
(1977) 02 CAL CK 0001
In the Calcutta High Court

Sanjit Kumar Sarkar

APPELLANT

Vs

Divisional Mechanical Engineer N.E.F. Railway and Others

RESPONDENT

Date of Decision : 21-02-1977

Acts Referred:

Constitution of India, 1950 — Article 131A, 131A(1), 131A(2), 226, 226(3)

Citation : 82 CWN 150

Hon'ble Judges : Chittatosh Mukherjee, J

Bench : Single Bench

Advocate : Sadhan Gupta, Sudhendu Mukherjee and S.M. Gupta, for the Appellant; Ajoy Kumar Basu, for the Respondent

Judgement

Chittatosh Mukherjee, J.—The petitioners in these two Rules were the employees of the North Eastern Frontier Railway and both were posted at the Locoshed, Alipurduar Junction. The Divisional Mechanical Engineer, Alipurduar Junction, North Eastern Frontier Railway, by two memoranda dated 16th March, 1971 informed the petitioners that upon a careful consideration of the charge-sheets issued against them and also their explanations to the notices of imposition of the proposed penalties, he had held that the charges of serious misconduct had been proved. The Divisional Mechanical Engineer, North Eastern Frontier Railway, accordingly removed the petitioners from their services. The petitioners in these two Rules have, inter alia, prayed that the respondents be commanded to cancel and withdraw the said removal orders and that the said orders removing them from service be quashed. While these two Rules were pending, section 38 of the Constitution (Forty Second Amendment) Act, 1976 came into force with effect from 1st February, 1977. Therefore, the previous Article 226 now stands substituted by a new Article. Clause (3) of the new Article 226 provides that no petition for the redress of any injury in sub-clause (b) or sub-clause (c) of clause (1) of Article 226 shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force. Mr. Ajay kumar Basu, learned Advocate for the respondents has submitted that in view of section 58(1) of the Constitution (Forty Second Amendment) Act, 1976, these

two petitions under Article 226 of the Constitution should be now dealt with in accordance with the provisions of Article 226 as substituted by section 38. Mr. Basu had further submitted that the relevant Discipline and Appeal Rules provide for appeals against the impugned orders removing the petitioners from service. Therefore, if these writ petitions were made after the "appointed day", i. e. 1st of February 1977, these two writ petitions would not have been entertained. According to Mr. Basu these two writ petitions, therefore, are liable to abate in terms of section 58(2) of the Constitution (Forty Second Amendment) Act, 1976.

2. Mr. Gupta, learned Advocate for the petitioners, has not disputed that if these writ petitions are to be dealt with in accordance with the provisions of Article 226 as substituted by section 38 of the Constitution (Forty Second Amendment) Act, 1976, these writ petitions would abate. Mr. Gupta however, has submitted that Section 58 of the Constitution (Forty Second Amendment) Act, 1976 is not valid because the Section 58 seeks to override the Article 226 of the Constitution which is not permissible under Article 368 of the Constitution.

3. Mr. Gupta has further submitted that the Parliament in exercise of its constituent power under Article 368(1) may amend the Constitution by way of addition, variation or repeal in accordance with the procedure laid down in the Article 368. Section 58, according to Mr. Gupta, does not add, vary or repeal the Article 226 and there is a clear repugnancy between section 58 of the Constitution (Forty Second Amendment) Act, 1976 and Article 226 as substituted by Section 38. Mr. Gupta had also submitted that this Court in view of Article 131A (1) of the Constitution read with Article 228A (1) cannot decide whether the Constitution (Forty Second Amendment) Act, 1976 is constitutionally valid or not. Therefore, this Court should refer the said question for decision by the Supreme Court and pending such decision by the Supreme Court stay all further proceedings in these two Rules.

4. In my view, clause (4) of Article 368 of the Constitution is a complete bar to the raising in this Court the aforesaid question of validity of section 58 of the Constitution (Forty Second Amendment) Act, 1976. The Clause (4) lays down as follows :--

No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty Second Amendment) Act, 1976 shall be called in question in any court on any ground.

The Parliament in the exercise of its power under Article 368 has enacted the Constitution (Forty Second Amendment) Act, 1976. The President has given his assent and the Act has been also ratified by legislature of more than one-half of the States. The Clause (4) of Article 368 deprives the jurisdiction of Courts to question the amendments of the Constitution on any ground. The expression "made" or purporting to "have been made" in Clause (4) of Article 368 signifies the very wide and exhaustive nature of this ouster of jurisdiction of Courts.

"Purporting to" has been used to prevent objection against validity of an amendment which otherwise might have been raised. When validity is given to anything, purporting to be done in pursuance of a power, a thing done under it may have validity though done at a time when the power would not be really exercisable. See *Dicker v. Angerstein*, (1876) 3 Ch. D. 600. The Supreme Court in *Azimunissa and Others Vs. The Deputy Custodian, Evacuee Properties, District Deoria and Others*, , while interpreting section 8 (2A) of the Administration of Evacuee Property (Amendment) Act, 1960 had observed that "Purporting" is therefore indicative of what appears on the face of it or is apparent even though in law it may not be so. This means that at the time when the Act purported to vest the property in dispute in the Custodian even though the power was not exercisable. Section 8 (2A) by giving a retrospective effect to section 8(2) of the Act makes the vesting as if it was vesting u/s 8(2) of the Act and therefore the attack on the ground of invalidity cannot be sustained. The decision in *Dicker v. Angerstein*, (supra) was relied on.

5. Article 131A(2) requires the High Court to refer questions relating to the constitutional validity of any "Central law". The Article 366 (4A) has assigned the following meaning to the expression "Central Law" :--

"Central Law" means any law other than a State law but does not include any amendment of this Constitution made under Article 368". An amendment made under Article 368, therefore, being not a "Central law" in the instant case, I am unable to make reference under Article 131A as suggested by the learned Advocate for the petitioner.

6. There is no substance in the contention that Section 58 of the Constitution (Forty Second Amendment) Act, 1976 is not covered by Article 368 (4) of the Constitution. Section 38 of the Constitution (Forty Second Amendment) Act, 1976 has substituted Article 226. Section 58 of the said Act makes special provisions as to pending petitions under Article 226. The Parliament by enacting Section 58(1) has made the substituted Article 226 applicable to petitions pending immediately before the "appointed day" on which Section 38 came into force. Thus, section 58 is consequential provision for giving effect to the amended of Article 226. The same is an integral part of the amendment of the Constitution. I cannot accept the submission that the date of enforcement of amending Article 226 and its applicability should have been specified on the Article 226. These can also be lawfully made by a provision contained in the Parliamentary Act amending the Constitution. The Article 368 (5) has declared that there is no limitation whatsoever on the constituent power of the Parliament to amend by way of addition, variation or repeal provisions of the Constitution. The Parliament is empowered by Article 368 to vary the provisions of the Constitution, and, therefore, there could be no question of repugnancy between Article 226 of the Constitution as inserted by section 38 and the Section 58 of the Constitution (Forty Second Amendment) Act.

7. In the above view, I conclude that sub-section (1) read with sub-section (2) of

Section 58 of the Constitution (Forty Second Amendment) Act, 1976 would apply in the present cases. It is not disputed that the petitioners had alternative remedies by way of appeals under the relevant discipline and appeal rules. The petitioners did not prefer appeals. Therefore, under Article 226(3) these writ petitions are not entertainable at the present stage. I accordingly dispose of the Rules in the following terms :--

These Rules stand abated. I accordingly make no decision on the merits of the cases of the two parties. The orders passed in these Rules shall not affect the rights of the petitioners to seek relief by way of appeals under Railway Servant (Discipline and Appeal) Rules in terms of the proviso to Section 58(2) of the Constitution (Forty Second Amendment) Act. There will be no order, as to costs.