

**2023 STPL(WEB) 73 SC
SUPREME COURT OF INDIA**

(DR DHANANJAYA Y CHANDRACHUD ; PAMIDIGHANTAM SRI NARASIMHA AND MANOJ MISRA JJ.)

GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI

Appellant

VERSUS

UNION OF INDIA & ORS.

Respondents

Writ Petition (C) No. 678 of 2023-Decided on 20-7-2023

Constitution Law – Challenge to ordinance related to power of Delhi Government – Referred to Constitutional Bench

ORDER

1. On 19 May 2023, eight days after the Constitution Bench of this Court pronounced the judgment in *Government of NCT of Delhi v. Union of India* [*Civil Appeal No. 2357 of 2017*] ["2023 Constitution Bench judgment"], the President in exercise of powers under Article 123 of the Constitution promulgated the Government of National Capital Territory of Delhi (Amendment) Ordinance 2023 ["NCT Ordinance"]. The NCT Ordinance amends the Government of National Capital Territory of Delhi Act 1991 ["GNCTD Act"]. The Preamble to the Ordinance states that Parliament has exclusive and plenary jurisdiction with respect to the national capital in view of Articles 239-AA(3)(b) and 239-AA(7):

"AND WHEREAS, keeping in mind various reports of various Commissions and since Delhi is the capital city of the nation, the Constitution retained certain exclusive and plenary jurisdiction in the Parliament while incorporating Article 239-AA in general and Article 239-AA(3)(b) read with Article 239-AA(7) in particular.

[...]

AND WHEREAS for the purpose of giving effect to Article 239(1) read with Article 239AA and in exercise of powers of Article 239AA(3)(b) and Article 239AA(7) of the Constitution of India, which includes the power to supplementing the provisions under Article 239-AA including the power to make suitable amendments thereof, an Ordinance namely the Government of National Capital Territory of Delhi (Amendment) Ordinance, 2023 is proposed to provide for a comprehensive scheme of administration of services deployed in the functioning of NCTD and other allied issues thereby balancing the local and domestic interests of the people staying in the NCTD with the democratic will of the entire nation reflected through the President of India."

(emphasis supplied)

2. The NCT Ordinance inserts Section 3A in the GNCTD Act 1991. Section 3A stipulates that notwithstanding anything contained in any judgment, order, or decree of any Court, the Legislative Assembly shall have the power to enact laws as prescribed in Article 239-AA, except with respect to Entry 41 of List II of the Seventh Schedule to the Constitution. The provision excludes Entry 41 of List II

from the legislative competence of NCTD in addition to Entries 1,2, and 18 of List II which are excluded by Article 239-AA. In effect, Section 3A amends Article 239-AA.

3. In addition to excluding the legislative power of NCTD with respect to Entry 41 of List II, the NCT Ordinance also establishes a new scheme for the distribution of executive power over services between the Union of India and the Government of NCTD. A brief overview of the scheme is provided below:

(i) The President shall constitute any authority, board, commission or statutory body in and for NCTD, or appoint or nominate any office bearer or member to the body. [Section 45D]

(ii) The National Capital Civil Service Authority ["Authority"] is constituted. The Authority shall consist of the Chief Minister of NCTD, the Chief Secretary of the Government of NCTD, and the Principal Home Secretary of the Government of NCTD. Decisions shall be taken by a majority of votes of the members present and voting. [Section 45E]

(iii) The authority has the power, inter alia, to recommend transfers and postings of Group A officers and officers of DANICS serving in the affairs of NCTD (excluding those serving in connection with Entries 1,2,18 of List II), recommend on all matters connected with and falling under the subject of 'vigilance' and 'non-vigilance' for the purpose of disciplinary proceedings, to make recommendations on transfer and postings, and on the suitability of officers on postings. [Section 45H]

(iv) The Lieutenant Governor shall return the recommendation made by the Authority for reconsideration if he differs from the recommendation of the Authority. In case of a difference of opinion between the Lieutenant Governor and the Authority, the decision of the Lieutenant Governor shall be final. [Section 45H]

(v) Proposals which may, inter alia, affect the peace of NCTD, interests of the Scheduled Castes, Scheduled Tribes and socially and educationally backward community, or proposals on matters which affect the relations of the Government of NCTD with the Central Government, State Government, Supreme Court of India or the High Court of Delhi shall be placed before the Lieutenant Governor for opinion. [Section 45J(4)]

(vi) The Secretary of the Council of Ministers or the Departments shall bring a proposal of the Council of Ministers or the concerned Departments to the attention of the Lieutenant Governor if they are of the opinion that the proposal is not in accordance with law or that the proposal will bring NCTD into "controversy" with the Central Government, the State Governments, the Supreme Court or the High Court of Delhi. [Section 45K]

4. The petitioner has instituted proceedings under Article 32 of the constitution challenging the constitutional validity of the 2023 Ordinance.

5. The 2023 Ordinance is challenged on three broad grounds:

(i) Section 3A, by excluding NCTD's legislative power over Entry 41 of List II, in effect amends a constitutional provision, that is, Article 239-AA(3)(a);

(ii) The provisions of the NCT Ordinance remove the executive power vested in the Government of NCTD over the day-to-day administration of National Capital from the elected government of NCTD and place it exclusively in the Lieutenant Governor, a nominated head. The 2023 Constitution Bench judgment in the specific context of services observed that the people are the

ultimate sovereign and the executive is accountable to the public through the "triple chain of accountability". The triple chain of accountability requires the permanent executives to be responsible to the elected government, the elected government to be responsible to the legislature, and the legislature to be responsible to the public. The 2023 Ordinance abrogates the principles of collective responsibility and the triple chain of accountability which are important facets of NCTD's governance structure;

(iii) Article 239-AA(7)(b) is not a sui generis provision in the constitutional scheme. Other provisions of the Constitution (such as Articles 4,169,239A, 244A,312, Part D Fifth Schedule, and Paragraph 21 Sixth Schedule) also stipulate that certain laws made by Parliament shall not be deemed to be a constitutional amendment though it has the effect of amending the constitution. Article 239-AA(7)(b) does not vest Parliament with wide powers to abolish the constitutional scheme of governance envisaged for NCTD in Article 239-AA; and (iv) The President could not have exercised the power to promulgate an Ordinance under Article 123 because circumstances which warranted immediate action did not exist. There was no urgency to promulgate the Ordinance when the monsoon session of Parliament was going to begin in a few months.

6. The Government of NCT has also sought a stay of the NCT Ordinance [*IA No. 130505 of 2023*] on the ground that it prevents the Government of NCTD from meeting its popular mandate. Mr. Abhishek Manu Singhvi, learned senior counsel highlighted instances where senior bureaucrats have ignored the orders of the concerned Minister to call the National Disaster Relief Force for aiding with the flood situation in Delhi, the Directorate of Vigilance has issued work allocation order in direct contravention to prior orders of the Minister-in-charge, and the Lieutenant Governor has terminated the contract of 437 consultants working with various departments of the government of NCTD without any consultation with the elected government. Additionally, the letter issued by the Lieutenant Governor on 5 July 2023 terminating the engagement of specialists/fellow/consultants is also sought to be stayed.

7. Mr. Tushar Mehta, learned Solicitor General appearing for the Union of India made a reference to paragraph 95 of the 2023 Constitution Bench judgment. In the said paragraph, this Court observed as follows:

"The legislative power of the Union extends to all entries under the State List and Concurrent List, in addition to the Union List. The executive power of the Union, in the absence of a law upon executive power relating to any subject in the State List, shall cover only matters relating to the three entries which are excluded from the legislative domain of NCTD. As a corollary, in the absence of a law or provision of the Constitution, the executive power of the Lieutenant Governor acting on behalf of the Union Government shall extend only to matters related to the three entries mentioned in Article 239AA(3)(a), subject to the limitations in Article 73. [...] However, if Parliament enacts a law granting executive power on any subject which is within the domain of NCTD, the executive power of the Lieutenant Governor shall be modified to the extent, as provided in that law."

8. Mr. Harish Salve, learned senior counsel appearing for the Lieutenant Governor submitted that the consultants were terminated because their appointment was arbitrary.

9. Article 239-AA(3)(a) stipulates that the legislative assembly of NCTD has the power to make laws with respect to matters enumerated in the State List and Concurrent List insofar as such matter is applicable to Union Territories except entries 1,2, and 18 of List II and entries 64, 65 and 66 of List II insofar as they relate to the above entries. The issue for consideration before the 2023 Constitution Bench was whether Article 239-AA(3)(a), excludes by implication, NCTD's legislative competence over Entry 41 of List II. The Constitution Bench held that Article 239-AA does not exclude the legislative power of

NCTD over any entries other than those which are expressly excluded. This Court also held that NCTD will have executive power over Entry 41 of List II because executive power is coextensive with legislative power.

10. Since in view of Article 239-AA(3)(b), Parliament also has legislative power over Entry 41 of List II, a corresponding issue on the extent of executive power of the Union of India and the Government of NCTD on matters over which both Parliament and the legislative assembly of NCTD have the power to enact laws arose.

11. Drawing upon the principles in Articles 73 and 162 [*The proviso to Article 73 states that the Union of India shall not have executive power on matters over which the State can also enact on unless such power is expressly granted by the Constitution or law of Parliament. The proviso to Article 162 states that on matters over which both the state legislature and Parliament can make laws, the executive power of States shall be subject to and limited by the executive power expressly conferred upon Union of India by a law of Parliament or by the Constitution.*], the 2023 Constitution Bench held that on entries over which Parliament also has legislative competence, the executive power of NCTD shall be "subject to and limited by" the executive power expressly conferred upon the Union of India by provisions of the Constitution or a law made by Parliament. Thus, the position of law is that a law enacted by Parliament can limit the executive power of NCTD over "services".

12. The power of Parliament to enact a law granting the Union of India executive power over services is not in contention. It is now a settled position of law. However, this Court while deciding the constitutional validity of the 2023 Ordinance must decide if the exercise of such a power is valid.

13. There are two preliminary considerations which arise at this stage. The first is on the import of Section 3A. Section 3A removes Entry 41 of List II from the legislative competence of NCTD. On the exclusion of Entry 41 from NCTD's legislative power, the government of NCTD ceases to have executive power over services because executive power is co-terminus with the legislative power. Therefore, the issue whether a law could completely remove NCTD's executive power over Entry 41 is interconnected with the validity of Section 3A.

14. The Preamble to the 2023 Ordinance states that the law is made in exercise of powers under Article 239-AA(3)(b) and Article 239-AA(7). Article 239-AA(3)(b) states that Parliament has the power to make laws with respect to "any matter" for NCTD. Article 239-AA(7)(a) grants Parliament the power to enact a law for "giving effect to, or supplementing" the provisions of Article 239-AA, and for all matters incidental to it. Article 239-AA(7)(b) stipulates that such a law shall not be deemed to be an amendment to the Constitution even if the law amends the Constitution or has the effect of amending the Constitution. Article 239-AA(7) is extracted below:

"(7)(a) Parliament may, by law, make provisions for giving effect to or supplementing the provisions contained in the foregoing clauses and for all matters incidental or consequential thereto.

(b) Any such law as is referred to in sub-clause (a) shall not be deemed to be an amendment of this Constitution for the purpose of Article 368 notwithstanding that it contains any provision which amends or has the effect of amending, this Constitution."

15. While Article 239-AA(7)(a) states that the law must only give effect to or supplement the provisions of Article 239-AA, Article 239-AA(7)(b) states that the law shall not be deemed an amendment to the Constitution even if it has the effect of amending Article 239-AA. A primary reading of Article 239-AA(7)(a) indicates that the law shall not alter the existing constitutional structure envisaged for

NCTD in Article 239-AA. However, a prima facie reading of Article 239-AA(7)(b) denotes that the law enacted under Article 239-AA(7)(a) could alter the existing constitutional structure of governance of NCTD. This apparent conflict between the two clauses on the nature of law making power vis-à-vis NCTD's constitutional structure of governance needs to be resolved by this Court.

16. Neither the 2018 Constitution Bench judgment [*Government of NCT of Delhi v. Union of India, Civil Appeal No. 2357 of 2017*] nor the 2023 Constitution Bench judgment has dealt with the interpretation of Article 239-AA(7). We are of the considered opinion that the disposal of the writ petition requires this Court to answer a substantial question of law as to the interpretation of the Constitution. We accordingly refer the following questions to a Constitution Bench:

- (i) What are the contours of the power of Parliament to enact a law under Article 239-AA(7); and
- (ii) Whether Parliament in the exercise of its power under Article 239-AA(7) can abrogate the constitutional principles of governance for NCTD.

17. We are also of the opinion that it would be appropriate for the Constitution Bench to dispose of the writ petition because of the protracted legal battle between the Union of India and the Government of NCTD on the administration of NCTD. We direct the Registry to place the papers of this petition before the Chief Justice of India on the administrative side for the constitution of a Constitution Bench to answer the questions identified above and for the disposal of the petition. IA No. 130505 of 2023 seeking a stay of the NCT Ordinance is dismissed.
