

(2003) 11 CAL CK 0055
In the Calcutta High Court
Case No : Writ Petition No. 2102 of 2003

Amar Nath Sen

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 13-11-2003

Acts Referred:

Constitution of India, 1950 — Article 123, 226, 32, 323B

Citation : (2004) 186 CTR 686 : (2004) 175 ELT 51 : (2004) 265 ITR 362

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : Pal, for the Appellant; S.K. Kapur, Addl. Solicitor General, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.—Dr. Pal, appearing for the petitioners, contends that this Ordinance is constitutionally bad, as the power of the President under Article 123 to promulgate the same is conditioned. He must be satisfied that circumstances exist which render it necessary for him to take immediate action. His satisfaction must be an objective one and is not subjective. According to him no circumstances can be said to reasonably exist for which it is incumbent upon him to take immediate action. The object of this Ordinance is to set up a Tax Tribunal purported to be under Article 323B of the Constitution of India in place of the High Court for adjudication of the disputes relating to direct and indirect taxes.

2. He contends further that for the last 60 years, if not more, the High Court has been satisfactorily functioning in relation to the jurisdiction conferred upon it by the various tax statutes. This is not the subject for which an immediate result could be achieved by promulgating the Ordinance. It will take much time to set up infrastructure in various parts of the country by constructing buildings and making proper arrangement of man-power, it cannot be done overnight. He contends even during the last budget session and the monsoon session there was no whisper of setting up of this Tribunal. Taking advantage of Parliament not

being in session for a brief period in the month of October, 2003, this Ordinance has been promulgated. The Government could have waited till the winter session of Parliament commences in the mid November, 2003. It is quite apparent that there is an oblique motive and mala fides on the part of the executive Government whose purported satisfaction as to existence of the emergent circumstances has been endorsed by the President.

3. His further contention is that the satisfaction of the President is judicially reviewable and further justiciable. According to him the standard for judging the reasonableness in reaching satisfaction of the President should be that of a reasonable prudent man on the given facts and circumstances of this case. Whether on the given facts and circumstances of this case a reasonable prudent man could have taken such a decision is the test of reasonableness and the same is also applicable in case of legislative action like executive action.

4. His further contention that the legal principles laid down in the decisions rendered by the Privy Council, the Federal Court (AIR 1931 111 (Privy Council); AIR 1945 48 (Privy Council) and Lakhi Narayan Das v. Province of Bihar AIR 1950 FC 59) on the question of justiciability is not applicable as the same were rendered while dealing with the corresponding provisions of the Government of India Act, 1915, and the Government of India Act, 1935. The ratio and the principle laid down therein in relation to the Acts promulgated during colonial rule are wholly inappropriate in the context of the provisions of the Constitution relating to the power of judicial review of legislative and executive action. In support of this submission, Dr. Pal relied on the decisions reported in A.K. Roy and Others Vs. Union of India (UOI) and Others, ; Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another, ; Supreme Court Advocates-on-Record Association and another Vs. Union of India, and S.R. Bommai and others Vs. Union of India and others etc. etc., .

5. He has said that the petitioners have been able to establish prima facie that there could not be nor do these exist any circumstances for which immediate action was required to be taken by the President by promulgating such Ordinances. Now it is for the Government to discharge the burden u/s 106 of the Evidence Act, satisfying the court that circumstances really exist and such circumstances warranted reasonably to take such a decision as a reasonable prudent man could have taken. Dr. Pal does not dispute the proposition that the power of the President under Chapter III of Article 123 is of a power of a Legislature though the President is the head of the executive.

6. The learned Additional Solicitor General of India, Mr. S.K. Kapur, while opposing this application and praying for the discontinuation of the interim order contends that the President has properly and constitutionally promulgated the Ordinance having felt that such circumstances exist which rendered it necessary for him to take immediate action. It is not in dispute that Parliament is not in session. Therefore, the conditions in Article 123 have been fulfilled.

7. He submits that satisfaction of the President or bona fides in his satisfaction cannot be judicially reviewable nor is the same justiciable. If there is a statement in the object of the Ordinance of satisfaction of the President as to existence of the emergent circumstances the court cannot hold they do not exist. Unlike executive action the theory of reasonableness is wholly misplaced as the President being an executive, has been discharging his duty as a Legislature. In the scheme of the Constitution as to the separation of powers the thought process of the Legislature for making laws in Parliament and in this case that of the President promulgating the Ordinance cannot be questioned in any place other than in Parliament, That is why Article 123 has made it obligatory upon the Government to place the Ordinance within the time mentioned therein on the floor of Parliament when the members of Parliament will either accept this Ordinance or will reject it.

8. According to him the Government has discharged its onus by establishing the fact of existence of emergent circumstances in the statement of objects. The burden of proof heavily lies upon the person who alleges that the circumstances do not exist, here the petitioner is unable to do so. The founding fathers of the Constitution despite having traumatic experience of the colonial rule because of misuse of similar provision in the Government of India Act, 1935, and Act of 1915 had adopted verbatim the same provision for promulgating Ordinances.

9. He contends that it is for the President who is to be satisfied on the advice being given by the council of ministers while issuing an Ordinance. This satisfaction is a subjective one for objective purposes and this is not justiciable, where there exist such circumstances ; indeed the same cannot be scrutinised. In support of his submission he has relied on the decisions reported in Bhagat Singh v. Emperor [1931] 58 IA 169 ; Emperor v. Benoari Lal Sarma [1945] 72 IA 57 (PC) ; Lakhi Narayan Das v. Province of Bihar AIR 1950 FC 59 ; S.K.G. Sugar Ltd. Vs. State of Bihar and Others, ; R.K. Garg and Others Vs. Union of India (UOI) and Others, ; K. Nagaraj and Others Vs. State of Andhra Pradesh and Another, and T. Venkata Reddy and Others Vs. State of Andhra Pradesh, .

10. His next contention is that this Tax Tribunal is sought to be established in exercise of power under Article 323B of the Constitution. It is now well settled by the apex court by various judgments that a forum can be established by law in place of the High Court under Articles 323A and 323B. He contends that because of the great pressure on High Courts and huge arrears of cases pending therein, resultant blockade of large amount of revenue it was felt that to reduce the burden of the High Courts on the one hand and for effective and speedy disposal of cases arising out of revenue laws on the other this Ordinance is required to be promulgated to set up the National Tax Tribunal. It is not in dispute that Parliament is competent to legislate. Whether taking away the jurisdiction of the High Court under various fiscal statutes is mala fide or for that matter whether it amounts to an onslaught on the judiciary, can be a subject-matter of debate on the floor of Parliament not in courts primarily, so long as Parliament enjoys its

power within its own field. This has already been established and settled in the latest decision of the Supreme Court rendered in *L. Chandra Kumar Vs. Union of India and others*, . By this Ordinance the power of judicial review of the High Courts and the Supreme Court under Article 226/227 and under Article 32, respectively, have not been touched and in fact it cannot be as the same is part of the basic structure of the Constitution.

11. His further contention is that it is too early for the petitioners to rush to this court for obtaining an interim order as at present no infrastructure has been established nor any appointment of personnel of this Tribunal has been made. Whether by this Ordinance establishing a forum can ensure the independent judiciary being part of the basic structure of the Constitution cannot be debated at this stage and it can perhaps be examined later on affidavit. Moreover, he contends that this Ordinance cannot last more than six weeks from the date of reassembly of Parliament. This can be decided in the floor of Parliament when it will be placed in the ensuing session. Therefore, there is no need for continuation of the interim order by this court and if this court thinks that this matter may be heard on affidavit.

12. Having heard the respective contentions of learned counsel and considered the petition together with annexures it appears to me in this case the issue is whether the National Tax Tribunal Ordinance, 2003 (hereinafter referred to as "the said Ordinance"), is constitutionally valid or not. To answer this issue it is to be examined whether the President has promulgated the said Ordinance in proper exercise of power under Article 123 or not. It is now well settled by the apex court, the power under Article 123 of the President is of legislative power in the capacity of executive. It has also been settled by the apex court that such power of President is co-extensive with the power of Parliament within its own field meaning thereby, the President has power to promulgate ordinances in respect of any subject as enumerated in Lists I and III in the Seventh Schedule of the Constitution.

13. Under Article 323B of Part XIV-A of the Constitution of India the appropriate Legislature may by law, provide for the adjudication or trial by the Tribunal of any disputes or offences with respect to all the matters amongst others levy, assessment, collection and enforcement of any tax, the purpose of the promulgation of the Ordinance is to provide for the adjudication by the National Tax Tribunal, all disputes with respect to levy, assessment, collection and enforcement of direct tax and also for determination of the rates of duties of customs, central excise on goods and valuation of goods for the purpose of assessment of such duties, as well as matters relating to levy of tax on service. It appears from the said Ordinance the tax laws relates to Income Tax, wealth-tax, expenditure-tax, interest-tax, customs and Central excise. These subjects are falling within entries Nos. 82, 83, 84 and 90 of List I of the Seventh Schedule. In this connection, the decision of the Supreme Court reported in *L. Chandra Kumar Vs. Union of India and others*, may be referred to.

14. On a careful reading of Article 123 of the Constitution of India it will appear that the President can promulgate ordinances in the event the following conditions are satisfied :

(i) Both the Houses of Parliament are not in session.

(ii) The subject matter of the ordinance must be falling within the subject of List I and List III of the Seventh Schedule of the Constitution of India.

(iii) Satisfaction of the President that circumstances exist which render it necessary for him to take immediate action.

15. The first two conditions are not disputed at all. The only condition is as to whether the President is satisfied that circumstances exist for which immediate action is necessary.

16. I accept the argument of Dr. Pal that this action of the President is susceptible to judicial review under Article 226 of the Constitution of India and Article 32 of the Constitution of India by the High Courts and the Supreme Court. If those conditions are not satisfied and there is no satisfaction of the President expressly that circumstances exist for which immediate action is necessary, the superior court will certainly interfere with this matter. In the absence of those conditions the act of the President, may be a legislative one, under Article 123 of the Constitution of India, would be struck down as the same would be unconstitutional.

17. Now it has to be seen as to whether any satisfaction of the President as required under the aforesaid article has been recorded or reached by the President of India or not. In the preamble of the said Ordinance it is mentioned that Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action. Had there been no such statement this Ordinance would have been an invalid and unconstitutional one.

18. Dr. Pal, however, said that mere mechanical reproduction of the provision of Article 123, Clause (1), as to the satisfaction of the President is not the real requirement. The satisfaction of the President must be an objective one and for achieving an objective purpose. In other words, he contends that the superior court must look into the materials on which the President has reached his satisfaction. Therefore, according to him the satisfaction of the President is justiciable. I am unable to accept this submission that the satisfaction of the President is a justiciable one. The power of judicial review is one thing and justiciability of a particular subject-matter is another thing. In exercise of the power of judicial review if the court finds any subject-matter is not justiciable, this power cannot be exercised. The citation by Dr. Pal in support of his submission reported in A.K. Roy and Others Vs. Union of India (UOI) and Others, , is not a helpful one in this case, the Supreme Court in this case did not decide as to whether the satisfaction of the President is justiciable. It is true,

Clause (4) of Article 123 of the Constitution of India has been deleted by the Constitution 44th Amendment Act, 1978, and thereby the scope of judicial review has been made open. Because of this deletion the subject-matter of the satisfaction of the President cannot be made justiciable except in a case where there is no material at all. The effect of deletion, in my view, is that there is no embargo on the court particularly a superior one to exercise power of judicial review.

19. Dr. Pal has relied on the decision of the Supreme Court reported in Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another, and in my view this judgment is also not helpful in this case, as the said decision was rendered while dealing with a case of transfer of a High Court judge vis-a-vis independence of the judiciary. Here at this stage it is early to say that the independence of the judiciary is at stake. The decision of the Supreme Court rendered in the S.R. Bommai and others Vs. Union of India and others etc. etc., was rendered by the apex court while deciding the question whether the action of the President under Article 356 of the Constitution of India is amenable to judicial review or not. It was held that the power of the President under Article 356 is essentially an executive one under the Constitution. It was held further that the superior court can scrutinise the materials on the basis of which advice is given by the council of ministers and ultimately the President has taken a decision thereupon. Therefore, the S.R. Bommai and others Vs. Union of India and others etc. etc., may be applicable after affidavits are filed and at the time of final hearing.

20. There are limitations of the superior courts to interfere in the case of legislative action. To make law is the function of the Legislature under the Constitution and under what conditions and circumstances a Legislature is to act cannot be scrutinised by the judiciary. On the given facts and circumstances whether any particular Act is required to be made or not can be scrutinised by the Members of Parliament. After having debated in Parliament if such an Act is passed the court is not supposed to encroach on the field of the Legislature to make a post mortem of the situation and circumstances on which such an Act was passed. If such an attempt is made by the court then that amounts to an unconstitutional action as simply in that case the court will be encroaching the field of the Legislature without any basis. The only difference in the case of legislative action by way of an Ordinance is the existence of circumstances which warrant immediate action.

21. The learned Additional Solicitor General has rightly and appropriately drawn my attention to the judgment of the Supreme Court reported in S.K.G. Sugar Ltd. Vs. State of Bihar and Others, , the Constitution Bench of the Supreme Court in this case in paragraph 16 while dealing with an Ordinance promulgated by the Governor under Article 213 of the Constitution of India has held that the necessity of immediate action and of promulgating an Ordinance is a matter purely for the subjective satisfaction of the Governor, He is the mere judge as to the existence of circumstances necessitating the making of an Ordinance, his

satisfaction is not a justiciable matter ; it cannot be questioned on the ground of error of judgment or otherwise. The language as regards satisfaction under Article 213 is almost the same as in the Article 123. This observation will be applicable in full force here.

22. As I have already observed the intention and wishes or thought process of the Members of Parliament while making laws cannot be debated nor questioned in a court of law. Similarly, when the President or the Governor as the case may be, promulgates an Ordinance taking the role of the Legislature their thought process for reaching satisfaction on a material cannot be questioned before a court of law. But as I have already observed if the conditions as mentioned in Article 123 and Article 213 are not satisfied then certainly this legislative action of the President or the Governor must be an unconstitutional one.

23. In the case of K. Nagaraj and Others Vs. State of Andhra Pradesh and Another, , the Supreme Court in paragraph 31 has observed as follows (page 565) :

"It is impossible to accept the submission that the Ordinance can be invalidated on the ground of non-application of mind. The power to issue an Ordinance is not an executive power but is the power of the executive to legislate. The power of the Government to promulgate an Ordinance is contained in Article 213, which occurs in Chapter IV of Part VI of the Constitution. The heading of that Chapter is "Legislative power of the Governor". This power is plenary within its field like the power of the State Legislature to pass laws and there are no limitations upon that power except those to which the legislative power of the State Legislature is subject. Therefore, though an Ordinance can be invalidated for contravention of the constitutional limitations which exists upon the power of the State Legislature to pass laws it cannot be declared invalid for the reason of non-application of mind, any more than any other law can be. An executive act is liable to be struck down on the ground of non-application of mind. Not the act of a Legislature."

24. In the case of T. Venkata Reddy and Others Vs. State of Andhra Pradesh, , the Supreme Court while discussing the powers of the President and the Governor under articles 123 and 213, respectively, has reiterated the ratio laid down in K. Nagaraj and Others Vs. State of Andhra Pradesh and Another, . In that case, while dealing with an Ordinance of the State of Andhra Pradesh in paragraph 14, at page 731, it has been observed amongst others that :

"While the courts can declare a statute unconstitutional when it transgresses constitutional limits, they are precluded from enquiring into the propriety of the exercise of the legislative power. It has to be assumed that the legislative discretion is properly exercised. The motives of the Legislature in passing a statute is beyond the scrutiny of courts. Nor can the courts examine whether the Legislature had applied its mind to the provisions of a statute before passing it. The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by the

courts, and an Ordinance passed either under Article 123 or under Article 213 of the Constitution stands on the same footing. When the Constitution says that the ordinance making power is legislative power and an Ordinance shall have the same force as an Act, an Ordinance should be clothed with all the attributes of an act of Legislature carrying with it all its incidents, immunities and limitations under the Constitution. It cannot be treated as an executive action or an administrative decision."

25. Therefore, in view of the aforesaid pronouncement the legislative action of the President under Article 123 enjoys the same immunity as the Legislature does. Simply because the President is an executive and his act and action is on the advice of the council of ministers or satisfaction of the executive this action of the President cannot be treated differently from the legislative one, the only exception is whether there was any material namely for the advice of the council of the ministers on which the President reached his satisfaction. In the case of State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., , the Supreme Court observed amongst others that :

"A law made by the Parliament or the Legislature can be struck down by courts on two grounds and two grounds alone : (i) lack of legislative competence and (ii) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no other ground."

26. In this case when the question of the satisfaction of the President as to the existence of the circumstances is insulated from justiciability of the court and when it is found in the Statement of Objects of the Ordinance that the President is satisfied it shall be presumed prima facie, of course, that the President has validly exercised his legislative power. This could have been unconstitutional had there been no such satisfaction being recorded. Therefore, I hold prima facie that the President has validly exercised under Article 123 of the Constitution of India unless it is established that there is no material to reach such satisfaction. There are other old decisions rendered by the Privy Council reported in Bhagat Singh v. Emperor [1931] 58 IA 169 ; Emperor v. Benoari Lal Sarma [1945] 72 IA 57, of Lakhi Narayan Das v. Province of Bihar, AIR 1950 FC 59. The decision rendered by the Privy Council while dealing with the corresponding provision of the Government of India Act, 1915, and the Government of India Act, 1935, in those cases there Privy Council held that the satisfaction of the Governor General and the Governor as the case may be are not justiciable. Similarly the Federal Court also held on the same lines.

27. Accordingly, I am of the prima facie view that whether the President was satisfied on existence of the real circumstances or on insufficient material to reach such conclusion cannot be scrutinised by this court, unless it is found that there is absolutely no such material.

28. Now the next question remains as to whether the provisions of this Ordinance with establishment of the Tax Tribunal offend the basic structure of the

Constitution of India or rather whether this ensures independence of judiciary or not in place of the High Courts. I think Article 323B has empowered the appropriate Legislature (here the President) to make laws relating to establishment of any Tribunal relating to tax laws. I have checked up the provisions of the Ordinance and the mechanism for appointment of the personnel for the Tribunals and also the qualification of the personnel of the Tribunal. At the present moment I cannot say *prima facie* the mechanism will not ensure independence of judiciary. A number of Acts have been passed by Parliament for setting up similar types of Tribunal for adjudication of the disputes relating to administrative matters and this mechanism for constituting the forum was upheld by the Supreme Court in *L. Chandra Kumar Vs. Union of India and others*, .

29. However, I think whether this mechanism will really ensure the independence of judiciary or for that matter free and fair trial of the disputes can be ensured or not, can very well be debated in the floor of Parliament, when this Ordinance will be tabled in the floor of Parliament and Parliament in its wisdom may not accept this mechanism. Therefore, I refrain myself from making any comment on this issue at this stage. It appears from the Ordinance no attempt has been made to take away the power of judicial review of this court as well as the Supreme Court under Article 226 and Article 32 of the Constitution of India, respectively.

30. The jurisdiction and power of the High Court conferred under other parliamentary statutes or Acts of the State Legislature can very well be taken away under the provisions of Articles 323A, 323B which is the source of such power of Parliament and the State Legislature providing equally efficacious independent justice-delivery system.

31. Therefore, I find that there is legislative competency and *prima facie* no violation of any provisions of the Constitution. I cannot accept the argument of Dr. Pal that this Ordinance will offend free and independent justice-delivery system. All these findings and observations of mine are *prima facie* and are subject to final decision of this court.

32. The learned Additional Solicitor General says that no infrastructure has yet been established nor any appointment of personnel like chairperson or members of the Tribunal has been made. Therefore, the apprehension of the petitioners is without any basis at the present moment. Under such circumstances I do not find any reason to continue the interim order. As such the same is vacated.

33. The matter would be heard on affidavits. Affidavit-in-opposition may be filed by the respondent, inclusive of the Attorney General of India if so advised, within two weeks from date. Reply thereafter. Matter to appear after four weeks hence, for hearing. Any action which might be taken excepting placing the Ordinance before Parliament, will abide by the result of the writ petition.

34. All parties are to act on a signed copy of the minutes of the operative portion of this judgment and order on the usual undertaking.