

Supreme Court of India

Sri Sankari Prasad Singh Deo

vs

Union Of India And State Of ... on 5 October, 1951

Equivalent citations: 1951 AIR 458, 1952 SCR 89

Author: MP Sastri

Bench: Kania, Hiralal J. (Cj), Sastri, M Patanjali, Mukherjea, B.K., Das, Sudhi Ranjan, Aiyar, N Chandrasekhara

PETITIONER:

SRI SANKARI PRASAD SINGH DEO

Vs.

RESPONDENT:

UNION OF INDIA AND STATE OF BIHAR(And Other Cases).

DATE OF JUDGMENT:

05/10/1951

BENCH:

SASTRI, M PATANJALI

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SASTRI, M PATANJALI

KANIA, HIRALAL J. (CJ)

MUKHERJEA, B.K.

DAS, SUDHI RANJAN
AIYAR, N. CHANDRASEKHARA

CITATIONS

1951 AIR 458 1952 SCR 89

CITATOR INFO :

F 1952 SC 252 (1,30)
RF 1954 SC 257 (4)
R 1959 SC 395 (28)
E&D 1959 SC 512 (4)
F 1965 SC 845 (20,21,23,24,25,27,33,35,38,39)
R 1965 SC1636 (25)
O 1967 SC1643 (12,14,23,27,43,44,56,59,61,63)
RF 1973 SC1461 (16,20,27,30,32,38,39,44,46,88)
RF 1975 SC1193 (17)
RF 1975 SC2299 (649)
RF 1980 SC1789 (96)
RF 1980 SC2056 (61)
RF 1980 SC2097 (6)
D 1981 SC 271 (19,33,42,43)
RF 1986 SC1272 (78)
RF 1986 SC1571 (34)
RF 1987 SC1140 (3)

ACT:

Constitution (First Amendment) Act, 1951, Arts. 31A, 31B-Validity--Constitution of India, 1950, Arts. 13(2), 368, 379, 392--Provisional Parliament--Power to amend Constitution- Constitution (Removal of Difficulties) Order No. 2 of 1950--Validity --Amendment of Constitution--Procedure--Bill amended by Legislature--Amendment curtailing fundamental rights--Amendment affecting land--Validity of Amending Act.

HEADNOTE:

The Constitution (First Amendment) Act, 1951, which has inserted, inter alia, Arts. 31A and 31B in the Constitution of India is not ultra vires or unconstitutional.

The provisional Parliament is competent to exercise the power of amending the Constitution under Art. 368. The fact that the said article refers to the two Houses of the Parliament and the President separately and not to the Parliament, does not lead to the inference that the body which is invested with the power to amend is not the Parliament but a different body consisting of the two Houses.

The words "all the powers conferred by the provisions of this Constitution on Parliament" in Art. 379 are not con-

fined to such powers as could be exercised by the provision-
al Parliament consisting of a single chamber, but are wide
enough to include the power to amend the Constitution con-
ferred by Art. 368.

The Constitution (Removal of Difficulties) Order No. 2
made by the President on the 26th January, 1950, which
purports to adapt Art. 368 by omitting "either House of"
and "in each House" and substituting "Parliament" for "that
House" is not

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beyond the powers conferred on him by Art. 39:1 and ultra
vires. There is nothing in Art. 392 to suggest that the
President should wait, before adapting a particular article,
till the occasion actually arose for the provisional Parlia-
ment to exercise the power conferred by the article.

The view that Art. 368 is a complete code in itself in
respect of the procedure provided by it and does not contem-
plate any amendment of a Bill for amendment of the Constitu-
tion after it has been introduced, and that if the Bill is
amended during its passage through the House, the amendment
Act cannot be said to have been passed in conformity with
the procedure prescribed by Art. 368 and would be invalid,
is erroneous.

Although "law" must ordinarily include constitutional

law there is a clear demarcation between ordinary law which is made in the exercise of legislative power and constitutional law, which is made in the exercise of constituent power. In the context of Art. 13, "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the constitution made in the exercise of constituent power with the result that Art. 13(2) does not affect amendments made under Art. 368.

Articles 31A and 31B inserted in the Constitution by the Constitution (First Amendment) Act, 1951, do not curtail the powers of the High Court under Art. 226 to issue writs for enforcement of any of the rights conferred by Part III or of the Supreme Court under Arts. 132 and 136 to entertain appeals from orders issuing or refusing such writs; but they only exclude from the purview of Part III 'certain classes of cases. These articles therefore do not require ratification under cl. (b) of the proviso to Art. 368.

Articles 31A and 31B are not invalid on the ground that they relate to land which is a matter covered by the State List (item 18 of List II) as these articles are essentially amendments of the Constitution, and Parliament alone has the power to enact them.

JUDGMENT:

ORIGINAL JURISDICTION: Petitions under Art. 32 of the Constitution (Petitions Nos. 166,287,317 to 319, 371,372, 374 to 389, 392 to 395, 418, 481 to 485 of 1951). The facts which led to these petitions are stated in the judgment.

Arguments were heard on the 12th, 14th, 11th, 18th and 19th of September.

P.R. Das (B. Sen, with him) for the petitioners in Petitions Nos. 371, 372, 382,383, 388 and 392. Article 368 of the Constitution is a complete code in itself. It does not contemplate any amendments to the Bill after its introduction. The Bill must be passed and assented to by the President as it was introduced without any amendment. As the Constitution Amendment Bill was amended in several respects during its passage through the Parliament, the Constitution (First Amendment) Act was not passed in conformity with the procedure laid down in article 368 and is therefore invalid. When the Parliament exercises its ordinary legislative powers it has power to amend the Bills under articles 107, 108, 109(3) & (4). It has no such power when it seeks to amend the Constitution itself as article 368 does not give any such power: of The Parliament Act of 1911 (of England). The Article 368 vests the power to amend the Constitution not in the Parliament but in a different body, viz., a two-thirds majority of the two Houses of the Parliament. In article 368, the word Parliament which occurs in other articles is purposely avoided. There is a distinction between ordinary legislative power and power to amend the Constitution. This distinction is observed in America and the power to amend the Constitution is vested there also in a different body. Vide Willis, page 875, Coolly Vol. 1. page 4, Orfield, page 146. Article 379 speaks of the power of the provisional Parliament as a legislative body. The powers under article 368 cannot be and was not intended to be exercised by the provisional Parliament under article 379. As it consists only of a Single Chamber the adaptations made in article 368 by the Constitution (Removal of Difficulties) Order No. 2 are ultra vires. Article 392 gives power to the President to remove only such difficulties as arise in the working of the Constitution. It cannot be used to remove difficulties in the way of amending the Constitution that have been deliberately introduced by the Constitution. No difficulty could have been possibly experienced in the working of the Constitution on the very day the Constitution came into force. The Constitution could legally be amended only by the Parliament consisting of two Houses constituted under clause 2 of Part V. In any event, the impugned Act is void under article 13 (2) as contravening the provisions relating to fundamental rights guaranteed by Part III. ' Law ' in article 13 (2) evidently includes all laws passed by the Parliament and must include laws passed under article 368 amending the Constitution: Constituent Assembly Debates, Vol. IX No. 37, pp. 1644, 1645, 1661, 1665.

S.M Bose (M L. Chaturvedi, with him) for the petitioner in Petition No. 375. The word "only" in article 368 refers to all that follows and article 368 does not contemplate amendment of a Bill after it has been introduced. The President's Order is ultra vires his powers Under article

392. There is no difficulty in working article 368 and there could be no occasion for the President to adapt 368 in the exercise of his powers under article 392. S. Chaudhuri (M L. Chaturvedi, with him) for the petitioner in Petition No. 368 adopted the arguments of P.R. Das and S.M Bose.

S.K. Dhar (Nanakchand and ML. Chaturvedi, with him) for the petitioner in Petition No- 387. Article 379 on which the provisional Parliament's jurisdiction to amend the Constitution is based not only empowers the said Parliament to exercise the powers of the Parliament but also imposes upon it the obligation to perform all the duties enjoined upon the Parliament by the Constitution. Hence Parliament cannot seek to abridge the rights of property of the citizens guaranteed by Part III. As the present Act contravenes the provisions of Part III, it is void under article 13 (2). In any event, the new articles 31A and 31B curtail the powers of the Supreme Court under articles 32, 132 and 136 and those of the High Court under article 226, and as such, they required ratification under clause (b) of the proviso to article 368 and not having been ratified, they are void and unconstitutional. They are also ultra vires as they relate to land, a subject matter covered by List II (see item 18) over which the State Legislatures have exclusive power. Parliament cannot make a law validating a law which it had no power to enact.

N.P. Asthana (K. B. Asthana, with him) for the petitioners in Petitions Nos. 481 to 484. Article 338 s, does not confer power on any body to amend the constitution. It simply lays down the procedure to be followed for amending the Constitution. In this view u article 379 does not come into operation at all. Under article 392 the President himself can alter the Constitution but he cannot authorise the provisional Parliament to do so.

S.P. Sinha (Nanak Chand, with him) for the petitioner in Petition No. 485. Article 13(2) is very wide in its scope and it invalidates all laws past, present and future which seek to curtail the rights conferred by Part II 1. It does not exempt laws passed under article 368 from its operation. N.C. Chatterjee (with V.N. Swami for the petitioner in Petition No. 287 and with Abdul Razzak Khan for the petitioner in Petition No. 318). Article 368 must be read subject to article 13(2). Articles 31A and 31B are legislative in character and were enacted in the exercise of the law-making power of the Parliament and not in the exercise of any power to amend the Constitution and Parliament has no power to validate the laws as it had no power to enact them. N.R. Raghavachari (V. N. Swami, with him) for the petitioner in Petition No. 166. The fundamental rights are supreme and article 13 (2) is a

complete bar to any amend- ment of the rights conferred by Part III.

N.S.. Bindra (Kahan Chand Chopra, with him) for the petitioner in Petition No. 319.

ML. Chaturvedi for the petitioners in Petitions Nos. 374,376, 377, 379, 380, 381,384, 385, 386, 389, 393, 394 and

395. Bishan Singh for the petitioner in Petition No. 418. Abdul Razzak Khan and P. 5. Safer for the petitioner in Petition No. a17.

MC. Setalvad, Attorney-General for India (with G.N. Joshi) for the Union of India, and (with Lal Narain Singh, G N. Joshi, A. Kuppuswami and G. Durgabai) for the State of Bihar. The donee of the power under article 368 is Parliament. and The process of the passage of the Bill indicated in the said article is the same as that of ordinary legislative Bills. The arti- cle does not mean that the powers under article 368 are to be exercised by a fluctuating body of varying majority and not by Parliament. If the constituent authority and the legislative authority are two different entities the saving clauses in articles 23, 4 and 240, will be meaningless. Under article 379 provisional Parliament can exercise all the powers of Parliament; hence Provisional Parliament can act under article 368. "All the powers" in article 379 include power to amend the Constitution and there is no reason to restrict the import of these words by excluding amendment of the Constitution from their ambit. The words "perform all the duties" in that article do not in any manner cut down the power of Parliament under article 379 because article 13 (2) does not impose any duty. There is no conflict between exercising all the powers under article 379 and the prohibition in article 13 (2). No technical meaning should be given to the word "difficulty" in article 392 (1). The adaptation of article 368 is really an adapta- tion for the removal of difficulties. The adaptation is not of a permanent character. This shows that the adaptation is not an amendment and even if it is an amendment, it is so by way of adaptation. Article 13 (2) prohibits "laws" incon- sistent with fundamental rights. It cannot affect article 368 since the word "law" in article 13 (2) refers to ordi- nary legislative enactments and not constitution making. The argument that the Bill to amend the Constitution should be passed as introduced, without amendments, is fallacious. It cannot be said that the Bill referred to in article 368 has to be dealt with under a procedure different from that laid down for ordinary Bills in articles 107 and 108. Arti- cles 31-A and 31B are not legislative in character. The said articles do not affect the scope of articles 226 and 32, for the power of the Court under the said two articles remains unaltered. What has been done is to alter the content of fundamental rights.

P.L. Banerjee, Advocate-General of Uttar Pradesh (U. K. Msra and Gopalji Mehrotra, with him) for the State of Uttar Pradesh adopted the arguments of the un. Attorney-General and added that articles 31-A and 31-B do not necessarily stand or fall together; even if 31-B goes, 31-A will remain. T.L. Shevde, Advocate-General of Madhya Pradesh (T. P. Naik, with him) for the State of Madhya Pradesh adopted the arguments of the Attorney General. The Provisional Parliament is competent to do all that the future Parliament can do. The adaptation under article 392 does not seek to amend article 368.

P.R. Dots, S.M. Bose, S. Chaudhuri, N.C. Chatterjee, S.K. Dhar and S.P. Sinha replied.

1951. October 5. The Judgment of the Court was delivered by PATANJALI SASTRI J.—These petitions, which have been heard together, raise the common question whether the Constitution (First Amendment) Act, 1951, which was recently passed by the present provisional Parliament and purports to insert, inter alia, articles 31A and 31B in the Constitution of India is ultra vires and unconstitutional. What led to that enactment is a matter of common knowledge. The political party now in power, commanding as it does a majority of votes in the several State legislatures as well as in Parliament, carried out certain measures of agrarian reform in Bihar, Uttar Pradesh and Madhya Pradesh by enacting legislation which may compendiously be referred to as Zemindary Abolition Acts. Certain zemindars, feeling themselves aggrieved, attacked the validity of those Acts in courts of law on the ground that they contravened the fundamental rights conferred on them by Part III of the Constitution. The High Court at Patna held that the Act passed in Bihar was unconstitutional while the High Courts at Allahabad and Nagpur upheld the validity of the corresponding legislation in Uttar Pradesh and Madhya Pradesh respectively. Appeals from those decisions are pending in this Court. Petitions filed in this Court by some other zemindars seeking the determination of the same question are "also pending. At this stage, the Union Government, with a view to put an end to all this litigation and to remedy what they considered to be certain defects brought to light in the working of the Constitution, brought forward a bill to amend the Constitution, which, after undergoing amendments in various particulars, was passed by the requisite majority as the Constitution (First Amendment) Act, 1951, (hereinafter referred to as the Amendment Act). Swiftly reacting to this move of the Government, the zemindars have brought the present petitions under article 32 of the Constitution impugning the Amendment Act itself as unconstitutional and void.

The main arguments advanced in support of the petitions may be summarised as follows:

First, the power of amending the Constitution provided for under article 368 was conferred not on

Parliament but on the two Houses of Parliament as a designated body and, therefore, the provisional Parliament was not competent to exercise that power under article 379.

Secondly, assuming that the power was conferred on Parliament, it did not devolve on the provisional Parliament by virtue of article 379 as the words "All the powers conferred by the provisions of this Constitution on Parliament" could refer only to such powers as are capable of being exercised by the provisional Parliament consisting of a single chamber. The power conferred by article 368 calls for the co-operative action of two Houses of Parliament and could be appropriately exercised only by the Parliament to be duly constituted under Ch. 2 of Part V.

Thirdly, the Constitution (Removal of Difficulties) Order No. 2 made by the President on 26th January 1950, in so far as it purports to adapt article 368 by omitting "either House of" and "in each House" and substituting "Parliament" for "that House", is beyond the powers conferred on him by article 392, as "any difficulties" sought to be removed by adaptation under that article must be difficulties in the actual working of the Constitution during the transitional period whose removal is necessary for carrying on the Government. No such difficulty could possibly have been experienced on the very date of the commencement of the Constitution.

Fourthly, in any case article 368 is a complete code in itself and does not provide for any amendment being made in the bill after it has been introduced in the House. The bill in the present case having been admittedly amended in several particulars during its passage through the House, the Amendment Act cannot be said to have been passed in conformity with the procedure prescribed in article 368. Fifthly, the Amendment Act, in so far as it purports to take away or abridge the rights conferred by Part III of the Constitution, falls within the prohibition of article 13 (2).

And lastly, as the newly inserted articles 31A and 31B seek to make changes in articles 132 and 136 in Chapter IV of Part V and article 226 in Chapter V of Part VI, they require ratification under clause (b) of the proviso to article 368, and not having been so ratified, they are void and unconstitutional. They are also ultra vires as they relate to matters enumerated in List II, with respect to which the State legislatures and not Parliament have the power to make laws.

Before dealing with these points it will be convenient to set out here the material portions of articles 368, 379 and 392, on the true construction of which these arguments have largely turned.

368. An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change

(a) articles 54, 55, 78, 162 or 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or (e) the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States specified in Parts A and B of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

379. (1) Until both Houses of Parliament have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body functioning as the Constituent Assembly of the Dominion of India immediately 'before the commencement of this' Constitution shall be the provisional Parliament and shall exercise all the powers and perform all the duties conferred by the provisions of this Constitution on Parliament.

392. (1) The President may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provisions of this Constitution, by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient:

Provided that no such order shall be made after the first meeting of Parliament duly constituted under Chapter II of Part V.

**** On the 'first point, it was submitted that whenever the Constitution sought to confer a power

upon Parliament, it specifically mentioned "Parliament" as the donee of the power, as in articles 2, 3, 33, 34 and numerous other articles, but it deliberately avoided the use of that expression in article 368. Realising that the Constitution, as the fundamental law of the country, should not be liable to frequent changes according to the whim of party majorities, the framers placed special difficulties in the way of amending the Constitution and it was a part of that scheme to confer the power of amendment on a body other than the ordinary legislature, as was done by article 5 of the American Federal Constitution. We are unable to take that view. Various methods of constitutional amendment have been adopted in written constitutions, such as by referendum, by a special convention, by legislation under a special procedure, and so on. But, which of these methods the framers of the Indian Constitution have adopted must be ascertained from the relevant provisions of the Constitution itself without any leaning based on a priori grounds or the analogy of other constitutions in favour of one method in preference to another. We accordingly turn to the provisions dealing with constitutional amendments.

Now, the Constitution provides for three classes of amendments of its provisions. First, those that can be effected by a bare majority such as that required for the passing of any ordinary law. The amendments contemplated in articles 4, 169 and 240 fall within this class, and they are specifically excluded from the purview of article 368. Secondly, those that can be effected by a special majority as laid down in article 368. All constitutional amendments other than those referred to above come within this category and must be effected by a majority of the total membership of each House as well as by a majority of not less than two thirds of the members of that House present and voting; and thirdly, those that require, in addition to the special majority above-mentioned, ratification by resolutions passed by not less than one-half of the States specified in Parts A and B of the First Schedule. This class comprises amendments which seek to make any change in the provisions referred to in the proviso to article 368. It will be seen that the power of effecting the first class of amendments is explicitly conferred on "Parliament", that is to say, the two Houses of Parliament and the President (article 79). This would lead one to suppose, in the absence of a clear indication to the contrary, that the power of effecting the other two classes of amendments has also been conferred on the same body, namely, Parliament, for, the requirement of a different majority, which is merely procedural, can by itself be no reason for entrusting the power to a different body. An examination of the language used in article 368 confirms that view.

In the first place, it is provided that the amendment must be initiated by the introduction of a "bill in either House of Parliament", a familiar feature of parliamentary procedure (of. article 107(1) which says "A bill may originate in either House of Parliament"). Then, the bill must be "passed in each House" - just what Parliament does when it is called upon to exercise its normal legislative function [article 107(2)]; and finally, the bill thus passed must be "presented to the President" for his "assent", again a parliamentary process through which every bill must pass before it can

reach the statute-book (article 111). We thus find that each of the component units of Parliament is to play its allotted part in bringing about an amendment to the Constitution. We have already seen that Parliament effects amendments of the first class mentioned above by going through the same three-fold procedure but with a simple majority. The fact that a different majority in the same body is required for effecting the second and third categories of amendments cannot make the amending agency a different body. There is no force, therefore, in the suggestion that Parliament would have been referred to specifically if that body was intended to exercise the power. Having mentioned each House of Parliament and the President separately and assigned to each its appropriate part in bringing about constitutional changes, the makers of the Constitution presumably did not think it necessary to refer to the collective designation of the three units.

Apart from the intrinsic indications in article 368 referred to above, a convincing argument is to be found in articles 2, 3, 4, 169 and 240. As already stated, under these articles power is given to "Parliament" to make laws by a bare majority to amend certain parts of the Constitution; but in each case it is laid down that no such law should be deemed to be an amendment of the Constitution "for the purpose of article 368." It would be quite unnecessary, and indeed inappropriate, to exclude these laws from the operation of article 368, which requires a special majority, if the power to amend under the latter article was not also given to Parliament.

Somewhat closely allied to the point discussed above is the objection based on the bill in the present case having been passed in an amended form, and not as originally introduced. It is not correct to say that article 368 is a "complete code" in respect of the procedure provided by it. There are gaps in the procedure as to how and after what notice a bill is to be introduced, how it is to be passed by each House and how the President's assent is to be obtained. Evidently, the rules made by each House under article 118 for regulating its procedure and the conduct of its business were intended, so far as may be, to be applicable. There was some discussion at the Bar as to whether the process of amending the Constitution was a legislative process. Petitioners' counsel insisted that it was not, and that, therefore, the "legislative procedure" prescribed in article 107, which specifically provides for a bill being passed with amendments, was not applicable to a bill for amending the Constitution under article 368. The argument was further supported by pointing out that if amendment of such a bill were permissible, it must be open to either House to propose and pass amendments, and in case the two Houses failed to agree, the whole machinery of article 368 would be thrown out of gear, for the joint sitting of both Houses passing the bill by a simple majority provided for in article 108 in the case of ordinary bills would be inapplicable in view of the special majority required in article 368. The argument proceeds on a misconception. Assuming that amendment of the Constitution is not legislation even where it is carried out by the ordinary legislature by passing a bill introduced for the purpose and that articles 107 to 111 cannot in terms apply when Parliament is dealing with a bill

under article 368, there is no obvious reason why Parliament should not adopt, on such occasions, its own normal procedure, so far as that procedure can be followed consistently with statutory requirements. Repelling the contention that a Local Government Board conducting a statutory enquiry should have been guided by the procedure of a court of justice, Lord Haldane observed in *Local Government Board v. Arlidge*(1):

"Its (the Board's) character is that of an organisation with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended to follow the procedure which is its own and is necessary if it is to be capable of doing its work efficiently."

These observations have application here. Having provided for the constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rules made by each House (article 118), the makers of the Constitution must be taken to have intended (1) [1915] A.C. 120.

Parliament to follow that procedure, so far as it may be applicable, consistently with the express provisions of article 368, when they entrusted to it the power of amending the Constitution,.

The argument that a power entrusted to a Parliament consisting two Houses cannot be exercised under article 379 by the provisional Parliament sitting as a single chamber overlooks the scheme of the constitutional provisions in regard to Parliament. These provisions envisage a Parliament of two Houses functioning under the Constitution framed as they have been on that basis. But the framers were well aware that such a Parliament could not be constituted till after the first elections were held under the Constitution. It thus became necessary to make provision for the carrying on, in the meantime, of the work entrusted to Parliament under the Constitution. Accordingly, it was provided in article 379 that the Constituent Assembly should function as the provisional Parliament during the transitional period and exercise all the powers and perform all the duties conferred by the Constitution on Parliament. Article 379 should be viewed and interpreted in the wider perspective of this scheme and not in its isolated relation to article 368 alone. The petitioners' argument that the reference in article 368 to "two Houses" makes that provision inapplicable to the provisional Parliament would equally apply to all the provisions of the Constitution in regard to Parliamentary action and, if accepted, would rob article 379 of its very purpose and meaning. It was precisely to obviate such an argument and to remove the difficulty on which it is rounded and other difficulties of a like nature in working the Constitution

during the transitional period that the framers of the Constitution made the further provision in article 392 conferring a general power on the President to adapt the provisions of the Constitution by suitably modifying their terms. This brings us to the construction of article 392.

It will be seen that the purpose for which an adaptation may be made under that article is widely expressed. It may be made for the purpose of removing "any difficulties". The particularisation of one class of difficulties which follows is illustrative and cannot have the effect of circumscribing the scope of the preceding general words. It has been urged, however, that the condition precedent to the exercise of powers under article 392 is the existence of difficulties to be removed, that is to say, difficulties actually experienced in the working of the Constitution whose removal would be necessary for carrying on the Government, such as for instance, the difficulties connected with applying articles 112, 113, etc., in the transitional period. But, the argument proceeds, constitutional amendments cannot be said to be necessary during that period. Besides, amendment of the Constitution is a very serious thing, and hence, by providing that both Houses must deliberate and agree to the amendment proposed and pass the bill by a special majority, the Constitution has purposely placed difficulties in the way of amending its provisions. It would be fantastic to suppose that, after deliberately creating those difficulties, it has empowered the President to remove them by a stroke of his pen. We see no force in this line of argument. It is true enough to say that difficulties must exist before they can be removed by adaptation, but they can exist before an occasion for their removal actually arises. As already stated, difficulties are bound to arise in applying provisions, which, by their terms are applicable to a Parliament of two Houses, to the provisional Parliament sitting as a single chamber. Those difficulties, arising as they do out of the inappropriateness of the language of those provisions as applied to the provisional Parliament, have to be removed by modifying that language to fit in with the situation created by article 379. There is nothing in that article to suggest that the President should wait, before adapting a particular article, till an occasion actually arose for the provisional Parliament to exercise the power conferred by that article. Nor is there any question here of the President removing by his adaptation any of the difficulties which the Constitution has deliberately placed in the way of its amendment. The adaptation leaves the requirement of a special majority untouched. The passing of an amendment bill by both Houses is no more a special requirement of such a bill than it is of any ordinary law made by Parliament. We are, therefore, of opinion that the adaptation of article 368 by the President was well within the powers conferred on him by article 89 and is valid and constitutional.

A more plausible argument was advanced in support of the contention that the Amendment Act, in so far as it purports to take away or abridge any of the fundamental rights, falls within the prohibition of article 13(2) which provides that "the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall to the extent of the contravention be void." The argument was put thus: "The State" includes

Parliament (article 12) and "law" must include a constitutional amendment. It was the deliberate intention of the framers of the Constitution, who realized the sanctity of the fundamental rights conferred by Part III, to make them immune from interference not only by ordinary laws passed by the legislatures in the country but also from constitutional amendments. It is not uncommon to find in written constitutions a declaration that certain fundamental rights conferred on the people should be "eternal and inviolate" as for instance article 11 of the Japanese Constitution. Article 5 of the American Federal Constitution provides that no amendment shall be made depriving any State without its consent "of its equal suffrage in the Senate." The framers of the Indian Constitution had the American and the Japanese models before them, and they must be taken to have prohibited even constitutional amendments in derogation of fundamental rights by using aptly wide language in article 13 (2). The argument is attractive, but there are other important considerations which point to the opposite conclusion.

Although "law" must ordinarily include constitutional law, there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power. Dicey defines constitutional law as including "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State." It is thus mainly concerned with the creation of the three great organs of the State, the executive, the legislature and the judiciary, the distribution of governmental power among them and the definition of their mutual relation. No doubt our constitution-makers, following the American model, have incorporated certain fundamental rights in Part III and made them immune from interference by laws made by the State. We find it, however, difficult, in the absence of a clear indication to the contrary, to suppose that they also intended to make those rights immune from constitutional amendment. We are inclined to think that they must have had in mind what is of more frequent occurrence, that is, invasion of the rights of the subjects by the legislative and the executive organs of the State by means of laws and rules made in exercise of their legislative power and not the abridgement or nullification of such rights by alterations of the Constitution itself in exercise of sovereign constituent power. That power, though it has been entrusted to Parliament, has been so hedged about with restrictions that its exercise must be difficult and rare. On the other hand, the terms of article 36a are perfectly general and empower Parliament to amend the Constitution, without any exception whatever. Had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. In short, we have here two articles each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other. Having regard to the considerations adverted to above, we are of opinion that in the context of article 13 "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that article 13(2) does not affect amendments made under article

368. It only remains to deal with the objections particularly directed against the newly inserted articles 31A and 31B. One of these objections is based on the absence of ratification under article 368. It was said that, before these articles were inserted by the Amending Act, the High Courts had the power under article 226 of the Constitution to issue appropriate writs declaring the Zemindari Abolition Acts unconstitutional as contravening fundamental rights, and this Court could entertain appeals from the orders of the High Courts under article 132 or article 136. As a matter of fact, some High Courts had exercised such powers and this Court had entertained appeals. The new articles, however, deprive the High Courts as well as this Court of the power of declaring the said Acts unconstitutional, and thereby seek to make changes in Ch. 4 of Part V and Ch. 5 of Part VI. It was therefore submitted that the newly inserted articles required ratification under the proviso to article

368. The argument proceeds on a misconception. These articles so far as they are material here, run thus :—

31A. Saving of laws providing for acquisition of estates, etc.—(1) Notwithstanding anything in the foregoing provisions of this part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part :—

***31B. Validation of certain Acts and Regulations. Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

It will be seen that these articles do not either in terms or in effect seek to make any change in article 226 or in articles 132 and 136. Article 31A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of article 13 read with other relevant articles in Part III, while article 31B purports to validate certain specified Acts and Regulations already passed, which, but for such a provision, would be liable to be impugned under article 13. It is not correct to say that the powers of the High Court under article 226 to issue

writs "for the enforcement of any of the rights conferred by Part III" or of this Court under articles 132 and 136 to entertain appeals from orders issuing or refusing such writs are in any way affected. They remain just the same as they were before: only a certain class of case has been excluded from the purview of Part II/and the courts could no longer interfere, not because their powers were curtailed in any manner or to any extent, but because there would be no occasion hereafter for the exercise of their power in such cases.

The other objection that it was beyond the power of Parliament to enact the new articles is equally untenable. It was said that they related to land which was covered by item 18 of List II of the Seventh Schedule and that the State legislatures alone had the power to legislate with respect to that matter. The answer is that, as has been stated, articles 1A and 31B really seek to save a certain class of laws and certain specified laws already passed from the combined operation of article 13 read with other relevant articles of Part III. The new articles being thus essentially amendments of the Constitution, Parliament alone had the power of enacting them. That the laws thus saved relate to matters covered by List II does not in any way affect the position. It was said that Parliament could not validate a law which it had no power to enact. The proposition holds good where the validity of the impugned provision turns on whether the subject-matter falls within or without the jurisdiction of the legislature which passed it. But to make a law which contravenes the constitution constitutionally valid is a matter of constitutional amendment, and as such it falls within the exclusive power of Parliament. The question whether the latter part of article 31B is too widely expressed was not argued before us and we express no opinion upon it.

The petitions fail and are dismissed with costs.

Petitions dismissed.

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