
(1989) 08 CAL CK 0047
In the Calcutta High Court

Shyam Sundar Gupta

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 09-08-1989

Acts Referred:

Constitution (Twenty-Sixth Amendment) Act, 1971 — Article 13(2), 13(4)
Constitution of India, 1950 — Article 200, 226, 243A, 243B, 243E

Citation : AIR 1990 Cal 64 : (1990) 1 CALLT 219

Hon'ble Judges : K.M. Yusuf, J

Bench : Single Bench

Advocate : Nigam Chakraborty, Sanjib Misra and Sm. Shyamali Ganguli, for the Appellant; K. Parasaran, Attorney General of India, Somendra Chandra Bose, Rathindra N. Das, Ashim Kr. Ganguli, Sushanta Kundu, N.N. Gooptu, Advocate-General, West Bengal, Indrajit Sen, J.N. Halder and Tarun K. Roy, for the Respondent

Judgement

1. For the first time a Consti-tution Amendment. Bill has been challenged in a High Court since, the Constitution of India came into force on 26th January, 1950., The Constitution,, (Sixty-Fourth Amendment) Bill, 1939 (commonly known as the Panchayati Raj Bill) which, has since been introduced in the Lok Sabha (the House of the People) has been challenged in a writ application. Apart from the Union of India; the Secretary to the. Government of India Ministry of Law and Justice; and the State of West Bengal; the writ petitioner has also made, the Speaker of the, Lok Sabha, the Chairman of the Rajya Sabha, the, Prime Minister of India in his official capacity, and Mr.Rajiv Gandh in Prime Minister of India in his personal capacity as the parties-respondents. The writ petitioner is a man of some public importance. He was the Mayor of Calcutta for a term and was also elected to the Lok Sabha once: Naturally, he is interested in the political activities and constitutional affairs of the country.

2. The writ, petitioner's case, in short is that the Constitution (Sixty-Fourth Amendment) Bill, 1989 (hereinafter referred to as "the Bill") is not an ordinary amendment of the Constitution bu,t in fact is a manoeuvring for eroding into the

foundation of the Constitution of India by legislating about the Panchayats which form an integral part of local government and include village administration being Entry No. 5 of List-II of the Seventh Schedule of the Constitution. The petitioner's case that the power of Parliament to amend the Constitution and procedure therefore is conferred by Article 368 in Part XX of the Constitution. The said amending power of Parliament in exercise of its constituent power has come up for judicial review before the Hon'ble Supreme Court on several occasions. This Constitution Amendment as contained in the Bill seeks to interfere with the basic structure as well as the basic features of the Constitution and is against the letter and spirit of Article 40 being the Directive Principles of State Policy as contained in Part IV of the Constitution. The said Directive does not confer any competence on Parliament either to legislate in the field of village panchayats or to exercise its constituent power to amend the Constitution by adding thereto any provision relating to the organisation of village panchayats. Article 246 of the Constitution clearly makes provision as to the subject matter of laws to be made by Parliament and the Legislatures of the States. It is further contended that the different States in India have their own legislation covering the field of Panchayats, including their establishment, organisation and functioning. The State of West Bengal has also a comprehensive legislation and statutory, rules covering the Panchayat system which is functioning as full-fledged unit of local self government and the election of different bodies of the Panchayats are held periodically. It is further contended that the provisions of the said Constitution (Sixty-Fourth Amendment) Bill purport to establish legislative and executive supremacy of the Union over the States in the matter of the village Panchayats administration as a whole. The proposed Articles 243B, 243E, 243J and 243M of the Bill make the legislative power of the State Legislature subordinate to the provisions of this constitutional amendment thereby conferring upon the Central Government and or the Central Agencies like the Comptroller & Auditor-General of India and the Election Commission to interfere with the, establishment organisation and functioning of an exclusive State subject. The Directive Principles of State Policy enshrined in the Constitution do not anywhere confer any power upon the Union Government or Parliament to legislate in the form of a constitutional amendment over an exclusive legislative field earmarked for operation by the State Legislature alone. If such encroachments are allowed to be made by grabbing powers of the States by the Union then such amendments of the Constitution will completely destroy the essential, basic features and structure of the Constitution of the country and ultimately the federal system will be turned into a unitary system of Government with the State Government serving as the Central Government's subordinate agencies instead of autonomous units. This process if not checked by the Rule of Law will imbalance the constitutional framework. It is further stated in the petition that the local self-government was not even included in the Concurrent List in the Seventh Schedule and this goes to demonstrate the intention of the Constitution-makers. The writ petition also referred to the Preamble of the Constitution containing the basic structure of the Constitution which cannot

be amended in; "exercise of power conferred under Article 368 of the Constitution. It is further contended that List-I Union List, List-II State List and List-III Concurrent List in the Seventh Schedule with reference to the distribution of legislative power as envisaged under Article 246 specify the different items which cannot otherwise be interfered with. It is also contended that the Bill and its numerous provisions are ultra vires the amending power of the Parliament under Article 368 as that Bill intends to completely wreck the established Constitution as envisaged by the Constitution-makers. The Bill not only interferes with an integral part of the Union and State Relationship but also seeks to destroy the Rule of Law thereby interfering with the political justice secured to the citizens of India in the Preamble to the Constitution. The writ petitioner prays for a Rule commanding the respondents not to proceed with the Constitution (Sixty-Fourth Amendment) Bill, 1989 and or to enact the same and also for a declaration that the Bill is illegal unconstitutional and ultra vires the basic structure and features of the Constitution, a declaration that the constituent power of the Parliament cannot be exercised to amend the Constitution in derogation to the scheme of distribution of legislative power contained in Part "XI of the Constitution read with the Seventh Schedule. The writ petitioner also prayed for an interim order upon the respondents from proceeding with the Constitution (Sixty-Fourth Amendment) Bill, 1989 and for taking steps for enacting the same and from giving it effect, if enacted.

3. Mr. Chakraborty, the learned Counsel appearing for the petitioner, in a strenuous argument submitted that the Constitution (Sixty-Fourth Amendment) Bill, 1989 and its professed objects and reasons tend to violate the basic structure of the Constitution of India and certain basic features thereof i.e., federalism, distribution of legislative power between the Union and the States forming essential part of the relation between the Union and the States in the federal set-up rule of law upon which the said basic structure is founded and the guarantee of political justice to the citizens of India contained in the Preamble to the Constitution. The impugned Bill is a proposed measure to bring about certain amendments to the Constitution not only in violation of its basic structure and features but also to overstep the limitation imposed on the constituent and or amending power under Article 368 of the Constitution by the Supreme Court in its three historic judgments in the cases of *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala*, ; *Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others*, and *Waman Rao and Others Vs. Union of India (UOI) and Others*, .

4. He submitted that the proposed constitutional amendment has cast a cloud of grave threat to the sovereign law of the land and poses a challenge to the process of judicial review by attempting to violate the judicial mandate as to the scope and ambit of the constituent and or amending power of the Parliament under Article 368. This Bill is distinguishable from an ordinary legislative measure not affecting the basic structure of the Constitution and as such there is scope of interference under the writ jurisdiction of all the High Courts in India because the

threat, which is the substantial part of the cause of action, is pervasive all throughout the country. The impugned measure is not a bona fide attempt to amend the Constitution in furtherance of any of the objects contained in the Preamble or any of the Directive Principles of State Policy. The reference to Article 41 in the Statement of Objects and Reasons is a mere eye-wash. Mr. Chakraborty contended that the expression "State" in Article 41 should be held to mean the States and not the Union so far as the question of any legislation in relation to Panchayats is concerned, in view of the express delegation of exclusive legislative power to the State Legislatures in respect of local government under Entry No. 5 of the Seventh Schedule read with Articles 245 and 246 of the Constitution. To superimpose the supremacy of the Central Government and Central Agencies over the establishment, organisation and functioning of Panchayats in the country would amount to undo the established Constitution of the land. According to him the attempt in achieving the object by pretended recourse to the constituent and or amending power under Article 368 of the Constitution is a fraud upon such constituent and or amending power.

5. The learned counsel submitted that the plenary legislative power of the Parliament is clearly distinguishable from its constituent power. The mode and manner of exercise of the said two powers, the distinct nature of the two powers as well as the distinct objects for which the said two powers are exercisable in two distinct fields and the peculiar limitations imposed upon the exercise of the power under Article 368 render manifestly the distinction between the two. He referred to paragraph 492 of the judgment of the Supreme Court in *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala*, containing the conclusions of S. M. Sikri C.J. which is a directive reference to the Parliament's constituent capacity and ordinary legislative capacity, particularly clause (e) thereof at page 1566. The validity of the Constitution (24th Amendment) Act, 1971 and consequently Article 13(4) was upheld by the Supreme Court in *Keshavananda Bharati's case (supra)* by which the decision in *I.C. Golak Nath and Others Vs. State of Punjab and Another*, was overruled. It was made clear in *Keshavananda's case (supra)* that the power of amendment of the Constitution is a constituent power located in Article 368 and not an ordinary legislative power to be found elsewhere in the Constitution. As a result, the clear distinction between the ordinary legislative power and constituent power and the nature of the enactments in the two different fields of Parliament's function as well as the two different processes relating thereto leave no scope for any further controversy now.

6. Mr. Chakraborty further contended that the threat and apprehension as pleaded in the writ petition forming a substantial part of the cause of action have also arisen within the territorial jurisdiction of this Court and one of the respondents, i.e., the State of West Bengal being very much within this jurisdiction, the High Court has ample requisite jurisdiction to entertain and try the writ petition in exercise of the power vested in it under clause (2) of Article 226 of the Constitution. The plea of lack of jurisdiction and absence of cause of

action at the formative stage of the said constitutional amendment is but superfluous. He submitted that the decisions of the Supreme Court as well as this Court cited on behalf of the petitioner support the maintainability of the writ petition, existence of cause of action or part thereof within the jurisdiction of this Court and consequently the existence of jurisdiction of this Court to entertain and try this writ petition. In any event the writ petition has disclosed a prima facie case as well as a cause of action. The issue involved is of paramount national importance requiring complete adjudication. The issues purported to be raised as to non-maintainability and or lack of jurisdiction and or cause of action are in any event triable issues, which can be decided on the basis of materials that may be placed through affidavits.

7. Mr. Chakraborty concluded his argument by emphasising that Political Justice is inherent in the Preamble of the Constitution and includes the Rule of Law and the basic structure theory of the Constitution as enunciated in *Waman Rao and Others Vs. Union of India (UOI) and Others*, Apart from the aforementioned cases he cited a number of decisions those on territorial jurisdiction and maintainability and cause of action and some of them are noted hereunder:- (1) *Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and Others*, ; (2) *The Statesman Ltd. and Others Vs. The Fact Finding Committee and Others*, ; (3) *Serajuddin and Co. Vs. The State of Orissa and Others*, ; (4) *Uma-shankar Chatterjee v. Union of India* reported in (1982) 1 CHN 100 : (1982 LIC 1361) and (5) *Union of India (UOI) and Others Vs. Hindustan Aluminium Corporation Limited and Another*, . On the point of threat some of the decisions cited one noted as follows:--(1) *S.P. Gupta Vs. President of India and Others*, ; (2) *D.A.V. College, Bhatinda, etc. Vs. The State of Punjab and Others*, ; (3) *In Re: Bharat Sugar Mills Ltd. and Another*, ; (4) *Dhanpat Singh Surana Vs. Union of India*, ; and (5) *A.N. Shashtri Vs. State of Punjab and Others*, .

7A. The learned Attorney-General of India Mr. K. Parasaran, ably assisted by the learned Senior Advocate Mr. Somendra Chandra Bose, forcefully submitted on behalf of the respondents Nos. 1 and 2 that the Parliament which is sovereign cannot be subordinate to a Court of Law and the respondents as impleaded in this writ application do not represent Parliament. According to him as Parliament is not before this Court the prayers asked for by the respondents, cannot be granted at all and the Parliament cannot be restrained from deliberating on the Bill. He further elucidated the point that the respondents, namely (1) The Union of India, through the Secretary to the Government of India, (2) The Secretary to the Government of India, Ministry of Law. (3) The Speaker of the Lok Sabha, (4) The Chairman of the Rajya Sabha, (5) The Prime Minister of India, and (6) Shri Rajiv Gandhi, Prime Minister of India by name do not represent Parliament at all. The Parliament consists of the President and the two Houses the Lok Sabha (the House of the People) and the Rajya Sabha (the Council of States). The "Parliament as constituted under the Constitution of India is deliberating upon the Constitution (Sixty-Fourth Amendment) Bill, 1989 and the said Parliament is not before the Court upon which any order can be made. He submitted that only

after the enactment of the Bill its vires can be tested in a Court of Law and in this connection he cited Articles 79, 80 and 81 of the Constitution. He also referred to Article 361 relating to the protective immunity of the President but submitted that the second proviso of clause (I) of the said Article provides that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India. The Bill as it stands today is not a piece of legislation altogether. It is just a proposal placed" before Parliament where the democratically elected representatives of this Sovereign Socialist Secular Democratic Republic are deliberating over it and at this stage the Bill cannot be made a subject matter of adjudication in the Court of Law and in this connection the learned Attorney-General pointed out Articles 194 and 211 of the Constitution by way of elucidation. The learned Attorney-General submitted that the Courts in India and England unanimously agree that at the Bill stage no intervention should be done as the same will be premature and to overjudge the act of Parliament.

8. On the point of cause of action the learned Attorney-General submitted that the respondents Nos. 1 to 6 are not within the jurisdiction of this Court and unless the Bill becomes an Act it does not affect in any way anybody's right and hence cannot be challenged. He described the writ petition as incompetent and premature at the Bill stage and as such the Court should not interfere with it. He dealt with Article 368 relating to amendment of the Constitution with particular reference to clause (2)(c) which stipulates that any amendment in respect of any of the Lists in the Seventh Schedule shall require to be ratified by the Legislatures of not less than one-half of the States and they also referred to Article 200 of the Constitution. He cited a number of decisions bringing home the point that at the Bill stage the Court has no jurisdiction to interfere with Parliament or Legislatures. I shall mention those cases afterwards.

9. The learned Attorney General submitted that the cases cited with regard to the Bills equally applied for Constitutional Amendment Bills and on principle there is no difference. Undoubtedly the Constitutional Amendment Bill has been challenged in the High Court for the first time but it does not make any difference in principle or justify the issuance of Rule. An ordinary Bill whether introduced in Parliament or in a State Legislature when enacted into law has many more limitations under Article 13(2) of the Constitution than a Bill for the amendment of the Constitution. A Bill under Part-XIII such as one relating to Sales tax has also to observe the limitation contained in Article 286 of the Constitution. He contended that in the light of the decisions cited by him that a Bill unless enacted is not justiciable before a Court of Law, a Constitution Amendment enjoys a greater immunity because an amendment of the Constitution can only be challenged on the ground that it has altered the basic structure of the Constitution or that the said Bill has not been passed in accordance with the procedure laid down in Article 368 but certainly there cannot be any preventive measure against Parliament from discussing a Bill because the Court cannot go into the constitutionality or otherwise of a Bill to strike it down.

He repeated his earlier submission that unless the Bill becomes an Act and the Act as Law effects the rights of the citizen the functioning of the Court is non est. He very much emphasised the point that Parliament is never before the Court and no remedy lies in Court against the legislative functioning of Parliament; only an Act can be tested in a Court of Law. If during the passage of any Bill any provision of the Constitution is violated that may be a ground to question the validity of the Act but during the passage of the Bill the Court cannot presume that there will be a contravention of the constitutional provisions or that, any illegality will be committed.

10. The learned Attorney-General concluded his argument questioning the maintainability of the writ petition by emphasising that there is nothing in the Constitution which prohibits the amendment of the Lists in the Seventh Schedule. The only procedure prescribed as said hereinbefore is Article 368(2) Proviso (c). Only after the Bill is passed it can be said whether it has amended any of the Lists by-passing the procedures laid down in the Constitution. He emphasised that the privilege of Parliament which is sovereign cannot be abrogated by the High Court and the discussion of the Bill in the Parliament cannot be interfered with. He stressed that in spite of any writ Parliament can still proceed with the passage of the Bill and the court cannot haul up the Parliament for contempt as the Court cannot interfere with the privilege of Parliament.

11. In support of his contention the learned Attorney-General cited a number of decisions of High Courts and Supreme Court and some of them are noted hereunder:-- (1) Chotey Lal Vs. The State of Uttar Pradesh and Others, (2) Bhaira-bendra Narayan Bhup v. The State of Assam reported in AIR 1953 Assam 162 (3) Doypack Systems Pvt. Ltd. Vs. Union of India (UOI) and Ors, , (4) C. Shri-kishan v. The State of Hyderabad reported in AIR 1956 Hyd 186, (5) K.P. Kochanujan Thirumulpad Vs. State of Kerala, ,(6) V. Ramachandra Rao and Others Vs. The Andhra Pradesh Regional Committee and Others, (7) Chander Sekhar Singh Bhoi Vs. State of Orissa, (8) Sunil Kumar Mondal v. Union of India reported in AIR 1989 Cal 197 and (9) A.K. Roy and Others Vs. Union of India (UOI) and Others, .

12. On the point of jurisdiction and cause of action the learned Attorney-General relied on the decision of In Re: Bharat Sugar Mills Ltd. and Another, which has also been cited by the petitioner and submitted that it rebuts the decision reported in Union of India (UOI) and Others Vs. Hindustan Aluminium Corporation Limited and Another, Apart from this he cited a decision in Dharsanlal Anand Prakash v. Collector of Customs and Central Excise reported in 1974 Cal LJ 27 and the State of Rajasthan and Others Vs. Swaika Properties and Another, , Also he heavily relied upon Halsbury's Law of England, Vol. 44, 4th Edition, Para 832 on page 505 on Formal Validity of Statute. I have not cited the pre-independence decisions of the High Courts referred to by both the parties.

13. Replying to the learned Attorney-General, Mr. Chakraborty submitted that no

post-Keshavananda decision has been cited on behalf of the appearing respondents in support of their contention about the lack of the High Court's jurisdiction to entertain any challenge to a Constitutional Amendment Bill before it is enacted as law. The decisions cited relate to Bills introduced in the exercise of the ordinary legislative power mostly of State Legislatures which have no constituent power or function. No decision of this High Court has been cited on this point but a Kerala decision which differed from the Calcutta view in two reported cases has been sought to be relied on. The two Supreme Court decisions of 1972 referred to in support of the above contention do not relate to Bills and in one of those decisions the expression "Ordinarily" has been used to qualify the restriction in the exercise of power by the Courts in going into the question of validity of an Act or a provision thereof unless the same has been brought into force. The point sought to be made out about the non-maintainability of the present writ petition and the ouster of the jurisdiction of this Court to try the same because the Bill has been challenged has not been made out either by itself or by relying on the decisions cited because none of those decisions relate to the exercise of constituent power by the Parliament or the constituent process of the amendment of the Constitution.

14. The learned Counsel submitted that the/constituent process itself is subject to judicial review, although the legislative process may not be so. The pre-enactment review is justified as under : first, because the Constitution is the supreme and organic law of the land; second, because its basic structure and basic features are unamendable and indestructible; third, because it is the fundamental duty of every citizen to abide by the Constitution and respect its ideals and institution and to uphold and protect the sovereignty, unity and integrity of India as enshrined in Article 51A of the Constitution; fourth, because of the limitation imposed by the Supreme Court on the amending power of Parliament in exercise of its constituent power under Article 368; fifth, because the amendment-brought about may cause irreparable damage and injury to the Constitution unless the power of judicial review is exercised at the threshold itself; sixth, because it is the duty of the Courts vested with the power of judicial review to exercise vigilance over the sanctity of the Constitution with a view to protect and uphold the same; and seventh, because "any process to destroy or emasculate the Constitution or its basic structure and basic features is itself unconstitutional being violative of the/judicial mandate in His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, and the limitations on the process of amendment of the Constitution imposed thereby. He further argued that the power and privileges of the members of Parliament, are not above the Constitution nor its supremacy and sanctity and the same are not and cannot be claimed to be absolute. As has been held, by the Supreme Court in *Kehar Singh and Another Vs. Union of India (UOI)* and *Another*, all power belongs to the people and it is entrusted by them to specified institutions and functionaries with the intention of working it out.

15. Mr. Chakraborty further contended that the writ petition as framed is

maintain-able. The members of the Parliament need Act be impleaded as parties as the Presiding Officers of both the Houses have already been impleaded. The hyper-technicalities of the judicial process need not be imported into a public interest litigation of this nature. The prayers, as framed, are perfectly in order and the Court is capable of granting, complete protection and remedy within the frame work of the prayers and by moulding the same in such manner as may be conducive to granting of such relief. He further contended that there has been no submission, by the contesting respondents on the merit of the case or the grounds on which the impugned constitutional amendment has been assailed. The case has been heard for quite a number of days and the writ petition raise"s important points of great public importance requiring interpretation of several provisions of the Constitution. There is no precedent case-law on the points against the maintainability of a writ petition challenging a constitutional amendment in process. In the premises it is a fit case in which this Court should interfere with a view to adjudicating the points after proper investigation for the ends of justice.

16. The learned Advocate-General of West Bengal, Mr. Naranarayan Gooptu. appearing for the State of West Bengal, vehemently opposed the provisions of the Constitution (Sixty-Fourth Amendment) Bill, 1989 which he described as a fraud upon the Constitution. He described the Bill as a manoeuvring of grave consequence where the constitutional provisions have been given a go-bye to inflict a severe blow on the federal structure of the Constitution and by-passing the judicial pronouncement in His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, which is binding upon the respondents and give ample authority and jurisdiction to the High Court to interfere and stop the trampling of the Constitution. The learned Advocate-General contended that only the respondents Nos. 1 and 2 have made submissions before this Court but the Speaker and the Chairman of Parliament are not before the Court and their submissions on behalf of the Parliament are essential. He submitted that unless a Rule is issued on the respondents Nos. 3 and 4 this question cannot be decided. He contended by pointing out that the threat is grave in the light of the Bill on the local self-government which is in the offing and such acts of mischief to undermine the provisions of the Constitution must be nipped in the bud before damage is done and the federal structure is destroyed. He stressed that prima facie this is a fit case where High Court should interfere.

17. I have given my considerate thought to the facts of the writ application and the submissions made by the learned counsel on behalf of the parties. At the very outset I must state that Mr. Chakraborty, the learned Counsel for the writ petitioner, while presenting his case and justifying the maintainability of the writ application has almost traversed through all the fact"s stated in the writ application and made submissions thereon, but the learned Attorney-General strictly confined himself to the point of maintainability of the writ application and the jurisdiction of this Court to entertain the said application. The Constitution (Sixty-Fourth Amendment) Bill, 1989 is intended to be inserted as Part-IX of the

Constitution under the caption "The Panchayats". This Part-IX is presently lying "vacant" omitted by the Constitution (7th Amendment) Act, 1956. A glance through the Bill would lead to the conclusion that the entire constitution, administration and management of the village Panchayats will have a shake-up and to much extent go under the direct supervision and control of the Central Government. The proposed Articles 243A and 243B relate to the Constitution or Panchayats at the village, intermediate and district levels. Further the proposed Article 243E creates a new schedule being Eleventh Schedule after the Tenth Schedule specifying matters listing twenty-nine items. Apart from that, the proposed Articles 243H, 243I and 243J virtually make the Panchayats of the States subservient to the Central Government and, or the Central Agencies. The Statement of Objects and Reasons of the Bill, inter alia, states: "A review of the working of Pancha-yati Raj Institutions has shown that in many States they have become weak and ineffective owing to a variety of reasons, including the failure to hold regular and periodical elections, prolonged supersession, inadequate representation to the weaker sections like the Schedule Castes, the Schedule Tribes and women, lack of financial resources and inadequate devolution of powers and responsibilities on them". The aforesaid reference is laudable but indicates that this Bill will erode the powers and functions of the States as contained in Entry No. 5 of List-11 of the Seventh Schedule thereby changing the basic federal structure of the Constitution of India. But I do not agree with the contention of Mr. Chakraborty that the Statement of Objects and Reasons, a part of which is quoted hereinbefore, is a mere eye-wash. It will be too immature to pass such a remark at this stage and only time will testify the truth at the laudable objects of the Bill when it becomes an act of Parliament and is enforced.

18. The main attack on the Bill is that it affects the federal character of the Constitution and takes away the powers of the States guaranteed by the Constitution thereby tampering with the basic structure and features of the federal Constitution by over-stepping the limitation imposed on the amending power under Article 368 of the Constitution. Article 368 relates to the constituent power given to Parliament to amend by addition, variation or repeal of any provision of the Constitution in accordance with the procedure laid down in this Article. In three historic judgments the Hon'ble Supreme Court dealt with Article 368 of the Constitution and those decisions relate to the cases of *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala*, *Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others*, and *Waman Rao and Others Vs. Union of India (UOI) and Others*. Of the three, the decision of the Special Bench of 13 Judges in *Keshavananda Bharati's* case is the pioneering decision on the subject. In all the three cases it has been expressly held that the Parliament while passing a Constitution Amendment Act exercising its "constituent power" under Article 368 must not undermine the basic features of the Constitution. In the *Keshavananda Bharati's* case it was also held that the objective specified in the Preamble contained the basic structure of the Constitution which cannot be amended in exercise of the power under Article

368. Chief Justice Sikri in his Conclusions in Part-VIII of the Keshavananda's case summarised his findings under eight heads of which (c) and (e) deserve to be quoted as the guideline for amendment of the Constitution. Clause (c) runs thus: "the expression "amendment of this Constitution" does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article. And then Clause (e) is quoted as under : "Article 368 does not enable Parliament in its constituent capacity to delegate its function of amending the Constitution to another Legislature or to itself in its ordinary legislative capacity"". In the above background and the mandate of the Hon'ble Supreme Court in the aforesaid three leading cases there may be a genuine apprehension that the federal structure of the Constitution may be tampered with and the framework of the Constitution may be shaken. But I keep this issue open to be decided on merits.

19. Now I come to the vital questions as to the jurisdiction of the High Court, cause of action and the maintainability of the writ application. Strong arguments have been advanced on the points by the parties. Mr. Chakraborty for the petitioner submitted that the threat as pleaded in the writ petition forms a substantial part of a cause of action which has arisen within the territorial jurisdiction of this High Court and this High Court can very well exercise its power vested in clause (2) of Article 226 of the Constitution which empowers the High Court to exercise jurisdiction "within which the cause of action, wholly or in part, arises". He further contended that the view that Parliament is sovereign and cannot be subordinate to a Court of Law is not tenable because of the fact that even, at the Bill stage the Court can interfere if it finds that the judicial pronouncements safeguarding the basic structure of the Constitution are tampered with. It is not necessary that all the Members of Parliament need be impleaded as parties to the petition when the Presiding Officers of both the Houses of Parliament are made respondents and in a public interest litigation of this nature such technicalities must be overlooked for the greater good of the country. There is a clear and blatant violation of Article 368 and limitations imposed by the Supreme Court on the "constituent power" of Parliament which is totally different from ordinary legislative power and when flouted this gives ample authority to the High Court to interfere and adjudicate the matter even at the Bill stage. But the learned Attorney-General by citing a number of decisions argued that Parliament with its two Houses presently deliberating upon the Constitution (Sixty-Fourth Amendment) Bill, 1989 is not before the Court and the Court cannot pass any order interfering with the proceedings of the Parliament. The Court cannot go into the constitutionality or otherwise of a Bill and prevent the Parliament from discussing it or striking it down until and unless the Bill becomes an Act and the Act is enforced. He convincingly argued that even if the High Court commands Parliament by way of a writ not to proceed with the passage of the Bill, the Parliament can of its own proceed with the "passage of the Bill and the Court cannot haul it up for contempt as the privileges, of

Parliament are above the jurisdiction of the High Court because the Parliament is sovereign. The Bill before it is enacted and enforced is not justiciable and no Court has jurisdiction to interfere with the legislative function of Parliament in a democratic sovereign republic and the freedom of speech of the Members of the Parliament and their deliberations within the four walls of Parliament cannot be restrained. Unless a Bill is turned into a piece of legislation and affects anybody's right it cannot be put to the dock to test its vires and/or validity.

20. Now let me first see what is laid down in Halsbury's Laws of England, 4th Edition, " Para 832 on page 505. I quote : "The legislative supremacy of Parliament implies not only the inability of the courts to question its power to enact in particular statutory provision, but also their duty to give effect as statutes only to, enactments answering that description. It follows that the courts can become concerned with the question whether a particular document which they are invited to apply has received the consents necessary to constitute it an Act of Parliament". In the case of Chotey Lal Vs. The State of Uttar Pradesh and Others, a Division Bench of Allahabad High Court held that the Courts in India have no jurisdiction to interfere with the proceedings of legislatures with reference to Article 13(2) of the Constitution. The Division Bench said that if the Legislature does what it is directed by the Constitution not to do, its Act may be declared void, but this Article does not confer a right upon a citizen to move the Court for the issue of a writ or direction to the Legislature not to proceed with a Bill. In the case of C. Shri-kishen v. The State of Hyderabad (AIR 1956 Hyd 186) (supra) the Division Bench was strongly of the view that there is no jurisdiction in the High Court to issue any writs against a Legislature or Parliament or the Speaker or any Officer of these Assemblies; and further, neither a Writ of Prohibition nor a Writ of Certiorari nor a Writ of Mandamus, will lie to restrain the State or Parliament from enacting any legislation even if it is ultra vires their powers. Now I quote from a Supreme Court decision presided over by S. M. Sikri, C.J. reported in Chander Sekhar Singh Bhoi Vs. State of Orissa, where their Lordships in words categorical held that the Court should not ordinarily go into the question of the validity of an Act or a provision of an Act unless it has been brought into force. If this is the position then how this Court can go into the question of the validity of a Bill or the provisions of a Bill which has yet to be converted into an Act of Parliament. Further, in the same case the Supreme Court held that the Supreme Court alone in exercise of its advisory jurisdiction can deal with such question. Then again the same Chief Justice S. M. Sikri presiding over a Bench in the case of Balmadies Plantations Ltd. and Others Vs. State of Tamil Nadu, held that the question of validity of issuing notice under an Act, when the Act itself has not come into force, is purely of academic nature and the writ would become futile and such a situation should not be dealt with in writ jurisdiction. Blackstone in his "Commentaries on the Laws of England". Vol. I, suggests : "The fairest and most rational method to interpret the will of the Legislator is by exploring his intention at the time when the law was made, by signs, most natural and probable. And these signs are the word;., the context,

the subject matter, the effect and consequence, or the spirit and reason of the law". This quotation must be supplemented with the words of Lord Scarman : "We are to be governed not by Parliament's intentions but by Parliament's enactment". In a recent decision my learned brother Mr. Justice Susanta Chatterji was of the opinion that the Darjeeling Gurkha Hill Council accord is not enforceable unless a legislation to that effect is passed and to challenge the same a writ petition would be premature (Sunil Kumar Mondal v. Union of India (supra)).

21. In view of the discussion made by me hereinbefore I am of the opinion that the legislative competency of Parliament must not and should not be interfered with by the High Court at a stage when the Constitution (Sixty-Fourth Amendment) Bill, 1991 is under its "active-consideration: The Court must not create a constitutional crisis by passing any order which may affect the smooth functioning of Parliament. I have no hesitation to hold that the Bill, presently before Parliament, if enacted and enforced and thereafter if it affects the federal structure and the framework of the Constitution then only the vires of the same can certainly be challenged in a Court of Law having jurisdiction and will be justiciable. The legislative competence of Parliament and the application of the "constituent power" under Article 368 of the Constitution cannot be the subject-matter of challenge and adjudication in the High Court at this stage, No cause of action arises until the Bill is enacted into the Constitution (Sixty-Fourth Amendment) Act and its enforcement by notification is made, and till such period the doctrine of *brutum fulmen* (i.e the threat to which effect cannot be given) prevails.

22. Before I come to the ordering portion of my judgment I like to record my disapproval of the contents of paragraphs 5 to 10 of the writ petition which have nothing to do with the actual issues agitated in this petition. These paragraphs are nothing but personal abuses hurled on Mr. Rajiv Gandhi. His maternal grandfather, Jawaharlal Nehru, who was in the forefront of the freedom struggle and was one of the architects of Modern India has also been dragged in unnecessarily by the petitioner just to make out a case for the annulment of this Bill. One thing astonished me very much : as to what led the petitioner to make Mr. Rajiv Gandhi by name a party-respondent. I understand that he is made a party as Prime Minister but now he can improve the writ application if he is made a party by name in person. Perhaps the sole object of the writ petitioner was to cast aspersion on the personality of Mr. Rajiv Gandhi and this is the reason why he has taken pain to make so many allegations in those paragraphs which have no bearing on the reliefs sought and appear to be political gimmick.

23. In the circumstances aforesaid I hold that the writ petition is premature and not maintainable, and therefore, stands dismissed. There will be no order as to costs.

24. If the urgent application is made for the certified copy of the judgment the same should be expeditiously given.