.

53. The facts in this case are shortly as follows : There exists an Act passed by Parliament called "The High Court Judges (Conditions of Service) Act, 1954 being Act 28 of 1954, which is an Act to regulate certain, conditions of service of the Judges of High Courts in Part A States. It came into operation on or about 20th May, 1954. As originally framed, there was no provision in this Act for the control by the Central Government of any vacations enjoyed by the learned Judges of High Courts in India. So far as the Calcutta High Court is concerned, the power to control vacations vests in the High Court itself, subject to any statutory provision made in accordance with the provisions of the Constitution. On or about 17th December, 1958 Parliament passed the High Court Judges (Conditions of Service) Amendment Act, 1958 being Act No. 46 of 1958. By Section 7 of that Act, Section 23A was introduced into the High Court Judges (Conditions of Service) Act, 1954. The relevant part of Section 23A runs as follows :-

"23A(1). Every High Court shall have a vacation or vacations for such period or periods as may, from time to time, be fixed by the President, by order notified in this behalf in the Official Gazette, and every such order shall have effect notwithstanding anything contained in any other law, rule or order regulating the vacation of the High Court."

54. On or about 28th December, 1960 in exercise of the power conferred by Sub-Section (1) of Section 23A of the said Act, the President passed an order called "The Calcutta High Court (Vacation) Order, 1960 by which it was ordered that the vacations of the Calcutta High Court during the year 1961 shall be 4 days during Easter, 40 days during the Annual Vacation and 7 days during the Christmas Vacation. What led to the promulgation of this order may be shortly stated. Prior to the independence of India, and even thereafter, the working days of the Calcutta High Court and most of the High Courts in India, numbered less than 200 days in a year. It was urged by the Central Government that owing to arrears of work pending in the various High Courts, the working days should be increased. Thereupon, most High Courts increased their working days and this High Court increased its working days to 200 days in a year. This increase was, however, not sufficient to satisfy the Central Government which asked all the High Courts to increase the working days to 210 in a year. This High Court, and many others, 'pointed out that such an increase was undesirable, and in the long run would not be of any assistance in the

disposal of arrears but would rather defeats the purpose for which it was intended. It is not necessary to go into the details of the ensuing wrangle over the question of working days. It is sufficient to state that ultimately, some of the High Courts in India have increased their working days to 210 in a year, but the Calcutta High Court, and three other High Courts refused to do so. Thereupon, the Act was amended and this Presidential Order has been promulgated. After this order was promulgated, a communication was received by this High Court requesting it to rearrange its vacations in accordance with the Presidential Order, and to amend the list of holidays, which had in the meantime been already printed and published. The matter first came up before the Full Court of the learned Judges on the 27th January, 1961 and it was resolved that the Easter Vacation, Annual Vacation and the Christmas Vacation in the year 1961 be curtailed in accordance with the order made by the President of India under Section 23A of the said Act. There was, however, a second resolution amending the list of holidays other than vacations. On the 1st of March, 1961 the second resolution was rescinded so that the first resolution above-mentioned stands, together with three additional holidays, which were revived. After this, a demand for justice was served on the learned Chief Justice of this High Court by the petitioners, stating that the Presidential Order pretended to have been passed under Section 23A of the said Act was ultra vires the Constitution, and therefore, the order of the learned Chief Justice altering the holidays was also bad. On the 15th March, 1961 a reply was given on behalf of the learned Chief Justice to the effect that he was powerless to go beyond the Presidential Order and, therefore, he was unable to withdraw or modify the order curtailing the vacations of the Court. Thereupon, this application has been made. The application may be divided into two parts. The first is concerned with the question as to whether Section 23A of the said Act, and the Presidential Order made thereunder, are ultra vires the provisions of the Constitution. If Section 23A of the said Act is ultra vires, then the Presidential Order made thereunder is also bad, and the question arises as to the validity of the fixation of the vacations, in accordance with the Presidential Order. Next, we have to deal with certain technical points as to whether, even if the Act and order be ultra vires, this Bench as constituted, has jurisdiction to grant the remedy asked for. On this heading, a number of questions have to be answered, namely, as to whether the frame of the application is good, as to whether a writ of mandamus can be issued by a Bench of this Court against the learned Chief Justice or this very High Court, or whether this Bench could make an order in the absence of the other learned Judges, constituting the Full Court. The learned Solicitor-General has asked us not to deal with the merits of the case, if we are going to dismiss the application on a preliminary point or on a technical point. In my opinion, this is not a desirable course. After all, it is a question which is bound to arise from year to year and in all the High Courts. Since the matter is purely a question of law, and has been exhaustively argued, it would not be proper to avoid giving our opinion on the subject, whether this application succeeds or fails on a technical point. On the merits, the first point to be considered is as to whether Section 23A of the Act is ultra vires the Constitution. As appears from that provision, which has been set out above, it grants power to the President to pass orders from time to time fixing the vacation or vacations of the High Courts in India. The point is as to whether Parliament has, under the Constitution, the power to fix the vacation or vacations of the High Courts, from time to time. It is an instance of delegated legislation. In other words, Parliament has delegated power to the President to fix the vacation or vacations of all High Courts, from time to time. It is therefore the legislative competency of Parliament that is to be investigated. In this application, we are primarily concerned with the High Court at Calcutta, and it would be necessary to trace historically the power of controlling the vacation or vacations of the said High Court. I might here mention one important fact. The word 'vacation' is not defined in the relevant Acts or the

Order. It cannot therefore be taken to be synonymous with the word 'holidays'. As ordinarily understood, the Calcutta High Court has, and always had, three vacations, namely the Easter Vacation, the Puja Vacation and the Christmas Vacation. The Acts and the Order purport to control these vacations and not holidays other than vacations. For our purpose it is not necessary to go beyond the establishment of the Supreme Court in Calcutta. Prior to 1772, there was the Mayor's Court in Calcutta, and in that year, a Committee of Secrecy of the English House of Commons was appointed to enquire into the state of the East India Company. In 1773, it reported unfavourably on the existing system of Mayor's Courts in India, and as a result, the Regulating Act 1773 (13 Geo. III, C 63) was Passed. It was this Act which provided for the establishment of the Supreme Court in Calcutta. By Section 13 of the said Act, it was provided that it would be lawful for His Majesty, by Charter or Letters Patent under the Great Seal of Great Britain, to erect and establish a Supreme Court of Judicature in Calcutta. Pursuant to this power, on 26th March, 1774, the Charter establishing the Supreme Court was issued, and the Mayor's Court was abolished. It is unnecessary to go into the detailed history of the Supreme Court. We might at once come to the year 1858 when the Directors of the East India Company transferred their possessions in India to the British Crown. It was announced by Royal Proclamation, on the 1st November, 1858, and the Act of 1858 was passed (2) and 22 Vict., c. 106) for the better government of India. As a result of the Act of 1858, a Bill was introduced in Parliament in England in 1861, for the establishment of High Courts in India, and this was passed in the form of an Act (24 and 25 Vict. c. 104) dated 6th August, 1861, making it lawful for Her Majesty the Queen of England to establish High Courts in India by Letters Patent. In pursuance of the powers contained in the said Act, the Letters Patent dated 14th May, 1862 were issued, establishing the High Court of Judicature at Fort William in Bengal. This was followed by the Letters Patent of 1865. The position, therefore, is as follows : There was the Charter of 1774 establishing the Supreme Court. The Supreme Court was supplanted in 1861 by the High Court of Calcutta, but under the 1861 Act, the High Court, as inheriting the powers of the Supreme Court, continued to have the same authority and jurisdiction which the Supreme Court enjoyed, but subject to modifications if any made by the 1861, Act or by the Letters Patent. So far as vacations and holidays are concerned, the first thing to be considered is clause 37 of the 1774 Charter, establishing the Supreme Court. The relevant part thereof runs as follows :

"And we do hereby authorize and empower the said Supreme Court of Judicature, at Fort William in Bengal (respect being had to the seasons of the year, and the convenience of the suitors) to settle and appoint proper terms and law days, and days for sitting after term and to proclaim, hold, and adjourn the sessions of Oyer and Terminer and Goal Delivery, and Admiralty Sessions, as to them shall seem most expedient; provided nevertheless, that the said Supreme Court of Judicature, at Fort William in Bengal, shall, and they are hereby required to appoint not less than four terms in the year, each term consisting of four weeks at the least, in each year, and sittings after each term, each sitting to consist of fourteen days, if the business of the said Supreme Court of Judicature at Fort William in Bengal, be not sooner dispatched; and the said Supreme Court of Judicature, at Fort William in Bengal, do in each year hold two Sessions of Oyer and Terminer and Goal Delivery."

There is no specific mention here about holidays or vacations. But the power to regulate the

sittings of the Court, implies the power of regulating the holidays and vacations. The sittings of the Court necessarily include the non-sittings.

55. The Act of 1861, empowered the vesting of powers and authority hitherto exercised by the Supreme Court and Sudder Courts, in the High Court to be established by Letters Patent, all Calcutta. The High Court in Calcutta was established by the Letters Patent of 1862, and continued by the Letters Patent of 1865. There is no specific mention in these Letters Patent as to the particular number of days during which the Court should sit or be on vacation, and it is to be implied that the power contained in clause 37 of the Charter establishing the Supreme Court, continued to be vested in the High Court. The 1861 Act was repealed by the Government of India Consolidating Act, 1915 (5 and 6 Geo V. c. 61) and was replaced by Part IX of that Act. So far as the Government of India Act, 1915 is concerned, the jurisdiction of the High Court is dealt with in Section 106. The High Courts were to have all such power and authority over, and in relation to, the administration of justice and the power to make rules for regulating the practice of the Court, as were vested in them by the Letters Patent. The next thing to be considered is the Government of India Act, 1935. The relevant provision is Section 223, which runs as follows :-

"223. Subject to the provisions of this Part of this Act, to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration, of justice in the court, including any power to make rules of court and to regulate the sittings of the court and of members thereof sitting alone or in division courts, shall be the same as immediately before the commencement of Part III of this Act".

56. We have already seen that in the Charter establishing the Supreme Court, there was clause 37 which directly referred to the number of days during which the Court should sit. Thereafter, in the Charter establishing the High Courts and the Letters Patent issued thereunder, we do find reference to the rule-making powers of the High Courts, but there is no express provision about the 'regulation of sittings', until the above-mentioned provision was introduced into the Government of India Act, which expressly refers to the power of regulating the sittings of the Court and of members thereof sitting alone or in division courts. There remains no doubt therefore that under the Government of India Act 1935 the power to regulate sittings of the Court, which implies the power to regulate the vacations and other holidays was expressly vested in the High Court, which power is exercised by the Judges of the High Court collectively. When sitting to exercise such power, it is known as the "Full Court". I must mention here that clause 44 of the Letters Patent of 1865 laid down that the provisions of the said Letters Patent were subject to the legislative powers of the Governor General in Legislative Council and also of the Governor General in Council etc. In other words, the power that vested in the Judges could be modified by the appropriate legislative body. The point did arise as to whether and if so, how far, the Provincial Legislature could affect the jurisdiction of the High Court. We are however not concerned with that aspect of the question, in this application. We now come to the provisions of the Government of India Act 1935, List I, that is to say, the Federal Legislative List contained Item No. 53 which related to the jurisdiction and powers of all courts except the Federal Court,

with respect to any of the matters in List I. In List II, that is to say, the Provincial Legislative List, we had Item No. 2, which related to the jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in the said list. We now come to the Constitution of India. Chapter V of the Constitution relates to the High Courts in the States-Article 214 lays down that there should be a High Court for each State. Article 216 lays down the constitution of such High Courts, and Article 217 lays down the conditions of appointment of a Judge of a High Court. Article 220 imposes certain restrictions on the Judges, and Article 221 Provides for their salaries. Article 225, which corresponds to Section 108 of the Government of India Act, 1935 lays down the jurisdiction of the existing High Courts. The relevant part thereof runs as follows :

"Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution....."

57. The position therefore is this : The power of regulating the sittings of the court, which had hitherto been vested in the High Court, that is to say, in its Judges collectively, continued as before, subject to any law passed by the appropriate Legislature, by virtue of powers conferred on that Legislature by the Constitution. Before going to the actual statutes framed under this provision, it would be necessary to refer to the Legislative items in the Seventh Schedule which are relevant. We first of all proceed to consider List I, that is to say, the Union List, Item 78 runs as follows :-

"Constitution and organization of the High Courts except provisions as to officers and servants of High Courts, persons entitled to practice before the High Courts."

Item 95 runs as follows :-

"Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction."

Item 97 is the residuary item and relates to any other matter not enumerated in List II or List III. Coming now to List II, that is to say, the State List, the relevant item is item 3 which runs as follows :-

"Administration of justice; constitution and organization of all courts, except the Supreme Court and the High Court; officers and servants of the High Court; procedure in rent and revenue courts; fees taken in all courts except the Supreme Court."

Item 65 runs as follows :

"Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List."

We now go back to the High Court judges (Conditions of Service) Act, 1954, namely Act 28 of 1954. This was an Act to regulate certain conditions of service of the Judges of the High Courts in Part A States. Obviously, this comes under item 78 of List I of the Seventh Schedule namely, "constitution and organization of the High Courts". Coming now to the amendment, we find that the relevant bill was introduced in the Lok Sabha on the 12th November, 1958. The statement of objects and reasons relating to the proposed Section 23-A is somewhat cryptic and runs as follows :-

"Certain minor as well as clarificatory amendments, which have been found necessary as a result of the working of the Act of 1954, have also been included in the Bill."

58. So far as the parent Act is concerned, it did not contain any provision at all for regulating the holidays of the High Courts. Section 23 relates to the facilities for medical treatment and other conditions of service of Judges and Section 24 confers the 'power to make rules upon the Central Government, to carry out the purposes of the Act. It is, therefore, difficult to understand how Section 23-A is a clarification, and if so of what. It introduces a new provision altogether. Further, the parent Act was promulgated to regulate certain conditions of service of the Judges of the High Courts. It is difficult to understand how it can contain any provision controlling or regulating the vacation of the "High Courts", because the terms "Judge" and "High Court" are not identical for all purposes. The difficulty is patent. A High Court consists not only of its learned Judges, but also of officers and Staff, some of whom have to carry out judicial duties. For example, the Registrars, or the Masters of this Court have regularly to carry out judicial duties. So far as officers and servants of the High Courts are concerned, they have been expressly excluded from the legislative powers of Parliament. It is, therefore, difficult to understand how the vacation or vacations of the entire High Court including its officers, staff and servants can be controlled by a provision of law incorporated in an Act which has been enacted only to deal with the conditions of service' of Judges. Apart from this difficulty, the main thing to be considered is as to whether the amended Section 23-A, comes within any legislative item in List I of the Seventh Schedule. The said Act is a Central Act, passed by Parliament, and Section 23-A has also been introduced by an Amending Act passed by Parliament. The competition, therefore, is really between item 78 in List I of the Seventh Schedule and item 3 in List II of the said Schedule of the Constitution. What is really happening is that Parliament is seeking to control the vacation or vacations to be enjoyed by High Courts as a whole, and not merely of the Judges, by an Act which lays down the conditions of services of Judges only. Assuming that this was a permissible thing to do, the next question is whether such a subject-matter comes under the heading "constitution and organization of the High Courts" or "administration of justice". The former is within the jurisdiction of Parliament, while the latter is within the jurisdiction of the State Legislature, which has not purported to pass any legislation affecting the existing powers vested in the High Court, of regulating its own holidays and vacations. In my opinion, it may possibly come under the expression "administration of justice". In Article 225, there is sufficient indication that the regulation of the sittings of the Court is included within the meaning of the expression "Administration of Justice". I failed to see, however, how it could ever come under the expressions, "constitution" or "organization" of the High Courts. The dictionary meaning of

the word "constitution" is the "act of formation of", the "establishment of", any given thing. To "constitute" a High Court means to form it or establish it, in the same manner as the Calcutta High Court was formed or established by the Letters Patent of 1862, promulgated under the High Courts Act of 1861. The dictionary meaning of the word

"organize" is "to get into working order". Both the words "constitution" and "organization", mean the fixation of the form in which a High Court should come into existence. Giving it a liberal meaning, it could consist of a determination of its territorial jurisdiction, of the number of learned Judges which it should consist of and the financial resources upon which it should draw, and other such matters. The learned Solicitor General has argued that, this liberal meaning can be extended to the provision of holidays and vacations of the High Courts. Now, I can imagine, that while constituting a High Court, it may be laid down that a High Court shall not have less than a specified number of working days. That might be a part of its constitution. But once the High Court or High Courts have been constituted or organize, the power to control vacations periodically, (In this case, annually), for all time to come, cannot possibly be said to be related to the "constitution" or "organization" of such a High Court, even if we apply the doctrine of "pith and substance". There must be some distinction between the words "constitution" and "organization" and the expression "administration of justice". In certain cases, the boundaries may overlap; but if the words "constitution" and "organization" include every aspect of the administration of justice, for all times to come, then there is nothing left for the State Legislature to do regarding the High Court. In my opinion therefore, the periodical fixation of the vacations of the High Court, is no part of its constitution or organization and the matter does not come within item 78 of the Union List. Section 23-A is therefore not within the legislative competence of Parliament and is ultra vires. It is also beyond the scope of the Act itself into which it has been incorporated by way of amendment.

59. I now come to the technical aspects of the case, which I have already outlined above. The question is as to whether the frame of the application is in order, and whether we have jurisdiction to grant the relief or reliefs prayed for. The first question that arises is as to whether this Bench can issue a writ of mandamus against the Chief Justice of this very Court. It will be remembered that the first respondent in this case is the Chief Justice of this Court and the second respondent is the Union of India. So far as the reliefs prayed for are concerned, they are all directed against the learned Chief Justice. This question as to whether, in an application made before a Bench of this Court, it is permissible to issue a writ of mandamus upon the Chief Justice of this very Court, came up for consideration in an application made under Article 226 of the Constitution, to this Court, (Matter No. 139 of 1952, D/d. 27-10-1953 (Cal) (SB)). What happened was that proceedings were taken against a Registrar of this Court, Pradyat Kumar Bose. He was asked to show cause, and later on, was dismissed by the Chief Justice. He thereupon made an application under Article 226, for quashing the departmental proceedings, and the order of the Chief Justice dated 3rd September, 1951 terminating his services, and for an order upon him to desist from giving effect to the said order. A rule nisi was issued, and the matter was ultimately referred to a Special Bench. It was held that such an application did not lie,

and the rule was discharged. Das, J. held that a writ of certiorari, or a writ of an allied nature, cannot be issued by the High Court on the Chief Justice of that Court. Mukharji, J. held that a rule, or a writ of certiorari, or prohibition could only be issued against inferior courts or quasi-judicial authorities or quasi-judicial bodies, but not against the Chief Justice. Learned Counsel appearing for the petitioner eventually asked for a writ in the nature of mandamus. It was held that the basis of a mandamus was that the administrator, person or authority upon whom the writ was to be issued, should be subordinate or inferior to the court issuing a writ, and that the Chief Justice was not such a person or authority subordinate to such a court. It was further held that neither as a judicial nor as a quasi-judicial body or authority nor as an administrator, is the Chief Justice of this High Court amenable to any writ like certiorari, prohibition or mandamus, or writs of like nature, or even any other constitutional order or direction. The rule nisi was discharged. Against this order there was an appeal to the Supreme Court (1955) 2 SCR 1331 : AIR 1956 Supreme Court 285. It was held upon the merits that the Chief Justice was competent to dismiss the appellant, and the appeal was dismissed. So far as the technical point was concerned, namely as to whether a writ could issue against the Chief Justice, the Supreme Court left the matter open. Jagannadhadas, J. stated as follows :

"This would be enough to dispose of the case against the appellant. The learned Judges of the High Court have also dealt at some length with the question as to the maintainability of an application for a writ in a case of this kind and of the availability of any remedy by way of a writ against the action of the Chief Justice, whether administrative or judicial. Arguments in this behalf have also been strongly urged before us by the learned Advocate General of West Bengal. In the view, however, that we have taken as to the contention raised before us regarding the validity of the order of dismissal, we do not feel called upon to enter into the discussion relating to the availability of the writ. We express no opinion on the question so raised. We consider it, however, desirable to say that our view that the exercise of power of dismissal of a civil servant is the exercise of administrative power may not necessarily preclude the availability of remedy under Article 226 of the Constitution in an appropriate case. That is a question on which we express no opinion one way or the other in this case."

60. It follows from this that the extreme proposition that was laid down by the Special Bench, namely that under no circumstances could an application lie under Article 226 against the Chief Justice, no longer holds the field. From that point of view, the question to be determined in this case is as to whether, in the facts and circumstances of this case, such an application would lie. But although this is so, there are other difficulties in the way of entertaining this application and in granting the necessary reliefs. Let us visualize what has happened. The Presidential Order being promulgated, a communication was received by this Court to recast the vacations in accordance therewith. The list of holidays and vacations had already been determined by this Court, and printed and published. Upon this communication being received, there was a meeting of the Full Court, and the vacations were modified in accordance with the Presidential Order, and a number of holidays were added. Subsequently, there was another meeting of the Full Court, which rescinded the resolution as regards the holidays, and while not disturbing the original resolution about the vacations, added three holidays to the list. These two resolutions, which have already been mentioned above, now hold the field. Assuming that the right to declare vacations

and holidays still remained vested in this High Court, it is the Full Court which can make a decision on the matter. The Full Court, rightly or wrongly has made a decision. The question is whether three of the learned Judges of this Court, in the absence of the remaining Judges, can set aside those resolutions, and issue a writ of mandamus on the learned Chief Justice directing him to forbear from giving effect to such resolutions. In any view of the matter, it is not the learned Chief Justice who has a right to regulate the holidays and vacations of this Court. Our attention has been drawn to Rule 2 of Chapter III of the Original Side Rules, which lays down that the vacations, namely the Easter, Long and the Christmas Vacation shall begin and end on such date as the Chief Justice may direct. Regard being had to the legal position already explained above, this Rule is not in accordance with the Charter and the Letters Patent. The power vests in the Full Court, that is to say, the totality of all the Judges, and this Rule should be changed at an early date. The situation is truly "Gilbertian", as was pointed out by Mukharji, J. in Pradyat Kumar Bose's case, Matter No. 139 of 1952 D/d. 27-10-1953 (Cal) (SB) (supra), where the Judges of this Court having passed a resolution, are called upon to issue a writ against themselves or one of them, preventing its implementation. In any event, I do not see how three learned Judges of this Court who were themselves parties to the resolutions could achieve this, particularly in the absence of the other Judges. Although every opportunity was granted, no amendment was made to the form of the application by addition of parties or otherwise. The position therefore, although very unsatisfactory to everybody concerned, is inescapable. The Full Court, consisting of 22 judges in one instance, and 23 in another, have decided that the vacations should be enjoyed in a particular manner. It happens now to be in conformity with the Presidential Order. Therefore, the quantum of the vacations remains the same whether the power vests in the President or the Full Court. The resolutions of the Full Court have not been rescinded. If the Full Court has jurisdiction to fix the vacations, I do not see how we can issue a writ of mandamus controlling its discretion. It has been argued that this discretion has not been properly exercised, because it was done under duress i.e., upon the view that the Presidential Order was binding. Again, assuming that this is so, three learned Judges of this Court cannot set aside or quash or restrain the action of the Full Court, in an application where the other Judges are not before it. I have already pointed out that the learned Chief Justice is not the rule-making authority. In Other words, it is not he who has fixed the vacation or is capable of fixing it. Therefore, while the resolutions themselves stand, it is impossible to restrain the learned Chief Justice from giving effect to them. He is bound to give effect to the resolutions of the Full Court.

61. As I said, this situation is eminently unsatisfactory to everybody concerned. In the facts and circumstances of this case however nothing can be done in this application, and no relief can be granted by a Bench constituted as it is at present. We can only indicate the legal position and with all sincerity hope that wiser counsel will prevail in the future, and that this unedifying conflict between the Judiciary and the Executive shall not be allowed to continue indefinitely.

62. The application, therefore, fails. I agree that the application should be dismissed and no order be made as to costs.

Application dismissed.