

(1972) 01 RAJ CK 0012
In the Rajasthan High Court
Case No : Civil Writ Petition No. 144 of 1972

K.N. Joshi

APPELLANT

Vs

The State of Rajasthan

RESPONDENT

Date of Decision : 31-01-1972

Acts Referred:

Constitution of India, 1950 — Article 213, 226, 254

Citation : AIR 1972 Raj 168 : (1972) RLW 191 : (1972) WLN 92

Hon'ble Judges : V.P. Tyagi, J

Bench : Single Bench

Advocate : M.B.L. Bhargava and A.K. Bhandari, for the Appellant; S.K. Tewari, Dy. Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

V.P. Tyagi, J.—The validity of the Rajasthan Urban Improvement (Amendment) Ordinance, 1972, (hereinafter called the Ordinance) has been challenged by petitioner K. N. Joshi, who was the member of the Urban Improvement Trust, Jodhpur, having been elected to that body by the Municipal Council, Jodhpur. The main grounds of challenge are,—

(1) that the Governor while promulgating the Ordinance did not place it for consideration before the President nor has the assent of the President been obtained on it;

(2) that the Governor while exercising this emergency legislative power acted on the advice of the executive Government, which tendered that advice on the eve of the general election to achieve certain political motives and this power under Article 213 of the Constitution has been used by the Governor in a mala fide manner.

(3) that the impugned Ordinance confers arbitrary and unbridled power on the Government and, therefore, it is violative of Article 14 of the Constitution.

2. A notice was given to the Advocate General to show cause why this petition may not be admitted. Mr. Tewari, Deputy Government Advocate, has, however, appeared on his behalf.

3. It is contended by Mr. Tewari that the motive for promulgating the Ordinance is irrelevant, and the Court has no Jurisdiction to examine the motive or the circumstances necessitating the promulgation of the Ordinance by the Government According to learned Deputy Government Advocate these matters are not justiciable. As regards the assent of the President it was urged that the Court while examining this question should look to the contents of the Ordinance and if it is discovered that the Ordinance was promulgated by the Governor in the exercise of his legislative power under Entry No. 5 of List II of VII Schedule of the Constitution then there was no necessity to secure the assent of the President, even though the parent Act, which stands amended by the impugned Ordinance, got the assent of the President, Regarding the arbitrary nature of power alleged to have been conferred on the executive of the State Government it was argued by Mr. Tewari that the effect of the amendment of Section 9 of the parent Act is only to do away with the representatives elected by the Municipal Council, otherwise in substance the constitution of the Trust is the same and there is not any material alteration in the constitution thereof.

4. Mr. Bhargava, appearing on behalf of the petitioner, has placed reliance on the following authorities in support of his arguments:-- Ratan Roy Vs. State of Bihar and Others, ; State of Punjab Vs. Satya Pal Dang and Others and Baldev Parkash and Others, Bhupendra Kumar Bose v. State of Orissa AIR 1960 Orissa 46; P. Achiah Chetty v. State of Mysore AIR 1962 Mys 218.

5. The Ordinance was promulgated by the Governor in the exercise of his powers under Article 213 of the Constitution and is dated January 6, 1972. It is not disputed that the State Legislature was not in session when this Ordinance was issued. It is mentioned in the Ordinance that the Governor has satisfied himself about the circumstances which existed for issuing the Ordinance and which were necessary to take such immediate action. The question is whether this Court can look into these circumstances, which necessitated the promulgation of the impugned Ordinance and for which Governor had satisfied himself before he exercised his emergency legislative power under Article 213 of the Constitution.

6. Article 213(1) of the Constitution provides that if at any time, except when the Legislative Assembly of a State is in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require. This language of Article 213 clearly indicates that it is Governor and the Governor alone who has to satisfy himself about the existence of such circumstances necessitating the promulgation of the Ordinance. In my opinion the existence of such a necessity is not justiciable for which the Courts can be called upon to examine by applying objective tests. This view was taken by the Federal Court in Lakhi Narayan Das v. Province of Bihar AIR 1950 SC 59. This

view was also expressed by the Madhya Pradesh High Court in *Upendralal v. Smt. Narainee Devi Jha* AIR 3968 MP 89 . The Supreme Court in *Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another*, has held that the motive with which the law has been promulgated under the emergency power under Article 213 of the Constitution, is not relevant factor to be considered by the Court. The same view was taken by the Kerala High Court in *N. Srinivasan v. State* AIR 1968 Ker 158 (FB). In view of these judgments I am definitely of opinion that the Courts of law cannot be called upon to go into the question of motive or the presence of the circumstances which prompted the Governor to take the emergency measure by promulgating an Ordinance under Article 213 of the Constitution.

7. Mr. Bhargava in support of his contention placed reliance on a decision of the Patna High Court in *Ratan Roy Vs. State of Bihar and Others*, The view taken in that case is:

"..... .A Government might falsely say that in its opinion the circumstances required the action taken. The safeguard may be slender, but it is not nugatory because the Courts can always enquire if mala fides have become apparent, and it might well be that a Government unscrupulous enough to make an emergency an excuse for unjust action might yet hesitate and the Governor at the head of it, however constitutional, might even more hesitate, to give a formal certificate implying honest examination of the circumstances and the formation of an honest opinion. Moreover, the more slender the safeguard, the more rigorously must the Courts examine it and apply it."

These are the words of Meredith, C. J. Sarjoo Prasad, J., while supporting this view has also observed:--

"It must also be remembered at the same time that wherever a legislation uses the word "satisfied", it must mean reasonably satisfied. I again quote for my authority the decision of the House of Lords in *Liversidge v. Anderson* 1942 AC 206 : 1941 3 All ER 338. In that case Lord Wright pointed out "satisfied" must mean "reasonably satisfied". It cannot import an arbitrary or irrational state of being satisfied. It is, therefore, quite obvious that if it is found on the very face of an Ordinance that it is an irrational and an unreasonable piece of legislation, a Court of law would certainly be entitled to hold that the legislation is invalid and pronounce against its being enforceable. My learned brother himself points out: "Courts can always enquire if mala fides have become apparent."

In my opinion, that is never the purpose of Article 213 of the Constitution. Such a legislation would be declared void on the ground of mala fides and as being wholly unreasonable on the very face of it." These observations of the learned Judges of the Patna High Court in view of the later decision of the Supreme Court in AIR 3959 SC 308, are no longer a good law. The Supreme Court has specifically laid down that motive is always irrelevant to judge the validity of a legislation. In this state of law it is not open to the Court to go behind the motive

which prompted the emergency legislative authority, i. e., the Governor to promulgate the Ordinance. The question before the Supreme Court in the above case was whether the validity of the law could be examined by the Court on the ground that it was a colourable legislation and it was in that context that their Lordships observed as follows:

"..... the argument that the doctrine of colourable legislation imputes dishonest motive or mala fides to the State making the law. But, Mukherjea J., as he then was, clarified the legal position in *K.C. Gajapati Narayan Deo and Others Vs. The State of Orissa*, It was contended in that case that the Orissa Estates Abolition Act, 1952, was a colourable legislation and as such void. Adverting to that argument, Mukherjea J., as he then was, says at p. 10 (of SCR): (at p. 379 of AIR) thus:

"It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always question of power If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not in respect to the subject-matter of the statute or in the method of enacting it transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears on proper examination, to be a mere pretence or disguise. As was said by Duff J., in *Attorney-General for Ontario v. Reciprocal Insurers* 1924 AC 328 337.

"Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing."

In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that Legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The Legislature cannot violate the constitutional prohibitions by employing an indirect method."

The learned Judges after discussing the aforesaid observations of Mukherjea J., observed as follows,--

"The Legislature can only make laws within its legislative competence. Its legislative field may be circumscribed by specific legislative entries or limited by Fundamental Rights created by the Constitution. The Legislature cannot overstep the field of its competency, directly or indirectly. The Court will scrutinize the law to ascertain whether the Legislature by device purports to make a law which, though in form appears to be within its sphere, in effect and substance, reaches beyond it. If, in fact, it has power to make the law, its motives in making the law are irrelevant." (The underlining is mine)

8. The only question, therefore, that remains to be examined by the Court is that whether the Governor had power to enact the impugned Ordinance or not? The motive with which the Ordinance is promulgated is, therefore, quite irrelevant and cannot be looked into by the Court if it is of opinion that the Governor has acted within his legislative competence under Article 213 of the Constitution.

9. Entry No. 5 in List II of Schedule VII of the Constitution reads as follows,--

"5. Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration."

In the presence of this entry No. 5 the legislative competence of the Governor cannot be questioned with any justification. If the Governor after examining the circumstances felt satisfied that the promulgation of the Ordinance was necessary when the State Legislative Assembly was not in session, the validity of the law cannot be questioned on the ground that it was promulgated by the Governor with mala fide intention.

10. The validity of the Ordinance is also questioned on the ground that the assent of the President was not obtained especially when the parent Act which stands amended by the Ordinance was assented to by the President. It is argued that the Rajasthan Urban Improvement Act, 1959, was enacted with the assent of the President, and, therefore, it can be amended by such law which has also received the assent of the President. In support of this proposition the learned counsel for the petitioner placed reliance on AIR 1960 Orissa 46 and AIR 1962 Mys 218.

11. Article 254 is a relevant provision under the Constitution which requires certain laws be enacted by the State legislature only after the assent of the President is obtained. Under Clause (2) of Article 254 where a law made by the State Legislature with respect to one of the matters enumerated in the Concurrent List contains any provisions repugnant to the provisions of an earlier law made by the Parliament or of an existing law with respect to that matter, then, the law so made by the Legislature of State, shall prevail in the State only

if it has been reserved for the consideration of the President and has received his assent. Under this provision of the Constitution only that enactment made by the State Legislature has to be reserved for consideration of the President and for his assent which contains provisions repugnant to the provisions of the law made earlier by the Parliament in relation to the subject enumerated in the concurrent List or is repugnant to an existing law in respect to that matter.

12. Existing law has been defined by the Constitution as the law which was in force at the time when the Constitution came into force. It is not the case of the petitioner that the impugned Ordinance is in any manner repugnant to the provisions of any existing law and, therefore, on that account the question of declaring it invalid does not arise. The other contingency for reserving the Ordinance for the consideration of the President and receiving his assent thereto arises only when it is repugnant to an earlier law made by the Parliament on this subject. It may be mentioned that the Ordinance relates to the matter which is squarely covered by entry No. 5 of List II of the Seventh Schedule, which is exclusively a subject matter of the State Legislature, therefore, on that account also its validity cannot be questioned as being violative of Art. 254 of the Constitution. The Governor has power under Article 213 of the Constitution to promulgate Ordinance in respect of the subject covered by List II of the Seventh Schedule even if the parent law which contains provisions about acquisition of land was enacted after getting President's assent. The impugned Ordinance deals only with the Constitution of the Improvement Trusts and, therefore, it was not necessary to get the assent of the President on such Ordinance. The two authorities cited by Mr. Bhargava, however, do not throw any light on this proposition of law. Mr. Tewari on the other hand has referred to an authority of Madhya Pradesh High Court in Chhotabhai Jethabai Patel and Co. v. State of Madhya Pradesh, AIR 1966 Madh Pra 110, wherein an Ordinance which was promulgated to amend certain Rules to validate the appointments of certain Agents, were challenged on the ground that the Ordinances did not receive the assent of the President. Their Lordships were of opinion that in order to judge whether a particular Ordinance requires the assent of the President or not regard must be had to the contents of the law itself. According to the tenor of the judgment of the Madhya Pradesh High Court if the Ordinance has been promulgated in respect of a subject which is within the competence of the State Legislature then the assent of the President is not necessary, if the two conditions mentioned in Clause (2) of Article 254 are not attracted. It is true that the parent Act in the present case did receive the assent of the President, but since the parent Act contains certain provisions regarding the acquisition of property it was necessary that the legislation should have received the assent of the President before it becomes law. But the present Ordinance does not in any manner amend those sections of the parent Act which necessitated the presentation of the bill for the consideration of the President or require the assent of the President, and, therefore, in my opinion it was not necessary that this Ordinance should have been put before the President for getting his assent

before it was promulgated by the Governor.

13. If we examine the contents of Section 9 of the parent Act and compare it with the changes brought in it by the amended Ordinance then it becomes clear that it does not confer any power on the State Government which may be called an arbitrary power. It cannot, therefore, be said with any justification that the impugned Ordinance is violative of Article 14 of the Constitution.

14. For the reasons mentioned above I find that this petition is misconceived and it is, therefore, dismissed summarily.