

**(1969) 01 AHC CK 0015**

**In the Allahabad High Court**

**Case No :** Special Appeal No. 1054 of 1967 with 30 and 87 of 1968

Behariji Dass, Civil and Sessions Judge, Sultanpur and Others **APPELLANT**

**Vs**

Chandra Mohan, Civil and Sessions Judge, Fatehpur and Others **RESPONDENT**

---

**Date of Decision :** 06-01-1969

**Acts Referred:**

Constitution of India, 1950 — Article 141, 142, 144, 233, 233(2)

**Citation :** AIR 1969 All 594 : (1969) 39 AWR 82

**Hon'ble Judges :** V.G. Oak, C.J; T.P. Mukherjee, J; G.C. Mathur, J

**Bench :** Full Bench

**Advocate :** Shanti Bhushan and Rajaram Agarwal, for the Appellant; H.N. Seth, B.D. Agarwala, J. Swarup and N. Lal, for the Respondent

**Final Decision :** Disposed Of

---

## **Judgement**

Oak, C.J.—The question for consideration in these connected appeals is whether certain persons should be prohibited from functioning as District Judges in Uttar Pradesh. The three appeals arise out of a writ petition filed in the year 1967 by Shri Chandra Mohan against the State of Uttar Pradesh and 15 others.

2. Several years ago, the State Government established U. P. Higher Judicial Service. This service consists of two grades: (1) District & Sessions Judges, and (2) Civil & Sessions Judges. Under Article 309 of the Constitution, the Governor framed rules for appointment to U. P. Higher Judicial Service. These rules are known as U. P. Higher Judicial Service Rules, 1953 (hereafter referred to as the Rules). The Rules provide two separate methods for appointment of Civil & Sessions Judges. The first method is by promotion from the Uttar Pradesh Civil Service (Judicial Branch). The second method is by direct recruitment of advocates and Judicial Magistrates as Civil & Sessions Judges. Under these Rules, a number of persons were appointed to the U. P. Higher Judicial Service between 1953 and 1964.

3. Sri Chandra Mohan is a member of the Uttar Pradesh Civil Service (Judicial Branch). In the year 1965 he was officiating as Civil & Sessions Judge. He apprehended that direct recruitment of advocates and Judicial Magistrates to U. P. Higher Judicial Service was likely to affect his chances of promotion adversely. So, he filed a writ petition challenging the appointment of advocates and Judicial Magistrates to U. P. Higher Judicial Service. That was Writ Petition No. 526 of 1965.

4. That writ petition was partly allowed by this Court on 21-2-1966. It was held that Sri Om Prakash was not eligible for appointment to U. P. Higher Judicial Service. In other respects, the petition was dismissed. Sri Chandra Mohan took up the matter in appeal before the Supreme Court. The appeal was allowed by the Supreme Court on 8-8-1966. It was held that Judicial Magistrates were not eligible for appointment as Civil & Sessions Judges. It was further held that the U. P. Higher Judicial Service Rules are constitutionally void, as they contravened Article 233 of the Constitution. The operative part of the judgment of the Supreme Court ran thus:--

"In the result, we hold that the U. P. Higher Judicial Service Rules providing for the recruitment of District Judges are constitutionally void and, therefore, the appointments made thereunder were illegal. We set aside the order of the High Court and issue a writ of mandamus to the 1st respondent not to make any appointment by direct recruitment to the U. P. Higher Judicial Service in pursuance of the selections made under the said rules. The 1st respondent will pay the costs of the appellant. The other respondents will bear their own costs."

The case is reported in AIR 1966 SC 1987.

5. This decision of the Supreme Court created a serious situation. According to the judgment, appointment of several persons as District Judges during the course of some ten years became illegal. Parliament intervened in order to meet the serious situation, and enacted the Constitution (Twentieth Amendment) Act 1966. By this amendment, Article 233A was inserted in the Constitution. Article 233A of the Constitution ran thus:--

"Notwithstanding any judgment, decree or order of any court,--

(a) (i) no appointment of any person already in the judicial service of a State or of any person who has been for not less than seven years an advocate or a pleader, to be a district judge in that State, and

(ii) no posting, promotion or transfer of any such person as a district judge, made at any time before the commencement of the Constitution (Twentieth Amendment) Act, 1966 otherwise than in accordance with the provisions of Article 233 or Article 235 shall be deemed to be illegal or void or ever to have become illegal or void by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions;

(b) no jurisdiction exercised, no judgment, decree, sentence or order passed or

made, and no other act or proceeding done or taken, before the commencement of the Constitution (Twentieth Amendment) Act, 1966 by, or before, any person appointed, posted, promoted or transferred as a district judge in any State otherwise than in accordance with the provisions of Article 233 or Article 235 shall be deemed to be illegal or invalid or ever to have become illegal or invalid by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions."

On 1-2-1967 Sri Chandra Mohan filed another writ petition again challenging the appointment of persons from advocates and Judicial Magistrates between 1953 and 1964. This is Writ No. 397 of 1967, out of which the present special appeals have arisen. The petition challenged the appointments of opposite parties Nos. 2 to 16 to U. P. Higher Judicial Service. Sri Riksheshwari Prasad. Sri R. C. Bajpai and Sri Behariji Das, who are opposite parties Nos. 13, 14 and 15 to the second writ petition were parties to the appeal before the Supreme Court, that arose out of Sri Chandra Mohan's first writ petition. The main contention of the petitioner in the second writ petition is that the Constitution (Twentieth Amendment) Act is unconstitutional, because the Amendment Act was not passed in accordance with the special procedure laid down in the proviso to Article 368 of the Constitution.

6. This writ petition was disposed of on 24-11-1967 by a single Judge of this Court. The petition was partly allowed. It was held that opposite parties Nos. 13, 14 and 15 are holding the posts of District Judges illegally and without the authority of the Constitution. A writ in the nature of quo warranto was directed to be issued ousting the three persons from their offices.

7. Three separate appeals have been filed against the decision of the learned single Judge dated 24-11-1967. Special Appeal No. 1054 of 1967 has been filed by Sri Behariji Das, Sri R. C. Bajpai and Sri Riksheshwari Prasad, who were opposite parties Nos. 15, 14 and 13 respectively in the writ petition. Special Appeal No. 30 of 1968 has been filed by Sri Chandra Mohan, petitioner. The State of Uttar Pradesh has filed Special Appeal No. 87 of 1968. The petitioner in his special appeal has prayed that the opposite parties Nos. 2 to 11 should also be ousted from their offices. Sri Behariji Das and others and the State of Uttar Pradesh have prayed that the writ petition should be dismissed in its entirety.

8. It will be noticed that Sri Chandra Mohan filed two writ petitions in succession in 1965 and 1967. It will be convenient to refer to the former writ petition of Sri Chandra Mohan as the previous case.

9. In grounds Nos. 12 and 13 of the present writ petition the petitioner raised the question of violation of Article 16 of the Constitution. This contention has been rejected by the learned single Judge. Mr. Jagdish Swarup appearing for the petitioner did not raise the question of infringement of Article 14 or Article 16 of the Constitution before us.

10. It will be convenient to take up the case of Sri Prayag Narayan first. He was opposite party No. 12 in this writ petition. At the time of his appointment to U. P.

Higher Judicial Service he was serving as a Judicial Magistrate. In the previous case (AIR 1966 SC 1987) it has been held that Judicial Magistrates are not eligible for appointment to U. P. Higher Judicial Service.

11. However, Sri Prayag Narayan raised another ground in support of his appointment. Clause (2) of Article 233 of the Constitution states :-

"A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

Sri Prayag Narain urged that he is qualified under Clause (2) of Article 233, because he was a pleader for not less than seven years before his appointment as a Judicial Magistrate. He filed a counter-affidavit. In paragraph 15 of the counter-affidavit he deposed that he had already completed more than seven years as a pleader before his appointment to the Higher Judicial Service. The petitioner did not file a rejoinder challenging this allegation of Sri Prayag Narayan. I, therefore, accept Sri Prayag Narayan's counter-affidavit to the effect that he had completed more than seven years as a pleader before his appointment to the Higher Judicial Service.

12. This position was not seriously disputed by Mr. Jagdish Swarup. He urged that, in spite of Sri Prayag Narayan's practice as a pleader for seven years, his case is not covered by Article 233(2), because he was in the service of the State as a Judicial Magistrate.

13. It is true that Sri Prayag Narayan was in service at the material time. But in the previous case AIR 1966 SC 1987 it has been held by the Supreme Court that the expression "the service" in Article 233(2) can only mean "Judicial service" as defined in Clause (b) of Article 236. Admittedly, Sri Prayag Narayan was not in "judicial service" as defined in Clause (b) of Article 236. It follows that he was not in "the service" within the meaning of Clause (2) of Article 233.

14. Some emphasis was placed upon the expression "has been" appearing in Clause (2) of Article 233. The contention was that the expression "has been" made it necessary that the person concerned must have been in active practice as an advocate or a pleader at the time of his selection as a District Judge.

15. In State of Assam Vs. Horizon Union and Another, the question arose whether one Sri Dutta was eligible to be appointed as the presiding officer of an Industrial Tribunal in Assam under the Industrial Disputes Act, 1947. For over three years Sri Dutta held the post of an Additional District Judge. He worked as Registrar of Assam High Court. He retired from that office in 1959. In 1965 the State Government appointed Sri Dutta the presiding officer of an Industrial Tribunal in Assam. Section 7A of the Industrial Disputes Act, 1947 provided for constitution of Industrial Tribunals. Subsection (3) of Section 7A ran thus:--

"A person shall not be qualified for appointment as the presiding officer of a

Tribunal unless--

(a) . . .

(aa) he has worked as a District Judge or as an Additional District Judge or as both for a total period of not less than three years or is qualified for appointment as a Judge of a High Court ....."

It was held that Sri Dutta was qualified for appointment as the presiding officer of the Industrial Tribunal under Clause (aa) of Sub-section (3) of Section 7A. It will be noticed that Sri Dutta's appointment in the year 1965 was upheld, although he had retired from service long before 1965.

16. Clause (2) of Article 217 prescribes qualifications for appointment of a High Court Judge. Clause (2) of Article 217 states:--

"A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and --

(a) has for at least ten years held a judicial office in the territory of India ....."

17. It is well known that in several cases persons have been appointed as High Court Judges some time after their retirement as District Judges. Such appointments have never been challenged. The position under Article 233(2) is similar to that under Article 217(2)(a) of the Constitution.

18. Sri Prayag Narayan was not already in the service of the State within the meaning of Clause (2) of Article 233. He has been a pleader for not less than seven years before his appointment to the Higher Judicial Service. He was, therefore, eligible for the appointment under Clause (2) of Article 233. The learned single Judge was right in upholding Sri Prayag Narain's appointment.

19. Next we have to consider the question of validity of appointment of opposite parties Nos. 2 to 11 and Nos. 13 to 15. The Constitution (Twentieth Amendment) Act, 1966 validates the appointment of these officers. But according to the petitioner, the Amendment Act is itself unconstitutional. This contention has been partly accepted by the learned Single Judge. He has held that the Constitution (Twentieth Amendment) Act affects Article 142 also. Opposite parties Nos. 13, 14 and 15 were parties to the previous case. Consequently, the Constitution (Twentieth Amendment) Act, 1966 is unconstitutional and void in so far as it validates the appointment of these three persons. I am unable to agree.

20. The first contention of Mr. Jagdish Swarup is that Article 233A does not amount to amendment of the Constitution at all. I found some difficulty in following the argument. It is true that a Written Constitution is the fundamental law of the country. But there are no fixed rules as to the subjects that can properly be included in a Written Constitution. The Constitution of India is a lengthy document. Our Constitution deals with such diverse subjects as language and prohibition. Article 233A is in the nature of a proviso to Article 233. There

was no suggestion that Article 233 is not a part of the Constitution. If Article 233 is a part of the Constitution, there is no difficulty in holding that Article 233A is also a part of the Constitution. The process of inserting Article 233A involved amendment of the Constitution. The amendment had to be made by Parliament as laid down in Article 368. Amendment was made according to the procedure laid down in the main provision of Article 368. The question has been raised whether the special procedure laid down in the proviso, to Article 368 was necessary on the ground that certain Articles covered by the proviso are affected by this amendment.

21. The object underlying Article 233A was to validate certain appointments, which were invalid on the ground that the appointments contravened Article 233. The question has been raised whether it is permissible to make a provision in the Constitution so as to get over the constitutional difficulty previously experienced. It has also been argued for the petitioner that constitutional amendment for getting over Supreme Court decisions is not permissible.

22. The learned single Judge has referred to the American doctrine of separation of powers. It is true that our Constitution also has devoted separate parts for the executive, legislature and judiciary. But division of powers in our Constitution is not so rigid as that under the Constitution of the United States of America. It is the settled legislative practice in India that whenever a decision of a Court creates practical difficulty, such difficulty may be overcome by appropriate legislation. This has been the practice in India both before and after the commencement of the Constitution.

23. In *United Provinces v. Atiq Begum* AIR 1941 SC 16 it was held by the Federal Court that legislation for the purpose of validation of executive orders must necessarily be regarded as subsidiary or ancillary to the power of legislating on the particular subject in respect of which the executive orders may have been issued.

24. Schedule VII to Government of India Act, 1935 contained a list of subjects within the jurisdiction of the Federation and Provinces. In AIR 1944 1 (Federal Court) it was held by the Federal Court that the power of validation must be taken to be ancillary or subsidiary to the power to deal with the subjects specified in the Lists in Schedule VII of the Act.

25. In *State of Orissa Vs. Bhupendra Kumar Bose*, it was held that the Governor was competent to issue an Ordinance with a view to override the judgment delivered by the High Court in its jurisdiction under Article 226 of the Constitution.

26. Mr. Jagdish Swarup conceded that validity of Acts may be given retrospective effect. He also conceded that Legislature may intervene in order to cure defects in executive action. But he urged that such power of validation cannot be pressed into service in the case of legislative defect or constitutional infirmity.

27. Articles 31A and 31B were inserted in the Constitution in order to get over difficulties created by decisions of Courts. In *Sri Sankari Prasad Singh Deo Vs. Union of India (UOI) and State of Bihar*, it was held that the Constitution (First Amendment) Act, 1951 by which the two Articles were inserted was valid.

28. In *Mt. Jadao v. Municipal Committee, Khandwa* AIR 1961 SC 1486 it was held that retrospective laws could validate an Act, which contained some defect in its enactment. The power of validating defective laws was ancillary and subsidiary to the powers conferred by the Entries and was included in those powers.

29. In *West Ramnad Electric Distribution Co. Ltd. Vs. State of Madras*, , it was held that a notification issued under a prior invalid Act can be validated by a subsequent valid Act.

30. In *Sajjan Singh Vs. State of Rajasthan*, it was held that it cannot be urged that inasmuch as the impugned Act purported in substance to set aside the decisions of Courts of competent jurisdiction by which some of the Acts added to the Ninth Schedule had been declared to be invalid, it is unconstitutional. Legislative power to make laws in respect of areas entrusted to the legislative jurisdiction of different legislative bodies can be exercised both prospectively and retrospectively. On several occasions, Legislatures think it necessary to validate laws which have been declared to be invalid by Courts of competent jurisdiction, and in so doing, they have necessarily to provide for the intended validation to take effect notwithstanding any judgment, decree or order passed by a Court of competent jurisdiction to the contrary.

31. In *I.C. Golak Nath and Others Vs. State of Punjab and Another*, it has been held that there are no limitations on the power to amend under Article 368 except that such amendment must not infringe fundamental rights. By inserting Article 233A in the Constitution, Article 233 has been modified. Neither Article 233 nor Article 233A involves fundamental rights. So, amendment of the Constitution by inserting Article 233A was within the competence of Parliament.

32. Next we have to consider the petitioner's contention that the impugned amendment affects Articles 142 and 144 of the Constitution. Article 141 lays down that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. Article 141 does not prevent the appropriate Legislature from amending the law. Nor does Article 141 take away Parliament's power to amend the Constitution according to the prescribed procedure.

33. Clause (1) of Article 142 states:--"The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter, pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe."

It was urged for the petitioner that the impugned amendment affects the Supreme Court's power under Clause (1) of Article 142. This contention has to be repelled for a variety of reasons. Clause (1) of Article 142 has been divided into two parts. According to the first part of Clause (1), the Supreme Court may pass decrees and orders in cases coming before it. Article 233A does not prevent the Supreme Court from passing decrees or orders in cases coming before it. The second part of Clause (1) lays down that decrees of the Supreme Court are enforceable throughout the territory of India according to the procedure to be prescribed by Parliament. Now, the Supreme Court's decree dated 8-8-1966 in the previous case consists of two parts. The first part is declaratory. That part is not executable. Under the second part of the decree, the State Government was prohibited from making appointments under the invalid Rules. Opposite parties Nos. 2 to 15 had been appointed to U. P. Higher Judicial Service before 8-8-1966. There was, therefore, no question of executing the decree dated 8-8-1966 against these officers. If Parliament can lay down the procedure for execution of Supreme Court decrees, it is open to Parliament to create a situation where there would be no occasion for execution of such a decree.

34. Article 144 states:--

"All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court."

This Article also does not prevent Legislatures from altering law by appropriate legislation.

35. In *Udai Ram v. Union of India* AIR 1968 SC 1138 it was held that the provisions of an Act cannot be challenged as invalid on the ground that they encroached upon the domain of the judiciary by seeking to nullify judicial decisions. The American doctrine of well-defined separation of legislative and judicial powers has no application in India. It cannot be said that an Indian Statute which seeks to validate invalid actions is bad if the invalidity has already been pronounced upon by a Court of law.

36. I find no conflict between Articles 142 and 144 on one hand and Article 233A on the other hand. Inserting Article 233A in the Constitution had not the effect of amending Article 142 or Article 144 directly or indirectly. Articles 233 and 233A fall under Chapter VI of Part VI of the Constitution. This Chapter is not covered by the proviso to Article 368. So, it was not necessary in the instant case to follow the special procedure laid down in the proviso to Article 368. The ordinary procedure laid down in the main part of Article 368 was followed. That was sufficient. In my opinion, the Constitution (Twentieth Amendment) Act, 1966 is valid.

37. The learned single Judge has expressed the view that, in spite of the decision of the Supreme Court in the previous case, certain rules in the U. P. Higher Judicial Service Rules, 1953 are valid. It is not necessary to deal with that question in the present appeals. The opposite parties do not rely upon any

particular part of U. P. Higher Judicial Service Rules, 1953. The opposite parties take their stand on the Constitution (Twentieth Amendment) Act, 1966. I, therefore, express no opinion on the question whether certain rules in the U. P. Higher Judicial Service Rules, 1953 are valid, in spite of the decision of the Supreme Court in AIR 1966 SC 1987. That question is left open.

38. Appointments of opposite parties Nos. 2 to 15 have been validated by Constitution (Twentieth Amendment) Act, 1966. The fact that opposite parties Nos. 13, 14 and 15 were parties to the previous case makes no difference. Appointments of all these 14 officers are valid. Sri Om Prakash Sharma, opposite party No. 16 was not actually appointed to the U. P. Higher Judicial Service. There is, therefore, no question of ousting him from any office. In my opinion, Special Appeals Nos. 1054 of 1967 and 87 of 1968 should be allowed; and Special Appeal No. 30 of 1968 should be dismissed. The writ petition should be dismissed against all the opposite parties.

G.C. Mathur, J.

39. I agree with the judgment of my Lord the Chief Justice and with the order which he proposes to pass. I, however, wish to say a few words on the question whether the Constitution (Twentieth Amendment) Act makes any change in Article 142(1) so as to attract the proviso to Article 368. Clause (1) of Article 142 is in two parts; The first part empowers the Supreme Court to pass such decree or order as is necessary to do complete justice in the matter before it. There is no complaint that this part is affected by the Amendment Act. The second part empowers Parliament, by law, and the President by order to prescribe the procedure for the enforcement of the decree and order of the Supreme, Court throughout the territories of India. Under this power, the President has made the Supreme Court (Decrees and Orders) Enforcement Order, 1954. The Amendment Act does not touch this power of Parliament or of the President. In this view, the Amendment Act does not make any changes in Article 142(1).

40. Even if the second part of Clause (1) of Article 142 be construed as declaring that the decrees and orders of the Supreme Court shall be enforceable throughout the territories of India and further as empowering Parliament and the President to prescribe the procedure for the enforcement of the decrees and orders, the Amendment Act makes no change in it. The Amendment Act does not make any change in the language of Clause (1) of Article 142; nor does it add any proviso or exception to it. What is said is that the Amending Act renders the order passed by the Supreme Court in the previous case unenforceable and thereby affects the operation of Article 142(1). The operative order of the Supreme Court is in two parts: The first part declares the Rules to be void and consequently the appointments made thereunder to be illegal. This part is merely declaratory and no question of enforcing or executing it can arise. So far as this part of the order is concerned, there is no difficulty as it is now well settled that an order of a Court can be legally superseded by legislative or constitutional amendment and Clause (1) of Article 142 does not prohibit such supersession.

Therefore, the Amending Act, in so far as it supersedes the declaration made by the Supreme Court, does not affect the operation of Article 142(1).

41. The second part of the order of the Supreme Court directs the State Government not to make any appointments to the U. P. Higher Judicial Service in pursuance of the selections made under the Rules. This injunction could only operate in the future. The Supreme Court did not order the removal of any persons from service who had already been appointed. Respondents Nos. 2 to 12 to the present writ petition were appointed to the Higher Judicial Service before the first writ petition was filed and respondents Nos. 13 to 15 were appointed in May-June, 1966, after the dismissal of the first writ petition and after the vacation of the stay order by the Supreme Court but before it passed final orders in that case. The injunction was not directed against the appointments of respondents Nos. 2 to 15 but only against future appointments. The Amendment Act does not permit the State Government to make any appointments in future on the basis of selections made under the Rules and, therefore, it cannot be said to render unenforceable an injunction issued by the Supreme Court. Since the Amending Act does not at all touch the enforceable part of the order of the Supreme Court, it does not affect the operation of Clause (1) of Article 142.

42. The matter may be viewed from another angle. Clause (1) of Article 142 guarantees the enforceability of a subsisting decree or order of the Supreme Court; but it does not guarantee the subsistence of the decree or order itself. If the decree or order does not subsist, then there is nothing on which Article 142(1) can operate. It is not disputed that the decree or order of a Court can be superseded by a legislative or constitutional amendment; there is no prohibition in the Constitution -- and certainly not in Article 142(1) -- against such supersession of a decree or order of the Supreme Court. Once the decree or order of the Supreme Court is properly and legally superseded no question of its enforceability under Article 142(1) can arise. The order of the Supreme Court in the previous case has been properly and legally superseded by the Amending Act. There is no subsisting order the enforceability of which can be said to have been affected. One simple example will illustrate the point. Suppose the Supreme Court passes a decree or order and later, upon an application for review, reverses it. Can it be urged that the subsequent order affects the applicability of Article 142(1) as it renders unenforceable the earlier order? Surely not. The Supreme Court has the power to review its decree or order and, it having exercised that power the original decree or order is superseded by the subsequent order. No question of enforcing the original decree or order under Article 142(1) can arise. Likewise, Parliament has, in the exercise of its constitutional power to supersede judgments, decrees and orders of courts, superseded the order of the Supreme Court in the previous case by the Amendment Act.

43. The Amendment Act does not affect the application of Article 142(1) and, therefore, cannot be said to make any change therein. The proviso to Article 368 is not attracted and the Amendment was not required to be ratified by the

Legislatures of the States.

Mukerjee, J.

44. I agree with the judgment of my Lord, the Chief Justice.

45. BY THE COURT: Special Appeals Nos. 1054 of 1967 and 87 of 1968 are allowed with costs against respondent No. 1. Special Appeal No. 30 of 1968 is dismissed with costs to contesting respondents. The writ petition is dismissed with costs to contesting opposite parties.