

CASE NO.:
Appeal (civil) 684 of 2003

PETITIONER:
Municipal Committee, Patiala

RESPONDENT:
Model Town Residents Asson. & Ors

DATE OF JUDGMENT: 01/08/2007

BENCH:
B. Sudershan Reddy

JUDGMENT:
JUDGMENT

CIVIL APPEAL NO.684 OF 2003
WITH

Civil appeal Nos. 685/2003, 686/2003, 687/2003, 690-691/2003, 692/2003, 693-694/2003, 695/2003, 696-698/2003, 699/2003, 700-702/2003, 703-704/2003, 705-706/2003, 710-711/2003, 712/2003, 713-714/2003, 715-717/2003, 718/2003, 719/2003, 721/2003, 722/2003, 724/2003, 727-728/2003, 730/2003, 732/2003, 735/2003, 736/2003, 737/2003, 738/2003, 740-744/2003, 757/2003, 758/2003, 759/2003, 760/2003, 761/2003, 762/2003, 763/2003, 764/2003, 765/2003, 766/2003, 767/2003, 768-774/2003, 781/2003, 782/2003, 790/2003, 791/2003, 792/2003, 793/2003, 795/2003, 796/2003, 797/2003, 798/2003, 799/2003, 800/2003, 801/2003, 802/2003, 803/2003, 804/2003, 805/2003, 806/2003, 807-808/2003, 825-828/2003, 1425-1433/2003, 4616-4618/2003, 8426/2003, 4329/2004 and C.A. No. 3387 @SLP)No. 13183/2003, C.A.No. 3388 @SLP)No. 13708/2003, C.A.No. 3386 @SLP)No.14774/2003.

B. Sudershan Reddy, J.

While I entirely agree with my esteemed brother Kapadia, J. in the judgment proposed to be delivered by him, I wish to add particularly to supplement what he has said to the topic of separation of powers.

My excuse for inflicting this epilogue is for obvious reasons.

The Constitution is filled with provisions that grant Parliament or to State legislatures specific power to legislate in certain areas. These granted powers are of course subject to constitutional limitations that they may not be exercised in a way that violates other specific provisions of the Constitution. Nothing in the text, history or structure of the Constitution remotely suggest the High Courts jurisdiction under Article 226 of the Constitution should differ in this respect \026 that invocation of such power should magically give High Court a free ride through the rest of Constitutional document. If such magic were available the High Court could structure, restructure legislative enactments. The possibilities are endless. The Constitution makers cannot be charged with having left open a path to such total obliteration of Constitutional enterprise.

In M/s. Narinder Chand Hem Raj and others vs. Lt. Governor, Administrator, Union Territory, Himachal Pradesh and others [1971 (2) SCC 747] a writ of mandamus was sought by the petitioners from enforcing levy of sales tax on the sale of liquor. This Court held that the appellants were liable to pay tax imposed under the law. The appellants in reality wanted a mandate from court to the competent authority to delete the certain entry from Schedule A and include the same in Schedule B. The court proceeded to hold:
"The power to impose a tax is undoubtedly a

legislative power, that power can be exercised by the Legislature directly or subject to certain conditions the Legislature may delegate that power to some other authority. But the exercise of that power, whether by the Legislature by its delegate is an exercise of a legislative power. The fact that the power was delegated to the executive does not convert that power into an executive or administrative power. No court can issue a mandate to a Legislature to enact a particular law. Similarly no court can direct a subordinated legislative body to enact or not to enact a law which it may be competent to enact. The relief as framed by the applicant in his Writ Petition does not bring out the real issue calling for determination. In a reality he wants this court to direct the Government to delete the entry in question from Schedule A and include the same in Schedule B. Article 265 of the Constitution lays down that no tax can be levied and collect except by authority of law. Hence the levy of a tax can only be done by the authority of law and not by any executive order. Unless the executive is specifically empowered by law to give any exemption, it cannot say that it will not enforce the law as against a particular person. No court can give a direction to a Government to refrain from enforcing a provision of law." [Emphasis supplied]

In T. Venkata Reddy and others versus State of Andhra Pradesh [(1985) 3 SCC 198], a constitution bench of this court while considering the question as to whether it is permissible to strike down an Ordinance which has the same force and effect or an Act of Parliament or an Act of State Legislature on the ground of non-application of mind or malafides or that the prevailing circumstances did not warrant the issue of an Ordinance held that validity of an Ordinance cannot be decided on grounds similar to those on which an executive or judicial action is decided. It is observed :

"Any law made by the Legislature, which it is not competent to pass, which is violated of the provisions in Part III of the Constitution or any other constitutional provision is ineffective. It is a settled rule of constitutional law that the question whether a statute is constitutional or not is always a question of power of the Legislature concerned, dependant upon the subject matter of the statute, the manner in which it is accomplished and the mode of enacting it. While the courts can declare a statute unconstitutional when it transgresses constitutional limits, they are precluded from inquiring into the propriety of the exercise of the legislative power. It has to be assumed that the legislative discretion is properly exercised. The motive of the Legislature in passing a statute is beyond the scrutiny of courts. Nor can the courts examine whether the legislature had applied its mind to the provisions of a statute before passing it. The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by the courts."

It is so well settled and needs no restatement at our hands that the legislature is supreme in its own sphere under the Constitution subject to the limitations provided for in the Constitution itself. It is for the legislature to decide as to when and in what respect and of what subject matter the laws are to be made. It is for the legislature to decide as to the nature of operation of the statutes.

In *State of Himachal Pradesh versus A Parent of a student of Medical College, Simla and others* [(1985) 3 SCC 169], the High Court of Himachal Pradesh required the State Government to initiate legislation against ragging in educational institutions and for this purpose time of six weeks was granted to the State Government. The decision was challenged before this court. This court was of the opinion that the direction given by the division bench was nothing short of an attempt to compel the State Government to initiate legislation with a view to curb the evil of ragging. It is held :

"\005\005\005..It is entirely a matter for the executive branch of the Government to decide whether or not to introduce any particular legislation. Of course, any member of the legislature can also introduce legislation but the court certainly cannot mandate the executive or any member of the legislature to initiate legislation, howsoever necessary or desirable the court may consider it to be. That it is not a matter which is within the sphere of the functions and duties allocated to the judiciary under the Constitution. If the executive is not carrying out any duty laid upon it by the Constitution or the law, the court can certainly require the executive to carry out such duty and this is precisely what the court does when it entertains public interest litigation. Where the court find, or being moved by an aggrieved party or by any public spirited individual or social action group, that the executive is remiss in discharging its obligations under the Constitution or the law, so that the poor and the underprivileged continued to be subjected to exploitation and injustice or are deprived of their social and economic entitlements or that social legislation enacted for their benefit is not being implemented thus depriving them of the rights and benefits conferred upon them, the court certainly can and must intervene and compel the executive to carry out its constitutional and legal obligations and ensure that the deprived and vulnerable sections of the community are no longer subjected to exploitation or injustice and they are able to realize their social and economic rights. When the court passes any orders in public interest litigation, the court does so not with a view to mocking at legislative or executive authority or in a spirit of confrontation but with a view to enforcing the constitution and the law, because it is vital for the maintenance of the rule of law that the obligations which are laid upon the executive by the Constitution and the law should be carried out faithfully and no one should go away with a feeling that the Constitution and the law are meant only for the benefit of a fortunate few and have no meaning for the large members of half-clad, half-hungry people of this country. That is a feeling which should never be allowed to grow. But at the same time the court cannot usurp the functions assigned to the executive and the legislature under the Constitution and it cannot

even indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law making activities of the executive and the legislature." [Emphasis supplied]

In *Asif Hameed and others versus State of Jammu and Kashmir and others* [1989 Suppl. (2) SCC 364], this court had an occasion to have a fresh look on the inter-se functioning of the three organs of democracy under our Constitution. It is held :

"17. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the function assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strange and independents of each of its organ. Legislature and executive, the two facets of people's will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint.

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18. *Frankfurter , J. of the U.S. Supreme Court* dissenting in the controversial expatriation case of *Trop vs. Dulles* observed as under :

"All power is, in Madison's phrase, "of an encroaching nature". Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and nor the less so since the only restraint upon it is self-restraint\005.

Rigorous observance of the difference between limits of power and wise exercise of power \026 between questions of authority and questions of prudence \026 requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere of the difference. It is not easy to stand aloof and allow want to wisdom to prevail to disregard once own strongly held view of what is wise in the conduct

of affairs. But it is not the business of this court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the courts giving effect to its own notion of what is wise of politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the executive branch do."

19. When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action. While doing so the court must remain within its self imposed limits. The court sits in judgment of the action of a coordinate branch of the Government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere the legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers."

The court cannot usurp the functions assigned to the legislative bodies under the Constitution and even indirectly require the legislature to exercise its power of law making in particular manner. The court cannot assume to itself a supervisory role for the law making power of the legislature under the provisions of the Constitution. The High Court must ensure that while exercising its jurisdiction which is supervisory in nature it should not over step the well recognized bounds of its own jurisdiction.

In Chandigarh Administrator and others versus Manpreet Singh and others [1992 (1) SCC 380], the High Court while disposing of a petition under Article 226 of the Constitution changed the categorization and order of priority specified in the Rule framed by the University for giving admissions to engineering colleges. The Supreme Court while reversing the decision observed :

"\005\005.if the High Court thought that this categorization was discriminatory and bad it ought to have struck down the categorization to that extent and directed the authority to reframe the rule. It would then have been upon to the rule making authority either to merge these two categories or delete one or both of them, depending upon the opinion they would have formed on a review of the situation. We must make it clear again that we express no opinion on the question of validity or otherwise of the rule. We are only saying that the High court should not have indulged in the exercise of 'switching' the categories \026 and that too without giving any reasons thereafter. Thereby, it has practicably assumed the role of rule making authority, or, at any rate, assumed the role of an appellate authority. That is clearly not the function of the High Court acting under Article 226 of the Constitution of India."

The High Court's directions to make the law in a particular manner are clearly unsustainable.

I agree with S.H. Kapadia, J. that the appeals preferred by the State as well as Municipal Committee, Patiala should be allowed.

JUDIS