REPORTABLE

2023INSC817

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.377 OF 2007

CBI **...APPELLANT(S)**

VERSUS

R.R. KISHORE **...RESPONDENT(S)**

WITH

CRL. APPEAL NO. 2763/2023
(Arising out of SLP(CRL.) NO.4364 OF 2011)

J U D G M E N T

VIKRAM NATH, J.

Crl. Appeal No.377/2007.

1. This Constitution Bench has been constituted to consider whether the declaration made by a Constitution Bench of this Court, in the case of **Subramanian Swamy vs. Director, Central Bureau of Investigation and another**[1], that Section 6A of the Delhi Special Police Establishment Act, 194[2] being unconstitutional, can be applied retrospectively in context with Article 20 of the Constitution.

1 (2014) 8 SCC 682

2 In short 'DSPE Act'

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2. Necessary facts relevant for the purposes of this case are stated hereunder:

2.1 The appellant-Central Bureau of Investigation[3] after registering the First Information Report at 02:00 pm on 16.12.2004 for offences under the Prevention of Corruption Act, 1988[4] laid a trap in the evening on the same day wherein the respondent is said to have accepted bribe to set the things right for the radiologist conducting Pre-Natal test to determine the sex of the foetus in contravention of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. The respondent applied for discharge, *inter alia*, amongst others on the ground that the trap which was a part of the enquiry/investigation had been laid without the previous approval of the Central Government as provided under Section 6A of the DSPE Act.

3 In short, "CBI"

4 In short "PC Act, 1988"

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2.2. The Special Judge, CBI, rejected the application for discharge vide order dated 30.04.2006 which was carried in revision before the High Court and was registered as Criminal Revision Petition No.366 of 2006. Learned Single Judge of the High Court vide judgment dated 05.10.2006 framed three questions for consideration namely:

1. What is the background with regard to Section 6A of the DSPE Act?
2. Did the CBI acted in contravention of Section 6A(1)?
3. If yes, does it mean that the entire trial, consequent upon an illegal investigation, is vitiated?

It answered question No.2 in favour of the respondent and further with respect to question No.3 left it open for the competent authority to take the decision and further proceed with reinvestigation and in case sanction is not granted, to notify the Special Judge, CBI, to close the case. The operative part of the order is in paragraph 29 of the judgment which is reproduced hereunder:

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"29. It follows that if, at the initial stage of trial, the illegality of investigation is brought to the notice of the court and yet the Trial Court continues with the trial then, such proceedings would be liable to be set aside by the High Court in exercise of its revisional jurisdiction. In this case, in view of the discussion above, it is clear that the provisions of Section 6 A(1) of the Prevention of Corruption Act, 1988 are mandatory and not merely directory. The investigation carried out in contravention of such provisions is, therefore, clearly illegal, in violation of a statutory requirement. The dismissal of the discharge application moved on behalf of the petitioner means that the trial would continue. This cannot be permitted in view of the discussion above. Because, then the court would be turning a blind eye and a deaf ear to the illegality in investigation which has been brought to its notice at the earliest stage. However, it also does not mean that the petitioner is entitled to a discharge and the closure of the case against him. As pointed out in Rishbud's case and Mubarak Ali's case, reinvestigation is to be ordered in the context of the provisions of section 6A of the said Act. While the file is to be kept pending before Special Judge, approval of the Central Government is to be sought for investigation. If approval is accorded then the matter shall be reinvestigated as per prescribed procedure and the material gathered in such re-investigation shall be placed before the Special Judge for further proceedings in accordance with law. If the approval is not given by the Central Government, then the same shall be notified to the Special Judge who shall then close the case."

2.3. The CBI, feeling aggrieved by the judgment of the Delhi High Court, has preferred the present appeal substantially on the ground that Section 6A(2) of DSPE Act would be applicable and not Section 6A(1) thereof. The High Court erred in holding that Section 6A(1) was applicable.

2.4. The said appeal is pending since 2007. During the pendency of the appeal Section 6A(1) of the DSPE Act was held to be invalid and violative of Article 14 of the Constitution by a Constitution Bench vide judgment dated 06.05.2014 in the case of **Subramanian Swamy (supra).** Paragraph 99 of the said report which makes the above declaration is reproduced hereunder:

> *"99. In view of our foregoing discussion, **we hold that Section 6A(1)**, which requires approval of the Central Government to conduct any inquiry or investigation into any offence alleged to have been committed under the PC Act, 1988 where such allegation relates to: (a) the employees of the Central Government of the level of Joint Secretary and above, and (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, government companies, societies and local authorities owned or controlled by the Government, **is invalid and violative of Article 14 of the Constitution**. As a necessary corollary, the provision contained in Section 26(c) of Act 45 of 2003 to that extent is also declared invalid."*

3. What the Constitution Bench did not decide was whether the declaration of Section 6A(1) of the DSPE Act to be violative of Article 14 of the Constitution would have retrospective effect or it would apply prospectively.

4. The appeal was taken up on a number of occasions and argued from both sides. Relying upon the judgments regarding retrospective or prospective applicability of the said declaration, the appellant-CBI would submit that once Section 6A(1) has been declared to be violative of Article 14, the judgment of the High Court deserves to be set aside and the prosecution should be allowed to continue with the proceedings from the stage of rejection of discharge application. On the other hand, the respondent would submit that the judgment in the case of **Subramanian Swamy (supra)** could not have any retrospective operation and therefore, no fault could be found with the judgment of the High Court and the appeal deserves to be dismissed.

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5. At a particular stage, this Court felt that the Union of India should be made a party and should be heard. It accordingly *suo moto* issued notices vide order dated 27.04.2012 and the Union of India was required to file an affidavit. The Union of India filed an affidavit dated 05.10.2012. However, the same was permitted to be withdrawn by order dated 29.01.2013. Thereafter, the Union of India filed another affidavit in February, 2013. The matter was thereafter taken up on 10.03.2016 when this Court, after recording the submissions advanced by the rival parties and considering the importance of the question and also the fact that the retrospectivity or prospectivity of the judgment in the case of **Subramanian Swamy (supra)** could only be dealt with by a Constitution Bench, directed that the matter be placed before the Chief Justice of India on the administrative side for constituting an appropriate Bench. Paragraph 7 of the order dated 10.03.2016 framed the question for determination and the same is reproduced hereunder:

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> *"7. The provisions of Section 6A(1), extracted above, do indicate that for officers of the level of Joint Secretary and above a kind of immunity has been provided for.* ***Whether there can be a deprivation of such immunity by a retrospective operation of a judgment of the Court, in the context of Article 20 of the Constitution of India, is the moot question that arises for determination in the present case.****"*

6. As the order of reference also briefly deals with the necessary facts and also the reasons for referring the issue to the Constitution Bench, it would be appropriate to reproduce the complete order dated 10.03.2016. It reads as follows:

> *"1. A prosecution under the Prevention of Corruption Act, 1988 was sought to be questioned by the respondent accused on the basis of the provisions contained in Section 6A(1) of the Delhi Special Police Establishment Act, 1946 which was brought in by an amendment in the year 2003. Section 6A(1) of the Delhi Special Police Establishment Act, 1946 is in the following terms:*

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> *"6A. Approval of Central Government to conduct inquiry or investigation.-(1) The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to- (a) the employees of the Central Government of the Level of Joint Secretary and above; and (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government."*

2. The Delhi High Court before whom the challenge was brought answered the question by holding that the respondent accused was entitled to the benefit of the said provision. Accordingly, the High Court took the view that the matter required fresh consideration for grant of previous approval under Section 6A(1) of the Delhi Special Police Establishment Act, 1946. Aggrieved, the C.B.I. is in appeal before us.

3. We have heard the learned counsels for the parties as also the respondent who appears in person.

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4. The provisions of Section 6A(1) of the Delhi Special Police Establishment Act, 1946 has been held to be unconstitutional being violative of Article 14 of the Constitution of India by a Constitution Bench of this Court in Subramanian Swamy versus Director, Central Bureau of Investigation and another [(2014) 8 SCC 682]. The judgment of the Constitution Bench is however silent as to whether its decision would operate prospectively or would have retrospective effect. Though a large number of precedents have been cited at the Bar to persuade us to take either of the above views, as would support the case of the rival parties, we are of the considered view that this question should receive the consideration of a Constitution Bench in view of the provisions of Article 145(3) of the Constitution of India.

5. In fact, in Transmission Corporation of A.P. versus Ch. Prabhakar and others [(2004) 5 SCC 551], the precise question that has arisen before us had been referred to a Constitution Bench. Paragraphs 15 and 21 dealing with the said question read as follows:

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"15. Whether constitutional guarantee enshrined in clause (1) of Article 20 is confined only to prohibition against conviction for any offence except for violation of law in force at the time of commission of the act charged as an offence and subjection to a penalty greater than that which might have been inflicted under the law in force at the time of commission of offence or it also prohibits legislation which aggravates the degree of crime or makes it possible for him to receive the same punishment under the new law as could have been imposed under the prior law or deprives the accused of any substantial right or immunity possessed at the time of the commission of the offence charged is a moot point to be debated.

(underlining is ours)

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21. However, as the interpretation of Article 20 as to its scope and ambit is involved in these proceedings, we refer the question formulated in para 15 of this order to a larger Bench for consideration."

However, the Constitution Bench in Transmission Corporation of A.P. versus Ch. Prabhakar and others [(2010) 15 SCC 200] declined to answer the question as in the meantime there were certain amendments to the statute in question and, therefore, the issues referred were understood to have become academic. The very same issues have been cropped up before us in the present proceedings.

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6. We have considered it necessary to make the present reference for the reason that in the case of Transmission Corporation of A.P. versus Ch. Prabhakar and others [(2004) 5 SCC 551] one of the questions referred is whether the scope and ambit of Article 20 of the Constitution of India is to be understood to be protecting the substantial rights or the immunity enjoyed by an accused at the time of commission of the offence for which he has been charged.

7. The provisions of Section 6A(1), extracted above, do indicate that for officers of the level of Joint Secretary and above a kind of immunity has been provided for. Whether there can be a deprivation of such immunity by a retrospective operation of a judgment of the Court, in the context of Article 20 of the Constitution of India, is the moot question that arises for determination in the present case.

8. For the aforesaid reasons and having regard to the provisions of Article 145(3) of the Constitution of India, we refer the aforesaid question to a larger bench for which purpose the papers may now be laid before the Hon'ble the Chief Justice of India on the administrative side."

7. In the above backdrop, the matter has been placed before this Bench and has been heard at length on the question referred.

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8. Leave granted.

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9. This appeal has been filed by the appellant assailing the correctness of the judgment and order of the Bombay High Court passed in Criminal Application No.1913 of 2010, titled **Manjit Singh Bali vs. Central Bureau of Investigation** dated 29.11.2010. By the above order, the Bombay High Court dismissed the petition praying for quashing of the FIR registered by CBI against the petitioner therein under Sections 7 and 8 of the PC Act, 1988. In this case, an FIR was registered on 18.02.2010 based on a complaint dated 16.02.2010. A raid was conducted on 24.02.2010, during which the petitioner therein was arrested and cash was recovered from his car. In this case also the issue is as to whether in the facts of the said case, Section 6A(1) of DSPE Act would be applicable or Section 6A(2) thereof would be applicable.

ARGUMENTS:

A. For CBI:

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10. Shri Tushar Mehta, learned Solicitor General appearing for the appellant-CBI in Criminal Appeal No.377 of 2007 made detailed submissions which are briefly summarized hereunder:

10.1. Section 6A of the DSPE Act is a mere procedural provision and not a penal provision as such would not attract Article 20(1) of the Constitution. Article 20 of the Constitution applies only to those provisions of law in force, violation of which results in conviction and resultantly awarding sentence. Procedural issues like statutory protection during trial, a provision providing for a particular Court to try the offence would not have any bearing while invoking Article 20 of the Constitution.

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10.2. Article 20 of the Constitution would have no applicability in determining whether the declaration made in the case of **Subramanian Swamy (supra)** would be prospective or retrospective. The protection provided under Article 20 of the Constitution against *ex post facto* law extends and confines only to conviction and sentence and would have no relevance for procedural aspects and also would not have any applicability to the powers exercised during the course of the investigation. He enlisted the following aspects in this respect:

(a) Article 20 is limited in application wherein distinct offences are created subsequently;

(b) The other aspect of Article 20 is debarring infliction of greater penalty, post commission of the offence;

(c) Section 6A did not decriminalise PC Act offences and removal of the said provision, therefore, does not create a new offence;

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(d) Section 6A did not provide any blanket immunity against anti-corruption laws and therefore, removal of the same does not create a new offence;

(e) Section 6A did not create any vested right which can be said to be covered by Article 20;

(f) Declaration of Section 6A as invalid and unconstitutional is through a judicial order and not a legislative measure.**;**

10.3. Reliance is placed upon the following judgments in support of the above propositions:

(1) Rao Shiv Bahadur Singh and another Vs. State of Vindhya Pradesh[5];

(2) State of West Bengal Vs. S.K. Ghosh[6];

(3) Sajjan Singh Vs. The State of Punjab[7];

(4) Rattan Lal Vs. State of Punjab[8];

5 (1953) SCR 1188

6 (1963) 2 SCR 111

7 (1964) 4 SCR 630

8 (1964) 7 SCR 676

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(5) Union of India Vs. Sukumar Pyne[9];

(6) G.P. Nayyar Vs. State (Delhi Administration)[10];

(7) Soni Devrajbhai Babubhai Vs. State of Gujarat and Others[11];

(8) Securities and Exchange Board of India Vs. Ajay Agarwal[12];

10.4. Referring to Section 6A of the DSPE Act, it was submitted that the same is not a penal provision and it does not create a new offence nor does it increase the punishment for an existing offence, which existed on the date of the commission of offence.

9 (1966) 2 SCR 34

10 (1979) 2 SCC 593

11 (1991) 4 SCC 298

12 (2010) 3 SCC 765

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10.5. Prior to insertion of Section 6A in the DSPE Act, similar provision was existing in Single Directive No.4.7(3) requiring prior sanction to investigation. This Court in the case of **Vineet Narain and Others Vs. Union of India and Another**[13]**,** amongst other larger issues was also testing the validity of the Single Directive No.4.7(3). This Court held in the said case that by administrative instructions the statutory powers could not be intermeddled or impeded. It accordingly declared Single Directive No.4.7(3)(i) as invalid.

10.6. As a result of such declaration Section 6A was introduced in the DSPE Act in the year 2003 vide Section 26(c) of the Central Vigilance Commission Act, 2003 w.e.f. 11.09.2003.

13 (1998) 1 SCC 226

10.7. Section 6A of the DSPE Act, undeniably does not create a new offence nor does it obliterate the offence. The Constitution Bench in **Subramanian Swamy's case (supra)** noted that the classification made in Section 6A neither eliminates public mischief nor achieves some positive public good and, therefore, the classification was held to be discriminatory and violative of Article 14 of the Constitution as it side-tracks the fundamental objects of the PC Act, 1988 to deal with corruption.

10.8. Shri Mehta commenting upon Section 6A of the DSPE Act enlisted the following short conclusions:

(a) It is not a provision creating an offence or providing immunity from an offence under which anyone can be punished;

(b) The said provision did not exempt applicability of anti-corruption laws to officers above the rank of Joint Secretary;

(c) It was a mere executive safety mechanism; It was a mere initial protective net of a particular kind which this Hon'ble Court declared as unconstitutional;

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(d) The said provision did not seek to create individual rights or immunities rather was, as was the submission of the Union of India in **Subramanian Swamy (supra)**, a provision which was aimed at protecting bona fide actions for ensuring honest decisions/advice in governmental functioning.

(e) It was not aimed as an immunity or substantive exclusion from application of laws, rather was a preliminary check provided in order to ensure honest officials are not unnecessarily harassed.

(f) It cannot be termed as a substantive procedural provision nor is it a substantive penal provision.

(g) At best, Section 6A of the DSPE Act was purely technical, procedural precondition, which was preliminary in nature and was to be exercised prior to the stage of investigation.

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10.9. It is settled proposition that declaration of unconstitutionality renders a law to be *non est,* void *ab initio* or *unenforceable*, as the case may be, subject to the legislature to cure the basis of the said unconstitutionality. Reliance was placed upon the following judgments of this Court in his context:

(1) Keshavan Madhava Menon Vs. The State of Bombay[14];

(2) Behram Khurshed Pesikaka Vs. The State of Bombay[15];

(3) M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh & Another[16];

(4) Deep Chand Vs. The State of Uttar Pradesh and Others[17];

(5) Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others[18];

(6) Municipal Committee, Amritsar

14 1951 SCR 228

15 (1955) 1 SCR 613

16 1958 SCR 1422

17 1959 SCR Suppl. (2) 8

18 AIR 1963 SC 1019

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and others Vs. State of Punjab and Others[19]**;**

(7) The State of Manipur & Ors. Vs. Surjakumar Okram & Ors.[20]**;**

10.10. The common opinion culled out from the various opinions rendered in the above judgments is that such declaration makes the law unenforceable and such unenforceability relates back. It was, thus, submitted that judgment in the case of **Subramanian Swamy (supra)** relates back to the point when Section 6A was inserted in the DSPE Act.

19 (1969) 1 SCC 475

20 2022 SCC Online SC 130

10.11. Further submission is that a decision of this Court enunciating a principle of law is applicable to all cases irrespective of its stage of pendency as it is assumed that what is enunciated by this Court is in fact the law from inception. There can be no prospective overruling unless expressly indicated in clear and positive terms. If the Constitution Bench in the case of **Subramanian Swamy (supra)** had any intentions of declaring that the same would be prospective in application, then the same should have been specifically and discretely stated therein. In absence of such declaration, the natural assumption is that the same is retrospective applying the Blackstonian theory of precedence.

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10.12. Reference was made by Shri Mehta to the cases of **I.C. Golaknath & Ors. Vs. State of Punjab and Anr.**[21] and **Managing Director, ECIL, Hyderabad and Others Vs. B. Karunakar and Others**[22] for the proposition that prospective overruling is to be exercised as an exception in rare circumstances and such power should be seldom exercised. He has further placed reliance upon a judgment of this Court in the case of **M.A. Murthy Vs. State of Karnataka and others**[23] for the proposition that if prospective overruling is not specifically provided in the decision, it would not be open for Courts in future to declare such a decision to be prospective in nature. If prospective applicability of a decision is not provided in the said decision, then it is presumed that it will have retrospective effect and declaration of any law as invalid would be unenforceable and non-existent from the statute book from the time of its inception. The judgment in the case of **Subramanian Swamy (supra)** would, therefore,

21 (1967) 2 SCR 762

22 (1993) 4 SCC 727

23 (2003) 7 SCC 517

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operate retrospectively and at least would be unenforceable *ab initio.*

10.13. The next submission is that the judgment in the case of **Transmission Corporation of A.P. Vs. C.H. Prabhakar and Others**[24] would also not be of any help to the respondent as under the American position of protection against '*ex post facto*' laws, removal of a provision similar to Section 6A of the DSPE Act would not be hit. Reference is made to the following judgments:

(1) Hopt Vs. People of the Territory of Utah[25]**;**

(2) Duncan Vs. State[26]**;**

24 (2004) 5 SCC 551

25 110 US 574 (1884)

26 152 US 377 (1894)

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(3) Gibson Vs. Mississippi[27];

(4) Thompson Vs. State of Missouri[28]; 171 US 380 (1898)

(5) John Mallett Vs. State of North Carolina[29];

(6) John Rooney Vs. State of North Dakota[30];

(7) Beazell Vs. State of Ohio Chatfield[31];

(8) Dobbert Vs. Florida[32];

(9) Smith et al Vs. Doe et al[33];

B: <u>For Union of India:</u>

11. Shri S.V. Raju, learned Additional Solicitor General of India made submissions on behalf of the Union of India. His submissions are briefly summarized as follows:

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27 162 US 565 (1896)

28 171 US 380 (1898)

29 181 US 589 (1901)

30 196 US 319 (1905)

31 269 US 167 (1925)

32 432 US 282 (1977)

33 538 US 84 (2003)

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11.1. Merely because the Court takes time to decide the matter or merely because the challenge to statutory provisions is made subsequently, it would not make an unconstitutional statutory provision legal or constitutional even if such provision has operated for some time till it is struck down by the Court. Such a violation is *void ab initio,* as settled by a large number of decisions of this Court. It is only rarely that in some cases in order to obviate the hardships and on equitable grounds, this Court had protected an action taken under an unconstitutional statute. However, that does not mean that the statute was not unconstitutional or bad during the period it was on the statute book.

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11.2. Prohibition under Section 6A of the DSPE Act is against conducting any enquiry or investigation. Referring to the definition of "enquiry" in Section 2(g) of the Code of Criminal Procedure, 1973[34], it was submitted that the enquiry commences after charge-sheet is filed and is a forerunner to the trial. Reliance was placed upon the case of **Hardeep Singh Vs. State of Punjab[35],** in particular, reference has been made to paragraphs 27, 29 and 39 of the report.

11.3. Further referring to the definition of the word "investigation" in Section 2(h) of Cr.P.C., it was submitted that the prohibition contained in Section 6A of the DSPE Act relates to the prohibition from collecting evidence in an enquiry or during the investigation.

34 In short 'Cr.P.C.'

35 (2014) 3 SCC 92

11.4. Referring to the case of **Subramanian Swamy (supra)** it is submitted that there could be two situations prior to the judgment in the aforesaid case i.e. prior to May, 2014; (i) where evidence is already gathered as part of investigation or (ii) where evidence is not gathered because of the prohibition contained in Section 6A of the DSPE Act. Placing reliance upon a judgment of this Court in **H.N. Rishbud and Inder Singh Vs. The State of Delhi**[36], wherein, while answering the first question, this Court held that the prohibition contained in Section 5(4) of the Prevention of Corruption Act, 1947[37] was mandatory in nature whereas while answering the second question, this Court held that trial following an investigation conducted in violation of Section 5(4) of the PC Act, 1947 would not be illegal. It was submitted that where a Magistrate has already taken cognizance upon an investigation, conducted without the approval under Section 6A of the DSPE Act, the Court can act on evidence collected during such investigation and the proceedings would not be vitiated in the absence of any prejudice both

36 (1955) 1 SCR 1150

37 In short, "PC Act, 1947"

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actual and pleaded with respect to such evidence. Reference has been made to the following judgments:

(i) Fertico Marketing and Investment Private Limited and Others Vs. Central Bureau of Investigation and Another[38];

(ii) Rattiram and Others Vs. State of Madhya Pradesh[39] ;

(iii) State of Karnataka Vs. Kuppuswamy Gownder and Others[40];

38 (2021) 2 SCC 525

39 (2013) 12 SCC 316

40 AIR 1987 SC 1354

11.5. It is further submitted that where investigation was not conducted and where the Magistrate has not taken cognizance, the Investigating Agency can conduct further investigation and collect evidence which earlier it was not able to do due to the bar of Section 6A of the DSPE Act. However, such further investigation would be subject to Section 17(A) of the PC Act, 1988. It was, thus, submitted that after judgment in the case of **Subramanian Swamy (supra)**, the prohibition contained in Section 6A of the DSPE Act having seized the CBI could investigate the matter subject to Section 17(A) of the PC Act, 1988 wherever applicable. There would be no requirement to obtain approval under Section 6A of the DSPE Act.

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11.6. The provisions under Section 6A of the DSPE Act do not confer any immunity from prosecution. Assuming that Section 6A of the DSPE Act was in operation prior to the judgment in the case of **Subramanian Swamy (supra)**, it could not bar investigation by an Agency other than those covered by the DSPE Act. Reference was made to the judgment of this Court in the case of **A.C. Sharma Vs. Delhi Administration**[41]. Further submission is that a trial on the basis of a private complaint relating to corruption cases would be maintainable and there would be no immunity in such cases by virtue of Section 6A of the DSPE Act.

11.7. It was next submitted that Article 20(1) of the Constitution would have no application in this case as investigation is only part of the procedure for collecting evidence and it neither amounts to conviction nor to sentence. Reliance was placed upon a judgment of this Court in the case of **Rao Shiv Bahadur Singh (supra).**

C: <u>Dr. R.R. Kishore – respondent in person in Crl.A.No.377 of 2007</u>:

41 (1973) 1 SCC 726

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12. The respondent, Dr. R.R. Kishore has throughout represented himself in person and has argued the matter at length before us. His submissions are summarized hereunder:

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12.1. At the outset, it was submitted that CBI is contesting this case against the stand of the Union of India. Initially Union of India was not a party to the proceedings, however, pursuant to an order dated 27.04.2012 passed in this appeal, the Union of India was made a party by the Court *suo moto*. The affidavit filed by Union of India, served upon the respondent on 25.02.2013 and which is part of the record, categorically stated that CBI does not have jurisdiction to initiate investigation against the respondent without prior approval of the Central Government. It further stated that the view taken by the learned Single Judge of the Delhi High Court in the impugned order dated 05.10.2006 is correct and effectively captures the purpose of enactment of a provision. It further took stand in paragraph 23 that purport of Section 6A of the DSPE Act is to accord meaningful protection to the persons imbued with decision making powers from frivolous or motivated investigation by providing a screening mechanism. Reference was also made to the directions issued by this Court in the case of **Vineet Narain (supra)** to the effect that Central

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Government shall remain answerable for the CBI's functioning and shall further take all measures necessary to ensure that CBI functions effectively, efficiently and is viewed as a non-partisan agency. On such submissions, it is the case of the respondent that nothing survives in this appeal filed by the CBI and the same deserves to be dismissed.

12.2. It was next submitted that CBI had not only violated Section 6A of the DSPE Act but had also violated Section 6 of the said Act and also Sections 17 and 18 of the PC Act, 1988. Even though the FIR was registered only under Section 7 of the PC Act, 1988 against the respondent alone, but still the CBI conducted investigation regarding possessing assets disproportionate to known sources of income not only against the respondent but also his wife, who was working as an employee of the State of U.P.

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12.3. Referring to the facts of the case, it was stated that the case was registered under Section 7 of the PC Act on 16.12.2004, the High Court delivered the judgment impugned in the appeal on 05.10.2006, the petition was preferred by the CBI in January, 2007, leave was granted thereafter and notice was issued to the Union of India on 27.04.2012. The affidavit was filed by the Union of India in February, 2013. The provisions of Section 6A of the DSPE Act was continuing on the statute book till 06.05.2014 when the judgment in the case of **Subramanian Swamy (supra**) was delivered. On the basis of above facts, it was submitted that the appeal was liable to be dismissed as being meritless.

12.4. It was next submitted that at the time when the appeal is being heard, there is already in existence a similar provision protecting the interest of the respondent by way of Section 17(A) of the PC Act, 1988.

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12.5. An argument relating to discrimination has also been raised by the respondent to the effect that in case if the contention of the appellant is accepted, the respondent would be discriminated from those set of government servants who have availed the protection of Section 6A of the DSPE Act and the proceedings against them have come to a closure in cases where the competent authority declined to grant sanction and also to another set of cases where the Courts have quashed the proceedings in the absence of sanction under Section 6A of the DSPE Act.

12.6. The next argument relates to Section 6 of the General Causes Act, 1897[42] dealing with effect of Repeal in view of its applicability under Article 367 of the Constitution.

12.7. It is also submitted that where a law has been in force for a long time and is subsequently repealed, the same would not affect the rights which had accrued during the existence of such law.

42 In short 'the Act, 1897'

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12.8. It is also his submission that if, while declaring the statute to be invalid, the Court does not expressly incorporate for its retrospective application, it shall be deemed to apply prospectively. Reliance was placed upon the following judgments:

(1) Keshavan Madhava Menon (supra);

(2) Ashok Kumar Gupta and Another Vs. State of U.P. and others[43];

(3) Kaiser Aluminium and Chemical Corporation Vs. Bonjorno[44];

(4) Assistant Excise Commissioner, Kottayam and Others Vs. Esthappan Cherian and another[45]

43 (1997) 5 SCC 201

44 494 US 827 (1990)

45 Civil Appeal No.5815 of 2009 by Supreme Court of India vide order dated 06.09.2021

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12.9. It was next submitted that appeal of the CBI has been filed primarily on two grounds; that Section 6A(1) of the DSPE Act is not mandatory; and that Section 6A(2) would apply. He also submitted that no ground has been taken that Section 6A(1) is unconstitutional or invalid, as such, CBI cannot argue this point.

12.10. Lastly, it is submitted that not only Article 20, but also Article 21 of the Constitution, should be read in favour of the respondent and also in favour of the law existing at the time when the offence is said to have taken place, benefit should be extended of any protection available at that time.

D: <u>Shri Arvind Datar, Senior Advocate for appellant-Manjit Singh Bali in Crl.Appeal @ SLP (Crl.) No. 4364 of 2011:</u>

13. Shri Arvind Datar, learned Senior Counsel appearing for the appellant-Manjit Singh Bali in Criminal Appeal arising out of SLP (Crl.) No.4364 of 2011 made the following submissions:

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13.1. After referring to the question referred to the Constitution Bench, Shri Datar, learned Senior Advocate submitted that following three corollary questions also arise for consideration namely:

(i) Whether declaration of a law being violative of Article 14 or any other Article contained in Part-III is *void ab initio* under Article 13(2)?

(ii) What is the effect of such a judgment on actions taken or omitted to be taken during the period when the law remained operational? and

(iii) Whether there is a difference between: (I) a law held as unconstitutional for lack of legislative competence; and (II) a law held to be unconstitutional for violation of Part-III or other constitutional limitations?

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13.2. Referring to Article 20(1) of the Constitution vis-a-vis deprivation of immunity retrospectively and analysing the said constitutional provision, it is submitted that a conviction of an accused can take place by following the prescribed procedure starting from enquiry, investigation, trial etc. According to him, if the first stages of enquiry, investigation are not permitted unless there is a specified prior approval as there is immunity from prosecution, no conviction can take place. According to him, this immunity referring to Section 6A of the DSPE Act, is entitled to protection under Article 20(1) of the Constitution. According to him, the marginal note refers to protection in respect of conviction and the phrase 'in respect of' must be interpreted to grant protection to all the existing procedural safeguards at the time when the offence was alleged to be committed. Reliance was placed upon a judgment of this Court in the case of **Prabhu Dayal Deorah Vs. District Magistrate**[46].

46 (1994) 1 SCC 103

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13.3. Section 6A(1) of the DSPE Act creates an immunity and grants a protection. It cannot be taken away retrospectively, either by retrospective amendment or by a judgment declaring such immunity invalid.

13.4. Section 6A was declared *ultra vires* Article 14 of the Constitution and, as such, under Article 13(2) of the Constitution it is *void* to the extent of the contravention. The argument further proceeds to elaborate the meaning and scope of the word "*void*" which came up for consideration in a number of cases right from 1951 to 1963. Dr. Datar has very fairly submitted that this Court has held that a provision which is held to be '*void*' would be a "nullity", "still born" or "dead" as if it was never in existence at all.

13.5 It was next submitted that a law which has been declared to be unconstitutional could only mean that such law becomes inoperative or ineffective, once declared and not before that. The submission is that a law declared unconstitutional cannot be treated as *void ab initio* for the following reasons:

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(a) As there is a presumption of constitutionality till a law is declared to contravene the provisions of Part-III or other constitutional limitations, it remains valid;

(b) The expression "to the extent of contravention" implies that there has to be a judicial declaration of contravention and the extent thereof. Till such declaration is made, no law can be treated as void;

(c) If there is no interim stay, the law has to be implemented and all actions taken pending final hearing will not become unlawful;

(d) The word "*void*" is used 14 times in the Constitution. The use of the word "void" in the context of the Constitution, unlike the Contract Act, only means that a judicial declaration renders a law inoperative or unenforceable;

(e) The Oxford Dictionary defines the word "*void*" in two ways:

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(i) As an adjective, it means that 'something is not valid or legally binding'; and

(ii) As a verb, it means 'to declare that (something) is not valid or legally binding'.

(f) A combined reading of Articles 249-251 read with Article 254 of the Constitution shows that the word "*void*" basically means 'invalid' or 'inoperative';

(g) The word "*void*" does not mean "repeal"; a judgment does not amend or alter the statue. It remains in the statute-book but cannot be given effect to.

(h) Part-III includes not only express fundamental rights but several derivative rights. Therefore, it will be incorrect to treat an unconstitutional law as *void ab initio.*

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13.6. The next submission is that an administrative act, unless declared invalid, will continue to have legal effect and actions taken before the law was declared invalid would still remain protected.

13.7. A large number of judgments have been referred for the proposition that declaration of invalidity and consequences that follow are two different aspects and this Court has repeatedly granted relief by protecting the actions taken during pendency of the litigation.

13.8. It is also submitted that a law declared as invalid either on the ground of lack of legislative competence or for violating Part-III of the Constitution or other constitutional limitations would have the same effect. No distinction can be drawn in either of the cases.

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13.9. It was next submitted that protection from prosecution has continued from 1969 as it was deemed necessary to ensure proper administrative function by Government officials except for brief periods when this Court had struck down the validity of the relevant clause of the Single Directive in the case of **Vineet Narain (supra)** and, thereafter, Section 6A of the DSPE Act in the case of **Subramanian Swamy (supra)**. Continuously, the legislature has been incorporating provisions in different statutes to continue to extend such protection to Government officials from unnecessary and frivolous criminal prosecutions.

13.10. It was lastly submitted that the doctrines of prospective overruling and the Blackstonian theory do not apply in the present case as no previous decision has been overruled. This is a case of declaring a law as unconstitutional being violative of Part-III of the Constitution.

13.11. In the facts and circumstances, it was submitted that the appeal of Manjit Singh Bali deserves to be allowed.

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13.12. Shri Amit Desai, learned Senior Counsel also appearing for the same party made a few submissions. He placed reliance upon two judgments of this Court, namely **(i) Mohan Lal Vs. State of Punjab**[47] and, (ii) **Varinder Kumar Vs. State of Himachal Pradesh**[48]**.**

47 (2018) 17 SCC 627

48 (2020) 3 SCC 321

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14. Having considered the submissions advanced on behalf of the parties, the following questions require consideration:

(i) Whether Section 6A of the DSPE Act is part of procedure or it introduces a conviction or sentence?

(ii) Whether Article 20(1) of the Constitution will have any bearing or relevance in the context of declaration of Section 6A of the DSPE Act as unconstitutional?

(iii) The declaration of Section 6A of the DSPE Act as unconstitutional and violative of Article 14 of the Constitution would have a retrospective effect or would apply prospectively from the date of its declaration as unconstitutional?

15. At the outset, it may be noted that during the course of arguments, it was made clear to the counsels that this Bench would be answering the specific question referred to it and would not be enlarging the scope of the reference made. Although learned counsels and the party in person were allowed to make their submissions and were not checked during the course of the arguments from raising points beyond the scope of the reference in order to enlarge its scope, that would not mean that the Court would deal with all such submissions. It was also made clear that the Bench would not be dealing with the merits of the individual cases and post answering the questions, the matters would be reverted to the regular Bench assigned of such jurisdictions for hearing and disposal.

16. Before commencing to analyse the respective arguments and legal position on the questions so framed, a brief narration of the history of obtaining sanction before launching prosecution may be referred to.

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16.1. In 1969, the Central Government issued Single Directive which is a consolidated set of instructions issued to the CBI by various Ministries/Departments and has been amended from time to time. Directive No.4.7(3) contained instructions regarding modalities of initiating an enquiry or registering a case against certain categories of civil servants and provided for a prior sanction of the Designated Authority to initiate investigation against officers of the Government and public sector undertakings & Nationalized Banks above a certain level. The same reads as follows:

> *"4.7(3)(i) In regard to any person who is or has been a decision making level officer (Joint Secretary or equivalent of above in the Central government or such officers as are or have been on deputation to a Public Sector Undertaking; officers of the Reserve Bank of India of the level equivalent to Joint Secretary of above in the Central Government, Executive Directors and above of the SEBI and Chairman & Managing Director and Executive Directors and such of the Bank officers who are one level below the Board of Nationalised Banks), there should be prior sanction of the Secretary of the Ministry/Department concerned before SPE takes up any enquiry (PE or RC), including ordering search in respect of them. Without such sanction, no enquiry shall be initiated by the SPE.*

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(ii) All cases referred to the Administrative Ministries/Departments by CBI for obtaining necessary prior sanction as aforesaid, except those pertaining to any officer of the rank of Secretary or Principal Secretary, should be disposed of by them preferably within a period of two months of the receipt of such a reference. In respect of the officers of the rank of Secretary or Principal Secretary to Government, such references should be made by the Director, CBI to the Cabinet Secretary for consideration of a Committee consisting of the Cabinet Secretary as its Chairman and the Law Secretary and the Secretary (Personnel) as its members. The Committee should dispose of all such references preferably within two months from the date of receipt of such a reference by the Cabinet Secretary.

(iii) When there is any difference of opinion between the Director, CBI and the Secretary of the Administrative Ministry/Department in respect of an officer up to the rank of Additional Secretary or equivalent, the matters shall be referred by CBI to Secretary (Personnel) for placement before the Committee referred to in Clause (ii) above. Such a matter should be considered and disposed of by the Committee preferably within two months from the date of receipt of such a reference by Secretary (Personnel).

(iv) In regard to any person who is or has been Cabinet Secretary, before SPE takes any step of the kind mentioned in (i) above the case should be submitted to the Prime Minister for orders."

The validity of the above Single Directive No.4.7(3) was considered in the case of **Vineet Narain (supra)**.

16.2. After considering the material placed on record, the three Judge Bench in the case of **Vineet Narain (supra)** came to the conclusion that such directive could not be held to be valid and, accordingly, struck it down. The judgment in the case of **Vineet Narain (supra)** was delivered on 18.12.1997.

16.3. The requirement of sanction similar to Single Directive No.4.7(3) was introduced by way of an Ordinance w.e.f. 25.08.1998 and the same lasted till 27.10.1998 when it lapsed. Thereafter, in 2003, Section 6A, akin to Single Directive No.4.7(3), was inserted in the DSPE Act w.e.f. 11.09.2003 vide Section 26(c) of Central Vigilance Commission Act, 2003 (Act No. 45 of 2003)[49]. The said provision is reproduced hereunder:

> "**Section 6A of the DSPE Act**
>
> *6A. Approval of Central Government to conduct inquiry or investigation.-*

49 In short, "Act No. 45 of 2003"

(1) The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to-

(a) the employees of the Central Government of the Level of Joint Secretary and above; and

(b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.

(2) Notwithstanding anything contained in sub-section (1), no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any gratification other than legal remuneration referred to in clause (c) of the Explanation to section 7 of the Prevention of Corruption Act, 1988 (49 of 1988).]"

17. This Section remained on the statute book for a period of more than ten years till the judgment in the case of **Subramanian Swamy (supra)** was delivered on 06.05.2014, which held it to be unconstitutional as being violative of Article 14 of Part-III of the Constitution.

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18. The Parliament again inserted Section 17A in the PC Act, 1988 w.e.f. 26.07.2018. This provision has continued to remain in the statute book. It also provided for sanction before prosecution but without any classification of Government servants. All Government servants of whatever category, class, or level, are provided protection under Section 17A of the PC Act, 1988. The said provision is reproduced hereunder:

> *17A. Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties.-- No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval--*
>
> *(a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;*
>
> *(b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;*

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(c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:

Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person:

Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.

19. From the above, we notice that there are small windows of couple of years on two occasions when there was no such protection available, otherwise, right from 1969 the protection regarding sanction before prosecution has remained in force and continues as such even now.

Article 20(1) of the Constitution and its applicability in the context of Section 6A of the DSPE Act (Question No.:1 & 2).

20. The Constitution Bench in the case of **Subramanian Swamy (supra)** was testing constitutional validity of Section 6A of DSPE Act. Section 6A has two sub-Sections (1) and (2). Sub-Section (1) provides of a protection from any enquiry or investigation into any offence under the PC Act, 1988 without the previous approval of the Central Government where the allegation relates to employees of the Central Government of the level of Joint Secretary and above (Clause a) and also such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by the Government. Sub-Section (2) begins with a non-obstante clause stating that no such approval would be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any gratification other than legal remuneration referred to in clause (c) of the *Explanation* to Section 7 of the PC Act, 1988. Sub-Section (2) takes away the protection to the Government servant of the category defined in sub-Section (1) where arrest of a

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person is to be made on the spot on the charge of accepting or attempting to accept any gratification.

21. The Constitution Bench held that Section 6A(1) which required approval of the Central Government to conduct any enquiry or investigation into any offence alleged to have been committed under the PC Act, 1988 to be invalid and unconstitutional and in violation of Article 14 of the Constitution. As a necessary corollary, it was further declared that the provision contained in Section 26(c) of Act No. 45 of 2003 introducing the above provision was also invalid.

22. The reference order dated 10.03.2016 required the retrospective application of the declaration by the Constitution Bench in **Subramanian Swamy (supra)** to be determined in the context of Article 20 of the Constitution. It would, therefore, be necessary to briefly discuss the scope of Article 20 and whether or not it would have any applicability in the context of Section 6A of the DSPE Act.

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23. Before proceeding to do that, it would be appropriate to examine whether Section 6A of the DSPE Act providing protection to certain categories of Government servants would, in any manner, amount to a conviction or sentence or it would be a purely procedural aspect. Section 6A of the DSPE Act does not lay down or introduce any conviction for any offence. It is a procedural safeguard only which is enumerated in Section 6A of the DSPE Act with regard to making of an investigation or enquiry of an offence under the PC Act, 1988. Section 6A of the DSPE Act also does not lay down any sentence nor does it alter any existing sentence for an offence.

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24. There is no attempt on the part of the respondent or by Mr. Datar to canvass that Section 6A of the DSPE Act is not part of procedural law and that it in any manner introduces any conviction or enhances any sentence post the commission of offence. **It is, therefore, held that 6A of the DSPE Act is a part of the procedure only in the form of a protection to senior government servants.** It does not introduce any new offence nor it enhances the punishment or sentence.

25. It would be useful to reproduce Article 20 of the Constitution at this stage itself for its proper analysis and appreciation of the arguments of the respective counsels. It reads as follows:

> ***"20. Protection in respect of conviction for offences.***
>
> *(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.*
>
> *(2) No person shall be prosecuted and punished for the same offence more than once.*

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(3) No person accused of any offence shall be compelled to be a witness against himself."

26. In the present case we are only concerned with sub-article (1) to Article 20 of the Constitution. Hence, we need not examine sub-article (2) and (3).

27. Sub-article (1) of Article 20 of the Constitution consists of two parts. The first part prohibits any law that prescribes judicial punishment for violation of law with retrospective effect. Sub-article (1) to Article 20 of the Constitution does not apply to civil liability, as distinguished from punishment for a criminal offence. Further, what is prohibited is conviction or sentence for any offence under an *ex post facto* law, *albeit* the trial itself is not prohibited. Trial under a procedure different from the one when at the time of commission of an offence, or by a court different from the time when the offence was committed is not unconstitutional on account of violation of sub-article (1) to Article 20 of the Constitution. It may be different, if the procedure or the trial is challengeable on account of discrimination under Article 14 of the Constitution or violation of any other fundamental right.

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28. The right under first part of sub-article (1) to Article 20 of the Constitution is a very valuable right, which must be safeguarded and protected by the courts as it is a constitutional mandate. The Constitution bench of this Court in ***Rao Shiv Bahadur Singh*** v. ***State of Vindhya Pradesh***[50], highlighted the principle underlying the prohibition by relying upon judgment of Willes, J. in ***Phillips*** v. ***Eyre***[51] and of the United States Supreme Court in ***Calder*** v. ***Bull***[52], to hold that it would be highly unjust, unfair and in violation of human rights to punish a person under the *ex post facto* law for acts or omissions that were not an offence when committed. In the English system of jurisprudence, in the absence of a written Constitution, the repugnance of such laws is justified on universal notions of fairness and justice, not on the ground of invalidating the law itself, but as compelling the beneficial construction thereof where the language of the statute by any means permits it. Under the American law, *ex post facto* laws are

50 (1953) 2 SCC 111

51 (1870) LR 6 QB 1 at pp. 23 and 25

52 1 L Ed 648 at p. 649 : 3 US (3 Dall) 386 (1798)

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rendered invalid by virtue of Article 1, Sections 9 and 10.[53]

53 It may be noted that the provisions of the American Constitution are differently worded. We must keep in view the language of sub-article (1) of Article 20.

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29. ***Rao Shiv Bahadur Singh*** (supra) observes that the language of sub-article (1) of Article 20 of the Constitution is much wider in terms as the prohibition under the Article is not confined to the passing of validity of the law, and that fullest effect must be given to the actual words used and what they convey. Accordingly, the decision had struck down Vidhya Pradesh Ordinance 48 of 1949, which though enacted on 11.09.1949, had postulated that the provisions would deemed to have come into force in Vidhya Pradesh on 09.04.1948, a date prior to the date of commission of offences. Interpreting the term 'law in force', it was held that the ordinance giving retrospective effect would not fall within the meaning of the phrase 'law in force' as used in sub-article (1) of Article 20 of the Constitution. The 'law in force' must be taken to relate not to a law deemed to be in force, but factually in force, and then only it will fall within the meaning of 'existing law'. Artifice or fiction will fall foul, when they are with the intent to defeat the salutary object and purpose

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behind sub-article (1) of Article 20 of the Constitution.[54]

30. The aforesaid rationale and principles of interpretation equally apply to the second part of sub-article (1) to Article 20, which states that a person can only be subjected to penalties prescribed under the law at the time when the offence for which he is charged was committed. Any additional or higher penalty prescribed by any law after the offence was committed cannot be imposed or inflicted on him. The sub-article does not prohibit substitution of the penalty or sentence which is not higher or greater than the previous one or modification of rigours of criminal law.[55]

54 In the present case, we need not examine-when an offence is a continuous offence, an aspect and matter of considerable debate.

55 See T. Barai Vs. Henry Ah Hoe, (1983) 1 SCC 177 and Pratap Singh Vs. State of Jharkhand, (2005) 3 SCC 551. The latter judgment refers to several judgments.

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31. In view of the limited scope of the present controversy, we need not examine in greater detail sub-article (1) of Article 20. The reason why we have referred to the constitutional guarantee, which protects the citizens and persons from retrospective *ex post facto* laws, is to affirm that our decision in no way dilutes the constitutional mandate. The issue involved in the present reference relates to a matter of procedure, and not the two aspects covered by sub-article (1) of Article 20 of the Constitution.

32. Learned counsel for the parties have also briefly referred to Section 6 of the General Clauses Act, 1897. It would be appropriate to reproduce the said provision hereunder:

> *"Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-*
>
> *(a) revive anything not in force or existing at the time at which the repeal takes effect; or*
>
> *(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or*

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(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

A plain reading of the above provision indicates that the repeal of an enactment shall not affect previous operation, unless a different intention appears. It may be appropriately noted here that the present case does not involve repeal or revival of any enactment but is a case where a Constitution Bench of this Court has declared a statutory provision as invalid and unconstitutional being hit by Article 14 of the Constitution. As such Section 6 of the 1897 Act will have no application.

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33. At this stage, it would be appropriate to briefly refer to the case law on the above point regarding applicability of Article 20 of the Constitution.

(i) In the case of **Rao Shiv Bahadur Singh (supra),** the Constitution Bench, as far back as 1953, was dealing with the effect of Article 20(1) of the Constitution raised under two separate circumstances. The first being that the Court which recorded the conviction had been conferred jurisdiction much after the offence had taken place and at the time of the offence the forum was different. The other issue raised with regard to Article 20(1) of the Constitution was that although the offence had been committed in the month of March and April 1949 but by way of an ordinance which came into force in September 1949, the laws were adopted which covered the offences for which the appellants were charged and as such Article 20(1) would protect them and they could not be tried for such offence which had been introduced later on.

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(ii) The Constitution Bench rejected the plea on both the counts. Although in the present case, the concern is only with the first aspect relating to the issue regarding competent court to try the offence which is a part of the procedure and had nothing to do with conviction or sentence being introduced subsequent to the offence. The Constitution Bench held as follows with regard to the above issue:

> *"9. In this context* ***it is necessary to notice that what is prohibited under Article 20 is only conviction or sentence under an ex post facto law and not the trial thereof.*** *Such trial under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which had competence at the time cannot ipso facto be held to be unconstitutional.* ***A person accused of the commission of an offence has no fundamental right to trial by a particular court or by a particular procedure, except insofar as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved.***
>
> ***(emphasis supplied)"***

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(iii) With respect to the second aspect also, the Constitution Bench did not find favour with the appellant and held that the State of Vindhya Pradesh had the power to frame laws being applied retrospectively and also for the reason that the said offence was already in existence and in force in the said state in 1948 itself.

(iv) The Constitution Bench in the case of **S.K. Ghosh (supra)** was dealing with an appeal filed by the State of West Bengal assailing the correctness of the judgment of the High Court by which two Hon'ble Judges had allowed the appeal of the respondent **S.K. Ghosh** but for different reasons. **Mitter J.** had not dealt with the applicability of Article 20(1) of the Constitution for setting aside the forfeiture proceedings. The same was set aside for the reason that there was no determination under Section 12 of the Criminal Law, 1944 Amendment vide 1944 Ordinance, whereas **Bhattacharya J.** set aside the forfeiture on the ground that the 1944 Ordinance had come into force on 23.08.1944 whereas the effective period for committing the offence had ended in July 1944.

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(v) The Constitution Bench allowed the appeal of the State of West Bengal by holding that both the views taken by the respective judges were not correct.

(vi) The Constitution Bench once again relied upon the earlier Constitution bench judgment in the case of **Rao Shiv Bahadur Singh (supra)** and laid down that forfeiture in the said case would have nothing to do with conviction or punishment and therefore there could be no application of Article 20(1). The relevant extract from the aforesaid judgment is reproduced hereunder:

"16. We may in this connection refer to Rao Shiv Bahadur Singh v. State of Vindhya Pradesh where Article 20(1) came to be considered. In that case it was held that "the prohibition contained in Article 20(1) of the Constitution against conviction and subjections to penalty under ex post facto laws is not confined in its operation to post-Constitution laws but applied also to ex post facto laws passed before the Constitution in their application to pending proceedings". ***This Court further held that Article 20 prohibits only conviction or sentence under an ex post facto law, and not the trial thereof. Such trial under a procedure different from what obtained at the time of the offence or by a court different from that which had competence at that time cannot ipso facto be held to be unconstitutional. Therefore, this case shows that it is only conviction and punishment as defined in Section 53 of the Indian Penal Code which are included within Article 20(1) and a conviction under an ex post facto law or a punishment under an ex post facto law would be hit by Article 20(1); but the provisions of Section 13(3) with which we are concerned in the present appeal have nothing to do with conviction or punishment and therefore Article 20(1) in our opinion can have no application to the orders passed under Section 13(3).***

(emphasis supplied)"

(vii) In the case of **Rattan Lal (supra),** a three-Judge Bench of this Court by a majority of 2:1 was of the view that a law made post the offence which neither creates an offence nor enhances the sentence but was a beneficial legislation for reformation of first-time offenders, the benefit could be extended to such an accused convicted for the first time, i.e., under the Probation of Offenders Act 1958, and that Article 20(1) of the Constitution will have no application.

(viii) The Constitution Bench in the case of **Sukumar Pyne (supra),** relying upon the earlier Constitution Bench in **Rao Shiv Bahadur Singh** (supra), further laid down that there is no principle underlying Article 20(1) of the Constitution which makes a right to any course of procedure a vested right. The relevant extract from the judgment is reproduced hereunder:

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"20. …As observed by this Court in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh a person accused of the commission of an offence has no vested right to be tried by a particular court or a particular procedure except insofar as there is any constitutional objection by way of discrimination or the violation of any other fundamental right is involved. It is well recognized that "no person has a vested right in any course of procedure" (vide Maxwell 11th Edn., p.216), and we see no reason why this ordinary rule should not prevail in the present case. ***There is no principle underlying Article 20 of the Constitution which makes a right to any course of procedure a vested right…***

(emphasis supplied)"

(ix) In the case of **G.P. Nayyar (supra)**, a two-judge Bench of this Court, while dealing with the effect of repeal and revival of Section 5(3) of the Prevention of Corruption Act, 1947, was of the view that Section 5(3) did not by itself lay down or introduce any offence. It was only a rule of evidence whereas the offence was provided under Section 5(1) or 5(2) of the 1947 Act. As such, the claim of the appellant therein that revival of Section 5(3) by the Anti-Corruption Laws (Amendment) Bill, 1967 retrospectively hit by Article 20(1) of the Constitution was without any merit. Reliance was placed upon the earlier Constitution Bench judgment in **Rao Shiv Bahadur Singh (supra)** that it was only conviction or sentence under an *ex post facto* law that was prohibited under Article 20(1) of the Constitution and would not affect the trial. What this Court said was that the appellant cannot object to a procedure different from what existed at the time of the commission of the offence by applying Article 20(1) of the Constitution. It may be noticed that this was a judgment relating to law being amended by the Parliament and not law being declared

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unconstitutional by a Court. The relevant extract from the said judgment reads as follows:

> *"There can be no objection in law to the revival of the procedure which was in force at the time when the offence was committed. The effect of the amendment is that sub-section (3) of Section 5 as it stood before the commencement of the 1964 Act shall apply and shall be deemed to have always applied in relation to trial of offences. It may be if by this deeming provision a new offence was created, then the prohibition under Article 20(1) may come into operation. But in this case, as already pointed out, what is done is no more than reiterating the effect of Section 6(1) of the General Clauses Act. Mr. Garg, the learned Counsel, submitted that by amending procedure drastically and giving it retrospective effect, a new offence may be created retrospectively. It was contended that by shifting the burden of proof as provided for in Section 5(3) of the Prevention of Corruption Act, 1947, a new offence is created. It is unnecessary for us to consider the larger question as to whether in certain circumstances giving retrospective effect to the procedure may amount to creation of an offence retrospectively.* ***In the present case the old procedure is revived and no new procedure is given retrospective effect. The procedure given effect to is not of such a nature as to result in the creation of a new offence.***
>
> ***(emphasis supplied)"***

(x) In the case of **Soni Devrajbhai Babubhai (supra)**, the facts were that on 13.08.1986, the daughter of the appellant therein had died. Subsequently, Section 304-B of the IPC was introduced in the Indian Penal Code through Amending Act No. 43 of 1986, which came into effect on November 19, 1986. The accused (respondent in the appeal therein) raised a plea that he could not be charged or tried under Section 304-B of the IPC as, at the time of the offence, such provision was not in existence. It had been introduced much later. The Trial Court rejected the said application. However, the High Court agreed with the contention of the accused-respondent therein and hold that he could not be tried under Section 304-B as it was a new offence created subsequent to the commission of the offence. The Supreme Court upheld the view of the High Court and rejected the contention of the complainant-appellant.

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(xi) In the case of **Ajay Agarwal (supra)**, a two-judge Bench of this Court while dealing with the provisions of Section 11B of the Securities and Exchange Board of India Act, 1992[56], which was inserted in 1995 held that this provision was procedural in nature and could be applied retrospectively. It was of the view that for any law which affects matters of procedure, the same would apply to all actions, pending as well as future and no procedural amendment could be said to be creating an offence; and, accordingly, disagreed with the view of the Appellate Tribunal, and upheld the order passed by the Chairman, SEBI that retrospective insertion of Section 11B of the SEBI Act cannot be hit by Article 20(1) of the Constitution. The Court once again relied on the judgment of the Constitution Bench in the case of **Rao Shiv Bahadur Singh (supra)**.

56 The SEBI Act

34. Although, Mr. Datar, learned counsel has sought to canvass that the marginal note along with Article 20 of the Constitution refers to protection in respect of conviction and, therefore, anything which may relate to or may be a pre-requisite for conviction should stand covered by Article 20(1) of the Constitution. The enquiry, investigation and trial being pre-requisite are an essential part on the basis of which, the Court may ultimately arrive at a conviction for an offence. It was thus submitted that if the enquiry, investigation and trial stand vitiated for any reason, the conviction itself cannot be sustained.

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35. The submission of Mr. Datar, learned counsel is too far-fetched and gives a very wide and open-ended expanse to Article 20(1) of the Constitution stretching it even to procedural aspects merely on account of the marginal note. As already stated, even at the cost of repetition, it may be noted that Article 20(1) of the Constitution only and only confines to conviction and sentence. It does not at all refer to any procedural part which may result into conviction or acquittal and/or sentence. Accordingly, the argument of Mr. Datar cannot be accepted. Change in procedure post the offence not attracting Article 20(1) of Constitution has been the settled law since 1953 enunciated in the Constitution Bench judgment of **Rao Shiv Bahadur Singh (supra).**

36. For the reasons recorded above, it can be safely concluded that **Article 20(1) of the Constitution has no applicability either to the validity or invalidity of Section 6A of the DSPE Act**.

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Retrospective or Prospective application of the judgment in the case of Subramanian Swamy (supra) (Question No.3).

37. The Constitution Bench in case of **Subramanian Swamy (supra)** declared Section 6A of the DSPE Act as unconstitutional on the ground that it violates Article 14 of the Constitution on account of the classification of the Government servants, to which the said provision was to apply. The invalidity of Section 6A of the DSPE Act is not on the basis of legislative incompetence or for any other constitutional violation. In **Vineet Narain (supra)** this Court had held that Single Directive No.4.7(3) to be invalid and it was struck down on the ground that by an administrative instruction the powers of the CBI conferred under statute could not be interfered with. It was because of the said declaration that Section 6A was inserted in the DSPE Act in 2003.

38. The question for determination is whether declaration of any law as unconstitutional by a Constitutional Court would have retrospective effect or would apply prospectively.

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39. Much emphasis has been laid on the interpretation of the word '*void*' used in Article 13(2) of the Constitution. The same word *'void'* is used in Article 13(1) of the Constitution also. The judgements relied upon by the parties which will be shortly discussed hereinafter relate to the interpretation of the said word *'void'* by various Constitution Benches and a seven-judge Bench and other regular Benches. In the Oxford dictionary, the word '*void*' is defined to mean something is not legally valid or binding, when used as an adjective and further when used as a verb, it means to declare that something is not valid or legally binding.

40. Article 13 of the Constitution has two sub-Articles (1) and (2). It reads as follows:

> ***"13(1).*** *All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void*
>
> ***13(2).*** *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."*

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41. Under Article 13(1) all existing laws prior to the commencement of the Constitution, insofar as they are inconsistent with the provisions of Part-III, would be *void* to the extent of inconsistency. Further, according to Article 13(2), the State is prohibited from making any law which takes away or abridges the rights conferred by Part-III and further that any law made in contravention of this clause would be *void* to the extent of contravention. Article 13(2) prohibits making of any law so it would be relating to laws made post commencement of the Constitution, like the case at hand. In the present case, as it has been held that Section 6A of DSPE Act is violative of Article 14 of Part-III of the Constitution, as such, the same would be *void*. The word "*void*" has been interpreted in a number of judgments of this Court beginning 1951 till recently and it has been given different nomenclature such as '*non est*', *'void ab initio' 'still born'* and '*unenforceable*'.

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42. A brief reference to the case law on the point would be necessary at this stage. It may be worthwhile to mention that the earlier seven-judge Bench and Constitution Bench judgments relate to Article 13(1) of the Constitution, dealing with pre-existing laws at the time of commencement of the Constitution. There are later judgments relating to Article 13(2) of the Constitution. However, reliance is placed upon the judgments on Article 13(1) while interpreting the word '*void*' used in Article 13(2).

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(i) The facts in the case of **Keshavan Madhava Menon (supra),** was that a prosecution was launched against the appellant therein under the provision of the Indian Press (Emergency Powers) Act, 1931[57] for a publication issued without the necessary authority under Section 15(1) of the said Act, and as such, became an offence punishable under Section 18 (1) of the same Act. This prosecution had been launched in 1949 itself and registered as Case No. 1102/P of 1949. During the pendency of the said proceedings, the Constitution of India came into force on 26.01.1950. The appellant therein took an objection that provisions of 1931 Act were *ultra vires* of Article 19(1)(a) read with Article 13(1) of the Constitution and would, therefore, be *void* and inoperative as such he may be acquitted. The High Court was of the view that the proceedings pending on the date of commencement of the Constitution would not be affected even if the 1931 Act was inconsistent with the Fundamental Rights conferred by Part III of the Constitution. However, the same would become *void* under Article 13(1) of the Constitution only after 26.01.1950.

57 In short, "1931 Act"

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(ii) The seven-judge Bench of this Court gave rise to three separate opinions: Justice Sudhi Ranjan Das authored the majority judgement with Chief Justice Kania, Justice M. Patanjali Sastri and Justice N. Chandrasekhara Aiyar concurring; Justice Mehar Chand Mahajan authored a separate opinion concurring with the majority view; Justice Fazal Ali wrote a dissenting judgment with Justice B.K. Mukherjea agreeing with him. The majority agreed with the view taken by the High Court. They accordingly dismissed the appeal. Para 16 of the report which contains the dictum is reproduced hereunder:

"16. As already explained above, Article 13(1) is entirely prospective in its operation and as it was not intended to have any retrospective effect there was no necessity at all for inserting in that article any such saving clause. The effect of Article 13(1) is quite different from the effect of the expiry of a temporary statute or the repeal of a statute by a subsequent statute. As already explained, Article 13 (1) only has the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of the commencement of the Constitution. It has no retrospective effect and if, therefore, an act was done before the commencement of the Constitution in contravention of the provisions of any law which, after the Constitution, becomes void with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned, for, to say that it is, will be to give the law retrospective effect. There is no. fundamental right that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force. So far as the past acts are concerned the law exists, notwithstanding that it does not exist with respect to the future exercise of fundamental rights."

However, Justice Fazal Ali was of the view that though there can be no doubt that Article 13(1) will have no retrospective operation and transactions which are past and closed, and rights which have already vested will remain untouched. However, with regard to inchoate matters which were still not determined when the Constitution came into force, and as regards proceedings not begun, or pending at the time of enforcement of the Constitution and not yet prosecuted to a final judgment, the answer to this question would be that the law which has been declared by the Constitution to be completely ineffectual, can no longer be applied. To be precise, paragraph no. 63 of the report from SCC Online referred has been reproduced hereunder:

> *"There can be no doubt that Article 13(1) will have no retrospective operation, and transactions which are past and closed, and rights which have already vested, will remain untouched. But with regard to inchoate matters which were still not determined when the Constitution came into force, and as regards proceedings whether not yet begun, or pending at the time of the enforcement of the Constitution and not yet prosecuted to a final judgment, the very serious question arises as to whether a law which has been declared by the Constitution to be completely ineffectual can yet be applied."*

(iii) In the case of **Behram Khurshed Pesikaka (supra),** a seven-judge Bench of this Court was considering the legal effect of the declaration made in the case of **State of Bombay Vs. F.N. Balsara**[58], whereby part of Section 13 clause (b) of the Bombay Prohibition Act (Act 25 of 1949) was declared unconstitutional. It was held by the majority opinion that declaration of such provision as invalid and unconstitutional will only mean that it is inoperative and ineffective and thus unenforceable.

58 (1951) 1 SCR 682

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(iv) The Constitution Bench in the case of **M.P.V. Sundararamier and Co. (supra)** was dealing with the validity of Sales Tax Laws Violation Act, 1956. In paragraph 41, while dealing with difference between law being unconstitutional on account of it being not within the competence of the legislature or because it was offending some constitutional restrictions differentiated between the two. Relevant extract is reproduced here under:

"41. Now, in considering the question as to the effect of unconstitutionality of a statute, it is necessary to remember that unconstitutionality might arise either because the law is in respect of a matter not within the competence of the legislature, or because the matter itself being within its competence, its provisions offend some constitutional restrictions. In a Federal Constitution where legislative powers are distributed between different bodies, the competence of the legislature to enact a particular law must depend upon whether the topic of that legislation has been assigned by the Constitution Act to that legislature. Thus, a law of the State on an Entry in List 1, Schedule VII of the Constitution would be wholly incompetent and void. But the law may be on a topic within its competence, as for example, an Entry in List II, but it might infringe restrictions imposed by the Constitution on the character of the law to be passed, as for example, limitations enacted in Part III of the Constitution. Here also, the law to the extent of the repugnancy will be void. ***Thus, a legislation on a topic not within the competence of the legislature and a legislation within its competence but violative of constitutional limitations have both the same reckoning in a court of law; they are both of them unenforceable.*** *But does it follow from this that both the laws are of the same quality and character, and stand on the same footing for all purposes? This question has been the subject of consideration in numerous decisions in the American Courts, and the preponderance of authority is in favour of the view that while a law on a matter not within the competence of the legislature is a nullity, a law on a topic within its competence but repugnant to the*

constitutional prohibitions is only unenforceable. This distinction has a material bearing on the present discussion. If a law is on a field not within the domain of the legislature, it is absolutely null and void, and a subsequent cession of that field to the legislature will not have the effect of breathing life into what was a still-born piece of legislation and a fresh legislation on the subject would be requisite. But if the law is in respect of a matter assigned to the legislature but its provisions disregard constitutional prohibitions, though the law would be unenforceable by reason of those prohibitions, when once they are removed, the law will become effective without re-enactment.

(emphasis supplied)"

The distinction drawn was that where a law is not within the domain of the legislature, it is absolutely null and void. But where a law is declared to be unconstitutional, then it would be unenforceable and to that extent void, as per Article 13(2) of the Constitution.

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(v) The challenge in the case of **Deep Chand (supra)** was with respect to the validity of the Uttar Pradesh Transport Service (Development) Act, 1955. The Constitution Bench, after discussing merit of Article 13(2) of the Constitution, was of the firm view that a plain reading of the Clause indicates, without any reasonable doubt, that the prohibition goes to the root of the matter and limits the State's power to make law; the law made in spite of the prohibition is a still born law. The relevant extract which is part of the paragraph 13 (from the AIR reference), is reproduced hereunder:

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"13. …A Legislature, therefore, has no power to make any law in derogation of the injunction contained in Art. 13. Article 13(1) deals with laws in force in the territory of India before the commencement of the Constitution and such laws in so far as they are inconsistent with the provisions of Part III shall, to the extent of such inconsistency be void. The clause, therefore, recognizes the validity of, the pre-Constitution laws and only declares that the said laws would be void thereafter to the extent of their inconsistency with Part III; whereas cl. (2) of that article imposes a prohibition on the State making laws taking away or abridging the rights conferred by Part III and declares that laws made in contravention of this clause shall, to the extent of the contravention, be void. There is a clear distinction between the two clauses. Under cl. (1), a pre-Constitution law subsists except to the extent of its inconsistency with the provisions of Part III; ***whereas, no post-Constitution law can be made contravening the provisions of Part III, and therefore the law, to that extent, though made, is a nullity from its inception.*** *If this clear distinction is borne in mind, much of the cloud raised is dispelled. When cl. (2) of Art. 13 says in clear and unambiguous terms that no State shall make any law which takes away or abridges the rights conferred by Part III, it will not avail the State to contend either that the clause does not embody a curtailment of the power to legislate or that it imposes only a check but not a prohibition.* ***A constitutional prohibition against a State making certain laws cannot be whittled down by analogy or by drawing inspiration from decisions on the provisions of other Constitutions****; nor can we appreciate the argument that the words " any law " in the*

second line of Art. 13(2) posits the survival of the law made in the teeth of such prohibition. It is said that a law can come into existence only when it is made and therefore any law made in contravention of that clause presupposes that the law made is not a nullity. This argument may be subtle but is not sound. The words " any law " in that clause can only mean an Act passed or made factually, notwithstanding the prohibition. The result of such contravention is stated in that clause. ***A plain reading of the clause indicates, without any reasonable doubt, that the prohibition goes to the root of the matter and limits the State's power to make law; the law made in spite of the prohibition is a still- born law.***

(emphasis supplied)"

(vi) In the case of **Mahendra Lal Jaini (supra),** again a Constitution Bench dealing with validity of the U.P. Land Tenures (Regulation of Transfers) Act, 1952 as also the amendment of 1956 in the Forests Act, 1957 had the occasion to analyse the difference between Article 13(1) and 13(2). Paragraph nos. 23 and 24 of the report contains the relevant discussion. In paragraph No. 23, it was laid down that the distinction between the voidness in one case arises from the circumstance that it was a pre-Constitutional law and the other is post-Constitutional law. However, the meaning of the word *void* is used in both the sub-Articles clearly making the law ineffectual and nugatory, devoid of any legal force or binding effect in both the cases. Further in paragraph no. 24 of the report, the Bench proceeds to deal with the effect of an amendment in the Constitution, with respect to the pre-Constitutional laws, holding that removing the inconsistency would result in revival of such laws by virtue of doctrine of eclipse as the pre-existing laws were not still born. However, in the case of the post-Constitutional laws, the same would be still

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born, and as such doctrine of eclipse would not be applicable to the post-Constitutional laws. Doctrine of eclipse does not apply in the present case, for Section 6A of the DSPE Act has been struck down as unconstitutional. There is no attempt to re-legislate this provision by removing the illegality resulting in unconstitutionality. We may beneficially reproduce paragraph nos. 23 and 24 of the said report hereunder:

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"23. It is however urged on behalf of the respondents that this would give a different meaning to the word 'void" in Art. 13 (1). as compared to Art. 13 (2). We do not think so. The meaning of the word "void" in Art. 13 (1) was considered in Keshava Madhava Menon's caseand again in Behram Khurshed Pesikaka's caseIn the later case, Mahajan, C. J., pointed out thatthe majority in Keshava Madhava Menon's case (3) clearly held that the word "void" in Art. 13(1) did not mean that the statute stood repealed and therefore obliterated from the statute book; nor did it mean that the said statute was void ab initio. This, in our opinion if we may say so with respect, follows clearly from the language of Art. 13(1), which presupposes that the existing laws are good except to the extent of the inconsistency with the fundamental rights. Besides there could not be any question of an existing law being void ab initio on account of the inconsistency with Art. 13(1), as they were passed by competent legislatures at the time when they were enacted. Therefore, it was pointed out that the effect of Art. 13(1) with respect to existing laws insofar as they were unconstitutional was only that it nullified them, and made them "'ineffectual and nugatory and devoid of any legal force or binding effect". ***The meaning of the word "void" for all practical purposes is the same in Art. 13(1) as in Art. 13(2), namely, that the laws which were void were ineffectual and nugatory and devoid of any legal force or binding effect. But the pre-Constitution laws could not become void from their inception on account of the application of Art. 13(1) The meaning of the word ','void" in Art. 13 (2) is also the same viz., that the laws are ineffectual and nugatory and***

devoid of any legal force on binding effect, if they contravene Art. 13(2). But there is one vital difference between pre-Constitution and post-Constitution laws in this matter. The voidness of the pre-Constitution laws is. not from inception. Such voidness supervened when the Constitution came into force; and so, they existed and operated for some time and for certain purposes; the voidness of post-Constitution laws is from their very inception and they cannot therefore continue to exist for any purpose. *This distinction between the voidness in one case and the voidness in the other arises from the circumstance that one is a pre-Constitution law and the other is a post-Constitution law; but the meaning of the word void" is the same in either case, namely, that the law is ineffectual and nugatory and devoid of any legal force or binding effect.*

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24. Then comes the question as to what is the effect of an amendment of the Constitution in the two types of cases. So far 'as pre-Constitution laws are concerned the amendment of the Constitution which removes the inconsistency will result in the revival of such laws by virtue of the doctrine of eclipse, as laid down in Bhikaji Narain's case (1) for the pre-existing laws were not still-born and would still exist though eclipsed on account of the inconsistency to govern_ pre-existing matters. ***But in the case of post-Constitution laws, they would be still born to the extent of the contravention. And it is this distinction which results in the impossibility of applying the doctrine of eclipse to post-Constitution laws, for nothing can be revived which never had any valid existence.*** *We are therefore of opinion that the meaning of the word "void" is the same both in Art 13 (1) and Art. 13 (2), and that the application of the doctrine of eclipse in one case and not in the other case does not depend upon giving a different meaning to the word "void' in the two parts of Art. 13; it arises from the inherent difference between Art. 13 (1) and Art. 13 (2) arising from the fact that one is dealing with pre-Constitution laws, and the other is dealing with post-Constitution laws, with the result that in one case the laws being not still-born the doctrine of eclipse will apply while in the other case the laws being still born-there will be no scope for the application of the doctrine of eclipse. Though the, two clauses form part of the same Article, there is a vital difference in the language employed in them as also in their content and scope. By the first clause the Constitution recognises the existence of certain operating laws and they are declared void, to the extent of their inconsistency with*

fundamental rights. Had there been no such declaration, these laws would have continued to operate. Therefore, in the case of pre- Constitution laws what an amendment to the Constitution does is to remove the shadow cast on it by this declaration. ***The law thus revives. However, in the case of the second clause, applicable to post Constitution laws, the Constitution does not recognise their existence, having been made in defiance of a prohibition to make them. Such defiance makes the law enacted void. In their case therefore there can be no revival by an amendment of the Constitution, MO though the bar to make the law is removed, so far as the period after the amendment is concerned. In the case of post- Constitution laws, it would be hardly appropriate to distinguish between laws which are wholly void-as for instance, those which contravene Art. 31-and those which are substantially void but partly valid, as for instance, laws contravening Art. 19. Theoretically, the laws falling under the latter category may be valid qua non-citizens; but that is a wholly unrealistic consideration and it seems to us that such nationally partial valid existence of the said laws on the strength of hypothetical and pedantic considerations cannot justify the application of the doctrine of eclipse to them. All post Constitution laws which contravene the mandatory injunction contained in the first part of Art. 13 (2) are void, as void as are the laws passed without legislative competence, and the doctrine of eclipse does not apply to them.*** *We are therefore of opinion that the Constitution (Fourth Amendment) Act cannot be applied*

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> *to the Transfer Act in this case by virtue of the doctrine of eclipse It follows therefore that the Transfer Act is unconstitutional because it did not comply with Art. 31 (2), as it stood at the time it was passed. It will therefore have to be struck down, and the petitioner given a declaration in his favour accordingly.*
>
> ***(emphasis supplied)"***

(vii) In the case of **State of Manipur (supra),** recently a three-judge Bench of this Court, was dealing with an appeal against the judgement of the Manipur High Court which had declared the Manipur Parliamentary Secretary (Appointment, Salary and Allowances and Miscellaneous Provisions) Act, 2012 (Manipur Act No. 10 of 2012) as also the Repealing Act, 2018, as unconstitutional. Justice L. Nageswara Rao, speaking for the Bench, observed that where a statute is adjudged to be unconstitutional, it is as if it had never been and any law held to be unconstitutional for whatever reason, whether due to lack of legislative competence or in violation of fundamental rights, would be *void ab initio.* Paragraph Nos. 22 and 23 of the said judgment are reproduced hereunder:

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*"**22**. **Where a statute is adjudged to be unconstitutional, it is as if it had never been**. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it and no one can be punished for having refused obedience to it before the decision was made. **Field, J. in Norton v. Shelby County, observed that "an unconstitutional act is not law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed".***

***23**. **An unconstitutional law, be it either due to lack of legislative competence or in violation of fundamental rights guaranteed under Part III of the Constitution of India, is void" ab initio.** In Behram Khurshid Pesikaka v. State of Bombay, it was held by a constitution bench of this Court that the law-making power of the State is restricted by a written fundamental law and any law enacted and opposed to the fundamental law is in excess of the legislative authority and is thus, a nullity. **A declaration of unconstitutionality brought about by lack of legislative power as well as a declaration of unconstitutionality brought about by reason of abridgement of fundamental rights goes to the root of the power itself, making the law void in its inception.** This Court in Deep Chand v. State of Uttar Pradesh & Ors. summarised the following propositions:*

> *"(a) Whether the Constitution affirmatively confers power on the legislature to make laws subject-wise or negatively prohibits it from infringing any fundamental right, they represent only two aspects of want of legislative power;*
>
> *(b) The Constitution in express terms makes the power of a legislature to make laws in regard to the entries in the Lists of the Seventh Schedule subject to the other provisions of the Constitution and thereby circumscribes or reduces the said power by the limitations laid down in Part III of the Constitution;*
>
> *(c)* ***It follows from the premises that a law made in derogation or in excess of that power would be ab initio void...***
>
> ***(emphasis supplied)"***

Further after discussing the law laid down by the previous pronouncements, the principles were deduced in paragraph no. 28 to state that a statute declared unconstitutional by a court of law would be still born and *non est* for all purposes. Paragraph 28 of the report is reproduced hereunder:

> "28. The *principles* that can be deduced from the law laid down by this Court, as referred to above, are:
>
> I. A statute which is made by a competent legislature is valid till it is declared unconstitutional by a court of law.
>
> ***II. After declaration of a statute as unconstitutional by a court of law, it is non est for all purposes.***

III. In declaration of the law, the doctrine of prospective overruling can be applied by this Court to save past transactions under earlier decisions superseded or statutes held unconstitutional.

IV. Relief can be moulded by this Court in exercise of its power under Article 142 of the Constitution, notwithstanding the declaration of a statute as unconstitutional.

(emphasis supplied)"

43. From the above discussion, it is crystal clear that once a law is declared to be unconstitutional, being violative of Part-III of the Constitution, then it would be held to be *void ab initio*, *still born*, *unenforceable* and *non est* in view of Article 13(2) of the Constitution and its interpretation by authoritative pronouncements. **Thus, the declaration made by the Constitution Bench in the case of Subramanian Swamy (supra) will have retrospective operation. Section 6A of the DSPE Act is held to be not in force from the date of its insertion i.e. 11.09.2003.**

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44. As indicated in the earlier part of this judgment, this Court has not delved into the other issues and arguments not germane to the reference order.

45. Accordingly, the matters may be placed before the appropriate Bench to be heard and decided on merits.

.....J.
(SANJAY KISHAN KAUL)

.....J.
(SANJIV KHANNA)

.....J.
(ABHAY S. OKA)

.....J.
(VIKRAM NATH)

.....J.
(J.K. MAHESHWARI)

NEW DELHI
SEPTEMBER 11, 2023