

STATE OF WEST BENGAL V. COMMITTEE FOR PROTECTION OF DEMOCRATIC RIGHTS: A CRITIQUE

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ABSTRACT

Can a High Court in exercise of its writ jurisdiction direct the CBI to investigate offences alleged to have taken place within the territorial jurisdiction of a State without the consent of the State Government – this is the legal question that this article considers. Analyzing the implications of the recent decision of the Supreme Court in State of West Bengal v. Committee for Protection of Democratic Rights on this issue, this paper makes a case against judicial interference in these matters, arguing that the court's role must be confined to examining whether the state government's refusal to order investigation was arbitrary or not.

One of the important decisions by a Constitution Bench last year was in *State of West Bengal v. Committee for Protection of Democratic Rights*.¹ The question involved is, whether a High Court in exercise of its jurisdiction under Article 226 of the Constitution of India can direct the Central Bureau of Investigation (CBI) established under the Delhi Special Police Establishment Act, 1946, to investigate cognizable offence which is alleged to have taken place within the territorial jurisdiction of a State without the consent of the State Government? The question assumed significance on account of the involvement of two basic features of the Constitution, namely, the federal structure and the power of judicial review. Entry 80 in List I of Schedule VII to the Constitution of India reads: "*Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated...*". The crucial words in this Entry are "*but not so as to enable*

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1 *State of West Bengal & Ors. v. Committee for Protection of Democratic Rights & Ors.*, (2010) 3 SCC 571 [Supreme Court of India].

the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated". Entry 80 in the Union List corresponds to Entry 39 of List I of Federal Legislative List in the VII Schedule to the Government of India Act, 1935. The wording is identical, except that the Entry referred to "British India", "Governor's Province" and "Chief Commissioner's Province", while Entry 80 in the Constitution refers to "State" and "Government of the State".

The CBI is constituted by the Central Government under the Delhi Special Police Establishment Act, 1946. 'Police' is a State subject – Entry 2 of List II. Section 2 of the Delhi Special Police Establishment Act, 1946 provides for constitution of a special police force, to be called the Delhi Special Police Establishment, by the Central Government for investigation in any Union Territory of offences notified in Section 3 of the said Act. Section 5(1) says that the Central Government may by order extend to any area in a State not being a Union Territory, the powers and jurisdiction of the members of the Delhi Special Police Establishment for the investigation of any offence or class of offences specified in the notification issued under Section 3 of the Act. Section 3 requires the Central Government to specify the offences or class of offences which are to be investigated by the Delhi Special Police Establishment. However, Section 6 requires consent of the State Government concerned to permit investigation of any offence within its territory by any member of the Delhi Special Police Establishment. It reads: "*Nothing contained in Section 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in a State, not being a Union Territory or Railway area, without the consent of the Government of that State.*" This pre-Constitution requirement of consent is incorporated in the Constitution of India in Entry 80 of List I. It follows that the consent of the State Government of the State concerned is a condition precedent to be satisfied before calling upon the CBI to investigate any offence in that State. This condition is consistent with the federal structure of the Constitution, which ensures autonomy for each State, in the matter of legislation and executive action.

In *State of West Bengal v. Sampat Lal*,² the Supreme Court took the view that Section 6 of the Delhi Special Police Establishment Act does not apply when the court gives a direction to the CBI to conduct an investigation, and observed that the counsel for the parties rightly did not dispute this position. It was just an undisputed assumption but not a declaration of law made after contest. However in the facts of that case, the court held that it was not necessary to take away the

2 *State of West Bengal v. Sampat Lal* (1985) 2 SCR 256, 269 [Supreme Court of India].

investigation from the hands of the State police machinery, which is a statutory agency, but suggested that the Director General of Police, West Bengal, should appoint a competent supervisory officer from the higher ranks of the State police to supervise the investigation in the case on hand. The Court reiterated the view taken by the *Privy Council in King Emperor v. Khwaja Nazir Ahmad*³ that the functions of the judiciary and the police are complementary, not overlapping.

On March 10, 1989 in *Haryana Mahila Sangathan v. Union of India*,⁴ a Bench of two Hon'ble Judges of the Supreme Court referred to the Constitution Bench the following question:

Whether a court can order the Central Bureau of Investigation (CBI), an establishment created under the Delhi Special Police Act to investigate a cognizable offence which is alleged to have taken place in a State without the consent of the State Government and without any notification or order having been issued by the State Government conferring powers on the CBI to investigate any case in the State?

However, the case was finally disposed of without deciding the question. In a few cases, Benches of two Hon'ble Judges each relied on Article 142 of the Constitution as the source of power for directing investigation by the CBI in any State without the consent of the State Government concerned.⁵ Article 142 of the Constitution empowers the Supreme Court in the exercise of its jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. However, such a power is not conferred on High Courts as held by the Supreme Court in *State of Punjab v. Surinder Kumar*⁶ and *Sanchalakshmi v. Vijaykumar Raghuvirprasad Mehta*.⁷ In *State of West Bengal v. Committee for Protection of Democratic Rights, W.B.*,⁸ a Bench of two Judges, once again referred the question: Whether a court can order the Central Bureau of Investigation (CBI), an establishment created under the Delhi Special Police

3 King Emperor v. Khwaja Nazir Ahmad (1944) LR 71 [Privy Council].

4 Haryana Mahila Sangathan v. Union of India, Writ Petition Nos. 531-36 of 1988 [Supreme Court of India].

5 Maniyeri Madhavan v. Sub Inspector of Police (1994) 1 SCC 536, 540, ¶9, Mohammed Anis v. UOI (1994) Supp. 1 SCC 145 [Supreme Court of India].

6 State of Punjab v. Surinder Kumar (1992) 1 SCC 489, 492 [Supreme Court of India].

7 Sanchalakshmi v. Vijaykumar Raghuvirprasad Mehta (1998) 8 SCC 245, 249 [Supreme Court of India].

8 State of West Bengal v. Committee for Protection of Democratic Rights, W.B. (2006) 12 SCC 534 [Supreme Court of India].

Establishment Act, 1946, to investigate a cognizable offence which is alleged to have taken place in a State without the consent of that State Government on the face of statutory limitations". In the order of reference, the Bench referred to relevant entries in the Government of India Act, 1935 and in Entry 80 of List I as well as Entries 2 and 2A of List II of the Constitution, besides the provisions of the Delhi Special Police Establishment Act, 1946 and the statutory limitations mentioned in Sections 5(2) and 6 of the Delhi Special Police Establishment Act, 1946. Finally, the Constitution Bench has since declared the law as follows: (i) The fundamental right, enshrined in Part III of the Constitution, is an inherent and cannot be extinguished by any constitutional or statutory provision, (ii) The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers, (iii) In view of the constitutional scheme and the jurisdiction conferred on this Court under Article 32 and on the High Courts under Article 226 of the Constitution the power of judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail the powers of the constitutional courts with regard to the enforcement of fundamental rights, (iv) any direction by the Supreme Court or the High Court in exercise of power under Article 32 or 226 to uphold the Constitution and maintain the rule of law cannot be termed as violating the federal structure and (v) Restriction on Parliament by the Constitution and restriction on the executive by Parliament under the enactment, do not amount to restriction on the power of the Judiciary under Articles 32 and 226 of the Constitution. In other words, the Constitution Bench answered the question referred to it by holding that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of the Government of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. The Constitution Bench reiterated the view taken in *Minor Irrigation & Rural Engg. Services, U.P. v. Sahngoo Ram Arya*⁹ that before directing an inquiry by CBI, the High Court should come to a conclusion after considering the material on record that the material does disclose a prima facie case calling for an investigation by CBI or any other similar agency.

The question that arises for consideration is: whether the power of judicial review can be exercised disregarding the constitutional limitation incorporated in Entry 80 of List I in Schedule VII of the Constitution? The requirement of consent

9 *Minor Irrigation & Rural Engg. Services, U.P. v. Sahngoo Ram Arya* (2002) 5 SCC 521 [Supreme Court of India].

of the State Government for entrusting investigation of a cognizable offence in the State by the CBI or any other external agency was intended to safeguard the federal structure of the Constitution which is also a basic feature. The question whether Article 142 empowers the Supreme Court to pass an order contrary to a substantive provision of a Statute was answered in the negative by successive Constitution Benches.¹⁰ The view taken was that however wide and plenary language of Article 142 maybe, the direction given by the Court should not be inconsistent with or repugnant to or in violation of a substantive provision of any statute. This being the settled law, can a direction which is plainly inconsistent with a provision of the Constitution be issued?

The next question which deserves consideration is: when there is need to entrust investigation of a cognizable offence in a State to the CBI or any other external investigating agency in a given case because investigation by the State police cannot be expected to be objective or independent in a case when, for instance, the chief minister of the State is the accused should the High Courts and the Supreme Court be powerless to direct such investigation without the consent of the State Government?

It is possible to observe the constitutional limitation set out in Entry 80 of List I of Schedule VII and Section 6 of the Delhi Special Police Establishment Act, 1946 by the Court first seeking the consent of the State Government concerned for such investigation by an outside agency and in the case of the State Government unreasonably refusing to give its consent, the High Court or the Supreme Court, as the case may be, may interfere on the ground that the decision of the State Government not to permit investigation by the CBI or any other independent agency as the case maybe, was unreasonable and arbitrary and then issue a direction for investigation by CBI. It is now well settled by *Maneka Gandhi v. Union of India*¹¹ that every power of the State has to be exercised reasonably and every exercise of power can be tested on the anvil of Article 14 to find out whether it is just, reasonable and fair or arbitrary. If the Court comes to the conclusion that the refusal on the part of the State Government to give consent to investigation by the CBI in a given case is arbitrary, then and only then, the court may direct investigation by the CBI in which case it would be enforcing the right to equality conferred on all persons by Article 14 of the Constitution.

10 Prem Chand Garg v. Excise Commissioner, UP, (1963) Supp. 1 SCR 885, 889 [Supreme Court of India]; A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602, 730 [Supreme Court of India]; Supreme Court Bar Association v. Union of India, (1998) 4 SCC 409 [Supreme Court of India].

11 Maneka Gandhi v. Union of India (1978) 1 SCC 248 [Supreme Court of India].