1951 INSC 55

SUPREME COURT OF INDIA

Sri Sankari Prasad Singh Deo

Vs.

Union of India and State of Bihar

(H.J.Kania,CJI., M.Patanjali Sastri and N.Chandrashekar Aiyar,JJ., B.K.Mukherjea, and S.R.Dass,JJ.,)

05.10.1951

JUDGMENT

Patanjali Sastri,J.,

1. These petitions, which have been heard together, raise the common question whether the Constitution (First Amendment) Act, 1951, which was recently passed by the present provisional Parliament and purports to insert, inter alia, articles 31A and 31B in the Constitution of India is ultra vires and unconstitutional.

2. What led to that enactment is a matter of common knowledge. The political party now in power, commanding as it does a majority of votes in several State legislatures as well as in Parliament, carried out certain measures of agrarian reform in Bihar, Uttar Pradesh and Madhya Pradesh by enacting legislation which may compendiously be referred to as Zamindary Abolition Act. Certain zemindars, feeling themselves aggrieved, attacked the validity of those Acts in courts of law on the ground that they contravened the fundamental rights conferred on them by Part III of the Constitution. The High Court of Patna held that the Act passed in Bihar was unconstitutional while the High Courts of Allahabad and Nagpur upheld the validity of the corresponding legislation in Uttar Pradesh respectively. Appeals from those decisions are pending in this Court. Petitions filed in this Court by some other zemindars seeking the determination of the same question are also pending. At this stage, the Union Government, with a view to put an end to all this litigation and to remedy what they considered to be certain defects brought to light in the working of the Constitution, brought forward a bill to amend the Constitution, which, after undergoing amendments in various particulars, was passed by the requisite majority as the Constitution (First Amendment) Act, 1951, (hereinafter referred to as the Amendment Act). Swiftly reacting to this move of the Government the zemindars have brought the present petitions under article 32 of the Constitution impugning the Amendment Act itself as unconstitutional and void.

3. The main arguments advanced in support of the petitions may be summarised as follows :

> "First, the power of amending the Constitution provided for under article 368 was conferred not on Parliament but on the two Houses Parliament as a designated body

and, therefore, the provisional Parliament was not competent to exercise that power under article 379."

4. Secondly, assuming that the power was conferred on Parliament, it did not devolve on the provisional Parliament by virtue of article 379 as the words "All the powers conferred by the provisions of this Constitution on Parliament" could refer only to such powers as are capable of being exercised by the provisional Parliament consisting of a single chamber. The power conferred by article 368 calls for the co- operative action of two Houses of Parliament and could be appropriately exercised only by the Parliament to be duly constituted under Ch. 2 of Part V.

5. Thirdly, the Constitution (Removal of Difficulties) Order No. 2 made by the President on 26th January, 1950, which purports to adapt article 368 by omitting "either House of" and "in each House" and subsisting "Parliament" for "that House" is not beyond the powers conferred on him by article 392, as "any difficulties" sought to be removed by adaptation under that article must be difficulties in the actual working of the Constitution during the transitional period whose removal is necessary for carrying on the Government. No such difficulty could possibly have been experienced on the very date of the commencement of the Constitution.

6. Fourthly, in any case article 368 is a complete code in itself and does not provide for any amendment being made in the bill after it has been introduced in the House. The bill in the present case having been admittedly amended in several particulars during its passage through the House, the Amendment Act cannot be said to have been passed in conformity with the procedure prescribed in article 368.

7. Fifthly, the Amendment Act, in so far as it purports to take away or abridge the rights conferred by Part III of the Constitution, falls within the prohibition of article 13 (2).
And lastly, as the newly inserted articles 31A and 31B seek to make changes in articles 132 and 136 in Chapter IV of Part V and article 226 in Chapter V of Part VI, they require ratification under clause (b) of the proviso to article 368, and not having been so ratified, they are void and unconstitutional. They are also ultra vires as they relate to matters enumerated in List II, with respect to which the State legislatures and not Parliament have the power to make laws.

8. Before dealing with these points it will be convenient to set out here the material portions of articles 368, 379 and 392, on the true construction of which these arguments have largely turned. 368. An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill :

9. Provided that if such amendment seeks to make any change in -

"(a) articles 54, 55, 73, 162 or 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventeenth Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States specified in Parts A and B of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

379. (1) Until both Houses of Parliament have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body functioning as the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution shall be the provisional Parliament and shall exercise all the powers and perform all the duties conferred by the provisions of this Constitution on Parliament.

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392. (1) The President may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provisions of this Constitution, by order direct that this Constitution shall during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient.

Provided that no such order shall be made after the first meeting of Parliament duly constituted under Chapter II of Part V.

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10. On the first point, it was submitted that whenever the Constitution sought to confer a power upon Parliament, it specifically mentioned "Parliament" as the donee of the power, as in articles 2, 3, 33, 34 and numerous other articles, but it deliberately avoided the use of that expression in article 368. Realising that the Constitution, as the fundamental law of the country, should not be liable to frequent changes according to the whim of party majorities, the framers placed special difficulties in the way of amending the Constitution and it was a part of that scheme to confer the power of amendment on a body other than the ordinary legislature, as was done by article 5 of the American Federal Constitution. We are unable to take that view. Various methods of constitutional amendment have been adopted in written constitutions, such as by referendum, by a special convention, by legislation under a special procedure, and so on. But, which of these methods the framers of the Indian Constitution have adopted must be ascertained from the relevant provisions of the Constitution itself without any leaning based on a priori grounds or the analogy of other constitutions in favour

of one method in preference to another. We accordingly turn to the provisions dealing with constitutional amendments.

11. Now, the Constitution provides for three classes of amendments of its provisions. First, those that can be effected by a bare majority such as that required for the passing of any ordinary law. The amendments contemplated in articles 4, 169 and 240 fall within this class, and they are specifically excluded from the purview of article 368. Secondly, those that can be effected by a special majority as laid down in article 368. All constitutional amendments other than those referred to above come within this category and must be effected by a majority of the total membership of each House as well as by a majority of not less than two thirds of the members of that House present and voting; and thirdly, those that require, in addition to the special majority above-mentioned, ratification by State specified in Parts A and B of the First Schedule. This class comprises amendments which seek to make any change in the provisions referred to in the proviso to article 368. It will be seen that the power of effecting the first class of amendments is explicitly conferred on "Parliament", that is to say, the two Houses of Parliament and the President (article 79). This would lead one to suppose, in the absence of a clear indication to the contrary, that the power of effecting the other two classes of amendments has also been conferred on the same body, namely Parliament, for, the requirement of a different majority, which is merely procedural, can by itself be no reason for entrusting the power to a different body. An examination of the language used in article 368 confirms that view.

12. In the first place, it is provided that the amendment must be initiated by the introduction of a "bill in either House of Parliament", a familiar feature of parliamentary procedure (cf. article 107 (1) which says "A bill may originate in either House of Parliament"). Then, the bill must be "passed in each House"-just what parliament does when it is called upon to exercise its normal legislative function [article 107 (2)]; and finally, the bill thus passed must be "presented to the President" for this "assent", again a parliamentary process through which every bill must pass before it can reach the statute-book (article 111). We thus find that each of the component units of parliament is to play its allotted part in bringing about an amendment to the Constitution. We have already seen that Parliament effects amendments of the first class mentioned above by going through the same three-fold procedure but with a simple majority. The fact that a different majority in the same body is required for effecting the second and third categories of amendments cannot make the amending agency a different body. There is no force, therefore, in the suggestion that Parliament would have been referred to specifically if that body was intended to exercise the power. Having mentioned each House of Parliament and the President separately and assigned to each its appropriate part in bringing about constitutional changes, the makers of the Constitution presumably did not think it necessary to refer to the collective designation of the three units.

13. Apart from the intrinsic indication in article 368 referred to above, a convincing argument is to be found in article 2,3,4,169 and 240. As already stated, under these articles power is given to "Parliament" to make laws by a bare majority to amend certain parts of the Constitution; but in each case it is laid down that no such law should be deemed to be an amendment of the Constitution "for the purpose of article 368. " It would be quite

unnecessary, and indeed inappropriate, to exclude these laws from the operation of article 368, which requires a special majority, if the power to amend under the latter article was not also given to Parliament.

14. Somewhat closely allied to the point discussed above is the objection based on the bill in the present case having been passed in an amended form, and not as originally introduced. It is not correct to say that article 368 is a "complete code" in respect of the procedure provided by it. These are gaps in the procedure by it. There are gaps in the procedure as to how and after what notice a bill is to be introduced, how it is to be passed by each House and how the President's assent is to be obtained. Evidently, the rules made by each House under article 118 for regulating its procedure and the conduct of its business were intended, so far as may e, to be applicable, There was some discussion at the Bar as to a legislative process. Petitioners' counsel insisted that it was not, and that, therefore, the "legislative procedure" prescribed in article 107 which specifically provides for a bill being passed with amendments, was not applicable to a bill for amending the Constitution under article 368. The argument was further supported by pointing out that if amendment of such a bill were permissible, it must be open to either House to propose and pass amendments, and in case the two Houses failed to agree, the whole machinery of article 368 would be thrown out of gear, for the joint sitting of both Houses passing the bill by a simple majority provided for in article 108 in the case of ordinary bills would be inapplicable in view of the special majority required in article 368. The argument proceeds on a misconception. Assuming that amendment of the Constitution in not legislation even where it is carried out by the ordinary legislature by passing a bill introduced for the purpose and that article 107 to 111 cannot in terms apply when Parliament is dealing with a bill under article 368, there is no obvious reason why Parliament should not adopt, on such occasions, its own normal procedure, so far as that procedure can be followed consistently with statutory requirements. Repelling the contention that a Local Government Board conducting a statutory enquiry should have been guided by the procedure of a court of justice, Lord Haldane observed in Local Government Board v. Arlidge (1):

> "Its (the Board's) character is that of an organisation with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, parliament must be taken, in the absence of any declaration to the contrary, to have intended to follow the procedure which is its own and in necessary if it is to be capable of doing its work efficiently."

15. These observations have application here. Having provided for the constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rules made by each House (article 118), the makers of the Constitution must be taken to have intended parliament to follow that procedure, so far as it may be applicable, consistently with the express provisions of article 368, when they entrusted to it the power of amending the Constitution.

16. The argument that a power entrusted to a Parliament consisting two Houses cannot be exercised under article 379 by the provisional Parliament sitting as a single chamber

overlooks the scheme of the constitutional provisions in regard to Parliament. These provisions envisage a Parliament of two Houses functioning under the Constitution framed as they have been on that basis. But the frames were well aware that such a Parliament could not be constituted till after the first elections were held under the Constitution. It thus became necessary to make provision for the carrying on, in the meantime, of the work entrusted to Parliament under the Constitution, Accordingly, it was provided in article 379 that the Constituent Assembly should function as the provisional Parliament during the transitional period and exercise all the powers and perform all the duties conferred by the Constitution on Parliament. Article 379 should be viewed and interpreted in the wider perspective of this scheme and not in its isolated relation to article 368 alone. The petitioners' argument that the reference in article 368 to "two Houses" makes that provision inapplicable to the provisional Parliament would equally apply to all the provisions of the Constitution in regard to parliamentary action and, if accepted, would rob article 379 of its very purpose and meaning. It was precisely to obviate such an argument and to remove the difficulty on which it is founded and other difficulties of a like nature in working the Constitution during the transitional period that the farmers of the Constitution made the further provision in article 392 conferring a general power on the President to adapt the provisions of the Constitution by suitably modifying their terms. This brings us to the construction of article 392.

17. It will be seen that the purpose for which an adaptation may be made under that article is widely expressed. It may be made for the purpose of removing "any difficulties". The particularization of one class of difficulties which follows is illustrative and cannot have the effect of circumscribing the scope of the preceding general words. It has been urged, however, that the condition precedent to the exercise of powers under article 392 is the existence of difficulties to be removed, that is to say, difficulties actually experienced in the working of the Constitution whose removal would be necessary for carrying on the Government, such as for instance, the difficulties connected with applying articles 112, 113, etc., in the transitional period. But, the argument processed, constitutional amendments cannot be said to be necessary during that period. Besides, amendment of the Constitution is a very serious thing, and hence, by providing that both Houses must deliberate and agree to the amendment proposed and pass the bill by a special majority, the Constitution has purposely placed difficulties in the way of amending its provisions. It would be fantastic to suppose that, after deliberately creating those difficulties, it has empowered the President to remove them by a stroke of his pen. We see no force in this line of argument. It is true enough to say that difficulties must exist before they can be removed by adaptation, but they can exist before an occasion for their removal actually arises. As already stated, difficulties are bound to arise in applying provisions, which, by their terms are applicable to a Parliament of two Houses, to the provisional Parliament sitting as a single chamber. Those difficulties, arising as they do out of the inappropriateness of the language of those provisions as applied to the provisional parliament, have to be removed by modifying that language to fit in with the situation created by article 379. There is nothing in that article to suggest that the President should wait, before adapting a particular article, till an occasion actually arose for the provisional Parliament to exercise the power conferred by that article. Nor is there any question here of the President removing by his adaptation any of the difficulties which the Constitution has deliberately placed in the way of its amendment. The

adaptation leaves the requirement of a special majority untouched. The passing of an amendment bill by both Houses is no more a special requirement of such a bill than it is of any ordinary law made by Parliament. We are, therefore, of opinion that the adaptation of article 368 by the President was well within the powers conferred on him by article 392 and is valid and constitutional.

18. A more plausible argument was advanced in support of the contention that the Amendment Act, is so far as it purpose to take away or abridge any of the fundamental rights, falls within the prohibition of article 13 (2) which provides that "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." The argument was put thus : "The State" includes Parliament (article 12) and "law" must include a constitutional amendment. It was the deliberate intention of the framers of the Constitution, who realised the sanctity of the fundamental rights conferred by Part III, to make them immune from interference not only by ordinary laws passed by the legislatures in the country but also from constitutional amendments. It is not uncommon to find written constitutions a declaration that certain fundamental rights conferred on the people should be "eternal and inviolate" as for instance article 11 of the Japanese Constitution. Article 5 of the American Federal Constitution provides that no amendment shall be made depriving any State without its consent "of its equal suffrage in the Senate." The farmers of the Indian Constitution had the American and the Japanese models before the, and they must be taken to have prohibited even constitutional amendments in derogation of fundamental rights by using aptly wide language in article 13 (2). The argument is attractive, but these are other important consideration which point to the opposite conclusion.

19. Although "law" must ordinarily include constitutional law, these is a clear demarcation between ordinary law, which is made in exercise of legislative power and constitutional law, which is made in exercise of constituent power. Dicey defines constitutional law as including "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State." It is thus mainly concerned with the creation of the three great organs of the Sate, the executive, the legislature and the judiciary, the distribution of governmental power among them and the definition of their mutual relation. No doubt out constitution-makers, following the America model, have incorporate certain fundamental rights in Part III and made them immune from interference by laws made by the State. We find it, however, difficult, in the absence of a clear indication to the contrary, to suppose that they also intended to make those rights immune from constitutional amendment. We are inclined to think that they must have had in mind what is of more frequent occurrence, that is, invasion of the rights of the subjects by the legislative and the executive organs of the State by means of laws and rules made in exercise of their legislative power and not the abridgment or nullification of such rights by alterations of the Constitution itself in exercise of sovereign constituent power. That power, through it has been entrusted to Parliament, has been so hedged about with restrictions that its exercise must be difficult and rare. On the other hand, the terms of article 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatever. Had it been intended to save the fundamental right from the operation of that provision, it would have been perfectly easy to make that

intention clear by adding a proviso to that effect. In short, we have here two article each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other. Having regard to the considerations adverted to above, we are of opinion that in the context of article 13 "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that article 13 (2) does amendments made under article 368.

20. It only remains to deal with the objections particularly directed against the newly inserted articles 31A and 31B. One of these objections is based on the absence of ratification under article 368. It was said that, before these articles were inserted by the Amending Act, the High Courts had the power under article 226 of the Constitution to issue appropriate writs declaring the Zemindari Abolition Acts unconstitutional as contravening fundamental rights, and this Court could entertain appeals from the orders of the High Courts under article 132 or article 136. As a matter of fact, some High Courts had exercised such powers and this Court had entertained appeals. The new articles, however, deprive the High Courts as well as this Court of the power of declaring the said Acts unconstitutional, and thereby seek to make changes in Ch. 4 Part V and Ch. 5 of Part VI. It was therefore submitted that the newly inserted articles required ratification under the proviso to article 368. The argument proceeds on a misconception. These articles so far as they are material here, run thus :-

> 31A. Saving of Laws providing for acquisition of estates, etc. - (1) Notwithstanding anything in the forgoing provisions of this part, no law providing for rights therein or or the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part :-
>
> 31B Validation of certain Acts and Regulation. - Without prejudice to the generality the provisions contained in article 81A none of the Acts and Regulations specified in the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal to repeal or amend it, continue in force.

21. It will be seen that these articles do not either in terms or in effect seek to make any change in article 226 or in articles 132 and 136. Articles 31A aims at saving laws providing of the compulsory acquisition by the State of a certain kind of property from the operation of article 13 read with other relevant articles in Part III, while article 31B purports to validate certain specified Acts and Regulations already passed, which, but for such a provision, would be liable to be impugned under article 13. It is not correct to say that the powers of the High Court under article 226 to issue writs "for the enforcement of any of the rights conferred by part III" or of this Court under articles 132 and 136 to entertain appeals from orders issuing or refusing such writs are in any way affected. They remain just the same as they were before

: only a certain class of case has been excluded from the purview of Part III and the courts could no longer interfere, not because their powers were curtailed in any manner or to any extent, but because there would be no occasion hereafter for the exercise of their power in such cases.

22. The other objection that it was beyond he power of Parliament to enact the new articles is equally untenable. It was said that they related to land which was covered by item 18 of List II of the Seventh Schedule and that the State legislatures alone had the power to legislate with respect to that matter. The answer is that, as has been started, articles 31A and 31B really seek to save a certain class of laws and certain specified laws already passed from the combined operation of article 13 read with other relevant articles of Part III. The new articles being thus essentially amendments of the Constitution, Parliament alone had the power of enacting them. That the laws thus saved relate to matters covered by List II does not in any way affect the position. It was said that Parliament could not validate a law which it had no power to enact. The proposition holds good where the validity of the impugned provision turns on whether the subject-matter falls within or without the jurisdiction of the legislature which passed it. But to make a law which contravenes the constitution constitutionally valid is a matter of constitutional amendment and as such it falls within the exclusive power of Parliament. The question whether the latter part of article 31B is too widely expressed was not argued before us and we express no opinion upon it.

22. The petitions fail and are dismissed with costs.

23. Petitions dismissed.