
(1971) 09 J&K CK 0004

In the Jammu And Kashmir High Court

Case No : Writ Petition No's. 68 of 1969 and 167 of 1970

Khairati Lal and others

APPELLANT

Vs

District Judge Jammu and Kashmir and another

RESPONDENT

Date of Decision : 09-09-1971

Acts Referred:

Constitution of India, 1950 — Article 14

Jammu and Kashmir Public Premises (Eviction of Unauthorized Occupants) Act, 1959
— Section 4, 5

Citation : AIR 1972 J&K 88

Hon'ble Judges : S. Muktaza Fazl Ali, C.J.; Raja Jaswant Singh, J.; Janki Nath Bhat, J.; Jalalud-Din, J

Bench : Full Bench

Advocate : D.D. Thakur and K.N. Raina, for the Appellant; Amar Chand, A.N. Raina and A.K. Malik, for the Respondent

Judgement

S. Muktaza Fazl Ali, C.J.—These two petitions raise common question of law and will be disposed of by one judgment.

2. The Benches concerned hearing these petitions have made a reference to the Full Bench and the question is as to whether or not the Jammu &

Kashmir Public Premises (Eviction of Unauthorized Occupants) Act 1959 (hereinafter to be referred to as the Principal Act) as amended by Act

VI of 1968 is ultra vires being violative of Art. 14 of the Constitution of India. The Benches have not decided the cases of the petitioners on merits

and only the question of law referred to above has been referred to us for an authoritative pronouncement.

3. In petition No. 68 of 69 Khairati Lal v. District Judge & ors. the petitioners were lessees under the Wasidari Rules in respect of the lands in

dispute and were granted leases for a period of over forty years about 30-35

years ago. The terms and conditions of the leases were governed by the Building Site Rules and were later replaced by the Land Grants Act of 1960 and the Rules made thereunder. In the year 1962 the Government passed an order resuming the lands because the petitioners had not constructed any house on the land. After the order of resumption was passed compensation was fixed by the Executive Engineer in 1963 and was accepted by the petitioners under protest. Before, however, proceedings for compensation could be terminated the Government took action for eviction against the petitioners under Sections 4 and 5 of the Act. The petitioners challenged the vires of Sections 4 and 5 of the Act in order to resist the order of eviction passed by the Estate Officer on 15-1-69.

4. In the other petition of Mohd. Sultan v. The State of Jammu and Kashmir the petitioners were in possession of 3 kanals of land since a very long time and in the year 1967 the Nazool Department issued a show cause notice to the petitioner for eviction under S. 5 of the Act. The petitioners challenged the vires of Section 5 of the Act in order to resist the notice given to them for eviction

5. It would thus appear that both the petitions raise the point relating to the unconstitutionality of Sections 4 and 5 of the Act. The petitioners have been inspired by a majority judgment of the Delhi High Court in the Full Bench case of P.L. Mehra, etc. Vs. D.R. Khanna etc., . This is the sheetanchor of their argument. Before, however. I come to the facts leading to the decision of the Delhi High Court (Supra), it will be necessary to mention a few important circumstances, pertaining to the Act prevalent in our State. The legislature passed the Public Premises (Eviction of Unauthorized Occupants) Act. Act No. 13 of 1959. as far back as 1959. Section 5 of that Act reads as follows:-

(1) If, after considering the cause, if any shown by any person in pursuance of a notice under Sec. 4 and any evidence he may produce in support of the same and after giving him a reasonable opportunity of being heard, the Estate Officer is satisfied that the public premises are in unauthorized occupation, the Estate Officer may on a date to be fixed for the purpose, make an order of eviction for reasons to be recorded therein, directing that the public premises shall be vacated by all persons who may be in occupation thereof or any part thereof and cause a copy of the order to be

affixed on the outer door or some other conspicuous part of the public premises.

(2) If any person refuses or fails to comply with the order of eviction within forty-five days of the date of its publication under sub-section (1) the

Estate Officer or any other officer duly authorized by the Estate Officer in this behalf may evict that person from and take possession of the public

premises and may for that purpose, use such force as may be necessary.

Provided that in the case of any such person who is not a Government employee and who has been in continuous occupation of the public

premises for a period exceeding three years immediately preceding the date of the publication of the order of eviction, the Estate Officer shall not.

if an application is made to him in this behalf, evict such person from the public premises within ninety days of such publication.

In Northern India Caterers Private Ltd. and Another Vs. State of Punjab and Another, the Supreme Court struck down Sections 5 and 7 (2) of

the Punjab Act as being violative of Arts. 14 and 13 (2) of the Constitution of India. Realizing therefore the infirmities from which the Act of the

State suffered the Governor, at once passed an Ordinance amending Section 5 and substituting new Sections 5. 6A and 9A with several sub-

sections. The Ordinance was soon replaced by Act VI of 1968-By virtue of this amendment the entire language of Section 5 was completely

changed and an entirely new section was substituted. Certain additional safeguards by way of Sections 6A and 9A were added so as to make the

Act immune from challenge on the ground of violating Art. 14 of the Constitution of India. By virtue of the amendment Section 5 runs thus:-

When in pursuance of the notice u/s 4. no objection is filed, or if an objection, not being an objection referred to a civil court u/s 6A is filed, then

after giving the parties reasonable opportunity of producing evidence if any, and if being heard, the Estates Officer shall, on being satisfied that the

public premises or part thereof is in unauthorised occupation, make an order of eviction, for reasons to be recorded in writing, directing that the

public premises or part thereof shall be vacated by the person in occupation thereof, and cause a copy of the order to be affixed on the outer door

or some other conspicuous part of such premises.

(2) An ex parte order passed under sub-section (1) may on application made within 30 days of the date of order and sufficient cause being shown

for absence, be set aside by the Estates Officer who may allow objections to be filed within such time as may be considered reasonable. The

objections shall be disposed of in accordance with the provisions of subsections (1) and (3). If any person refuses or fails to comply with the order

of eviction within fourteen days of its publication under sub-section (1) the Estates Officer or such other person as may be authorized by him in this

behalf, shall evict that person from and take possession of the public premises and may for that purpose use such force as may be necessary

Provided that the Estates Officer may on application being made to him before the expiry of the period specified above and on sufficient cause

being shown, extend such period by a period not exceeding 30 days.

As soon as the copy of the order mentioned in sub-section (1) of Section 6-A is received, the Estates Officer in case the premises is held to be

public premises, shall proceed to evict the person in unauthorized occupation in accordance with the provisions of sub-sections (1) and (3).

6. It would thus appear that the legislature not only amended the Act but practically reenacted the entire Act so far as Sections 5, 6A and 9A are

concerned. The constitutionality of the amended Act was challenged before this Court in *Yashpal v. State*. Civil reference No. 4 of 1967 (J. & K.)

(FB) and later in the Full Bench decision of this court in AIR 1969 J & K 88. The Full Bench of this Court consisting of five Judges upheld the

validity of the Act and found that in view of the amendment the vice of unconstitutionality from which the original Act suffered had been removed.

In the previous Full Bench case of *Yashpal* (Supra) their Lordships observed as follows:-

It would thus be seen that the ordinance has substantially amended the existing provisions of the principal Act. apart from introducing many new

provisions, Reading the amended Act. we find that the entire ambit, scope and complexion of the principal Act has been changed. To begin with.

Section 5 which previously was couched in a directory form has now been recast in a mandatory form.

7. Thus it is manifest that the amendment in the present case is not merely the substitution of a few words here and there but the entire ambit, scope

and complexion of the principal Act has been changed and therefore such an amendment is really in the nature of a reenactment and not an

amendment pure and simple. Thus the constitutionality of the Act was upheld by the two Full Bench decisions of this court one in Yashpal Civil

Ref. No. 4 of 1967 (J & K) (FB) (Supra) and the other in Wali Mohd. v. Administrator Municipality. AIR 1969 J & K 88 (FB) Therefore when

we are considering the validity of the Act in the present petitions, the admitted position is that the Full Bench decision of this court had upheld the validity of the amended Act.

8. In the case before the Delhi High Court, however the amended Act itself was the subject-matter of decision and the majority judgment held that

since Sections 5 and 7 were void ab initio they could not be revived merely by an amendment but the Act had to be reenacted afresh. The

Majority judgment proceeded on the premise that since the Act was void under Article 13 (2) of the Constitution of India, the doctrine of eclipse

was wholly inapplicable and the Act was completely still-born, dead and non-existent and therefore could be revived only by a re-enactment and

not by an amendment. Deshpande J. dissented from the majority view and was of the opinion that the amendment removed the vice of

unconstitutionality and therefore the amendment was a valid piece of legislation. Before, however, we go to the ratio decidendi of the Delhi High

Court judgment it may be necessary to examine the purport, ambit and the implications of a void statute. Art. 13 of the Constitution of India runs

thus:-

All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the

provisions of this part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this

clause shall to the extent of the contravention, be void.

An analysis of this Article would clearly show that it contains two categories of legislation; the first category includes within its ambit pre-

Constitution laws which are sought to be protected by Cl. (1) of Art. 13 except in so far as they violate the provisions of part III of the

Constitution of India. In other words if a particular provision of a preconstitution Act infringes any of the provisions of Part III of the Constitution, it

is void to that extent, but if by an amendment of the offending provisions of Part

III of the Constitution the vice is cured then the offending provision automatically revives by the doctrine of eclipse without the necessity of a fresh amendment. Furthermore, Cl. (1) of Art. 13 specifically provides that the voidness of a statute would extend only to that portion of the Act which violates the provisions of Part III of the Constitution of India.

9. As regards Cl. (2) it is couched in quite a different language and is an express prohibition to the legislature or the Parliament from passing any Act which is inconsistent with Part III of the Constitution of India, but at the same time the consequences of the violation of the provision is also provided in Art. 13 (2) namely that only that portion of the Act would be void which violates the provisions of Chapter III of the Constitution of India and not the entire Act. The only difference is that to such-Laws which are contemplated by Art. 13 (2) that is to say, post-Constitution laws, the doctrine of eclipse will have no application and even if a particular provision of Part III of the Constitution of India which is violated by such an Act is amended the offending portion of the Act has to be recast and amended by the legislature or the Parliament (as the case may be) and will not revive automatically. This question is no longer *res integra* but has been settled by numerous authorities of the Supreme Court as also by the Full Bench decision of this Court in AIR 1969 J. & K. 88 (Supra).

10. Now the next question that falls for determination is the extent and meaning of the word 'void'. On this question the decisions of the Supreme Court are by no means uniform. In *Keshavan Madhava Menon Vs. The State of Bombay*, 130 S. R. Das J. (as he then was) speaking for the Court observed as follows:-

After this first point is noted, it should further be seen that Art. 13 (1) does not in terms make the existing, laws which are inconsistent with the fundamental rights void *ab initio* or for all purposes. On the contrary, it provides that all existing laws in so far as they are inconsistent with the fundamental rights, shall be void to the extent of their inconsistency. They are not void for all purposes but they are void only to the extent that they come into conflict with the fundamental rights. In other words on and after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights. Therefore the voidness of the existing law is limited to the future exercise of the

fundamental rights. Art. 13 (1) cannot be read as obliterating the entire operation of the inconsistent laws, or to wipe them out altogether from the

Statute Book, for to do so will be to give them retrospective effect which, we have said, they do not possess. Such laws exist for all past

transactions and for enforcing all rights and liabilities accrued before the date of the Constitution.

11. It is true that in this case their Lordships were considering the voidness of a pre-Constitution statute, but in our opinion in principle it makes no

difference. Their Lordships have clearly pointed out that the statute will be void for all purposes and will not be enforceable at all but such voidness

will not have the effect of wiping out the statute altogether from the Statute Book. Similarly Fazl Ali J. approaching the same question observed as

follows at page 133 *ibid*:-

But in regard to inchoate matters which were still not determined when the Constitution came into force, and as regards proceedings whether not

yet begun or pending at the time of the enforcement of the Constitution and not yet prosecuted to a final judgment the very serious question arises

as to whether a law which has been declared by the Constitution to be completely ineffectual can yet be applied. On principle and good authority,

the answer to this question would appear to me to be that the law having ceased to be effectual can no longer be applied.

12. In another decision of the Supreme Court. *Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another*, . 784 their

Lord ships observed as follows:-

Art. 13 (1) by reason of its language cannot be read as having obliterated the entire operation of the inconsistent laws of having wiped it out

altogether from the statute book. Such laws existed for all past transactions and for enforcement of rights and liabilities accrued before the date of

the Constitution, as was held in *Keshavan Madhava Menon Vs. The State of Bombay*, . The law continued in force even after the commencement

of the Constitution, with respect to persons who were not citizens and could not claim the fundamental right. In short. Art. 13 (1) had the. effect of

nullifying or rendering the existing law which had become inconsistent with Art. 19 (1) (g) read with Cl. (6) as it then stood ineffectual, nugatory

and devoid of any legal force or binding effect only with respect to the exercise of

fundamental right on and after the date of the commencement of the Constitution.

13. In this case their Lordships further held that in case of pre-Constitution statutes the doctrine of eclipse would apply and observed as follows:-

The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamental right. The effect of the Constitution

(First Amendment) Act, 1951, was to remove the shadow and to make the impugned Act free from all blemish or infirmity. If that were not so,

then it is not intelligible what 'existing law' could have been sought to be saved from the operation of Art. 19 (1) (g) by the amended clause (6) in

so far as it sanctioned the creation of State monopoly for 'ex hypothesi' all existing laws creating such monopoly had already become void at the

date of the commencement of the Constitution in view of Cl. (6) as it then stood. (See page 785).

Thus in both these decisions while holding that a statute was void and therefore unenforceable and ineffectual the Supreme Court clearly held that it

continued to remain on the Statute Book and could not have been held to be obliterated therefrom. On the other hand in *Behram Khurshed*

Pesikaka Vs. The State of Bombay, and in *Deep Chand Vs. The State of Uttar Pradesh and Others*, their Lordships appear to have taken an

extreme view of the matter which is absolutely different from the view taken by them in the two earlier cases (*Supra*).

14. In *Behram Khurshed Pesikaka Vs. The State of Bombay*, Mahajan C. J. at page 145 observed as follows:-

The result therefore of this pronouncement is that the part of the section of an existing law which is unconstitutional is not law, and is null and void.

For determining the rights and obligations of citizens the Court declared void should be notionally taken to be obliterated from the Section for all

intents and purposes, though it may remain written on the statute book and be a good law when a question arises for determination of rights and

obligations incurred prior to 26th January 1950 and also for the determination of rights of persons who have not been given fundamental rights by

the Constitution. Thus, in this situation, there is no scope for introducing terms like 'relatively void' coined by the American Judges in construing a

Constitution which is not drawn up in similar language and the implications of

which are not quite familiar in this country.

15. Similarly in *Deep Chand Vs. The State of Uttar Pradesh and Others*, their Lordships of the Supreme Court observed as follows:-

A constitutional prohibition against a State making certain laws cannot be whittled down by analogy or by drawing inspiration from decisions on the provisions of other Constitutions: nor can we appreciate the arguments that the words 'Any law' in the second line of Art. 13 (2) posits the survival of the law made in the teeth of such prohibition. (see page 656).

16. In *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, . 1930 Wanchoo J. appears to have reconciled and synthesized the different views expressed in the above decisions and observed as follows:

It is however urged on behalf of the respondents that this would give a different meaning to the word 'void' in Article 13 (1) as compared to Art.

13 (2). We do not think so. The meaning of the word 'void' in Art. 13 (1) was considered in *Keshavan Madhava Menon Vs. The State of*

Bombay, and again in *Behram Khurshed Pesikaka Vs. The State of Bombay*, . In the later case. Mahajan C. J. pointed out that the majority in

Keshava Menon's case clearly held that word 'void' in Art. 13 (1) did not mean that the statute stood repealed and therefore obliterated from the

statute book, nor did it mean that the said statute was void ab initio. This in our opinion. if we may say so with respect, follows clearly from the

language of Art. 13 (1) which pre-supposes that the existing laws are good except to the extent of the inconsistency with the fundamental rights.

.....

Therefore it was pointed out that the effect of Art. 13 (1) with respect to existing laws in so far as they were unconstitutional was only that it

nullified them, and made them 'ineffectual and nugatory and devoid of any legal force or binding effect.' The meaning of the word 'void' for all

practical purposes is the same in Art. 13 (1) as in Art. 13 (2) namely, that the laws which were void were ineffectual and nugatory and devoid of

any legal force or binding effect.

17. Similarly in *Municipal Committee, Amritsar and Others Vs. State of Punjab and Others*, . 1103 the view expressed by Wanchoo J. appears to

have been endorsed in the following words:-

We are unable to accept the argument that since the High Court of Punjab by their judgment in Mohinder Singh Sawhney Vs. State of Punjab and

Others, struck down the Act. Act 6 of 1968 had ceased to have any existence in law and that in any event, assuming that the judgment of the

Punjab High Court in Mohinder Singh Sawhney Vs. State of Punjab and Others, did not make the Act non-existent, as between the parties in

whose favour the order was passed in the earlier writ petitions, the order operated as res judicata and on that account the Act could not be

enforced without re-enactment.

Here also the Supreme Court reiterated that even if a court struck down the validity of a statute it did not cease to have any existence in law. nor

did it become non-existent as between the parties. Deshpande J. in the P.L. Mehra, etc. Vs. D.R. Khanna etc., has accepted the view expressed

by Wanchoo J. in Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, and by Shah J. in the Amritsar Municipality case (Supra). We

respectfully agree with the view taken by Deshpande J. and hold that when a statute is struck down as violating any of the provisions of Part III of

the Constitution or in view of legislative incompetence, the Act does not become completely non-existent in law but continues to remain on the

Statute Book to be used for a collateral purpose that is to say for repeal or amendment. Indeed if the majority judgment of the Delhi High Court

that such a law is wholly non-existent, dead and still-born is accepted then as a consequence thereof the law will have to be completely obliterated

and effaced from the Statute Book and the legislature would be compelled to start the legislative process from beginning to end. because if the Act

is effaced from the Statute Book it cannot be looked into for any purpose whatsoever. Thus the result would be that by virtue of a decision of this

Court there will be direct interference in the legislative process leading to several complications. On the other hand the more reasonable view in our

opinion seems to be that when a statute is declared to be void either by the High Court or the Supreme Court, it becomes wholly ineffectual and

destitute of any legal effect and not binding on the parties so that no court can take notice of such a statute while adjudicating on the rights of the

citizens. For these reasons we express our respectful dissent from the view taken by Hardy J. constituting the majority judgment in the Delhi case

(Supra). Furthermore if the Delhi view is accepted that a statute once struck down as void being violative of the provisions of part III of the

Constitution, becomes still-born, dead and completely non-existent so as to be effaced from the statute book, then a very anomalous result would

follow. Suppose the Act has been struck down by the High Court or the Supreme Court and as a consequence ceases to remain on the statute

book. A little later the Supreme Court reverses the judgment of the High Court and upholds the validity of the Act or if a decision of the Supreme

Court subsequently overrules its previous decision and upholds the constitutionality of the Act. how can the Act then be brought back on the

statute book after having been completely obliterated from it? This will lead to an impossible situation. For these reasons also we are not able to

agree with the view of the Delhi High Court that a void statute ceases to remain on the Statute Book for any purpose whatsoever.

18. Another aspect that is to be considered is the extent of the voidness of a statute. A statute may be void either in part or as a whole. A statute

may be void as a whole in two ways: (1) by a declaration that all sections from one to the last are ultra vires. (2) by a declaration that some of the

Sections are ultra vires and as the remaining Sections being inseparable from the offending sections render the Act unworkable, therefore all the

sections are declared ultra vires. But there is an essential difference between these two kinds of declarations. In the former case the declaration

extends to the entire Act by declaring every section to be ultra vires. It is obvious, therefore that in such a case the only course for the legislature is

to repeal the law and to reenact a fresh law because there is nothing to amend. In the latter case the remaining provisions of the Statute are

declared ultra vires because they render the Act unworkable, although these sections themselves do not violate any provision of the Constitution so

as to be declared void. In other words, these sections become ineffectual in the absence of the offending sections in which case if the offending

sections alone are amended by the legislature, then the remaining sections automatically revive. This is not because of the application of the doctrine

of eclipse but because the remaining sections which do not offend any article of the Constitution become at once workable as soon as the vice of

unconstitutionality appearing in the offending sections is removed by an amendment.

19. This brings us to the most vital issue in the case that if an Act or a portion of it is declared void by the Supreme Court or the High Court, can it

be revived by amendment or can it be revived only by a fresh enactment. To begin with in the case before the Delhi High Court there is a clear

finding by their Lordships that Sections 5 and 7 (2) being ultra vires as violative of Art. 14 of the Constitution of India the whole act had to be

declared as void. In the case before us. however, that is not the position at all. Even before the court came to consider this point the amended Act

had come into force. The original S. 4 of the Act provides for notice for eviction and even if Section 5 is struck down it cannot be said that Section

4 is an inseparable part of Section 5. because Section 4 is not completely put out of action. It may be that if a notice is issued to an occupant for

eviction, as a law abiding citizen he might accept the notice and vacate the premises in which case recourse to S. 5 will not be necessary at all.

Thus even if S. 5 is struck down S. 4 does not become unworkable. Furthermore S. 7 of the Act has not been declared by us to be ultra vires so

far and we are not in the present case called upon to determine the validity of this section, because the present case does not relate to recovery of

rent as arrears of land revenue. The position, therefore, is that both Sections 4 and 7 have not so far been declared ultra vires by this court.

20. It was contended by the learned counsel for the petitioners that in view of the Full Bench Judgment of the Delhi High Court we should import a

legal fiction and hold that the amendment could not have revived Section 5 of the Act without the whole Act being re-enacted afresh and therefore

strike down the Amended Act. It seems to us that the argument is extremely far-fetched. The Delhi High Court proceeded on the footing that since

the Act was ultra vires there was 'nothing to amend it and the only remedy for the legislature was to re-enact the Act afresh. The facts in the Delhi

case are clearly distinguishable from the facts in the present case. Nevertheless projecting the arguments of the learned counsel for the petitioners

to their logical end. we feel ourselves unable to agree with the majority view taken by the Delhi High Court In this connection we might mention the

exact view taken by the Delhi High Court. The majority judgment adumbrated the following propositions:-

A wholly void statute may be rendered operative by the legislature in any of the following ways:-

(i) the statute may be re-enacted after the vice which had led to the declaration of voidness being removed from it.

(ii) The legislature may pass a validating Act retrospectively putting out of the way one of the competing statutes which enabled unconstitutional

discrimination being practised under it and by providing that all action should be deemed to have been taken and shall be continued under the other

statute which is otherwise without blemish.

(iii) By constitutional amendment specifically mentioning the void statute and protecting it against any attack on the ground that it violates any of the

fundamental rights secured under part III of the Constitution. Prospective amendment of the portions of a void statute with the intention of ridding it

of the vice afflicting it. as has been done by the Amending Act of 1968 in the present case, is not one of the methods that could be adopted to

achieve that result. At least the decisions of the Supreme Court as I understand them leave no room for that." While we agree with their Lordships

that the modes mentioned in paragraph 151 (i). (ii) and (iii) are undoubted modes which the legislature can resort to while replacing an Act

declared void by the courts, yet we do not agree that these are the only modes and no other. On the other hand we respectfully agree with the

propositions adumbrated by Deshpande J. who observed as follows:-

The conclusion on the first aspect of the question is that a statute which is void within the meaning of Art. 13 (2) of the Constitution is 'ineffectual,

nugatory and without legal force or binding effect' and the courts will not enforce it in deciding on the rights of the parties, but such a statute very

much exists on the statute book and Parliament is bound to take notice of it for further legislation to repeal or amend it..

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The second contention of the petitioners therefore concedes that the legislature has the power to repeal a void Act. If the legislature can repeal a

void Act. and it can make a new Act then it must follow that it can amend a void Act. For, the power to amend is either a power to enact or a

power to repeal. There can be no amendment which either does not repeal a part of the existing statute or does not add to it. Basically, it is the

power to enact a statute which is possessed by the legislature. A repeal or an amendment is nothing different from enactment. The possession of

the power to enact a new Act and to repeal a void Act therefore gives the legislature the power to amend a void Act.

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My answer to the second aspect of the question for decision therefore is that the principal Act could be revived or validated by the Amending Act

of 1968 and no further re-enactment of it was necessary.

21. It is, however, beyond dispute that where a particular portion or provision of an Act is violative of the provisions of Part III of the Constitution,

the vice can be cured by amending that particular part or provision and removing the vice of unconstitutionality. Even the Delhi High Court does

not hold that in view of Art. 13 (2) the legislature will have to re-enact the law afresh instead of making an amendment. Apart from this it seems to

us that there is some confusion about the scope and ambit of the word ""amendment"". After all amendment also is a form of reenactment and there

is no special charm in the word amendment. Where the offending sections are repealed and replaced by new sections, removing the vice of

unconstitutionality it is for all intents and purposes a re-enactment of a part of the statute and that should be sufficient to validate it. We fully agree

with the principles enunciated by Deshpande J. in para 16 of his judgment that an amendment should change the provisions of an unconstitutional

statute with a view to making it constitutional which is in effect a re-enactment of such a statute. In American Jurisprudence Vol. 50 para. 468 page

482 the following observations occur:

The amended statute is regarded as if the original statute has been repealed and the whole statute re-enacted with the amendment.

This is particularly so in respect of the Amendment Act before us where as pointed out by us the nature, ambit and the complexion of Section 5

has been changed and some new Sections have been added making fresh provisions- Therefore even if we agree with the Delhi view, we would

regard the present Amendment as a re-enactment of the original statute.

22. This brings us to a consideration of the judgment of the Supreme Court in B. Shama Rao Vs. The Union Territory of Pondicherry, on which

great reliance has been placed by the learned counsel for the petitioner. In this case the Pondicherry General Sales Tax (Amendment) Act (13 of

1966) was held to be void and their Lordships held that as the Act was a re-

enactment of principal Act it was still-born and void ab initio and it could not be cured merely by an amendment. Deshpande J. distinguished his case on various grounds and observed as follows:-

With great respect, it appears that the decision in B. Shama Rao Vs. The Union Territory of Pondicherry, is distinguishable. Firstly, it was the

Supreme Court which had held the Pondicherry General Sales Tax Act, 1965, to be void. The effect of the decision of the Supreme Court is

different from the effect of a decision of a High Court. Arts. 141 and 144 of the Constitution makes the Supreme Court decision binding on all

Courts in India and require all the civil and judicial authorities in India to act in aid of the same. The effect is that the Supreme Court decision

becomes a judge-made law of general application throughout India. In that respect it can be put against the statute which is declared void by it and

such a statute ceases to have any enforceability anywhere in the country.

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Secondly the unconstitutionality of the Pondicherry General Sales Tax Act 1965 was not by reason of it being contrary to any provision of Part III

of the Constitution. Therefore Art. 13 of the Constitution was not attracted at all. Consequently it is not a decision as to the nature of

unconstitutionality under Article 13 (2) of the Constitution. For the same reason it does not decide whether an Act void under Art. 13 (2) can be

validated by an amendment or not.

Thirdly the decision in Sham Rao's case was further explained and distinguished in Devi Das Gopal Krishnan and Others Vs. State of Punjab and

Others, by the same Constitution Bench, this time unanimously". (See Deshpande J. in P.L. Mehra, etc. Vs. D.R. Khanna etc., paras 45, 46 and

47 pp. 12-13).

We express our complete agreement with the grounds on which the learned judge has distinguished this authority of the Supreme Court. On the

other hand it seems to us that a later decision of the Supreme Court in Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others, is a

clear authority for the proposition that if there is any vice of unconstitutionality appearing in a part of a statute it can be cured by an amendment. In

this connection their Lordships observed as follows:-

No doubt in terms the section inserts the words ""not exceeding two pice in a rupee."" in Section 5. If Section 5 is inserted in the Act by the

Amending Act with the said words added, there cannot possibly be any objection. for that would be an amendment of an existing Act. But in

substance the amendment brings about the same effect. The words 'shall be deemed always to have been so inserted' indicate that in substance

Section 5 as amended is inserted in the Act with retrospective effect.

These observations of their Lordships clearly show that the legislature could by the Amending Act cure the vice which was present in the original

section 5. Indeed if this vice was incurable and could be cured only by a re-enactment of the entire statute, their Lordships should have made it

clear.

Apart from this, there is a catena of authorities to show that where a portion of a statute is void as being violative of the provisions of Part III of the

Constitution, the vice can be cured by an amendment. In a recent decision of the Supreme Court in *The Municipal Corporation of The City of*

Ahmedabad and Another, Vs. The New Shrock Spg. and Wvg. Co. Ltd. etc. etc., the following observations were made:-

The legislatures under our Constitution have within the prescribed limits, powers to make laws prospectively as well as retrospectively. By exercise

of those powers, the legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective.

23. Thus their Lordships of the Supreme Court clearly recognized the power of the legislature to bring in an amendment rendering the decision of

the Court ineffective. In other words it is clearly held that where a court struck down the provisions of a statute as violating Art. 14. the legislature

can amend that provision by removing the vice.

24. Similarly in *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*, . 195 the following observations were

made:-

When a legislature sets out to validate a tax declared by a court to be illegally collected under ineffective or an invalid law. the cause for

ineffectiveness or invalidity must be removed before validation can be said to take place effectively.

.....

The legislature may follow any one method or all of them and while it does so it may neutralize the effect of the earlier decision of the court which becomes ineffective after the change of the law.

.....

If the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions.

25. To the same effect are the decisions in *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, , *Municipal Committee,*

Amritsar and Others Vs. State of Punjab and Others, and *M.S. Oberoi Vs. Union of India (UOI)*, .

26. In *Roopchand Raghavji Phande and Others Vs. Abhyankar and Others*, it is clearly pointed out that even after an Act is struck down it is not

completely effaced but continues to remain on the statute book and therefore this decision impliedly holds that such an Act can be amended by the

legislature,

27. On a consideration of the circumstances, facts and the authorities discussed above, in our opinion the following legal propositions emerge:-

(1) When a statute either as a whole or in part is declared void it means that the portion which is declared void is ineffectual, destitute of any legal

effect, and not binding on the parties. Nevertheless the Act remains on the statute book for the consideration of the legislature in order to repeal or

amend the same and for using it for some other collateral purpose.

(2) Where a portion of the statute is declared void, the legislature has the full power to remedy this defect by bringing in proper and suitable

amendment without the necessity of re-enacting the law afresh. But where the whole Act has been declared to be void from Sections one to the

last it is obvious that there is nothing to amend and the only course for the legislature is to re-enact the statute afresh.

(3) The doctrine of eclipse applies only to pre-constitution laws and not to Post-Constitution Statutes. In cases where a portion of the statute is

struck down and as the other provisions of the Act are inseparable from the offending provisions, the whole Act is struck down, the legislature can

remove the defect by amendment of the offending section; as a result of this the other sections will revive automatically.

(4) The modes pointed out by the majority judgment of the Delhi High Court in P.L. Mehra, etc. Vs. D.R. Khanna etc., are not exhaustive but

purely illustrative.

(5) Where a provision of a post-Constitution statute is struck down as violating any of the provisions of part III of the Constitution, such a

provision cannot be revived merely by amending the concerned provision of part III of the Constitution because the doctrine of eclipse does not

apply and in such a case the offending provision of the Act has to be replaced by an amendment.

(6) The court does not repeal an Act which can only be done by the legislature. The function of the court is merely to interpret and give a particular

meaning to an Act and to strike it down if it is inconsistent with constitutional provisions.

28. For the reasons given above we are clearly of the opinion that the principal Act as amended by Act VI of 1968 is a valid piece of legislation

and cannot be held to be unconstitutional on any ground whatsoever. We decide the point referred to us accordingly. The cases will now be sent

back to the Benches concerned for disposal according to law.

29. We might mention here that in the case of Khairati Lal v. The District Judge the Referring Judge has mentioned that the question as to whether

a Wasidari lease granted under the old rules could be governed by the said rules may also be referred to the Full Bench, but after hearing the

parties. We think that this is not a substantial question of law and can be decided by the Bench concerned on merits along with the other facts.

J.N. Bhat, J.

30. I agree.

Mian Jalal-Ud-Din, J.

31. I agree.

Jaswant Singh, J.

32. I have had the advantage of perusing the elaborate judgment prepared by my lord the Hon'ble Chief Justice after an exhaustive review of the

case law bearing on the various points arising in the case. I entirely agree with his Lordship that a law which is declared void by a superior court

becomes ineffectual, inoperative, unenforceable and destitute of legal effect but

continues to exist on the statute book and is available to the legislature concerned for repeal, amendment, re-enactment or validation. If this were not so, it would not have been possible for the Parliament to validate certain statutes by means of the Constitution (First Amendment) Act, 1951, which inserted Article 31-B and added Ninth Schedule in the Constitution and later supplemented the Schedule by means of the Constitution (Fourth Amendment) Act, 1955, and the (Seventeenth Amendment) Act, 1964. That the law declared void becomes only unenforceable and inoperative but is not abrogated would also be clear by a reference to the original draft of Article 13 (1) of the Constitution which as pointed out by Fazl Ali, J. in *Keshavan Madhava Menon Vs. The State of Bombay*, (at p. 132) contained the words ""shall stand abrogated"" instead of the words ""shall be void"".

33. I am also in respectful agreement with the conclusion arrived at by my lord the Chief Justice that in view of the Full Bench decision of this court

in *Yash Pal v. State* (Civil Reference No. 4 of 1967 (J. & K.)) Section 5 of the Jammu and Kashmir Public Premises (Eviction of Unauthorised

Occupants) Act, 1959, as amended by Act No. VI of 1968 is no longer open to challenge as the vice of unconstitutionality on the basis of

discrimination from which it originally suffered was removed therefrom by Act No. VI of 1968 and it was not necessary to re-enact the whole Act

after removal of the vice.

Reference answered.