

Sudarsh Awasthi Vs. Election Commission of India and ors.

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Court : Allahabad

Decided On : Aug-25-2005

Reported in : AIR2006All111

Judge : Ajoy Nath Ray, C.J. and ;Jagdish Bhalla, J.

Acts : Representation of People Act, 1951 - Sections 156 and 156(1); [Constitution of India](#) - Articles 168, 172, 172(2), 226 and 361

Appeal No. : W.P. No. 5384 of 2005 (M/B)

Appellant : Sudarsh Awasthi

Respondent : Election Commission of India and ors.

Disposition : Petition dismissed

Judgement :

1. There is a Public Interest Litigation moved by one Citizen of India regarding the apprehension felt by him about the rotational retirement of Members of Legislative Council of the State.

2. The array of parties in this writ petition is interesting; the first respondent is the Election Commission of India, the second is his Excellency the Governor of Uttar Pradesh and the 3rd to the 40th respondent both inclusive are members of the Legislative Council.

3. Article 172 of the [Constitution of India](#) is the starting point of argument of learned Counsel for the petitioner. The said Article is quoted in full but only the second Sub-article is material for us.

172. Duration of State Legislature -

(1) Every Legislative Assembly of every State, unless sooner dissolved, shall continue for (five years) from the date appointed for its first meeting and no longer and the expiration of the said period of (five years) shall operate as a dissolution of the Assembly:

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

(2) The Legislative Council of a State shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

4. The next provision relied upon by him is Section 156, Sub-section (1) of the Representation of People Act, 1951 and the said Section is quoted below:

156. Term of office of members of State Legislative Councils. -

(1) The term of office of a member of the Legislative Council of a State, other than a member chosen to fill a casual vacancy, shall be six years, but upon the first Constitution of the Council the Governor shall, after consultation with the Election Commission, make by order such provision as he thinks fit for curtailing the term of office of some of the members then chosen in order that, as nearly as may be, one-third of the members holding seats of each class shall retire in every second year thereafter.

(2) A member chosen to fill a casual vacancy shall be chosen to serve for the remainder of his predecessor's term of office.

5. The argument on these two provisions of Indian law is simple; it is said that the initiation of the retirement of the specified proportion of the members of the Legislative Council has to be made by the Governor as per Section 156 of the Act; if the initiation is not made there will be no consultation and there will be no retirement and there will be breach of Article 172 Sub-article (2) because there will be no retirement at all, and no retirement at all militates against the phrase 'as nearly as possible 1/3rd of the members thereof shall retire' occurring in Article 172(2).

6. Prayers are, therefore, made before us for issuance of writs and declarations by exercise of the Court's powers under Article 226 of the Constitution for enforcement of the said constitutional provision and the said section of an Act of Parliament.

7. None of the respondents has accepted notice; the reason for non acceptance is not the same in each case; the Election Commission could not be served because no counsel appearing in general for the Election Commission was prepared to accept service, assuming that there is such a learned Counsel at present practicing at the Lucknow Bar.

8. His Excellency the Governor's Secretariat and the Members of the Legislative Council have refused to accept service apparently, even at this very threshold, on the ground that they are not amenable to the process of the ordinary courts of law in the matters raised and disputed in this writ petition.

9. We are faced with this problem that unless we can overrule this apparent prima facie ground for refusal or acceptance of service, we cannot direct issuance of notice either by the office or permit the writ petitioner to make service, which, if refused could then be looked upon by the Court as a sufficient service for complacence with the rules of natural justice.

10. The issue therefore has to be decided. If the issue is decided in favour of the writ petitioner, it will be prima facie because the writ would have to be heard upon notice to the respondents. If however, the matter is decided against the writ petitioner, it would be a final disposal as the writ would be disposed of and we

would lose jurisdiction over the matter after signing the judgment.

11. The single main Article which stares the writ petitioner in the face was also placed by the learned Counsel appearing and i.e. Article 361. The said Article is not set out in full but only the first part of Article 361, which is material and relevant is set out:-

361. Protection of President and Governors and Rajpramukhs - (1) The President, or the Governor or Rajpramukhs of a State, shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those power and duties:

12. Article 168 of the Constitution was read and that is in the following terms : -

168. Constitution of Legislatures in States. -

(1) For every State there shall be a Legislature which shall consist of the Governor, and

(a) in the States of Bihar, Maharashtra, Karnatka and Uttar Pradesh, 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.

13. It will be seen from the above that his Excellency is, according to the Constitution, a part of the State Legislature.

14. The simple harmonious reading of these basic Articles shows that the retirement of 1/3rd members or so of the Legislative Council at specified periods is a matter for the legislative body to be decided and acted upon by them as per the constitutional provisions, with provision for consultation.

15. It is a pure internal matter of the Legislature and not of the executive.

16. The issue is, can the Courts of law, in any case, however drastic, however shocking, however apparently unjust, control in any slightest manner, the functioning of the legislative body provided the matter is one of pure internal functioning of the legislative body as such, and has no element of the executive or the administration connected with it.

17. The recent Jharkhand case where the Hon'ble Supreme Court passed directions about the way a State Assembly Session was to be conducted is material and it was cited.

18. The directions as were given by the Hon'ble Court might be found reported at (2005) 3 SCC 150 : AIR 2005 SC 4255. It is a short ten paragraphs order; in the 5th paragraph their Lordships said that there was a strong prima facie case; then their Lordships passed an interim order about the Legislative Assembly.

19. The next material reporting is at page 399 of the same volume of reports where their Lordships recorded that the Hon'ble Court's order having been complied with, the subsequent event has rendered the petition infructuous.

20. It is the basic element of the doctrine of precedent that what a superior Court does in a particular case is not to be regarded as a precedent by a Court which is bound by that Court's decision, but the reasons for deciding are what bind the other Courts. The words *rationes decidendi* simply mean reason of deciding. In the application of the doctrine of precedent the ration has to be extracted and that is to be applied.

21. In the Jharkhand case the Hon'ble Supreme Court had, and we say it with the greatest of respect, solved a problem, but, and this we again say with the greatest of respect, had laid down no final ratio; this is because no reason is spelt out for controlling through the Courts the Legislative Assembly and further because the decision given was prima facie; but the former of the two reasons is much the stronger in our respectful opinion.

22. We, therefore, feel free to take a decision on first principles.

23. The matter appears to us to be crystal clear. Indian sovereignty is split by the Constitution into different parts; the split is not simple but the split is real. It is very difficult to enumerate that this, this and this belong to the judiciary pure and proper and that this, this and this belong to the Legislature pure and proper. But if one particular matter comes before the Court, it is quite possible for it to decide, in the facts and circumstance of the case as to whether the matter is one for pure legislature or one for pure judiciary.

24. For example, if the vires of certain Acts are challenged then although these are the products of the Legislature yet the legislature yet the examination of the constitutionality of those Acts is not a supervision by the Courts of the internal functioning of the Legislature which belongs to itself and to itself alone, the Court examines the product i.e. the fruit but not how it has come about to grow on the tree.

25. In our case, in our opinion, the matter is a purely internal one of the Legislature. His Excellency the Governor is to determine the strength and membership of the legislature. Even if nothing is done, even if the constitutional provision is flagrantly disobeyed (which is not our finding but our assumption for the purpose of deciding the case) even then, in our respectful opinion the Judiciary cannot interfere into the pure domain of the legislature.

26. The question is asked what, is the remedy of the petitioner? If nobody is above the law, it is further asked, then why should his Excellency the Governor, who is every high but yet under the law, which is higher than everybody, be permitted to disregard the law altogether when such law is the highest type known to India i.e. a provision of the Constitution? If his Excellency is not above the law then there must be some authority to judge when his Excellency is not overstepping the legal limits and when his Excellency is not overstepping or disregarding such limits or legal mandates and if somebody is to judge that, who should it be but the Superior Courts of India?

27. This is, in our opinion, only a specious argument. If there is a split of sovereignty and if one constitutional sovereign cannot examine the other constitutional sovereign acting in that sovereign in sphere, then nobody being

above the law does not dictate that the split of sovereignty be done away with. In these ultimate stages, the sovereign either obeys the law in his own domain or is made to obey the law by democratic measures; these democratic measures do not include the interference of one sovereign by the other, or more accurately speaking, the interference of one split sovereign by the other split sovereign.

28. The powers of these democratic methods are not to be underestimated. If we look to England, from where the Courts and Parliamentary democracy in their modern shape have originated, it will be noticed that even the House of Lords has no power to declare any Act of the English Parliament as invalid.

29. The power of American Courts to declare invalid the Acts of Legislatures derives from the written nature of their Constitution. In the beginning of the American Courts, a question was raised about the Courts being able to strike down an Act of the Legislature as being ultra vires the Constitution; the very first case given in the first volume of the three volume treatise of Willoughby, will show how the then Hon'ble Chief Justice Marshall of that country decided in a judgment not more than two pages long that, but of course, the Courts had that power of looking at the constitutionality of the Act and striking those down if those never pass the test.

30. But England has been different; the Courts there cannot strike down Acts of Parliament, nor even bits or parts of it. It is not that only US laws are just because the Court's power exists to examine the constitutionality and the British laws are unjust because Parliament is Supreme and can pass Acts freely. Democracy does not work in that way. Parliament cannot pass Acts which are flagrantly against public opinion or international practice; they have to keep within the bounds and dictates of the rule of law in a civilized society. They do it on their own.

31. Were anything to be done wholly opposed to the public opinion, whether by the legislative body or the executive of the State acting even in its eminent domain, ultimately the people can bring everything to a standstill or can obtain a reversal.

32. One case in point in England occurred at the time of the sudden death of lady Diana; there had been a rift with the Royal Family, quite sometime before that

much loved lady died. However, the public opinion was so strong, the streets and parks of London were so thronged with thousands and tens of thousands of people, that the estranged lady Diana was given a magnificent service, and that even the Queen of England came down to the street when the lady's last remains were being taken for burial.

33. Take next, the case of David Kelly, the Arms Inspector of Iraq; following his suicide, there was such a great uproar and public opinion that no less a person than the three times elected Prime Minister of Britain had to order an inquiry which was presided over by Lord Hutton and at which inquiry the Prime Minister himself offered himself to be cross examined by Counsel.

34. All these happened because of public opinion and public pressure.

35. The result of this short discussion is very simple; in the ultimate analysis it is the people of India who have given themselves the Constitution, and they are the full sovereign. If one split sovereign in his own domain goes wrong or very wrong or continues to go wrong or abuses its sovereignty, acting all the time within its own split sovereign domain, then and in that event, democracy has to find the solution; what the solution will be only the Courts of human events can show.

36. But for us, Courts of Law, it is essential to declare that the Judiciary remains within its own sphere and the Legislature within its own. Any attempt of unauthorized control of the superior judiciary by interfering with the Judges of the superior judiciary, their function, their appointment or their holding of office would be examples of encroachment of the Legislature into the split sovereign domain of the judiciary which belongs to itself and itself only.

37. Similarly in a matter like the present, interference by the Judiciary into whether his Excellency the Governor has acted properly and constitutionally in the matter of 1/3rd retirement of members of Legislative Council would be an interference by the Judiciary into the pure split domain of the legislative sovereign of India.

38. This type of encroachment is not permissible irrespective of what the complaint is.

39. The writ petition is, therefore, dismissed.

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