

Hollohon

Vs

Zachilhu and Others

Transfer Petition (Civil) No. 40 of 1991

(L. M. Sharma, M. N. Venkatachaliah, J. S. Verma, K. Jayachandra Reddy, S. C. Agrawal, JJ)

12.11.1991

JUDGMENT

VENKATACHALIAH, K.

1. The writ petitions, transfer petitions, civil appeals, special leave petitions, and other connected matters raising common questions as to the constitutional validity of the Constitution (Fifty-second Amendment) Act, 1985, insofar as it seeks to introduce the Tenth Schedule in the Constitution of India, were heard together. Some of these matters involve investigation and determination of factual controversies and of the extent of applicability to them of the conclusions reached on the various constitutional issues. That exercise shall have to be undertaken in the individual cases separately.
2. The present judgment is pronounced in the Transfer Petition No. 40 of 1991 seeking the transfer of the writ petition, Rule NO. 2421 of 1990 on the file of the High Court of Guwahati to this Court.
3. The transfer petition is allowed and the aforesaid writ petition is withdrawn to this Court for the purpose of deciding the constitutional issues and of declaring the law of the matter.
4. For the reasons to be set out in the detailed judgment to follow, the following are the operative conclusions in the majority opinion on the various constitutional issues :

[A] That having regard to the background and evolution of the principles underlying the Constitution (Fifty-second Amendment) Act, 1985, insofar as it seeks to introduce the Tenth Schedule in the Constitution of India, the provisions of paragraph 7 of the Tenth Schedule of the Constitution in terms and in effect bring about a change in the operation and effect of Articles 136, 226 and 227 of the Constitution of India and therefore, the amendment would require to be ratified in accordance with the proviso to sub-article (2) of Article 368 to the Constitution of India.

[B] That there is nothing in the said proviso to Article 368(2) which detracts from the severability of a provision on account of the inclusion of which the Bill containing the amendment requires ratification from the rest of the provisions of such Bill which do not attract and require such ratification. Having regard to the mandatory language of Article 368(2) that "thereupon the Constitution shall stand amended" the operation of the proviso should not be extended to constitutional amendments in a Bill which can stand by themselves without such ratification.

[C] That, accordingly, the Constitution (Fifty-second Amendment) Act, 1985, insofar

as it seeks to introduce the Tenth Schedule in the Constitution of India, to the extent or its provisions which are amenable to the legal sovereign of the amending process of the Union Parliament cannot be overborne by the proviso which cannot operate in that area. There is no justification for the view that even the rest of the provisions of the Constitution (Fifty-second Amendment) Act, 1985, excluding paragraph 7 of the Tenth Schedule become constitutionally infirm by reason alone of the fact that one of its severable provisions which attracted and required ratification under the proviso to Article 368 (2) was not so ratified.

[D] That paragraph 7 of the Tenth Schedule contains a provision which is independent of, and stands apart from, the main provisions of the Tenth Schedule which are intended to provide a remedy for the evil of unprincipled and unethical political defections and, therefore, is a severable part. The remaining provisions of the Tenth Schedule can and do stand independently of paragraph 7 and are complete in themselves, workable and are not truncated by the excision of paragraph 7.

[E] That the paragraph 2 of the Tenth Schedule to the Constitution is valid. Its provisions do not suffer from the vice of subverting democratic rights of elected Members of Parliament and the legislatures of the States. It does not violate their freedom of speech, freedom of vote and conscience as contended.

The provisions of paragraph 2 do not violate any rights or under Articles 105 and 194 of the Constitution.

The provision are salutary and are intended to strengthen the fabric of Indian parliamentary democracy by curbing unprincipled and unethical political defections.

[F] The contention that the provisions of the Tenth Schedule, even with the exclusion of paragraph 7, violate the basic structure of the Constitution in that they affect the democratic rights of elected members and, therefore, of the principles of parliamentary democracy is unsound and is rejected.

[G] The Speakers/Chairmen while exercising powers and discharging functions under the Tenth Schedule act as Tribunal adjudicating rights and obligations under the Tenth Schedule and their decisions in that capacity are amenable to judicial review.

However, having regard to the Constitutional Scheme in the Tenth Schedule, judicial review should not cover any stage prior to the making of a decision by the Speakers/Chairmen. Having regard to the constitutional intendment and the status of the repository of the adjudicatory power, no quia timet actions are permissible, the only exception for any interlocutory interference being cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repercussions and consequence.

[H] That paragraph 6(1) of the Tenth Schedule, to the extent it seeks to impart finality of the decision of the Speakers/Chairmen is valid. But the concept of statutory finality embodied in paragraph 6(1) does not detract from or abrogate judicial review under Articles 136, 226 and 227 of the Constitution insofar as infirmities based on violations of constitutional mandates, mala fides, non-compliance with rules of Natural Justice and perversity, are concerned.

[I] That the deeming provision in paragraph 6(2) of the Tenth Schedule attracts an immunity analogous to that in Articles 122(1) and 212(1) of the Constitution as understood and explained in Keshav Singh case ((1965) 1 SCR 413 : AIR 1965 SC 745) to protect the validity of proceedings from mere irregularities of procedure. The deeming provision, having regard to the words "be deemed to be proceedings in Parliament" or "proceedings in the legislature of a State" confines the scope of the fiction accordingly.

[J] That contention that the investiture of adjudicatory functions in the Speakers/Chairmen would by itself vitiate the provision on the ground of likelihood of political bias is unsound and is rejected. The Speakers/Chairmen hold a pivotal position in the scheme of parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to and do take far reaching decisions in the functioning of parliamentary democracy. Vestiture of power to adjudicate questions under the Tenth Schedule in such constitutional functionaries should not be considered exceptionable.

[K] In the view we take of the validity of paragraph 7 it is unnecessary to pronounce on the contention that judicial review is a basic structure of the Constitution and paragraph 7 of the Tenth Schedule violates such basic structure.

5. The factual controversies raised in writ petition will, however, have to be decided by the High Court applying the principles declared and laid down by this judgment. The writ petition is, accordingly, remitted to the High Court for such disposal in accordance with law.

(Operative conclusions in the minority opinion)

Per Sharma and Verma, JJ. -

6. For the reasons to be given in our detailed judgment to follow, our operative conclusions in the minority opinion on the various constitutional issues are as follows :

(1) Para 7 of the Tenth Schedule, in clear terms and in effect excludes the jurisdiction of all courts, including the Supreme Court under Article 136 and the High Courts under Articles 226 and 227 to entertain any challenge to the decision under para 6 on any ground even of illegality or perversity, not only at an interim stage but also after the final decision on the question of disqualification on the ground of defection.

(2) Para 7 of the Tenth Schedule, therefore, in terms and in effect, makes a change in Article 136 in Chapter IV of Part V; and Articles 226 and 227 in Chapter V of Part VI of the Constitution, attracting the proviso to clause (2) of Article 368.

(3) In view of para 7 in the Bill resulting in the Constitution (Fifty-second Amendment) Act, 1985 it was required to be ratified by the legislatures of not less than one-half of the States as a condition precedent before the Bill could be presented to the President for assent, in accordance with the mandatory special procedure prescribed in the proviso to clause (2) of Article 368 for exercise of the constituent power. Without ratification by the specified number of State legislatures, the stage for presenting the Bill for assent of the President did not reach and, therefore, the so-called assent of the President was non est and did not result in the Constitution

standing amended in accordance with the terms of the Bill.

(4) In the absence of ratification by the specified number of State legislatures before presentation of the Bill to the President of his assent, as required by the proviso to clause (2) of Article 368 it is not merely para 7 but, the entire Constitution (Fifty-second Amendment) Act, 1985 which is rendered unconstitutional, since the constituent power was not exercised as prescribed in Article 368, and therefore, the Constitution did not stand amended in accordance with the terms of the Bill providing for the amendment.

(5) Doctrine of Severability cannot be applied to a Bill making a constitutional amendment where any part thereof attracts the proviso to clause (2) of Article 368.

(6) Doctrine of Severability is not applicable to permit striking down para 7 alone saving the remaining provisions of the Bill making the constitutional amendment on the ground that para 7 alone attracts the proviso to clause (2) of Article 368.

(7) Even otherwise, having regard to the provisions of the Tenth Schedule of the Constitution inserted by the Constitution (Fifty-second Amendment) Act, 1985, the Doctrine of Severability does not apply to it.

(8) Democracy is a part of the basic structure of the Constitution and free and fair elections with provision for resolution of disputes relating to the same as also for adjudication of those relating to subsequent disqualification by an independent body outside the House are essential features of the democratic system in our Constitution. Accordingly, an independent adjudicatory machinery for resolving disputes relating to the competence of Members of the House is envisaged as an attribute of this basic feature. The tenure of the Speaker who is the authority in the Tenth Schedule to decide this dispute is dependent on the continuous support of the majority in the House and, therefore, he (the Speaker) does not satisfy the requirement of such an independent adjudicatory authority; and his choice as the sole arbiter in the matter violates an essential attribute of the basic feature.

(9) Consequently, the entire Constitution (Fifty-second Amendment) Act, 1985 which inserted the Tenth Schedule together with clause (2) in Articles 102 and 191, must be declared unconstitutional or an abortive attempt to so amend the Constitution.

(10) It follows that all decisions rendered by the several Speakers under the Tenth Schedule must also be declared nullity and liable to be ignored.

(11) On the above conclusions, it does not appear necessary or appropriate to decide the remaining questions urged.

ORDER BY COURT

7. The Transfer Petition is allowed and the writ petition, Rule No. 2421 of 1990 on the file of the High Court of Guwahati is withdrawn to this Court for the purpose of deciding the constitutional issues and of declaring the law on the matter.

8. In accordance with the majority opinion, the factual controversies raised in the writ petition will, however, have to be decided by the High Court applying the principles declared and laid down by the majority. The writ petition is, accordingly remitted to the High Court for such disposal in accordance with law.

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