

(2014) 06 MAD CK 0136
In the Madras High Court
Case No : W.P. No. 15150 of 2014

Prashaanth Balasubramaniam

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision : 13-06-2014

Acts Referred:

Constitution of India, 1950 — Article 123, 123(2), 123(2)(a)
Telecom Regulatory Authority of India Act, 1997 — Section 5(8)

Citation : (2014) 5 MLJ 500

Hon'ble Judges : Satish K. Agnihotri, Acting C.J.; M.M. Sundresh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This Pro bono Publico has been instituted by a young lawyer seeking to declare the Telecom Regulatory Authority of India (Amendment) Ordinance, 2014 (No. 3 of 2014) dated 28.5.2014 passed by the 1st respondent substituting Section 5(8) of Telecom Regulatory Authority of India Act, 1997 pursuant to which Mr. Nirpendra Misra has been designated as the Principal Secretary to the Honourable Prime Minister.

2. Mr. Nithyaesh Natraj, learned counsel appearing for the petitioner submitted that the Ordinance dated 28.5.2014 has been passed bypassing the constitutional process and it is nothing but a fraud on the Constitution. An ordinance cannot be used as a political tool and in this case it has been passed in a hurried manner when it is neither necessary nor required. The learned counsel in support of his contention has made reliance upon the decisions rendered by the Supreme Court in Dr D.C. Wadhwa and Others Vs. State of Bihar and Others, and A.K. Roy and Others Vs. Union of India (UOI) and Others, . Besides these two decisions reliance was also placed on the decision rendered by the Division Bench of the Andhra Pradesh High Court in B. Kota Mallaiah and Others Vs. Commissioner and Registrar of Co-operative Societies and Others, .

3. A perusal of the affidavit filed in support of the writ petition would show that

the grievance of the petitioner appears to be on the appointment of Mr. Nirpendra Misra as the Principal Secretary to the Honourable Prime Minister. It appears that Mr. Nirpendra Misra was the Former Chief of Telecom Regulatory Authority of India. In such a situation, we are of the view that the non-impleadment of Mr. Nirpendra Misra as a party to this writ petition, though filed for a writ of declaration, would be fatal. To put it differently, we are of the view that when it is a specific case of the petitioner that the Ordinance has been passed paving way for the appointment of Mr. Nirpendra Misra and in the event of it being declared as unconstitutional, resultantly the appointment would fall to the ground, in all fairness, he should have been made as a party - respondent. Having observed so, we do not wish to dismiss the writ petition on that ground alone.

4. Article 123 of the Constitution of India, which comes under Chapter III deals with the legislative powers of the President of India. On the President of India being satisfied on the existence of circumstances, necessitating a requirement for taking immediate action, he may promulgate such ordinance, as the circumstances appear to him require so. Article 123(2) makes it clear that an ordinance promulgated by the President of India shall have the same force and effect as the Act of Parliament. Such an exercise of legislative power is meant to be used for a limited period as mandated under Article 123(2)(a) by which such an ordinance shall be laid before both the Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions.

5. This position has been dealt with in extenso by the Supreme Court in R.K. Garg and Others Vs. Union of India (UOI) and Others, . It was held therein that the legislative power of the President of India under Article 123 to promulgate Ordinance is co-extensive with the power of the Parliament to make laws. No limitation can be read into such a legislative power of the President so as to make it ineffective to alter or amend tax laws. Therefore, the propriety and the expediency of a legislative mind is not amenable to a judicial review. Perhaps, the question of existence of any circumstances necessitating promulgation of Ordinance can be gone into in a given case, provided the person, who institutes such a case, will have to make out a prima facie case.

6. Section 5(8) of the Telecom Regulatory Authority of India Act, 1997 as it stood, before makes the Chairperson or any other member ceasing to hold office as such is ineligible for further employment under the Central Government or any State Government, as well as any commercial employment for a period of two years from the date he ceases to hold such office. Now by the Ordinance sought to be impugned before us, the said provision has been substituted in the following manner:

(8) The Chairperson and the whole-time members shall not, for a period of two years from the date on which they cease to hold office as such, except with the

previous approval of the Central Government, accept -

(a) any employment either under the Central Government or under any State Government: or

(b) any appointment in any company in the business of telecommunication service.

(ii) the Explanation at the end shall be omitted.

7. The grievance of the petitioner appears to be the discretion that has been given to the Central Government for the first time under the impugned Ordinance to grant prior approval in a given case. When the promulgation of the Ordinance is a legislative Act, then exercise of the discretion given to Central Government can be questioned. If the grievance of the petitioner is that the discretion has been wrongly exercised, then he has to question such a discretion instead of challenging the Ordinance. The petitioner has not placed before us that there are no circumstances that existed which necessitated the issuance of promulgation. The petitioner is not able to demonstrate any malafides or bias, that too, in a case where a legislative act is challenged. We do not find any malice in law in the facts and circumstances of the case. We are also not required to conduct a roving enquiry when a challenge is made to a legislative Act.

8. As held by the Supreme Court in *A.K. Roy and Others Vs. Union of India (UOI) and Others*, , an Ordinance is a necessary evil when the legislative functions keep expanding into new fields and it is also required for good governance. In *Dr D.C. Wadhwa and Others Vs. State of Bihar and Others*, , the Supreme Court was dealing with re-promulgation of Ordinance by Governor without getting them replaced by Acts. The facts of the present case are totally different. We do not find any substance in the submission made by the learned counsel for the petitioner that the power to promulgate an ordinance has been used wrongly to serve political ends. We are also at a loss to understand as to why the petitioner has rushed to this Court before the newly constituted Parliament deals with the Ordinance.

9. Under such circumstances, we do not find any merit in this writ petition. However, while dismissing the writ petition, we refrain ourselves from imposing costs.