

PETITIONER:
S.S. BOLA & ORS.

Vs.

RESPONDENT:
B.D. SARDANA & ORS.

DATE OF JUDGMENT: 11/07/1997

BENCH:
S. SGHIR AHMAD

ACT:

HEADNOTE:

JUDGMENT:

With
Civil Appeal Nos.423 of 1993, W.P. (C) No. 582/95 C.A. Nos.
1448-49 of 1993, 1452-53/93 and T.C. (C) Nos. 44-46/96,40/96
J U D G M E N T

S. SAHGIR AHMAD, J.

I have had the advantage of going through the judgments prepared separately by brother Ramaswamy and Brother Pattanaik. i agree with Brother Pattanaik on all the questions involved in this case, but I want to add a few words of my own without setting out the facts of the case which have already been reproduced in the two Judgements.

2. To declare what the law is or has been is a judicial power. To declare what the law shall be is a legislative power. this is the principle deducible from the education of the Federal Court in Basanta Chandra Vs. Emperor AIR 1944 FC 86 (90) and Ogden vs. Black Ledge 1804(2) Lawyers Edition 276 (278).

3. It would be within the exclusive domain of judiciary to expound the law as it is and not to speculate what it should be as it is the function to the Legislature. It is also within the exclusive power of the Judiciary to hold that a statute passed by the Legislature is ultra vires. The Legislature in that situation does not become a helpless creature as it continues to remain a living pillar of a living constitution. Though it cannot directly override the judicial decision, it retains the plenary powers under Articles 245, 246 and 248 to alter the law as settled or declared by judicial decisions. This is what was observed by this Court in M/S Anwar Khan Mahboob Co. vs. State of Madhya Pradesh (1966) 2 SCR 40, which had the effect of indirectly overruling its previous decision in Firm C.J. Patel & Co. & Ors. vs. The State of Madhya Pradesh AIR 1953 SC 108. The Legislature can also validate an Act which was declared invalid by the Court or amend it with retrospective effect so as to remove the grounds of its invalidity. (See Rai Ramkrishna & Ors. vs. State of Bihar (1964) 1 SCR 897 and Mt. Jadao Bahuji vs. Municipal Committee, Khandwa & Anr. AIR 1961 SC 1986.

4. The power to make a law includes the power to give it retrospective effect subject to the restriction imposed by

Article 20(1) that a legislature cannot make retrospective penal laws. It would be valid for the Legislature to make any other enactment with retrospective effect provided no fundamental Right is infringed by reasons of its taking away the vested right. Under the Scheme of the constitution, it is competent for the Legislature to put an end to the finality of a Judicial decision and, therefore, it would be competent for the legislature to render ineffective the judgment of a court by changing the basis of the Act upon which that judgment was founded (See: Shri Prithvi Cotton Mills Ltd. & Anr. vs. Broach Borough Municipality & ors. (1970) 1 SCR 388= (1962)2 SCC 522=(1933) Supp. 1 SCC 96. Hidayatullah, CJ. in Shri Prithvi Mills case observed as under:

" When a Legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to condition, of Course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are go fundamentally altered that the decision could not have been given in the altered circumstances."

This decision was considered in Madan Mohan Pathak vs. Union of India & ors. (1978) 3 SCR 334= (1978) 2 SCC 50, but was not doubted by the majority view in that case.

5. In Bhubaneshwar Singh vs. Union of India (1994) 6 SCC 77, it was observed that any action in exercise of the power under an enactment, which has been declared invalid by a court, cannot be made valid by merely saying so unless the defect which has been pointed out by the Court is removed with retrospective effect. It was further observed that the Validating legislation must remove the Cause of invalidity. It was further observed that till such defect as was pointed out by the Court in a Statute was removed by the subsequent enactment with retrospective effect, the binding nature of the Judgment of the Court cannot be ignored. In a situation of this nature, it would be open to the Legislature to pass a Validating Act, even with retrospective effect, removing the defect or the ground on which the Statute was held to be bad or ultra vires.

6. Where, however, the statutory provision is interpreted by the Court in a particular manner and directions are issued for implementing the judgment in the light of the interpretation placed on the statutory provisions, the Legislature need not pass a Validating Act. In this situation, the Legislature in exercise of its plenary powers under Articles 245, 246 and 248 can make a new Act altering fundamentally the provisions which were the basis of the

judgment passed by the Court. This can be done with retrospective effect. So far as service conditions are concerned, they can be altered with retrospective effect by making service rules under Article 309 or by an Act of the Legislature.

7. In the instant case, the judgments rendered by this Court in the earlier decisions relating to the seniority of the present incumbents were founded on the service rules then existing. These service rules have since been replaced by the impugned Act which has been enforced with retrospective effect. The various aspects of merits have been considered by my Brother Pattanaik and I cannot usefully add any further words on merits. I fully agree and endorse that in view of the settled legal position, specially those set out in the decisions referred to earlier as also in *Comorin Match Industries (P) Ltd. vs. State of Tamil Nadu* (1996) 4 SCC 281, *Indian Aluminium Company vs. State of Kerala* (1996) 7 SCC 637; and *Meerut Development Authority & Ors. vs. Satbir Singh & Ors.*, (1996) 11 SCC 462, the impugned Act, namely, the Haryana Act XX of 1995 is valid to the extent indicated by Brother Pattanaik. In this case the rule of seniority has been altogether altered and replaced by a new law made with retrospective effect so as to do away the mischief under which an undue advantage was being provided to a direct recruit, which was wholly inequitable and not sustainable on the principles of equity.

8. I also agree that the judgments of the Punjab & Haryana High Court are liable to be set aside, with a direction to the state Government to re-determine the question of seniority in the light of this judgment and the Haryana Act XX of 1995.

9. The civil Appeals, the Writ Petition and the Transferred Cases are disposed of accordingly with no order as to costs.