Source : www.thehindu.com Date : 2023-12-19

A BLOW FOR THE RIGHTS OF THE LEGISLATURE, IN LAW MAKING

Relevant for: Others | Topic: null

December 19, 2023 12:57 am | Updated 09:34 am IST

‘The judgment says that if the Governor decides to withhold assent, he has to send it back to the Assembly immediately for reconsideration’ | Photo Credit: V. SUDERSHAN

In a landmark judgment delivered on November 10, 2023, in the State of Punjab vs Principal Secretary to the Governor of Punjab and Another, the Chief Justice of India (CJI), D.Y. Chandrachud, gave a creative interpretation to Article 200 of the Constitution of India which relates to the options before a Governor when a Bill, after being passed by the State Legislature, is presented to him for his assent. The new interpretation relates to the real meaning of the first proviso to Article 200 which says that the Governor may send the Bill back to the Assembly with a request for re-consideration of the Bill as a whole or certain provisions thereof.

It further says that if the Assembly after such re-consideration passes the Bill with or without the amendments, the Governor shall not withhold assent from the Bill. There has been a considerable amount of confusion about the meaning of Article 200 and this proviso. Most of the commentators of the Constitution, like D.D. Basu and others, have held the view that the Governor’s power to withhold assent under this Article has a finality about it, and once assent is withheld, the Bill dies a natural death. They were also of the view that the option of sending the Bill back to the Assembly for reconsideration under the first proviso is discretionary and not mandatory. Thus, there was a presumption that the Governor’s power to withhold assent from a Bill is absolute.

But the CJI by linking the withholding of assent with the sending of the Bill back to the Assembly for reconsideration has virtually knocked out the option of withholding assent. The judgment says that if the Governor decides to withhold assent, he has to send it back to the Assembly immediately for reconsideration, in which case he has no other option except to give assent. Needless to say that through his judgment, the CJI, in a far-sighted approach, has protected the rights of the legislature in the matter of law making, and in fact the entire constitutional system from the depredations of unelected Governors.

Nevertheless, the woes of State governments are not over yet. It has been common practice by some Governors not to take any decision on the Bills sent to them for assent. They have been sitting on Bills for two or three years, virtually negating the legislative exercises of the State. The Supreme Court of India has in the Punjab case said emphatically that Governors cannot delay the decision on the Bills. Thus, the decision of the top court has brought greater clarity to Article

200 and Governors will have to quickly take a decision on the Bills.

But there is still an area which can be exploited by the Governors to frustrate the law-making exercise of State governments. Reserving a Bill for the consideration of the President is an absolute option still available to a Governor. The crucial question is on what kinds of Bills a Governor can send to the President for his consideration. The second proviso to Article 200 mentions one kind of Bills which are mandatorily to be reserved for the consideration of the President. These are Bills which derogate from the powers of the High Court in such a way as to endanger the constitutionally designed position of that court. So, the Constitution requires the Governor to send all such Bills for the consideration of the President. Since consideration by the President means consideration by the Union government, the officials of the Home Ministry will in effect decide the fate of such Bills.

The Constitution in fact does not refer to any category of Bills apart from the Bills mentioned above which can be sent to the President for his assent. Therefore, taking a surface view, the Governor can use his discretion to send any Bill to the President. In fact that is precisely what the Governor of Kerala, Arif Mohammed Khan, did the other day. He did not act on eight Bills that were with him for over two years. When the Supreme Court took up the Kerala government's petition challenging the Governor's inaction, he gave his assent to one Bill and sent the seven Bills to the President for his consideration. The Court, it is learned, is going to examine this issue — namely, what Bills can be reserved for the consideration of the President. The Tamil Nadu Governor sent 10 Bills for reconsideration by the Assembly after many complaints by the State government. The Assembly after reconsideration sent the Bills to the Governor without accepting any amendments. But in a strange act the Governor sent all those Bills to the President for his consideration which is patently against the Constitution. Article 200 (First proviso) requires him to give his assent to the Bills.

So, the question of crucial importance in the present political context is whether a Governor can reserve Bills for the consideration of the President at his discretion. The Constitution is silent on this. It makes only an indirect reference to the reserving of Bills for the consideration of the President in two places. Article 213 deals with the ordinance-making power of Governors. Under this provision, in certain cases, the Governor can promulgate an ordinance only with instruction from the President. Under clause (b) of the above Article, the Governor can promulgate an ordinance only with instructions from the President in a case where he would have deemed it necessary to reserve a Bill containing the same provisions as in the ordinance. The words "deemed it necessary" indicate the making of judgement by the Governor in terms of the constitutional scheme of the power of legislative division. In other words, the Governor cannot act on his whims while deeming it necessary to reserve the Bills.

The second place where the Constitution makes an indirect reference to the President's assent to a State Bill is in Article 254. Under clause (2) of this Article, a State law on an item in the Concurrent List will prevail in that State even when it contains a provision repugnant to the provisions of an existing central law if it has been reserved for the consideration of the President and has received his assent. This would mean that a Bill on a Concurrent subject can be or needs to be sent to the President for assent only if it contains provisions repugnant to an existing central law. But it does not indicate that every Bill on a concurrent subject should be sent to the President for assent.

In fact the President has no jurisdiction to scrutinise and give assent to a Bill exclusively on a subject in the State List because of the federal scheme of legislative division. Therefore, it would seem that if the Governor sends a Bill on the State's matter to the President, it would be an abdication of the constitutional duty of a Governor.

So, from the above analysis, it can be concluded that a Governor cannot send to the President for assent Bills which are exclusively on the State subject. Also, he cannot send Bills on concurrent subjects if they do not contain provisions repugnant to the central law. If the Governor thinks that a Bill contains unconstitutional provisions, the only option for him is to send it back to the Assembly for reconsideration. A Governor is not personally responsible for anything done by the government. Further, constitutional validity of a law is decided by the court and neither the Governor nor the President has any jurisdiction over it.

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