CALCUTTA HIGH COURT

Jatin Chakravorty

Vs.

Mr. Justice Himansu Kumar Bose

(D.N. Sinha, J.)

25.06.1964

ORDER

D.N. Sinha, J.

1. This is an application by Shri Jatin Chakravorty, a member of the West Bengal Legislative Council, for the issue of a writ in the nature of 'Quo Warranto', restraining the respondents from acting as a Judge of the High Court of Calcutta and from exercising the duties and functions of a Judge. There are five respondents to this application. The first is the present Chief Justice of this Court and the remaining four are puisne Judges.

2. In this application, the petitioner challenges the validity of the Constitution (Fifteenth Amendment) Act 1963 which came into operation on the 6th October 1963 and which inter alia amended Article 217, in Ch. V, Part VI of the Constitution.

3. Previous to the amendment, a Judge of a High Court held office until he attained the age of sixty years. By the amendment, the retiring age has been increased to sixty two. Under the old provision, the respondents attained their retiring ages as follows :

1. The Chief Justice ---- 1st March 1964.
2. Mr. Justice U. C. Law ---- 30th December 1963.
3. Mr. Justice D.N. Das Gupta ---- 1st Jan. 1964.
4. Mr. Justice P.C. Mallick ---- 12th March 1964.
5. Mr. Justice S.K. Niyogi ---- 1st February 1964.

It follows that, but for the amendment of the Constitution by the Fifteenth Amendment, they would all have retired by now. They are all exercising their functions as a Judge by reason of the extension in their tenure of office, caused by the said amendment.

4. The argument is that the said amendment of the Constitution has not been brought about in accordance with law. If that is so, then the respondents have already reached their retiring age and can no longer exercise their judicial office.

5. I might at once state that the form of the prayer is defective. In an application for the issue of a

writ in the nature of 'Quo Warranto', a rule nisi should be prayed for, calling upon a respondent to show to the satisfaction of the Court, as to under what right or authority he was holding a public office and if he failed to show the same, why the Court should not command him to desist from doing so. This is required by the rules of this Court in the Writ Jurisdiction. However, this defect may be said to be a formal one.

6. The petitioner attacks the Fifteenth Amendment of the Constitution. Part 20 of the Constitution consists of only one Article, namely, Article 368, which lays down the procedure for amendment of the Constitution. The relevant provisions of the said Article run as follows :

> "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.
> Provided that if such amendment seeks to make any change in .....
> (b)..... Chapter V of Part VI ....

the amendment shall also require to be ratified by the Legislature of not less than one-half of the States by resolutions to that effect passed by those legislatures before the Bill making provision for such amendment is presented to the President for assent."

7. For the facts upon which this petition is founded, the petitioner relies upon a number of letters exchanged between Mr. J.P. Mitter and the Secretary, Asst. Secretary or Under-Secretary of a number of Legislative Assemblies, Councils, Governors and Sadar-i-Riyasat of various States. Mr. Krishna Menon appearing for the petitioner informs me that at the relevant time there were 14 States in the Indian Union. From the materials disclosed, it appears that seven States (Madras, Punjab, Orissa, Gujarat, Mysore, Bihar and Jammu and Kashmir) passed resolutions ratifying the amendment. No such resolution was passed by three States (Uttar Pradesh, Maharashtra, Madhya Pradesh). I am not informed as to what happened in the remaining four States, save and except that in West Bengal, no assent of the Governor was taken. Unsatisfactory as the materials are, I need not dwell on this aspect further because it is not disputed before me that half of the total number of States did pass resolutions ratifying the amendment. It was thereupon placed before the President for his assent and after obtaining such assent, it has been placed on the Statute Book.

8. The objection of the petitioner is as follows : Article 168 is in Chapter III of the Constitution is entitled - "The State Legislature" It runs as follows :

> "168 (1) For every State there shall be a Legislature which shall consist of the Governor, and
> (a) In the States of Bihar, Bombay, Madhya Pradesh, Madras, Mysore, Punjab, Uttar Pradesh and West Bengal, two Houses;
> (b) in other States, one House.

(2) where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council and the other as the Legislative Assembly and where there is only one House, it shall be known as the Legislative Assembly."

9. It is argued that as the word "Legislature" is used in Article 368, it means that the assent of the Governor must be taken in each State, before it can be said that a resolution has been ratified, because under Article 168, he is a part of the Legislature. In the present case, no assent of the Governor was taken in any State (or at least in 11 States) and therefore there was no valid resolution ratifying the amending Bill and the amending Act has not been validly passed. In my opinion, this argument is patently defective. Article 168 is not a definition section at all. The definition section is Article 366 which contains no definition of the word 'legislature". The General Clauses Act, made applicable by Article 367 does not contain any definition. The dictionary meaning of 'Legislature' is a duly constituted body of men in a State or nation, empowered under the Constitution to enact amend or repeal the laws. Article 168 merely lays down the Constitution of a State Legislature and indicates the two limbs of it, namely the Governor and the House or Houses. The rights, duties, powers and privileges of the two limbs are set out in the body of the Constitution and may be further defined by law or rules and Standing Orders and until so defined shall be those of the House of Commons of the Parliament in the United Kingdom (Art. 194). This identical point came up before the Supreme Court in State of Bihar v, Kameshwar Singh, AIR 1952 Supreme Court 252. Article 31(3) of the Constitution runs as follows :

"(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President has received his assent."

It was argued that as the word 'Legislature' was deliberately used and as the legislature includes the Governor, he must also assent to the legislation, although the assent of the President is only explicitly mentioned therein. Patanjali Sastri, C.J. negatived this proposition and said as follows :

"I am unable to agree with this view. The term 'Legislature' is not always used in the Constitution as including the Governor, though Article 168 makes him a component part of the State Legislature. In Article 173, for instance, the word is clearly used in the sense of the 'house of legislature' and excludes the Governor ..... If it was intended that such a law should have the assent of both the Governor and the President, one would expect to find not only a more clear or explicit provision to that effect, but also some reference in Article 200 to the Governor's power to reserve a measure for the consideration of the President after himself assenting to it."

A legislature discharges a variety of functions. The House has to be summoned or prorogued, Bills have to be introduced, voted upon and passed, debates take place on important political questions, ministers are interrogated and so on. The Governor, though a limb of the legislature does not take part in every such action. While the Governor summons the House and may

prorogue or dissolve it (Art. 174) or address the legislature (Art. 175), he does not sit in the House, or vote upon any issue. When a Bill has been passed by the House or Houses, Article 200 requires that it shall be presented to the Governor for assent. The assent of the Governor is necessary, only because the Constitution expressly requires it. Whenever the assent of the Governor is necessary or the assent of the President is necessary, it is specifically provided for in the Constitution (see Articles 31-A, 200, 201 and 304). The necessity of such assent cannot be implied, where not specifically provided for.

10. Coming now to Article 368, we find that the first part relates to the Bill which has to be passed in a particular manner and there is specific provision for the assent of the President. So far as the State Legislatures are concerned, it requires that a 'resolution' should be passed ratifying the amendment. Such a resolution requires voting and the Governor never votes upon any issue. In fact, Mr. Krishna Menon did not suggest that he should. His point was that it is necessary to obtain the 'assent' of the Governor. Indeed, in all the letters written by Mr. J.P. Mitter, the principal question asked was whether the 'assent' of the Governor had been obtained. The answers also speak of 'assent' not being obtained or not required to be obtained. The article itself does not require the assent of the Governor. While it expressly provides for the assent of the President, it does not provide for the assent of the Governor. I asked Mr. Krishna Menon as to whether there were any laws or rules or standing orders requiring such assent or whether he relied on any English practice. He said that he was not aware of any such rule or practice, but that he relied solely on Articles 168 and 368 for establishing his point. In my opinion, the position is quite clear and that a resolution of a State Legislature ratifying a Bill for amendment of the Constitution does not require the assent of the Governor. This was the only point really pressed by Mr. Menon before me. He only referred cursorily to the other points raised. A point has been taken in the petition that the amendment was defective because it was "not placed before and/or considered by all the State Legislatures in India before it was presented to the President." I have no evidence before me at all to the effect that it was not placed before all the State Legislatures. Maharashtra has stated that it received the Bill on 22nd June 1963 but

> "before steps could be taken to pass a motion ratifying the Bill by the State Legislature, half the number of the State Legislatures had already ratified the Bill and therefore there was no longer any need to pass the motion".

There is no statement that it was not able to consider the same for any other reason. They had more than three months to do so. Madhya Pradesh has stated that before the resolution could be moved in the State Legislative Assembly, the Bill was published as an Act of Parliament. I am not told when they received the Bill, but there is no complaint that they did not find adequate time to place it before the Legislature. Uttar Pradesh has merely stated that no resolution was passed. Here again there is no complaint that there was no adequate time to do so and no evidence to establish any such fact. There is therefore no evidence at all to show that it was not placed before all the Legislatures or that they did not have adequate opportunity of considering the same. Let us now see what is required to be done under Article 368. All that is necessary under Article 368 is that the amendment should be "ratified by the Legislatures of not less than one half of the States". As long as necessary number of State Legislatures have ratified the amendment, the Parliament is empowered to present the amendment to the President for assent. We cannot rewrite Article 368 by adding the words - "after being placed before and/or considered

by all the State Legislatures." That would be legislating and not interpreting the Constitution. Besides, the introduction of such words would give rise to numerous complications. Suppose the amendment is sent to a State but it refuses to place it before the Legislature or consider it. Then, by the unilateral action of one single State, an amendment, however urgent, could be held up for an unspecified time and nullified. These are matters of high policy and not of interpretation by Courts of Law. I must hold therefore that prima facie, the requirements of Article 368 were complied with. There is no evidence of the fact that the Bill was not sent to the Legislature of any State or that any State was not given a reasonable time to consider it.

11. Apart from the merits, the application suffers from a serious defect of parties. It will be noted that what is challenged, is an Act of Parliament, which has received the assent of the President and duly placed on the Statute Book. Yet, the Union of India has not been made a party. I find from a perusal of the paragraph 26 of the petition that it states as follows :

> "The petitioner submits that the Union of India being vitally interested in the validity of the Constitution (Fifteenth Amendment) Act 1963, a copy of the Rule nisi prayed for may properly be served on the Union of India for its intervention in these proceedings, if so advised.

I do not know what is meant by "may properly be served". If the matter of propriety be left to Court, how can it ever direct a party "vitally interested" to be served with a rule, although not made a party. Such a party might then be compelled to appear at the hearing but will be unable to appeal against an adverse verdict. I cannot possibly grant this unjust prayer. The defect however does not end there. The petitioner admits that at least seven States have passed resolutions ratifying the amendment and forwarded it to the Central Legislature. It is said that all these resolutions are invalid and do not amount to 'ratification', because the assent of their respective Governors was not taken. If the petitioner cannot set aside these resolutions, or have them declared invalid, he cannot succeed. But he has not made any of these States a party to this application. How can I declare the resolutions of all these State Legislatures as invalid, in the absence of and without hearing the State Governments concerned, who are equally "vitally interested" in the matter ? This also is a serious defect.

12. Lastly, I must mention that Mr. Krishna Menon has referred me to a decision of the Supreme Court - *Himansu Kumar Bose v. Jyoti Prokash Mitter, unreported judgment in*[1] in which it has been held that where there are 'arguable issues' relating to matters of considerable importance, a rule-nisi should be issued. I respectfully agree with the proposition. But what are 'arguable issues'? There cannot be an arguable issue, simply because an argument has in fact been advanced. There are few points upon which a trained lawyer cannot say something or other. If that were the test, there would be no meaning in holding a preliminary hearing before issuing a rule-nisi. In my opinion, a point raises 'arguable issues', if the Court has some doubt upon the question raised or there are obscure points which require elucidation and upon which two views may reasonably be held. In the present case, the dispute is on a point of law, namely an interpretation of the Constitution. The petitioner has engaged the services of an eminent counsel from outside the State, who has argued the points involved, from all possible angles and I have dealt with all such points. I am in no doubt about the answer. I am not deciding something against any party who has not been heard. Under the circumstances I do not see why I should call

upon the other side to come and convince me on a point upon which I am already convinced.

13. Under the circumstances, I do not propose to issue a rule. This application should, for reasons given above, be dismissed.

Application dismissed.

[1] Appeal No. 485 of 1963, judgment D/-14-10-63 : (now reported in AIR 1964 SC 1636)