SUPREME COURT OF INDIA

Sampat Prakash

Vs.

State of J. and K.

Writ Petn. No. 111 of 1968

(M. Hidayatullah, C.J.I., J. M. Shelat, V. Bhargava, G. K. Mitter and C. A. Vaidialingam, JJ.)

10.10.1968

JUDGEMENT

BHARGAVA, J.:-

1. This petition under Article 32 of the Constitution of India (hereinafter referred to as "the Constitution") has been presented by Sampat Prakash who was the General Secretary of the All Jammu and Kashmir Low-Paid Government Servants Federation. On October 25, 1967, Government employees and teachers of the Jammu Province held a mass meeting making a demand that dearness allowance at Central rates should be paid to them. They further resolved that, if the Government did not accept this demand, the employees and the teachers would go on 'Dharna' on 5th November, 1967. The Revenue Minister of the Jammu and Kashmir State promised dearness allowance at half the rates applicable to Central Government servants. No dharna was started on 5th November, 1967, but, on 17th November, 1967, a notice was given on behalf of the employees to the Government that there would be a hunger strike on 18th November, 1967. On that day, the employees went on a hunger strike for one day outside the residence of the Chief Minister. Then, there was a mass meeting on 27th November, 1967, in which it was announced that, if their demands were not met, the employees would go on a pen-down strike on 2nd December, 1967. The Government failed to comply with this demand. Then, between 4th and 10th December, 1967, the

employees went on a strike - first a pen-down strike and, later, a general strike. Between this period, on 5th December, 1967, there was another mass meeting which was addressed by the petitioner. On 11th December, 1967, even the workers of the various industries in the State went on a general strike in sympathy with the Government employees. On that day, the petitioner was dismissed from government service and on 12th December, 1967, he addressed another mass meeting. In view of these activities of the petitioner and the continuance of such a situation the District Magistrate of Jammu, on 16th March, 1968, made an order of detention of the petitioner under Sec. 3 of the Jammu and Kashmir Preventive Detention Act No. 13 of 1964 (hereinafter referred to as "the Act") and, on 18th March, 1968, the petitioner was actually placed under detention. The grounds of detention were served on the petitioner on the 26th March, 1968 and the State Government granted approval to the order of detention on 8th April, 1968. The detention of the petitioner was continued without making a reference to the Advisory Board, as the State Government purported to act under Section 13A of the Act. The present petition was filed by the petitioner on 3rd May, 1968.

2. During the preliminary hearing of this petition, Mr. Ramamurthy, representing the petitioner, raised a ground that Section 13A of the Act was ultra vires the Constitution as contravening the provisions of Article 22 of the Constitution. That question was referred by the Constitution Bench of the Court to a larger Bench and came before the Full Court. On this occasion, the Court held that, in view of Clause (c) of Article 35 of the Constitution introduced in the Constitution in its application to the State of Jammu and Kashmir, the point that had been raised stood answered by the addition of this clause and, unless the clause itself was challenged, the point raised on behalf of the detenu did not arise. In this view, that reference was dissolved and the case has been heard by the Constitution Bench.

3. On the return of the reference, the main point which has been argued on behalf of the petitioner is based on the fact that Article 35 (c) of the Constitution, as initially introduced by the Constitution (Application to Jammu and Kashmir) Order, 1954 (C. O. 48) had given protection to any law relating to preventive detention in Jammu and Kashmir against invalidity on the ground of infringement of any of the fundamental rights guaranteed by Part III of the Constitution for a limited period of five years only. This clause, as introduced in 1954, read as follows:

"No law with respect to preventive detention made by the Legislature of the State of Jammu and Kashmir, whether before or after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, shall be void on the ground that it is inconsistent with any of the provisions of this Part, but any such law shall, to the extent of such inconsistency, cease to have effect on the expiration of five years from the commencement of the said Order, except as respects things done or omitted to be done before the expiration thereof."

It was urged that the five years mentioned in the clause expired in 1959, and consequently, the Act, which was passed in 1964, did not get immunity from being declared void on the ground of inconsistency with Article 22 of the Constitution. It, however, appears that for the words "five

years" in Article 35 (c), the words "ten years" were substituted by the Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1959 (C. O. 59), which was passed before the expiry of those five years and, subsequently, for the words "ten years" so introduced, the words "fifteen years" were substituted by the Constitution (Application to Jammu and Kashmir) Amendment Order, 1964 (C. O. 69). This modification was also made before the expiry of the period of ten years from the date on which the Constitution (Application to Jammu and Kashmir) Order, 1954 was passed. On these facts, the point raised on behalf of the detenu was that these two modifications in 1959 and 1964, substituting "ten years" for "five years" and "fifteen years" for "ten years", were themselves void on the ground that orders making such modifications could not be validly passed by the President under Article 370 (1) of the Constitution in the years 1959 and 1964.

4. Article 370 of the Constitution is as follows:-

"370. (1) Notwithstanding anything in this Constitution,-

(a) the provisions of Art. 238 shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State shall be limited to -

(i) those matters in the Union List and the Concurrent List which, in consultations with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for the State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation. - For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;-

(c) the provisions of article (1) and of this article shall apply in relation to that State:

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in Clause (2) shall be necessary before the President issues such a notification."

The first argument was that this article contained temporary provisions which ceased to be effective after the Constituent Assembly convened for the purpose of framing the Constitution of the Jammu and Kashmir State had completed its task by framing the Constitution for that State. Reliance was placed on the historical background in which this Article 370 was included in the Constitution to urge that the powers under this article were intended to be conferred only for the limited period until the Constitution of the State was framed, and the President could not resort to them after the Constituent Assembly had completed its work by framing the Constitution of the State. The background of the legislative history to which reference was made, was brought to our notice by learned counsel by drawing our attention to the speech of the Minister Sri N. Gopalaswami Ayyangar when he moved in the Constituent Assembly Clause 306A of the Bill, which now corresponds with Article 370 of the Constitution. It was stated by him that conditions in Kashmir were special and required special treatment. The special circumstances, to which reference was made by him were :-

(1) that there had been a war going on within the limits of Jammu and Kashmir State;

(2) that there was a cease-fire agreed to at the beginning of the year and that cease-fire was still on,

(3) that the conditions in the State were still unusual and abnormal and had not settled down;

(4) that part of the State was still in the hands of rebels and enemies;

(5) that our country was entangled with the United Nations in regard to Jammu and Kashmir and it was not possible to say when we would be free from this entanglement;

(6) that the Government of India had committed themselves to the people of Kashmir in certain respects which commitments included an undertaking that an opportunity would be given to the people of the State to decide for themselves whether they would remain with the Republic or wish to go out of it; and

(7) that the will of the people expressed through the Instrument of a Constituent Assembly would determine the Constitution of the State as well as the sphere of Union jurisdiction over the State.

Learned counsel urged that, in this background, Article 370 of the Constitution could only have been intended to remain effective until the Constitution of the State was framed and the will of the people of Jammu and Kashmir had been expressed and, thereafter, this article must be held to have become ineffective, so that the modifications made by the President in exercise of the powers under this article, subsequent to the enforcement of the Constitution of the State, would be without any authority of law. The Constitution of the State came into force on 26th January, 1956 and, therefore, the two Orders of 1959 and 1964 passed by the President in purported exercise of the power under Article 370 were void. It was also urged that the provisions of Cl. (2) of Article 370 support this view, because it directs that, if the concurrence of the Government of the State is given under paragraph (ii) of sub-clause (b) of Clause (1) or under the second proviso to sub-clause (d) of that clause before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, that concurrence has to be placed before such Assembly for such decision as it may take thereon. From this, it was sought to be inferred that the power of the President, depending on the concurrence of the Government of the State, must be exercised before the dissolution of the Constituent Assembly of the State, so that the concurrence could be placed for its decision, and that power must be held to cease to exist after the dissolution of the Constituent Assembly when that course became impossible.

5. We are not impressed by either of these two arguments advanced by Mr. Ramamurthy. So far the historical background is concerned, the Attorney-General appearing on behalf of the Government also relied on it to urge that the provisions of Article 370 should be held to be continuing in force because the situation that existed when this article was incorporated in the Constitution had not materially altered, and the purpose of introducing this article was to empower the President to exercise his discretion in applying the Indian Constitution while that situation remained unchanged. There is considerable force in this submission. The legislative history of this article cannot, in these circumstances, be of any assistance for holding that this article became ineffective after the Constituent Assembly of the State had framed the Constitution for the State.

6. The second submission based on clause (2) of Article 370 does not find support even from the language of that clause which only refers to the concurrence given by the Government of the State before the Constituent Assembly was convened, and makes no mention at all of the completion of the work of the Constituent Assembly or its dissolution.

7. There are, however, much stronger reasons for holding that the provisions of this article continued in force and remained effective even after the Constituent Assembly of the state had passed the Constitution of the State. The most important provision in this connection is that contained in Clause (3) of the article which lays down that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date, as the President may specify by public notification, provided that the recommendation of the Constituent Assembly of the State referred to in Clause (2) shall be necessary before the President issues such a notification. This clause clearly envisages that the article will continue to be operative and can cease to be operative only if, on the recommendation of the Constituent Assembly of the State, the President makes a direction to that effect. In fact, no such recommendation was made by the Constituent Assembly of the State, nor was any Order made by the President declaring that the article shall cease to be operative. On the contrary, it appears that the Constituent Assembly of the State made a recommendation that the article should be operative with one modification to be incorporated in the Explanation to Clause (1) of the article. This modification in the article was notified by the President by Ministry of Law Order No. C. O. 44 dated 15th November, 1952, and laid down that, from the 17th November, 1952, the article was to be operative with substitution of the new Explanation for the old Explanation as it existed at that time. This makes it very clear that the Constituent Assembly of the State did not desire that this article should cease to be operative and, in fact, expressed its agreement to the continued operation of this article by making a recommendation that it should be operative with this modification only.

8. Further reference may also be made to the proviso added to Article 368 of the Constitution in its application to the State of Jammu and Kashmir, under which an amendment to the Constitution made in accordance with Article 368 is to have no effect in relation to the State of Jammu and Kashmir unless applied by order of the President under Cl. (1) of Article 370. The proviso, thus, clearly requires that the powers of the President under Article 370 must be exercised from time to

time in order to bring into effect in Jammu and Kashmir amendments made by Parliament in the Constitution in accordance with Article 368. In view of these provisions, it must be held that Article 370 of the Constitution has never ceased to be operative and there can be no challenge on this ground to the validity of the Orders passed by the President in exercise of the powers conferred by this Article.

9. The next submission made for challenging the validity of the Orders of modification made in the years 1959 and 1964 was that, under sub-clause (d) of Clause

(1) of Article 370 of the Constitution, the power that is conferred on the President is for the purpose of applying the provisions of the Constitution to Jammu and Kashmir and not for the purpose of making amendments in the Constitution as applied to that State. The interpretation sought to be placed was that, at the time of applying any provision of the Constitution to the State of Jammu and Kashmir the President is competent to make modifications and exceptions therein but once any provision of the Constitution has been applied, the power under Article 370 would not cover any modification in the Constitution as applied. Reliance was thus placed on the nature of the power conferred on the President to urge that the President could not from time to time amend any of the provisions of the Constitution as applied to the State of Jammu and Kashmir. It was further urged that the President's power under Article 370 should not be interpreted by applying Section 21 of the General Clauses Act, because a Constitutional power cannot be equated with a power conferred by an Act, rule, bye-law, etc.

10. The argument, in our opinion, proceeds on an entirely incorrect basis. Under Article 370 (1) (d), the power of the President is expressed by laying down that provisions of the Constitution, other than article (1) and article 370 which, under Article 370 (1) (c), became applicable when the Constitution came into force, shall apply in relation to the State of Jammu and Kashmir subject to such exceptions and modifications as the President may by order specify. What the President is required to do is to specify the provisions of the Constitution which are to apply to the State of Jammu and Kashmir and, when making such specification, he is also empowered to specify exceptions and modifications to those provisions. As soon as the President makes such specification, the provisions become applicable to the State with the specified exceptions and modifications. The specification by the President has to be in consultation with the Government of the State if those provisions relate to matters in the Union List and the Concurrent List specified in the Instrument of Accession governing the accession of the State to the Dominion of India as matters with respect to which the Dominion Legislature may make laws for that State. The specification in respect of all other provisions of the Constitution under sub-clause (d) of Cl. (1) of Article 370 has to be with the concurrence of the State Government. Any specification made after such consultation or concurrence has the effect that the provisions of the Constitution specified with the exceptions and modifications become applicable to the State of Jammu and Kashmir. It cannot be held that the nature of the power contained in this provision is such that Section 21 of the General Clauses Act must be held to be totally inapplicable.

11. In this connection, it may be noted that Article 367 of the Constitution lays down that, unless the

context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. This provision made by the Constitution itself in Article 367, thus, specifically applied the provisions of the General Clauses Act to the interpretation of all the articles of the Constitution which include Article 370. Section 21 of the General Clauses Act is as follows:

"Where by any Central Act or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued." This provision is clearly a rule of interpretation which has been made applicable to the Constitution in the same manner as it applies to any Central Act or Regulation. On the face of it, the submission that Section 21 cannot be applied to the interpretation of the Constitution will lead to anomalies which can only be avoided by holding that the rule laid down in this Section is fully applicable to all the provisions of the Constitution. As an example, under Art. 77 (3), the President, and, under Article 166 (3) the Governor of a State are empowered to make rules for the more convenient transaction of the business of the Government of India or the Government of the State, as the case may be, and for the allocation among Ministers of the said business. If, for the interpretation of these provisions, Section 21 of the General Clauses Act is not applied, the result would be that the rules once made by the President or a Governor would become inflexible and the allocation of the business among the Ministers would for ever remain as laid down in the first rules. Clearly, the power of amending these rules from time to time to suit changing situations must be held to exist and that power can only be found in these articles by applying Section 21 of the General Clauses Act. There are other similar rule-making powers, such as the power of making service rules under Article 309 of the Constitution. That power must also be exercisable from time to time and must include within it the power to add to, amend, vary or rescind any of those rules. The submission that Section 21 of the General Clauses Act cannot be held to be applicable for interpretation of the Constitution must, therefore, be rejected. It appears to us that there is nothing in Article 370 which would exclude the applicability of this Section when interpreting the power granted by that article.

12. The legislative history of this article will also fully support this view. It was because of the special situation existing in Jammu and Kashmir that the Constituent Assembly framing the Constitution decided that the Constitution should not become applicable to Jammu and Kashmir under Article 394, under which it came into effect in the rest of India, and preferred to confer on the President the power to apply the various provisions of the Constitution with exceptions and modifications. It was envisaged that the President would have to take into account the situation existing in the State when applying a provision of the Constitution and such situations could arise from time to time. There was clearly the possibility that, when applying a particular provision, the situation might demand an exception or modification of the provision applied; but subsequent changes in the situation might justify the rescinding of those modifications or exceptions. This could only be brought about by conferring on the President the power of making orders from time to time under Article 370 and this power must, therefore, be held to have been conferred on him by applying the provisions of Section 21 of the General Clauses Act for the interpretation of the Constitution.

13. The next point urged was that Article 368 of the Constitution having been applied to Jammu and Kashmir with a proviso added to it, there now exists a provision relating to amendment of the Constitution as applied to Jammu and Kashmir under this article and, consequently, while such special provision for this purpose exists, we should interpret Article 370 as being no longer applicable for amending or modifying the provisions of the Constitution applied to that State. This argument, in our opinion, is based on a wrong premise. Article 368 has been applied to Jammu and Kashmir primarily with the object that amendments made by the Parliament in the Constitution of India as applicable in the whole of the country should also take effect in the State of Jammu and Kashmir. The proviso, when applying this article, serves the purpose that those amendments made should be made applicable to the State of Jammu and Kashmir only with the concurrence of the State Government and, after such concurrence is available these amendments should take effect when an order is made under Article 370 of the Constitution. Thus, Article 368 is not primarily intended for amending the Constitution as applicable in Jammu and Kashmir, but is for the purpose of carrying the amendments made in the Constitution for the rest of India into the Constitution as applied in the State of Jammu and Kashmir. Even, in this process, the powers of the President under Article 370 have to be exercised and, consequently, it cannot be held that the applicability of this article would necessarily curtail the power of the President under Article 370.

14. It was also urged that the power of making modifications and exceptions in the orders made under Article 370 (1) (d) should at least be limited to making minor alterations and should not cover the power to practically abrogate an article of the Constitution applied in that State. That submission is clearly without force. The challenge to the validity of Article 35 (c) introduced in the Constitution as applied to Jammu and Kashmir on this ground was repelled by this Court in P. L. Lakhanpal v. State of Jammu and Kashmir, (1955) 2 SCR 1101 = (AIR 1956 SC 197). Subsequently, the scope of the powers of making exceptions and modifications was examined in greater details by this Court in Puranlal Lakhanpal v. President of India, (1962) 2 SCR 688 at p. 692 = (AIR 1961 SC 1519 at p. 1521). Dealing with the scope of the word "modification" as used in Article 370 (1), the Court held:-

"But, in the present case, we have to find out the meaning of the word "modification" used in Article 370 (1) in the context of the Constitution. As we have said already, the object behind enacting Article 370 (1) was to recognise the special position of the State of Jammu and Kashmir and to provide for that special position by giving power to the President to apply the provisions of the Constitution to that State with such exceptions and modifications as the President might by order specify. We have already pointed out that the power to make exceptions implies that the President can provide that a particular provision of the Constitution would not apply to that State. If, therefore, the power is given to the President to efface in effect any provision of the Constitution altogether in its application to the State of Jammu and Kashmir, it seems that when he is also given the power to make modifications that power should be considered in its widest possible amplitude. If he could efface a particular provision of the Constitution altogether in its application to the State of Jammu and Kashmir, we see no reason to think that the Constitution did not intend that he should have the power to amend a particular provision in its application to the State of Jammu and Kashmir. It seems to us that when the Constitution used the word "modification" in Article 370 (1),

the intention was that the President would have the power to amend the provisions of the Constitution if he so thought fit in their application to the State of Jammu and Kashmir."

Proceeding further, and after discussing the meaning of the word "modify", the Court held:

"Thus, in law, the word "modify" may just mean "vary" i. e., amend; and when Article 370 (1) says that the President may apply the provisions of the Constitution to the State of Jammu and Kashmir with such modifications as he may by order specify, it means that he may vary (i. e., amend) the provisions of the Constitution in its application to the State of Jammu and Kashmir. We are, therefore, of opinion that in the context of the Constitution we must give the widest effect to the meaning of the word "modification" used in Article 370 (1) and in that sense it includes an amendment. There is no reason to limit the word "modifications" as used in Article 370 (1) only to such modifications as do not make any "radical transformation".

This decision being binding on us, it is not possible to accept the submission urged by counsel.

15. Lastly, it was argued that the modifications made in Article 35 (c) by the Constitution (Application to Jammu and Kashmir) Orders of 1959 and 1964 had the effect of abridging the fundamental right of the citizens of Kashmir under Article 22 and other articles contained in Part III after they had already been applied to the State of Jammu and Kashmir and an order of the President under Article 370 being in the nature of law, it would be void under Article 13 of the Constitution. Article 35 (c) as originally introduced in the Constitution as applied to Jammu and Kashmir laid down that no law with respect to preventive detention made by the Legislature of that State could be declared void on the ground of inconsistency with any of the provisions of Part III, with the qualification that such a law to the extent of the inconsistency was to cease to have effect after a period of five years. This means that, under Clause (c) of Art. 35, immunity was granted to the preventive laws made by the State Legislature completely, through the life of the inconsistent provisions was limited to a period of five years. The extention of that life from five to ten years and ten to fifteen years cannot, in these circumstances, be held to be an abridgement of any fundamental right, as the fundamental rights were already made inapplicable to the preventive detention law. On the other hand, if the substance of this provision is examined, the proper interpretation would be to hold that, as a result of Article 35 (c), the applicability of the provisions of Part III for the purpose of judging the validity of a law relating to preventive detention made by the State Legislature was postponed for a period of five years, during which the law could not be declared void. As already stated Article 370 (1) (d), in terms, provides for the application of the provisions of the Constitution other than Articles 1 and 370 in relation to Jammu and Kashmir with such exceptions and modifications as President may by order specify. It was not disputed that the President's Order of 1954, by which immunity for a period of five years was given to the State's preventive detention law from challenge on the ground of its being inconsistent with Part III of the Constitution was validly made under and in conformity with Cl. (d) of Article 370 (1). We have already held that the power to modify in Clause (d) also includes the power to subsequently vary, alter, add to or rescind

such an order by reason of the applicability of the rule of interpretation laid down in Section 21 of the General Clauses Act. If the order of 1954 is not invalid on the ground of infringement or abridgement of fundamental rights under Part III, it is difficult to appreciate how extension of period of immunity made by subsequent amendments can be said to be invalid as constituting an infringement or abridgement of any of the provisions of Part III. The object of the subsequent Orders of 1959 and 1964 was to extend the period of protection to the preventive detention law and not to infringe or abridge the fundamental rights, though the result of the extention is that a detenu cannot, during the period of protection, challenge the law on the ground of its being inconsistent with Article 22. Such extension is justified prima facie by the exceptional state of affairs which continue to exist as before.

16. The provision made in Art. 35 (c) has the effect that the validity of the Act cannot be challenged on the ground that any of the provisions of the Act are inconsistent with Article 22 of the Constitution.

17. As a result the grounds taken to challenge the validity of the Act fail and are rejected. The petition will now be set down for hearing arguments, if any, on the facts of the case.

Order accordingly.