

## **INVALIDATION OF CBI - HAS THE GUWAHATI HIGH COURT STIRRED UP THE HORNET'S NEST?**

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### **I. INTRODUCTION**

The Guwahati High Court on 06<sup>th</sup> November, 2013, in *Sh. Navendra Kumar v. Union of India*<sup>1</sup> invalidated in one stroke the functioning, jurisdiction and composition of the Central Bureau of Investigation. Pursuant to the findings of presiding-judge Justice A. Ansari, the premier investigation agency of the country stands void. The judgment has far-reaching implications as it is likely to stoke the hopes of those who fear its investigation and prosecution. The judgment is a momentous one as it restricts the power of the executive to infringe upon the rights of its citizens. It answers a fundamental question—whether an institution created by a mere executive fiat can impinge upon the right to life of its citizens? The case questions for the first time the existence of the nation's most cherished investigation agency.

The case begins with analyzing the importance of Article 21, the inextinguishable mandate to the state to protect the life and liberty of its citizens. It continues to elaborate upon the importance of separating legislative and executive functions; and the possible limits on executive power. The court believes that the sanctity of the right to life must be preserved and its ambit must only be curtailed in situations that warrant so. Even such situations must be backed

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<sup>1</sup> W.A. No.119 of 2008 in W.P.(C) No. 6877 of 2005.

by legislative sanction and any such executive command that intrudes upon this space is a manifestation of executive tyranny.

## II. BRIEF FACTS OF THE CASE

The case had been presented before the Guwahati High Court and is an appeal to the judgment passed by the same court in 2007. The petitioner, Sh. Navendra Kumar, fears prosecution by the Court of Special Judge and has appealed to the High Court to quash the proceedings against him. He pleads that the existence of CBI is marred with obscurity and the agency needs to be struck down. The basis of its establishment can be traced to a mere executive order passed by the Ministry of Home Affairs back in the year 1963. The petitioner, *inter alia*, contends that by establishing an investigative agency—armed with potent weapons to investigate, file charge-sheets and prosecute the offenders— on a mere executive *fiat* has caused grave injustice to many. He pleads that in a country governed by rule of law, the power of the executive needs to be checked for tyranny and sanctioned against possible abuse. The executive by establishing CBI on a mere diktat has abused its power. Consequently, the court must strike it down.

## III. SUBMISSIONS OF THE PETITIONER

The Petitioner has challenged the constitutional validity of CBI, an investigative agency formed pursuant to the passing of an Executive Order/Resolution No. 4/31/61-T (dated 01-04-1963) by the Ministry of Home Affairs. The petitioner contends that the agency is a non-statutory body inasmuch as no law has been declared to lay its birth. It has been unduly exercising powers of the police including—registration of FIR, arrest of persons, ‘investigation’ of crimes, filing of charge-sheets and prosecution of the offenders. Although the Parliament is empowered to make law on the ‘Central Bureau of Intelligence and Investigation’, CBI cannot carry out the functions of the police inasmuch as the Constitutional scheme does not permit the Central Government to carry out functions of the police that is exclusively within the domain of the State Government<sup>2</sup>. Further, the

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<sup>2</sup> ¶11.

Petitioner argues for the unconstitutionality of the Delhi Special Police Establishment Act (hereinafter DSPE Act), 1946 as the same is *ultra vires* the Constitution as it offends Article 372(1)<sup>3</sup> of the Constitution that prohibits Parliament to legislate laws on 'police'.

#### IV. SUBMISSIONS ON BEHALF OF CBI

Replying to the contentions of the Petitioner submits the following-

- I. That the CBI derives its power to 'investigate', like a police force as contemplated by the Cr.PC, from the DSPE Act, 1946.
- II. That the CBI is only a change of the name of the DSPE and the CBI is, therefore, not an organization independent of the DSPE.
- III. That the creation of CBI may also be taken to have been covered by Entry 80 of List I (Union List) of the Seventh Schedule to the Constitution of India by virtue of the expression, 'Central Bureau of Intelligence and Investigation' occurring in Entry 8 of List I (Union List).
- IV. Under Article 73 of the Constitution of India, the executive powers of the Union extends to matters with respect to which Parliament has the power to make laws and the resolution, dated 01.04.1963, whereunder CBI has been constituted, can be treated to have been issued by virtue of Union of India's executive powers as embodied in Article 73.
- V. That the Central Government can also be treated to have constituted the CBI by taking recourse to its powers as specified in Entry 1 and 2

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<sup>3</sup> Article 372(1) reads as follows-72. Continuance in force of existing laws and their adaptation-Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority".

of List III (Concurrent List) of the Seventh Schedule to the Constitution of India.

## V. CONCLUSION OF THE COURT

Since the inception of CBI by the impugned resolution is undisputed, the Court perused the same and concluded that the constitution of the CBI was an executive decision and that too, was taken without citing, or referring to, its source of power. Moreover, the same lacked presidential assent. Further, the expression 'As a first step in the direction' appearing in the resolution goes to show that CBI was constituted as an *ad hoc* measure to deal with certain exigencies. Further, the apparent failure of the resolution to refer to the DSPE Act goes on to show that the agency was never meant to be its part. Thus, the court rejected the first contention of the Respondent.

Secondly, the court concluded that since the DSPE Act had conferred a name to its establishment, the Delhi State Police Establishment (and not CBI) the Executive is prohibited from using any other name. If a statute gives a specific name to an organization, created by the statute, it is not permissible to confer a new name on the organization by any executive instructions.<sup>4</sup>

Regarding the third submission of CBI, the court referred to the Constitutional Assembly Debates to obtain a better understanding of Entry 8 of List-I, '*Central Bureau of Intelligence and Investigation*'<sup>5</sup>. The Constitution makers were against permitting the Center to make investigation into crimes. The word 'investigation' therefore is intended to cover general enquiry for the purpose of finding out what is going on. This investigation is not investigation preparatory to the filing of a charge against an offender which only a police officer under the Criminal Procedure Code can do.<sup>6</sup> As regards Entry 80, the Court concluded that the Entry mainly

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<sup>4</sup> ¶ 43.

<sup>5</sup> The expression has been explained by Dr. B.R Ambedkar as follows-The idea is this that at the Union office there should be a sort of bureau which will collect information with regard to any kind of crime that is being committed by people... and thereby be able to inform the Provincial Governments as to what is going on in the different parts of India so that they might themselves be in a position to exercise their Police powers in a much better manner."

<sup>6</sup> ¶ 54.

empowers the Parliament to extend the operation of a police force and not create a separate police force for investigation.

As regards the fourth submission, the Court read together Articles 73, 245 and 246 of the Constitution. Their bare reading makes it clear that the power of Executive is co-extensive with the power of Parliament to make laws. However, the same is subject to various restrictions. First, this exercise is subject to provisions of the Constitution and, secondly, this exercise of executive power shall not, save as expressly provided in the Constitution or in any law made by Parliament, extend, in any State, to matters with respect to which the Legislature of the State also has power to make laws. Thirdly, the exercise of executive power cannot be stretched to the extent of infringing fundamental rights. The power is also fettered by the distribution of powers by the seventh schedule. In other words, once a legislation occupies a field, neither any of the States nor the Union can exercise its executive powers on the same field inasmuch as the legislation is the primary work of the Legislature and not of the Executive.<sup>7</sup> Thus, 'police' being a state subject in List-II prevents the Executive from exercising its power on the same.

The Court rejected the final submission too. The Concurrent List can only be resorted to in situations that are not covered by List-I and II. Since Entry 8 of List-I specifically empowers the Parliament to enact a law on 'Central Bureau of Intelligence and Investigation', their final argument does not hold water either.

## **VI. STRIKING DOWN OF IMPUGNED RESOLUTION AND INVALIDATION OF CBI**

The impugned resolution was passed by the Ministry of Home Affairs and was not a decision of the Union Cabinet. It also lacked the presidential assent. In view of the aforementioned, the Court concluded that the

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<sup>7</sup> ¶ 110.

resolution can, at best, be termed as a departmental instruction which cannot be termed as 'law' within the meaning of Article 13(3)<sup>8</sup>.

The prescribed actions of the CBI include arresting of persons, conducting searches and seizures, prosecuting the accused, etc. Its actions invade the right to privacy of an individual and encroach upon their personal liberty. Consequently, the impugned resolution is *ultra vires* the Constitution as it seeks to violate Article 21. Thus, the court quashed the resolution, whereby CBI had been constituted; and declared CBI as unconstitutional. The court, however, refused to quash the DSPE Act.

## VII. ANALYSIS OF THE CASE

The case of *Sh. Navendra Kumar v. Union of India* is sure to create a lot of heated discussion. By invalidating in one stroke the existence of the country's premier investigation agency, the case has stirred-up the proverbial hornet's nest. CBI has been in existence for more than thirty years. It has successfully investigated high-profile cases involving politicians and criminals using sophisticated scientific techniques. It is known for investigating the 2G case, the well-known Priyadarshini Matoo case and the recent Coal-allocation scam.

The importance of the case can be gauged from its far-reaching consequences and the impact it is to have on the investigation agency. While the Supreme Court has put a stay on the order, it is necessary to attend to the questions raised in the proceedings as they relate to various subjects—abuse of executive power, legislative division between states and the much venerated ambit of Article 21.

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<sup>8</sup> The court for its conclusion placed reliance on *D. Bhuvan Mohan Patnaik v. State of AP* (AIR 1974 SC 2092) wherein the Court had concluded that departmental instructions are neither 'law' within the meaning of Article 13(3) and neither do they constitute "the procedure established by law" under Article 21 of the Constitution.