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Court : Madhya Pradesh

Decided On : Apr-15-1957

Reported in : AIR1957MP165

Judge : Hidayatullah, C.J. and ;A.H. Khan, J.

Acts : [Constitution of India](#) - Article 245; Madhya Bharat Municipalities (Second Amendment) Act, 1956 - Sections 2 and 3; Madhya Bharat Municipalities Act, 1954 - Sections 10

Appeal No. : Civil Misc. Case No. 54 of 1956

Appellant : Biharilal

Respondent : Ramcharan

Advocate for Def. : R.D. Sharma, ;A.B. Mishra and ;Inamdar, Advs.

Advocate for Pet/Ap. : Patankar and ;B.D. Gupta, Advs.

Disposition : Petition dismissed

Judgement :

Hidayatullah, C.J.

1. This is petition under Article 226 of the Constitution, seeking ii writ of prohibition against the District Judge, Bhind who is hearing an election petition. The facts of

the case go far back and will have to be stated at some length.

2. In the year 1955 in, the town of Gohad a municipal election was held. The petitioner Biharilal was a candidate in Ward No. 3, and the first three respondents were his rivals. The petitioner secured the largest number of votes and was declared elected. The first respondent filed an election petition under Section 10 of the Madhya Bharat Municipalities Act, 1954 (Act No. 1 of 1954) read with Rule 131 of the Rules framed thereunder. Before the District Judge an objection was taken to his jurisdiction to entertain the election petition, which the District Judge overruled.

Against the order of the District Judge and to seek a writ of prohibition a petition was filed in the High Court of Madhya Bharat, and the High Court acting on its own decision reported in *Bhikam v. Haridas Modi*, 1956 Madh B LJ (Bhopal) 156,(A), issued the writ. Thereafter the Madhya Bharat Legislature enacted a law called the Madhya Bharat Municipalities (Second Amendment) Act, 1956 (Act No. 7 of 1956) creating a jurisdiction which the High Court had denied to the District Judge. In Section 10 of the Madhya Bharat Municipalities Act, the provision ran as follows : 'Any voter aggrieved by an election or selection under this Act may within thirty days of the election or selection, submit election petition to the District Judge having jurisdiction, which shall be decided in accordance with the rules framed by the Government in this behalf'. It was held by Dixit and Samvatsar JJ. that the District Judge had to be pointed out and invested with jurisdiction before he could entertain the election petition. Khan J. took the contrary view, but was in a minority. Dixit and Samvatsar JJ. felt that, the jurisdiction to hear election petitions could be validly conferred 'upon one District Judge for the whole of the State, and unless the District Judge was properly pointed out and his jurisdiction created, every District Judge in the State was not entitled to take up and deal with election petitions under Section 10 of the Act.

3. In framing the amending law the Legislature supplied the want of jurisdiction. It framed an explanation which was to be deemed to be in force always, and it also provided for the re-opening of cases which under the writs of prohibition by the High Court or dismissal by the District Judge on the authority of the decision of the

Madhya Bharat High Court had been terminated. The explanation which was added to Section 10 was as follows :

'Explanation : The expression 'the District Judge having jurisdiction' in this Section means the District Judge of the District where the Municipality, the election or selection to which has been called in question, is situated'. Section 3 ran as follows :

'3, Any election-petition rejected or dismissed by the District Judge exclusively for want of jurisdiction, or returned for presentation to the competent authority, shall on a petition for review by the aggrieved person, presented within thirty days of the publication of this Act in the Gazette to the District Judge be revived by him and shall be disposed of on merits in accordance with law'.

4. The District Judge was moved to take the election petition and to hear it. An objection was taken before him, but it was overruled and the District Judge proceeded to hear the election petition and to dispose of it. The present petition for the writ above mentioned was therefore filed in this Court, and it is contended in this petition inter alia that the enactment of Section 3 was ultra vires the Madhya Bharat Legislature.

5. The main ground of attack, which has been narrowed down considerably during the course of arguments, is only this much. While the learned counsel for the petitioner accepts the contention that retrospective laws can be framed and that a jurisdiction which was not there can be created, he cavils at the provisions of the law which allows a decision to be re-opened to have the election-petition decided de novo. According to him, the mandate of the Legislature that the District Judge is to grant the review-application amounts to an exercise of judicial power by the Legislature which, under the present Constitution, is not open to the Legislature.

6. This short question has been argued at great length and with reference to numerous authorities, some of which will be noted by us during the course of this order. To begin with, it is quite clearly laid down in numerous cases in India that the doctrine of separation of powers advocated by Montesquieu, and which has been incorporated in the American Constitution with great particularity has not

been entirely accepted in India or the Indian Constitution. According to Montesquieu, there are three departments of Government, namely the Executive, the Legislature and the Judiciary, whose functions are entirely distinct. No one department is supposed to transgress upon the field of another.

Montesquieu considered this to be the salient feature of the English Constitution and he cited the English Constitution as a very good example of the doctrine of separation of powers. Unfortunately, the ideal of Montesquieu, namely, the English Constitution, never followed separation of powers with the rigidity to which Montesquieu referred. The House of Lords which is a legislative body, is the final Court of Appeal in England, and the executive does perform sometimes legislative functions in framing what are compendiously known as 'administrative laws.' Similarly, the judiciary has been allowed to frame laws and even to modify other in good cases and the Lord. Chancellor has framed the Supreme Court Rules under the exercise of that power.

7. It is therefore plain that even in England the separation of powers does not exist in that absolute form which Montesquieu would have us believe in his spirit of the laws. In America, when the Constitution was framed and certain guarantees were ensured, there were numerous articles in the Federal list recommending that the doctrine of separation of powers be given effect to. In the American Constitution, therefore, there is an indication of the separation of powers, though the Constitution does not lay it down as rigidly as the Constitutions of some of the States. In the Constitution of the States of Kansas it is laid down that the legislative power shall be exercised by the Legislative and only by the Legislature. Similar provisions are to be found with regard to Judicial and executive powers.

In spite of this, the American Supreme Court has not accepted the doctrine of separation of powers in the bland form which Montesquieu gave to it and delegated legislation by the executive, provided it is circumscribed by adequate restrictions, has been upheld even under the American Constitution. Indeed, in America a very detailed inquiry has been made into this doctrine and the reports which have been made from time to time, viz., those of Acheson Committee, the Brownlow Committee have said that the power to legislate can be conceded to the

Executive even under the American Constitution. See *Laxmibai v. The State*, ILR (1951) Nag 563 at page 583: (AIR 1951 Nag 94 at p. 100) (PB) (B).

8. In India the Supreme Court has been called upon on numerous occasions to decide whether the doctrine of separation of powers obtains in India under the present Constitution. The Supreme Court has laid down that the doctrine of separation-of powers is not extant in that the doctrine of separation of powers is not extant in India, but that there is- a certain demarcation of the three departments of Government for essential purposes. We need not quote here all the authorities. They begin with *In re Delhi Laws Act*, (1912) etc., AIR 1951 SC 332 (C) and come right up to *Ram Jawayg, v. State of Punjab*. AIR 1955 SC 549 (D). In all these their Lordships of the Supreme Court have tried to strike a mean between the supremacy of Parliament and the separation of powerism in attenuated form.

The decisions of the Supreme Court merely indicate that the Legislatures within the field of their enumerated powers are Supreme and that within that power' they can also validly do things which the English Parliament in the exercise of its plenary powers can do. There is, however, this difference. It has been laid down from time to time that the essential functions of legislation must be performed by the Legislature and it has also been ruled in the Federal Court in cases to which reference will be made hereafter that the Legislature cannot transgress upon the judicial power. We have therefore to examine for the purpose of this case and the interpretation of the impugned Section whether the power exercised by the Madhya Bharat Legislature in this case was in the nature of a judicial or legislative power,

9. The term 'judicial power' has received interpretation, both in America & Australia and also in the Privy Council. The leading cases on the subject are to be found discussed in the decision of their Lordships of the Supreme Court reported in *Bharat Bank, Ltd. v. Employees of Bharat Bank, Ltd.*, AIR 1950 SC 168 (E), particularly in the decision of Mukherjea J. (as he then was). Accepting, therefore, the propositions laid down in the case and in other cases of the Federal Court, to which we shall refer presently, we must hold that the Legislatures in India cannot

exercise a power which can be described as essentially judicial and not legislative.

10. We may now pass on to the cases to which we have been referring but which we have not yet examined. The first case of the Federal Court is reported in *Piara Duradh v. Emperor*, AIR 1944 PC 1 (F). That was a case under Ordinance No. 16 of 1943. Under Ordinance No. 2 of 1942, certain special Courts were established, to which the Provincial Government was authorised to send certain cases and classes of cases. The procedure of those Courts was specially laid down, and it was also provided that a right of appeal from the decision of those Courts was not available under the Code of Criminal Procedure, but that a review of the judgment could be made before a Judge who was a person designated.

The Federal Court held that the Ordinance was *ultra vires*. By that time numerous cases had been decided and in which convictions and sentences had resulted. The Governor General, immediately after the decision of the Federal Court, enacted Ordinance No. 19 of 1943, by which the sentences passed by those of special Courts were held to be valid and they were deemed to be those by a competent Sessions Judge acting in accordance with the Code of Criminal Procedure. This Ordinance was again challenged before the Federal Court. The Federal Court held the Ordinance to be valid, holding contrary to the view of Bajpai J. (not reported) of the Allahabad High Court, that this was not an exercise of judicial power.

It was held by the Federal Court that what the Governor-General had done was to give validity to the sentences passed and had supplied the lack of jurisdiction which had arisen on the Federal Court decisions. In the subsequent case, which is reported in same volume, namely, *Basanta Chandra v. Emperor*, AIR 1944 PC 86 (G), another Ordinance was challenged. There the law was with respect to preventive detention. Some cases which had been filed challenging the procedure as well as the effect of the Ordinance were declared to be bad and those cases were ordered to be discharged. Their Lordships of the Federal Court held that this was an exercise of judicial power and observed as follows :

'The distinction between a legislative act and a Judicial act is well known, though in particular instances it might not be easy to say whether an act should be held

to fall in one category or in the other. The Legislature is only authorised to enact laws. Some of the pending proceedings hit) at by Clause (2) of Section 10 may raise questions of fact and their determination may wholly depend upon questions of fact and not upon any rule of law, as for instance, when it is alleged that an order of detention was not really the act of the authority by whom, it purports to have been made or that it was a mala fide order or one made by a person who had not been authorised to make it,

A direction that such a proceeding is discharged is clearly a judicial act and not the enactment of law. This question was discussed at some length in the judgment of this Court in 1944 FCR 61 : (AIR 1944 FC 1) (F). The nature of the provision then considered was essentially different from Clause (2) of Section 10 of the present Ordinance. As explained in the judgment, the position there was that certain cases had in fact been tried by Tribunals constituted under an earlier Ordinance & decisions had been pronounced by those Tribunals, but the jurisdiction of those Tribunals was negated by a decision of this Court.

The later Ordinance provided that those decisions should be treated as decisions of duly constituted Tribunals, Applying the test laid down in *Federal Commr. of Taxation v. Munro*, (1926) 38 Com LR 153 (H), this Court held that that did not constitute an exercise of judicial power by the ordinance-making authority. But here there has been no investigation or decision by any Tribunal which the legislating authority can be deemed to have given effect to. It is a direct disposal of cases by the Legislature itself.'

11. From these two cases it is abundantly clear that where the Legislature on finding that there has been a lacuna in creating jurisdiction, supplies it, it acts within the legislative field. Where, however, the Legislature goes further than this & compels the determination of a case at the hands of a Court taking it completely out of the reach of the Court to make a contrary decision, the matter is one under judicial & not legislative power. To give an example of our own. If the Legislature were to say that all cases which have been filed before a particular date, say the 1st of April 1957, shall stand dismissed, it would be an exercise of judicial and not of legislative power.

It would be a direct disposal of cases contrary to the law in force. But where the Court holds that there is no jurisdiction the Legislature can say that notwithstanding the decision of that court the Tribunal shall be deemed to possess the jurisdiction and shall always be deemed to possess that jurisdiction. This distinction has been brought out clearly also in another case which is reported in *Potti Sarvai v. Narsingh Rao*, AIR 1955 Hyd 257 (I). The Division Bench in that case expressed the distinction between exercise of these two powers in these words:

'If any enactment disposed of a case by the vigour of the enactment itself without leaving to the judiciary the power to pass the appropriate orders with reference to the law in force at the date of the order, it may be open to the objection of judicial functions being usurped by the Legislature. Where, however, the Legislature enacts a rule of law applicable to certain facts which are to be ascertained by courts, it would be essentially an exercise of enacting power though the new law may vary or reiterate the earlier law. The exercise of such a power would obviously be different from the exercise of judicial power inasmuch as the essential characteristics of a judicial function, namely, adjudication on facts and interpretation of law would be wanting in such a case.'

In our opinion and we say it with due respect, this observation lays down the correct proposition.

12. We have, therefore, to see on which side of the fence this particular enactment falls. It is necessary to go back to what the Madhya Bha-rat High Court decided. That Court in its decision merely laid down that a particular District Judge had to be indicated before he could take cognizance of election-petitions. The generality of the words used namely, 'the District Judge having jurisdiction' was held by the majority to make it incumbent that the particular District Judge be designated. The reasoning of the majority was that one District Judge in the whole of the State could easily be designated under that power and that it was necessary for someone acting under the authority of law to name the District Judge or Judges who could take cognizance of those cases.

13. It is not necessary to consider whether the view taken by the Bench in that case was correct or not. The fact that remains is, that with this doubt created the Legislature enacted an Explanation which cleared their meaning as to which District Judge was meant. The explanation was, therefore, framed to supply the lacuna of jurisdiction which the Madhya Bharat High Court had pointed out in the cited case. Having done so, the Legislature enacted the further rule that the Explanation shall be deemed to have always been enacted.

With this explanation and the amendment of the law, the explanation had to be read as part of the statute. The next Section then began to provide for the disposal of cases. It laid down that in all cases where the petition had either been dismissed or returned for presentation to the proper court solely on the ground of want of jurisdiction as determined by the High Court, the petitioners were entitled to file an application for reviving the closed proceedings and the District Judge was given a mandate to reopen those proceedings. The question is whether in giving the mandate to the District Judge to reopen the proceedings, there was an exercise of judicial power.

14. Having considered the matter carefully, we are of opinion that this does not amount to an exercise of judicial power. The learned counsel for the petitioner relied upon a decision of the Privy Council reported in *Lemm v. Mitchell*, 1912 AC 400 (J), to show that when a case has once been disposed of and *res judicata* has been created, an amendment of the law cannot entitle the Legislature to ask a reopening of that case. That case dealt with a temporary law, and also involved a question of *res judicata*. It was held in that case that the repeal of a statute makes the law as if it was non-existing and that if the Legislature re-enacted the law it did not confer upon a party a right of action which under the earlier repealed law was not existing.

In that case the right to bring a suit for criminal conversation was not open to the plaintiff at the time he brought the suit because of an Ordinance of 1895 which was then in force and which had repealed the application of other laws. The Legislature then enacted an Ordinance (1908) under which the repeal itself was confirmed but it was added that the right to sue was available. Their Lordships of

the Privy Council held that such an enactment did not revive the cause of action because a right of action cannot retrospectively be conferred when the right at the time the suit was brought did not exist and that the decision once given cannot be reopened, except by clear provisions to that effect.

15. The above case of *Lemm v. Mitchell (J)*, (*supra*) has been distinguished on numerous occasions, as a reading of any book on the interpretation of statute will clearly show. That case is not an authority for the proposition with which we are contending. Indeed their Lordships themselves pointed out the distinction in the last paragraph on page 405.

16. In the present matter the High Court of Madhya Bharat stated that there was no jurisdiction in any particular District Judge till the District Judge was designated by Legislature or some authority acting under its commands. The amending Act merely supplied the lack of jurisdiction by designating the Judge and doing so retrospectively. The result of the induction of the Explanation was therefore to clear the jurisdiction, not only in *praesenti* when the Act was passed, but for all time. With that jurisdiction, therefore, the Legislature made it a duty for the court to reconsider the position of jurisdiction as arising under the amended law. It laid down that the want of jurisdiction was supplied only in those cases where the decision of dismissal or return of the petition as based exclusively on want of jurisdiction.

Thus the matter was left to the court itself to decide whether the earlier decision had been given exclusively on want of jurisdiction or on other matters. The decision of this issue was left to the court itself, but the law provided that once the decision was given by the Court that the want of jurisdiction alone had led to the termination of the proceedings before it, no discretion should be left to the court. The law, as it stood always had to be given effect to. Therefore the Legislature provided a right of application to the aggrieved party giving it the chance of moving the court once again for the re-opening of the prematurely terminated case, and compelled the court to go back on its own decision that the dismissal was the result only of want of jurisdiction.

The case has been left entirely in the hands of the Tribunal concerned except in the matter of jurisdiction. The Tribunal has to decide on all the facts arising in the petition including the question whether only the want of jurisdiction led to its dismissal. Having come to the latter conclusion the court has only been told that the lack of jurisdiction which had been found earlier has now been made up and the case be decided on merits. This on the best interpretation which has been placed on judicial power in the cases to which we have referred, cannot be said to be an exercise of it by the Legislature.

The intent and purpose of the enacted and impugned section is, merely to supply the want of jurisdiction and having done so, to tell courts that now the cases must go on as if this jurisdiction had already existed. If the courts had not been told this, it is argued they could have reached some other conclusion. But we do not see what other conclusion the court could reach in this matter when the jurisdiction was always existing. The law gives only a new remedy to the aggrieved party, viz., making an application for review. The consequences, of the jurisdiction which has newly been created has not been left to be worked out by the courts but has been enacted by the law itself.

This is an exposition of the law and explanation of it which the Legislature in the plenary exercise of its powers is certainly competent to do. It is not analogous to commands which say that cases be dismissed even though the law allows them to continue, which was the case before the Federal Court in AIR 1944 PC 86 (G). If the Legislature had enacted some such rule compelling the courts to decide cases validly instituted, contrary to the existing law, then it could be said to be an exercise of judicial power. If without changing the law it had created rights in the parties which did not exist and which had been the subject-matter of earlier decisions under the then existing law, it could also be said to be an exercise of judicial power. But where the law as here, has merely supplied a jurisdiction which was found to be wanting & has told the courts to proceed with the cases according to law, we do not think that it is an exercise of judicial power.

17. For these reasons we hold that Act No. 7 of 1956 is a valid piece of legislation both in its second and third Sections. The writ of prohibition asked for cannot be

granted. The petition is dismissed with costs. Counsel's fee Rs. 50. There shall be two sets of costs with two hearing fees, one for the Government Advocate and one for the counsel for the private party.

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