Chandra Mohan Vs. State of U.P. and ors.

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Court : Allahabad

Decided On : Nov-24-1967

Reported in : AIR1969All230

Judge : Satish Chandra, J.

Acts : Constitution of India - Articles 233, 233(1), 233A and 309; Uttar Pradesh Higher Judicial Service Rules, 1953; Constitution of India (20th Amendment) Act - Articles 141, 142, 142(1) and 144

Appeal No. : Civil Misc. Writ No. 397 of 1967

Appellant : Chandra Mohan

Respondent : State of U.P. and ors.

Advocate for Def. : K.C. Agarwal, ;S.N. Misra and ;S.K. Tewari, Advs.

Advocate for Pet/Ap. : N. Lal and ;H.S. Goshi, Advs.

Disposition : Petition partly allowed

Judgement :

ORDER

Satish Chandra, J.

1. This is a petition under Article 226 of the Constitution for a writ of quo warranto calling upon the respondents 2 to 16 to show cause by what authority they are holding the office of the District Judges and to oust them from the offices.

2. The present petition is a concomitant of the Supreme Court decision in an earlier writ petition filed by the petitioner in this Court, Chandra Mohan v. State of U. P., AIR 1966 SC 1987. On 8th August, 1966, the Supreme Court reversed the decision of this Court. It declared that the U. P. Higher Judicial Service Rules (which I shall hereinafter called 'the rules') providing for the recruitment of District Judges are constitutionally void, because they infringe Article 233 of the Constitution and therefore the appointments made thereunder were illegal. This decision invalidated practically all appointments made by promotion or direct recruitment. Thereupon, the judgments rendered by the Judges so appointed were challenged as being without jurisdiction. The majority opinion of a Full Bench of this Court in Jai Kumar v. State, 1966 All WR (HC) 705, decided on 17-10-1966, held that the judgments of such Judges could not be collaterally challenged in appeals till the de facto colour under which they functioned in office had been exposed. In view of this decision all judgments rendered by practically the entire strength of the District Judges after the date of decision of the Supreme Court would have been illegal. To remedy this serious situation, Parliament intervened, and, by the 20th Constitution Amendment Act, 1966 (passed on 22nd December, 1966) added the following as Article 233-A to the Constitution :--

'233-A. Notwithstanding any judgment, decree or order of any Court--

(a) (i) no appointment of any person already in the Judicial Service of a State or of any person who has been for not less than seven years an advocate or a pleader, to be a District Judge, in that State, and

(ii) no posting, promotion or transfer of any such person as a District Judge, made at any time before the commencement of the Constitution (Twentieth Amendment) Act, 1966, otherwise than in accordance with the provisions of Article 233 or Article 235 shall be deemed to be illegal or void or ever to have become illegal or void by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions;

(b) no jurisdiction exercised, no judgment, decree, sentence or order passed or made, and no other act or proceeding done or taken, before the commencement of the Constitution (Twentieth Amendment) Act, 1966, by, or before, any person appointed, posted, promoted or transferred as a District Judge in any State otherwise than in accordance with the provisions of Article 233 or Article 235 shall be deemed to be illegal or invalid or ever to have become illegal or invalid by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions.'

It validated all past appointments (except of Judicial Officers) notwithstanding non-compliance of Article 233 and notwithstanding any judgment or decree of any Court. Judgments rendered by such Judges were also declared immune.

3. Thereupon the present petition was filed on 1st February, 1967, primarily to challenge the validity of the Twentieth Amendment to the Constitution. The two out of the five questions urged before the Supreme Court, but not answered by it, have also been reiterated in the present petition. Before the Supreme Court the following five points were canvassed :

'(1) While under Article 233(1) of the Constitution the Governor has to make appointments of persons to be, and the posting and promotions of, District Judges in consultation with the High Court concerned, under the Rules made by the Governor under Article 309 of the Constitution he has to consult, before making such appointments, a selection committee constituted thereunder and therefore, the appointments made in consultation of two authorities instead of one as provided by the Constitution, were illegal.

(2) On a fair reading of the provisions of the Rules, it is manifest that the High Court is a transmitting authority while the selection committee is made the real consultative body, that is to say, the Governor has to make the appointments not in consultation with the High Court as it should be under the Constitution, but in consultation with the committee constituted under the Rules.

(3) The Governor has no power to appoint District Judges from judicial officers as they are not members of the judicial service.

(4) The exclusion of the members of the judicial service in the matter of direct recruitment offends Articles 14 and 16 of the Constitution; or, alternatively, the exclusion of the members of the judicial service in the matter of direct recruitment to the post of District Judges while permitting 'judicial officers' to be so recruited offends the said Articles.

(5) The recruitment is to the post of 'Civil and Sessions Judges' and they are not 'District Judges' as defined by Article 226 of the Constitution and therefore, the recruitment to those posts in terms of Article 233 is bad.'

4. The Supreme Court upheld the first three points and on these grounds held the U. P. Higher Judicial Services Rules unconstitutional. It did not express any opinion on the last two questions. The fourth point urged before the Supreme Court about discrimination had been negatived by the Division Bench of this Court. The view of the Division Bench not having been set aside by the Supreme Court, still prevails, and is binding on me sitting singly. This point, therefore, has to be negatived. The fifth point, namely, that the 'Civil

and Sessions Judges' are not 'District Judges' as defined by Article 236 of the Constitution was repelled by the Supreme Court in Prem Nath v. State of Rajasthan : [1967]3SCR186 .

5. Apart from the validity of the Twentieth Amendment to the Constitution, two other points were urged. It was submitted that Sri Prayag Narain, respondent No. 12, being a Judicial Officer was not qualified to be appointed to the post of District Judge. Further, Rule 8 and the proviso to Rule 19 of the Rules violate Article 16 of the Constitution.

6. Acting under Article 309 of the Constitution, the Governor framed the U. P. Civil Services (Judicial Branch) Rules, 1951. These rules dealt with the posts of Munsifs and Civil Judges. Similarly, under Article 309, the Governor made the U. P. Higher Judicial Service Rules, 1953, for the posts of Civil and Sessions Judges and District and Sessions Judges. These rules contemplated recruitment and appointment by promotion of Civil Judges and also by direct recruitment. At the first selection by direct recruitment which was held in 1953, respondents 2, 3 and 4 were appointed as Civil and Sessions Judges. Eight persons, namely, respondents Nos. 5 to 12, were appointed as a result of the second selection held in 1957. The third selection was held in 1963-64. Six persons including respondents Nos. 13 to 16 were approved for appointment. As a result of the impending appointments of these six persons, Chandra Mohan, who was officiating as Civil and Sessions Judge became liable to be reverted. He was informed of this contingency. At that stage he filed a writ petition No. 526 of 1965 under Article 226 of the Constitution in which he prayed that the State Government be directed not to make any appointment by direct recruitment. Subsequently, proceedings to hold the fourth selection were initiated in 1965. Chandra Mohan amended the writ petition so as to challenge its validity.

The six persons approved for appointment in the third selection applied for being im-pleaded as parties to the writ petition filed by Chandra Mohan and by an order dated 24-8-1965, they were impleaded as respondents. Respondent No. 13 Rakheshwari Prasad was respondent No. 3 in the previous petition. The present respondent No. 14 Sri R. C. Baijpai was respondent No. 2. Respondent No. 15 Sri Behari ji Das was respondent No. 4. These three were from the Bar. Respondent No. 16 Om Prakash Sharma was respondent No. 8 in the previous petition. The other remaining two were Judicial Officers. Chandra Mohan's writ petition was partly allowed on 21-2-1966. The judgment is reported in 1966 All LJ 599. It was held that Sri Om Prakash Jauhari was not eligible. It was also held that the fourth selection held in 1965 was illegal and the State was directed not to make any appointments on its basis. The selection or the other five was upheld as valid. As seen earlier, the Supreme Court reversed the decision and held the Higher Judicial Service Rules relating to recruitment as void as also the appointments made thereunder illegal. In view of that decision, respondent No. 16, Om Prakash Sharma, was not appointed. Respondents Nos. 13 to 15 appear to have been appointed before the decision of the Supreme Court. During this period respondents Nos. 2 to 12 who were initially appointed as Civil and Sessions Judge, were promoted to the grade of the District and Sessions Judge, under the rules.

The petitioner was, as a result of the competitive examination held in 1950, recruited to the U. P. Civil Services (Judicial Branch) and was appointed as Munsif. In 1963 the petitioner was appointed to officiate as Civil and Sessions Judge. He is still continuing in the officiating capacity. There is no allegation that he has been promoted through the Selection Committee.

7. Mr. Jagdish Swarup urged that Mr. Prayag Narain, respondent No. 12, was a Judicial Officer when he was recruited to the post of District Judge in 1957. The Supreme Court had declared that the Judicial Officers were not qualified to be recruited to the post of District Judge. The Twentieth Constitution Amendment did not validate the appointments of Judicial Officers. Mr. Prayag Narain hence was illegally occupying the post. Mr. Prayag Narain's case is that he had completed seven years' practice at the Bar and was hence eligible. The answer to this controversy depends upon the interpretation of Article 233 of the Constitution which reads:

'233 (1) Appointment of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than 7 years an advocate or a pleader and is recommended by the High Court for appointment.'

Sub-article (1) confers the power of appointment and provides for the conditions under which the power is to be exercised. Sub-article (2) deals with the field of eligibility to which the selection is to be confined. Under Sub-article (2) a person already in the service of the Union or of the State is eligible. According to the decision of the Supreme Court in Chandra Mohan's case, 'service' means the 'judicial service'. A person who is not already in the judicial service is eligible only if he has been an advocate or a pleader of at least seven years' standing and is recommended by the High Court. The submission of Mr. Jagdish Swarup, that a person who is in the service of the Union or of the State other than judicial service is not at all eligible, seems to do violence to the language of Sub-article (2). The construction of the sentence in Sub-article (2) seems to emphasise that a person not in the judicial service is also eligible, but only if the other two conditions are present, namely, that he has been a lawyer of seven years' standing and is recommended by the High Court.

8. It was urged that the words 'has been' in the phrase 'if he has been for not less than 7 years an advocate or a pleader' signify that the eligibility is that the individual is an advocate or a pleader at the time when he is recommended by the High Court, or, on the date of his appointment. In substance, the argument is that a person must be a practising lawyer when he is appointed. In Ramesnwar Dayal v. State of Punjab : [1961]2SCR874 , the Supreme Court held that Clause (2) of Article 233 provides a qualification for persons not already in service. The required qualification is that he should be an advocate or pleader of seven years' standing but that clause does not say how that seven years' standing has to be reckoned. The other authorities are also against Mr. Jagdish Swarup's contention.

In the second proviso to Section 86(3) of the Representation of the People Act, 1951 a person who 'has been' a Judge could be appointed as a member of the Election Tribunal. A Division Bench of this Court in Mubarak Mazdoor v. K. K. Banerji : AIR1958All323 . held that this phrase meant a person who has, at some time, held office as a Judge, but it does not necessarily mean that the person must be holding office as a Judge at the time of the appointment as a member of the Tribunal. A retired Judge was eligible. The Bench observed that the argument that the words 'has been' in the phrase 'a person who has been a Judge' is a present perfect continuous tense, was incorrect. 'Has been' when not followed by a participle is the present perfect tense of 'to be' and accordingly indicates that the state of being has existed and may be (but not necessarily is) continuing. For example, the statement 'A has been to Ceylon' indicates that A has visited Ceylon but is not there now; whereas the sentence 'the baby has been ill all day' implies not only that the baby has been ill but is still ill. On the other hand, 'Y has been a soldier' excludes neither the possibility that Y is still a soldier nor that he has ceased to be one. The line of reasoning of this authority is applicable. The qualification of seven years' standing need not necessarily be a continuing one till the appointment.

9. Similarly, in State of Assam v. Horizon Union : (1967)ILLJ409SC , the Supreme Court had occasion to consider a similar provision. Clause (aa) added to Section 7-A (3) of the Industrial Disputes Act by the Industrial Disputes (Amendment) Act No. 36 of 1964, provided that a person shall not be qualified for appointment as a Presiding Officer of a Tribunal unless he has for a period of not less than three years been a District Judge or an Additional District Judge. The Supreme Court held that the requirement of this provision was satisfied in a case where a person held the post for the requisite period even though he had not actually worked in that post for that period.

In that case Sri Dutta was appointed as Presiding Officer on 7th December, 1965. Sri Dutta was appointed as a temporary Additional District Judge on 16th August, 1954. He worked as such till March 8, 1957, when he was appointed Registrar of the High Court of Assam in an officiating capacity. On 30th June, 1959, he retired from the office of the Registrar. It was held that Sri Dutta continued to hold the office of the Additional District Judge while he was working on the post of the Registrar and that period will be counted for the purpose of the required qualification. The period between 16th August, 1954 and 24th April, 1958, when Sri Dutta was

confirmed, was held to be countable. Sri Dutta had been prior to his appointment on 7th December, 1965, the Presiding Officer of a Labour Court for about two years. He was hence not continuing to hold the post of the District Judge on the date of his appointment This was not held to be a disqualification. This decision is in line with the Division Bench of our Court. Clause (2) of Article 233 does not, in my opinion, restrict the field of eligibility to only such advocates or pleaders who were actively practising till the date of their appointment

10. Sri Prayag Narain has in his counter-affidavit mentioned the periods during which he was practising at the Bar. That period totals to more than seven years. He was thus qualified for appointment. It has not been alleged in the petition that Sri Prayag Narain was not recommended by the High Court. His appointment satisfied the requirements of Article 233 of the Constitution.

11. Mr. Jagdish Swarup initially argued that Rule 8 (number of appointments to be made) and the proviso of Rule 19 (appointment) of the U. P. Higher Judicial Service Rules, 1953, infringed the guarantee of equality mentioned in Article 16 of the Constitution. During the course of arguments, learned counsel, however, shifted his stand. He urged that the U. P. Higher Judicial Service Rules in their entirety became void as a result of the Supreme Court decision in Chandra Mohan's case, AIR 1966 SG 1987. The U. P. Higher Judicial Service Rules have been framed under the proviso to Rule 809 of the Constitution. They relate to the conditions of service of the cadre of District Judge. They deal with the strength of the service, recruitment including the procedure for it, qualifications, appointment, probation and confirmation, seniority and the scales of pay admissible to the members of the service. Rules 25 to 32 deal with other ancillary and subsidiary matters like canvassing, loyalty, knowledge of Hindi, regulation of allowances, pension, etc.

Part V of the rules consisting of Rule 13 dealt with the procedure for recruitment by promotion. Part VI (Rules 14, 15 and 16) provided for the procedure for direct recruitment. Appointment by promotion as well as by direct recruitment was to be made at the recommendation of the Selection Committee consisting of two Judges of the High Court and the Judicial Secretary to the Government. The Supreme Court held that the rules providing for recruitment were void because they contravened Articles 233(1) and 233(2). Under the rules the Governor consults the Selection Committee and acts on its recommendations. He does not consult the High Court. The Supreme Court further declared that the rules empowering recruitment from Judicial Officers were also unconstitutional. This would nullify Clause (b) of Sub-rule (2) of Rule 5 which provided for eligibility for direct recruitment and included judicial officers also. The direct effect of the Supreme Court's decision was to nullify Parts V and VI of the rules which postulated recruitment through the Selection Committee. The other rules like Rule 5 dealing with the source of recruitment, Rule 1 providing for reservation of seats for scheduled caste, Rule 8 indicating that the Governor shall decide the number of recruits to be taken at each selection from each of the two sources of recruitment specified in Rule 5 and also providing for the quota from the two sources, would not be hit by the principle enunciated by the Supreme Court. Similarly, Part VII dealing with the appointment, probation and confirmation was not dealt with by the Supreme Court nor declared to be unconstitutional.

12. The proviso to Article 309 confers powers to make rules to govern the conditions of service. The conditions of service mean and include various aspects like appointment, scale of pay, confirmation, seniority, promotion, payment of pension, etc. (See Accountant-General, Bihar v. Bakshi : AIR1962SC505 and General Manager, Southern Railway v. Rangachari : (1970)IILLJ289SC). Article 233 deals with only one aspect of the conditions of service, namely, appointment to the post of the District Judge. That has to be made in consultation with the High Court. The rules did not comply with this condition. The rules relating to appointment alone would be bad on that ground. Rules relating to other aspects of conditions of service having been validly framed under Article 309, would remain unaffected by the non-compliance with Article 233(1) of the Constitution.

13. The learned counsel suggested that the rules relating to recruitment and appointment having been declared void, the rest of the rules would not be severable and will consequently be bad. Prior to the coming into force of the rules with effect from 1st April, 1953, the post of District Judge was governed by the U. P. Civil

Service (Judicial Branch) Conditions of Service Rules, 1942. Officers recruited under the previous rules but holding office of the District Judge when the 1953 Rules came into operation, were also generally governed by the latter. The exceptions were mentioned in Rules 29 and 80. In so far as these rules were applicable to persons appointed otherwise than through the Selection Committee prescribed there under, they would continue to remain, in force.

14. The Supreme Court directed the State not to make any appointment under these rules. That direction would obviously operate in future. The Supreme Court also declared that the rules relating to recruitment were unconstitutional and the appointments made thereunder were illegal. Since no relief for ousting the illegally appointed respondents was prayed for in the petition, no such order was made. The declaration would render all appointments made under the rules through the agency of the Selection Committee illegal and unconstitutional, but all such officers, who were not parties to the case before the Supreme Court, would not be deemed to have vacated their offices automatically. The result of accepting the submission For the petitioner would be that all those officers would be deprived of the benefits of the rules relating to the various aspects of their conditions of service. Even the payment of salary in the pay-scale given in the rules would be illegal. That will not be desirable or feasible.

15. For all these reasons the rules relating to recruitment would be severable. The rest of the rules being valid, would continue to remain in force.

16. This position would be in consonance with Article 233-A. Under it no existing appointment would be deemed ever to have become illegal or void even though it may have been made otherwise than in accordance with Article 233, Thus, all such appointments would be deemed to have been made validly. The employment of the Higher Judicial Service Rules for making such appointments would also, as a necessary consequence, be deemed to be valid. In relation to such appointments, the rules would be deemed to nave remained in operation because the unconstitutionality arising by reason of non-compliance with Article 233 has been taken away. Article 233-A operates retrospectively. So, the rules would be deemed never to have become unconstitutional. They will continue to govern all officers appointed thereunder, including the present parties, between 1st April, 1953 and 21st December, 1966. The point that Rule 8 and the proviso to Rule 19 violated Article 16 need not be discussed because it was not argued at the hearing.

17. Having thus cleared the ground, I will now come to the principal point. Mr. Jagdish Swarup attacked the Twentieth Amendment on two grounds: He urged that an administrative action was not part of the Constitution. Curing of any illegality in an executive action would not in law be an amendment of the Constitution within the meaning o Article 368 of the Constitution. In the next place, he urged that Article 233-A affects the operation of Articles 142 and 144 of the Constitution. These Articles are included in the proviso to Article 368. Even an indirect change in them would require the ratification by the State Legislatures. No such ratification having been obtained, the Twentieth Amendment was unconstitutional.

18. Mr. Jagdish Swarup submitted that keeping in view the correct connotation of the term 'Constitution' and the implicit and implied limitations on the power or amendment thereof, an attempt to validate an executive action would not be an 'amendment' of the Constitution. In the recent case of L. C. Golak Nath v. State of Punjab : [1967]2SCR762 , the Supreme Court adverted to the question whether there are any implied limitations on the power possessed by Parliament to amend the Constitution. Subba Rao, C. J., speaking for himself and four other Judges (Sikri, Shah, Shelat and Vaidialingam, JJ.), held that Article 368 only provides the procedure for making amendments to the Constitution but does not confer the power of amendment either expressly or impliedly. The power vests in Parliament by reason of Articles 245, 246 and 248 read with Schedule VII, List 1, Item 97. The residuary power of Parliament takes in power to amend the Constitution. He held that there is nothing in the nature of the amending power which enables Parliament to override all the express or implied limitations imposed on that power. He did not elaborate or specify the extent or nature of the implied limitations.

It was argued before the Supreme Court that the expression 'amendment' in Article 308 has a negative content and in exercise of the power of amendment, Parliament cannot destroy the structure of the Constitution, but it can only modify the provisions thereof within the framework of the original instrument, for its better effectuation. The fundamentals of the Constitution could not be obliterated. The learned Chief Justice observed that there is considerable force in this argument but he did not express a final opinion on the point (para 40). It is thus clear that it was not even argued that an individual provision of the Constitution cannot be modified in order to offset judicial declaration of an executive action as invalid.

Hidayatullah, J., who concurred with the conclusions reached fay Subba Rao, C. J., and thus constituted the majority with him, observed that the question of implied limitations has evoked a spate of writings (paragraph 156); many authors and authorities holding that there are no implied limitations. He also mentioned that the opposite view has been strenuously stressed by reputable authors. His Lordship analysed the position to be that the principle that there are no implied limitations, flows from the doctrine that the process of amendment of a Constitution is not the ordinary legislative process but the exercise of a peculiar power. He rejected the premise. He seems to be of the opinion that there are limitations on the power of amendment, but there is nothing in his judgment to suggest that one of the limitations is that a provision of the Constitution could not be changed or altered with the intention to validate an executive action. His Lordship noted that many of the amendments to the Constitution have been made with the intention to nullify the decisions of Courts including the Supreme Court. His Lordship held that the intention behind Section 3 of the Seventeenth Amendment Act of 1964 (which added 44 State Acts to the Ninth Schedule) was to silence the courts and not to amend the Constitution. This was ultra vires the amending process (paragraph 191).

So, this was one implied limitation. But, provisions of the Constitution could be altered or changed. Herman Finer (The Theory and Practice of Modern Government, Revised Edition, p. 127), states that an amendment could deconstitute and reconstitute the provisions. Doing that would not be ultra vires. Is validation of an executive action within such an implied limitation? In my opinion not. The 20th Amendment added Article 233A to the Constitution. In substance it modified the provisions of Article 233(1) with retrospective effect. Thus, the pith and substance of the amendment was to deconstitute and reconstitute the scope of Article 233(1) with the intention to achieve a synthesis between necessities of the administration and the declaration of law made by the Supreme Court. This would be far beyond the purview of the implied limitation contemplated by Hidayatullah J. His Lordship noticed that the First and the Fourth amendments were brought about to nullify decisions of courts which had held Legislative and executive action invalid. That result was brought about by inter alia amending Article 31 and introducing Article 31A to the Constitution. This was not held to be beyond the amending process. On a parity of reasoning, the 20th amendment of the Constitution would equally be within the amending power.

19. The minority opinion of Wanchoo J. held that Article 368 conferred the substantive power to amend. The amending process is the constituent power, distinct from the legislative power of Parliament. Such constituent power knows no implied limitations. On this view the argument of Mr. Jagdish Swamp would not be valid. Bachawat J. also rejected the submission that there are implied limitations on the amending power. Rama-swami J. also agreed with Wanchoo J.

20. Mr. Jagdish Swarup invited my attention to the definition of the concept of Constitution as given by various writers. Herman Finer (The Theory and Practice of Modern Government, Revised Edition, p. 116) calls a 'Constitution' as 'an autobiography of a power relationship'. Garner (Political Science and Government, 1955 Edition, p. 456) enumerates definitions given by various authors. He has referred to Cooley (Constitutional Limitations, 7th Edition, p. 4) as defining a Constitution as 'the fundamental law of the State, containing the principles upon which government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confided and the manner in which it is to be exercised'. Cooley added that 'perhaps an equally complete and accurate definition would be the body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised'. The modifications of such rules

with a view to save administrative action would be an amendment of a Constitution as so defined.

21. W. Ivor Jennings (in the Law and the Constitution, 3rd Edition, p. 61) says that a written constitution is the fundamental law of a country, the express embodiment of the doctrine of the rule of law in one of its senses. All public authorities -- Legislative, administrative, and judicial --- take their powers directly or indirectly from it. Constitution determines these authorities and the general powers which they exercise. At p. 62 the learned author clarified that a written constitution deals with the selection of legal rules set out in the document and with their meaning and application. A modification of the meaning and application of the rules set out in the document of the Constitution would clearly be an amendment thereof. So, a provision like Article 233 conferring power on administrative head i.e. the Governor would be within the concept of a Constitution. Its alteration will be nothing else than its amendment. None of these authorities have anywhere indicated that a measure to validate an administrative action would be beyond the amending process.

22. In respect of the second ground the scope of Article 368 and of Articles 142 and 144 will have to be examined and then the impact of Article 233-A thereon will have to be seen. According to the majority opinion in Golak Nath's case : [1967]2SCR762 (Supra) Article 368 lays down the procedure for amendment of the Constitution. Its proviso requires that if an amendment of the Constitution seeks to make any change in the articles mentioned in Clauses (a) to (e) thereof the amendment shall also require to be ratified by the Legislatures of not less than one half of the States. Articles 142 and 144 are included in Clause (b) of the proviso. Mr. Jagdish Swarup submitted that the term 'change' in the phrase 'seeks to make any change' occurring in the proviso, signifies not only a verbal alteration in the language of the entrenched articles, but also takes in the concept of the effect, scope or the operation of those articles being adversely affected. To emphasise this he placed reliance upon 'Words and Phrases' Permanent Ed. Vol. 6, p. 512, where the shades of differences in the meanings of the words 'amend', 'modify', 'alter' and 'change' have been mentioned. It is unnecessary to refer to them because in Sajjan Singh v. State of Rajasthan : [1965]1SCR933 the Supreme Court held that for construing the word 'amend' in the context of Article 368 reliance on the dictionary meaning would be singularly inappropriate.

23. The Supreme Court has had occasion to consider the connotation of the word 'change' in the proviso to Article 368 more than once. In Shankari Prasad Singh v. Union of India, AIR 1951 SC 458 it was argued that Articles 31A and 31B sought to change Articles 132, 136 and 226 of the Constitution because they affected the powers conferred by them. The Court negatived this submission. It held that the amendment introducing these Articles only excluded certain classes of cases from the purview of the Courts. The powers o the Courts were not curtailed. After the amendment there would be no occasion for the exercise of those powers in the class of cases covered by the amending provision. The amendment did not introduce a change either in terms or in effect in Articles 132, 136 and 226 of the Constitution. So, an effect of the entrenched Articles, even though no verbal alteration is made, would be relevant.

24. In Sajjan Singh's case : [1965]1SCR933 (Supra) the Constitution 17th Amendment Act, 1964, came up for consideration. It amended Article 31-A of the Constitution. It was argued that the effect of the amending provision was to curtail the powers of the High Court conferred by Article 226 of the Constitution. Gajendragadkar, C. J. speaking for the majority held that the answer to the question whether an amendment seeks to make a change in the Articles mentioned in the proviso, would depend upon the effect of the amendment on them. If the effect of the amendment is indirect, incidental, or is otherwise of an insignificant order, the proviso will not apply. The effect ought to be judged in the light of the pith and substance test i.e. to say the true nature and character of the amending provision ought to be seen. The amendment must be scrutinised in, its entirety. To determine the pith and substance test, it would be relevant to recall the legislative history of the amendment and to see its scope, object and genesis.

It will be relevant to ask: Does the amendment purport to affect any Article directly or in any appreciable manner? So, if Article 233A affects Article 142 or 144 directly or in any appreciable manner, the 20th amendment would require ratification.

25. The significance of the phrase 'seeks to make any change' in the proviso to Article 368 was canvassed before the Supreme Court in Golak Nath's case, AIR 1967 SG 1643 (Supra). The majority opinion, however, did not deal with it. Wanchoo J. (for himself, Bhargava and Mitter, JJ.) held (in paragraphs 104 to 107) that primarily the change must actually be in the terms of the provision concerned. An indirect effect on the entrenched provisions would not be enough; but, referring to Sajjan Singh's decision, he observed that if an amendment directly affects the entrenched Article and necessitates a change thereunder, then recourse must, be had to ratification under tile proviso. His Lordship illustrated the principle. Article 226 confers power to issue write for the enforcement of any of the rights conferred by Part III and for any other purpose. If Part III is completely deleted by an amendment, it will necessitate an amendment of Article 226 also and deletion therefrom of the words for the enforcement of any of the rights conferred by Part III'.

If the amendment is silent as to the necessary consequential amendment in Article 226, it can then be said that deletion of Part III necessitated change in Article 226 also, and, therefore, ratification was in fact provided for amendment of Article 226. He took another example. Article 52 provides that there shall be a President. This Article is not mentioned in the proviso. Article 54 provides for the election of President. Article 55 lays down the manner of election. Articles 54 and 55 are entrenched Articles. His Lordship held that if Article 52 was amended so as to abolish the office of the President, it will necessitate a change in Articles 54 and 55. Even if the amendment does not make tile necessary consequential changes, it would require ratification. The test, therefore, was whether the amendment directly necessitates a change in an entrenched article.

26. The legislative history and genesis of the 20th Amendment is a matter or general knowledge. As a result of the decision in Chandra Mohan's case, AIR 1966 SC 1987 (Supra) the administration of justice in this State was virtually paralysed. The 20th amendment respected the interpretation of the Supreme Court on the content of the requirement of Article 233 as to consultation with the High Court. It by implication accepted that interpretation but, for reasons of administrative necessity it modified the effect of Article 233 in respect of past appointments. The object of this amendment does not appear to have been to affect the powers of the Supreme Court, but this does not conclude the matter. The question whether it directly or in any appreciable manner affects Article 142 or 144 remains to be considered.

27. Article 142(1) confers power on the Supreme Court to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. Then it provides that any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and until provision in that behalf is so made in such manner as the President may by order prescribe. In K. M. Nanavati v. State of Bombay, AIR 1961 SC 112 at p. 122 paragraph 18 it was observed that Article 142 contains no words of limitation and in the fields covered by it, it is unfettered. Article 144 provides that all authorities civil and judicial in the territory of India shall act in aid o the Supreme Court.

28. The question is what is the place and scope of Article 142(1) in the scheme of the Constitution. Article 141 provides that the law declared by the Supreme Court shall be binding on all Courts in India. This Article provides a binding efficacy to the decisions of the Supreme Court as a precedent. The efficacy or a declaration of law by a Court lasts only so long as the particular law interpreted is in existence. See Balwant Rao v. Bajirao, AIR 1921 PC 59 and Deen Chand Jain v. Board of Revenue, U.P., Allahabad : AIR1966All412 . If by an amendment, the law is changed, the amendment would not affect Article 141, because the declaration itself would come to an end with the change of the law.

29. Article 142 is not an application of the doctrine of res judicata either. On its terms, this Article does not make the decree binding on the parties in any subsequent litigation.

30. In Sajjan Singh's case : [1965]1SCR933 (Supra) it was observed (paragraph 16) that the Legislature can validate laws which have been declared invalid by Courts retrospectively. It can also provide for the intended validation to take effect notwithstanding any judgment, decree or order of a Court to the contrary. This would

amount to review of a Court's decision and in a sense would be exercise of the judicial function, in a case where the Courts decree in the particular cause, in which it was made, is sought to be nullified. The second part of Article 142(1) by conferring a constitutional status of enforceability prohibits such usurpation. This aspect may be examined in its historical perspective. The validity of such an exercise of judicial function arose while the Government of India Act 1935 was in force. Under it, there was no provision like Article 142(1).

31. In Piare Dusadh v. Emperor , it was held that as a general proposition it may be true enough to say that the legislative function belongs to the legislature and the judicial function to the judiciary. Such differentiation of functions and distribution of powers are in a sense part of the Indian law as of the American law. Spens, C. f. observed that an examination of the American authorities will show that there the rule was that the legislative action cannot be made to retroact upon past controversies and to reverse decisions which the Courts in the exercise of their undoubted authority have made.

His Lordship pointed out that this development was influenced not merely by the simple fact of distribution of powers, but by the pre-existing constitutional provisions in certain State Constitutions positively forbidding the Legislature from exercising judicial powers. The learned Chief Justice noted that in India the legislature has more than once enacted laws providing that suits which had been dismissed on a particular view of the law must be restored and retried. Section 31 (2) of the Limitation Act, 1908, and the Public Suits Validation Act (11 of 1932) are such instances. Debt relief legislation in the various provinces provided even for the reopening of decrees passed inter partes. His Lordship felt that in view of the history of the rule in America, it would be questionable whether it would be right to apply the same rule in this country.

32. Spens, C. J. further observed that the limitation was derived by the American Courts from the 5th and 14th Amendments whereunder no person could be deprived of life, liberty or property without due process of law. Due process of law was interpreted to mean the judicial process and not the legislative process. Under the then prevailing Constitutional law of India there was no corresponding provision to the 5th and the 14th amendments. The principles of British Jurisprudence applicable in this country as to the sacredness of personal freedom, was not part of the Constitutional law. It was only principle of private law. He observed:--

'While its enactment as an article of the Constitution would have placed it beyond the power of the Indian Legislature to alter it, the position must be different so long as it remains a rule of private law, however cardinal and fundamental.'

Referring to this decision, Chagla, C.J., speaking for the Full Bench in Gulabrao Keshavrao Dhole v. Pandurang Bhanji Dhomne : AIR1957Bom266 , observed:

'It is true that this decision was given in 1944 before our Constitution was enacted and it may be that after the enactment of our Constitution the position under our law and the American law has to a certain extent approximated; but this would only be in this sense that if the Courts declared that a particular Act or a particular law contravened the fundamental rights of a citizen, it may be that the Legislature could not undo the decision of the Court because the Courts are constituted the custodian of fundamental rights of the citizen and it is for the Courts to uphold those fundamental rights.'

33. Article 142 of the Constitution, in my opinion, approximates the legal position in this country still more with the American rule that the Legislature could not reverse decisions of Courts or reopen adjudicated controversies. The second part of Article 142(1) by guaranteeing the enforceability of the decree or order of the Supreme Court read with Article 144, is a restriction on the legislative power to undo the effect of that decree or order in respect of the cause or matter in which it was rendered. If a legislative enactment seeks to make unenforceable the decree or order of the Supreme Court in relation to the cause and the parties between whom it was made, such law would be void for contravening Article 142. According to the majority in Golak Nath's case : [1967]2SCR762 (supra), the power to amend the Constitution is legislative in its nature. An amendment having that effect would directly and substantially affect Article 142(1). It would necessitate a change in Article 142(1).

34. In Khem Chand v. Union of India : (1963)ILLJ665SC , while dealing with the argument that Rule 12 (4) introduced by the President of India in the Central Civil Services (Classification, Control and Appeal) Rules, 1957, went against the directions of the Supreme Court as contained in its decree passed in Khem Chand v. Union of India AIR 1958 SC 800 and thereby contravened Articles 142 and 144. Dasgupta J. observed (paragraph 15):

'If the decree of this Court had directed payment of arrears of appellant's salary and allowances and the effect of the rule made by the President was to deprive him of that right, there might perhaps have been scope for an argument that the rule contravened the provisions of Article 144.'

35. Thus, if the effect of a law was to nullify the declaration or the directions contained in a decree of the Supreme Court, Article 142 would be contravened. In Chandra Mohan's case AIR 1966 SC 1983 (supra), the Supreme Court made tile following order:--

'In the result we hold that the U. P. Higher Judicial Service Rules providing for the recruitment of District Judges are constitutionally void and, therefore, the appointments made thereunder were illegal. We set aside the order of the High Court and issue a writ of mandamus to the first respondent not to make any appointment by direct recruitment to the U. P. Higher Judicial Service in pursuance of the selections made under the said Rules. .....'

This contained a specific declaration or direction that the appointments made under the Higher Judicial Service Rules were illegal. That order was in virtue of Article 142(1) enforceable between the parties to that case. If the Twentieth Amendment has the effect of rendering unenforceable the declaration or directions contained in the order in relation to the persons who were parties to Chandra Mohan's case, AIR 1966 SC 1987 (that is to say, respondents 13, 14 and 15), it would directly and substantially affect Article 142 of the Constitution, because the second part of Article 142(1) would become completely nugatory in respect of that order.

36. If the effect of Article 233-A had been to create a fiction that Chandra Mohan's case was never pending before the Supreme Court, there may have been scope for the argument that the consequential effect on Article 142(1) was incidental or insignificant. But that is not the case. Article 233-A recognises the existence of the decree or order of the Supreme Court. It respects it is relation to Judicial Officers and for the future. It validates only past appointments made by promotion or by direct recruitment from members of the Bar. It does so notwithstanding any judgment, decree or order of any Court. On its terms it applies to the appointments of officers who were parties to Chandra Mohan's case, AIR 1966 SC 1987, namely, the present respondents Nos. 13, 14 and 15. Under Article 233-A their appointments also are to be deemed never to have become illegal or void. If Article 233-A were to prevail, the decree of the Supreme Court would not be enforceable. Article 142 is thus contravened and nullified in relation to the decree in Chandra Mohan's case. AIR 1966 SC 1987.

To have the full play of its amplitude, Article 233-A necessitates a change in Article 142. Article 142 would be deemed to have been modified so as to make it inapplicable to the decree of the Supreme Court in Chandra Mohan's case, AIR 1966 SC 1987. Article 142 being an entrenched provision, such a change could be brought about only under the proviso to Article 368 by obtaining the requisite ratification. The Twentieth Amendment was silent as to this necessary consequential amendment in Article 142. It would not be valid without ratification, even according to the opinion of Wanchoo J. in Golak Nath's case (supra). The Twentieth Amendment not having obtained the requisite ratification was ultra vires the amending power of Parliament, in so far as it affected the appointments of the parties to Chandra Mohans case, AIR 1966 3C 1987, It could not validate the appointments of the respondents Nos. 13, 14 and 15.

37. Either the legislative history or the language of Article 233-A does not indicate that it was intended to work as a whole or not at all. If for any reason it is held inapplicable in respect of a few officers only, its organic scheme would not be destroyed. In my opinion, Article 233-A is severable. The Twentieth Amendment

introducing it would be valid in respect of the other officers.

38. The conclusion is: The Twentieth Amendment is unconstitutional and void in so far as it makes valid the appointments of the parties to the Supreme Court decision in Chandra Mohan's case, AIR 1966 SC 1987. It is severable. The rest of it remains valid.

39. The petitioner wants a quo warranto to oust respondents Nos. 13, 14 and 15 from the post of District Judge. The learned Standing Counsel invited my attention to the decision in The King v. William Cowell, (1825) 6 Dow & Ry KB 336, for the submission that since the petitioner's appointment suffered from the same illegality as was imputed to respondents Nos. 13, 14 and 15, he was incapacitated from applying for this relief. In that case, relying on Rex y. Cuddinn, it was held that the Court will not file a quo warranto information against one corporator for defect of title, at the instance of another corporator whose title is equally deficient. There the only defect in title was the swearing in at a wrong place. It may not be applicable where the appointment is unconstitutional. When quo warranto lies on constitutional grounds, it should go. Moreover, the principle of this case does not appear to be applicable. There is no material on the record before me to establish that the petitioner was appointed as officiating Civil and Sessions Judge through the agency of the Selection Committee contemplated by the Higher Judicial Service Rules. Learned Standing Counsel urged that Clause (2) of Article 19 of the Rules authorised the Governor to make appointments in temporary and officiating vacancies as far as may be from the waiting list, in force at the time of appointment, as prepared under Rule 13. The waiting list under Rule 13 is prepared in accordance with the recommendations of the Selection Committee but Clause (2) applies 'as far as may be'. So, the Governor may make an officiating appointment from persons not mentioned in the waiting list. There is no assertion in any of the affidavits that the petitioner was on the waiting list. It cannot, therefore, be said that his officiating appointment was illegal because it was made through the Selection Committee. I cannot say that the petitioner's appointment was illegal, much less that the illegality was of the kind attaching to respondents Nos. 13, 14 and 15.

40. In the result, the petition is allowed in part. Respondent No. 13 Rikheshwar Prasad, respondent No. 14 R. C. Bajpai and respondent No. 15 Behariji Das are declared to the holding the post of District Judge (which includes the post of Civil and Sessions Judge) illegally and without the authority of the Constitution. A writ in the nature of quo warranto is issued ousting all of them from their offices. No order is made as to costs.