UPHOLDING VALIDITY

DECONSTRUCTING LEGALESE OF DEMONETISATION 2016

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The Supreme Court in its judgment dated 2.1.2023 upheld the validity of the decision of the incumbent government to demonetise Rs.500 and Rs.1000 currency notes of all denominations on 8.11.2016, by a majority of 4 in a Constitution Bench judgment of 5 judges. The said judgment has cleared the air on several doubts in the minds of the people as to the validity of such a decision having serious consequences on the citizen at large. Several issues raised were adjudicated in the course of the judgment in the majority opinion of four Hon'ble Judges who upheld the said decision as being in conformity with requirements of Law. The Dissenting opinion addressed the issues arising from interpretation of Section 26(2) of the RBI Act, 1934 while holding the decision to be illegal.

Demonetisation of the currency is a known device used by governments for various reasons primarily to regulate black money. The earliest instance of demonetisation was noticed to be in 1873 in the U.S.A. Another instance was in 1969 by President Richard Nixon to combat black money by declaring all currencies over $100 to be null. Britain in the year 1971 stopped circulation of old currency. Russia, formerly Union of Soviet Socialist Republics, in an attempt to combat the parallel economy removed 50 and 100 Rouble Notes from circulation under the leadership of Mikhail Gorbachev.

India resorted to demonetisation twice before 08.11.2016, first instance was on 12 January, 1946 and the second was on 16 January, 1978. In fact the Demonetisation done in 1978 was challenged as being violative of Fundamental Rights and the same was rejected by the Hon'ble Supreme Court vide its judgement reported in Jayantilal Ratanchand Shah, Devkumar Gopaldas Aggarwal vs. Reserve Bank of India. The time granted for exchange of demonetised notes was mere 3 days in 1978, which was upheld by the Supreme Court as being reasonable for "it was absolutely necessary to ensure that no opportunity was available to the holders of high denomination banknotes to transfer the same to the possession of others." The Demonetisation announced on 8th November 2016 was effectively the third instance of demonetisation undertaken in India, wherein 52 days were allowed for exchange of any amount of demonetised currency notes. The objectives cited in the notification published in the Gazette by the Central Government in exercise of power under section 26(2) of the RBI Act, 1934 are, a) percolation of fake currency notes in the denominations of Rs.500/- and Rs.1000/-; b) High denomination currency notes are used for storage of unaccounted wealth, and c) fake currency is being used for financing subversive activities such as drug trafficking and terrorism, causing damage to the economy and security of the Country.

The Constitution Bench of the Hon'ble Supreme Court was unanimous in so far as holding that the decision of the Central Government was justified and in the interest of the nation. Infact the following observation in the Dissenting opinion acknowledges this fact in no uncertain terms,

"22. Before parting, I wish to observe that demonetisation was an initiative of the Central Government, targeted to address disparate evils, plaguing the Nation's economy, including, practices of hoarding "black" money, counterfeiting, which in turn enable even greater evils, including terror funding, drug trafficking, emergence of a parallel economy, money laundering including Havala transactions. It is beyond pale of doubt that the said measure, which was aimed at eliminating these depraved practices, was well-intentioned. The measure is reflective of concern for the economic health and security of the country and demonstrates foresight. At no point has any suggestion been made that the measure was motivated by anything but the best intentions and noble objects for the betterment of the Nation. The measure has been regarded as unlawful only on a purely legalistic analysis of the relevant provisions of the Act and not on the objects of demonetisation."

Further, there was unanimity even on the question of Legislative competence and authority vesting in the Central Government to take the decision to demonetise high denomination currency notes for the objectives set out to be achieved.

The limited area of dissent was firstly, whether a simple Notification under Section 26(2) of the RBI Act, 1934 was adequate or a Legislation was required to exercise such power. Secondly, if the RBI could have recommended to demonetise 'all' series of notes of specified denominations when the relevant provision of section 26(2) uses the word "any" series of bank notes of any denomination.

The manner of exercise of power is where the Dissenting Opinion comes to the conclusion that the Central Government could not have initiated the process of seeking a recommendation from the RBI under sub-section 2 of Section 26. As the recommendation was at the behest of the Central Government it has been held to be legally flawed, being not independent exercise of statutory power by the Central Board of RBI.

According to the majority view the factum of Ministry of Finance writing a letter on 7th November, 2016 would not alter the nature of power conferred under Section 26(2) on the Central Board, as the process contemplated therein required a recommendation by the RBI and publication of the notification in the Gazette are both duly complied with. The scope of judicial review specially in matters of economic policy is very limited in view of the settled law by way of several pronouncements of the Supreme Court on the issue. The majority further opined "even experts can seriously err and doubtlessly differ". In fact upon perusal of the entire record pertaining to the said decision making process, i.e., communication dated 7th November, 2016, 8th November, 2016 and the minutes of the Central Board 561st Meeting as well as the Note for the Cabinet for consideration of the Cabinet Meeting dated 8th November, 2016, the majority arrived at the conclusion that relevant factors had been taken into consideration. Further, the majority returns a finding that "..the record itself reveals that the RBI and the Central Government were in consultation with each other for a period of six months before the impugned notification was issued. The record would also reveal that all the relevant information was shared by both the Central Board as well as the Central Government with each other. As such, it cannot be said that there was no conscious, effective, meaningful and purposeful consultation".

On this issue the Dissenting opinion lays emphasis on the language used in the letter dated 7th November, 2016 addressed to the Governor of the RBI, the draft memorandum of the Deputy Governor of the Bank placed before the Board which records that 'the Government had recommended' withdrawal of existing Rs. 500 and Rs. 1000 notes. Further, reliance is placed on the Deputy Governor, RBI letter to the Central Government dated 8th November, 2016, wherein it is stated that the proposal of the Central Government was placed before the Central Board of the Bank in its 561st meeting and that necessary recommendation to proceed with the said proposal had been 'obtained' from the Central Board of the Bank.

The second issue of divergence is on the interpretation of the expression "any series of bank notes of any denomination" could encompass 'all series of bank notes of any denomination'. According to the majority opinion the expression 'any' in the context would mean 'all' having regard to the context in which it has been used by applying the principle of purposive interpretation. In fact the majority also rejected the contention that in 1946 and 1978 plenary power of legislation was invoked by the Central Government cannot be the basis for restricting the meaning of 'any' in subsection (2) of Section 26 to exclude 'all' by confining it to mean 'some'.

On this issue, the dissenting opinion interpreted the said provision by applying the 'plain meaning rule'. According to the dissenting view, the considerations which could guide the Central Government will be "broad or wide", while considerations which could guide the Bank's recommendations are "limited or narrow in compass". Accordingly, it was opined that the RBI recommendation shall necessarily have to be of 'any' specified series and not 'all'. The power to demonetise 'all' notes is vested only in the Central Government by virtue of entry 36 of List I of the Seventh Schedule of the Constitution which of course has to be exercised by means of a plenary legislation and not by issuance of a gazette notification under sub-section (2) of Section 26 of the Act.

The judgement of the Constitution Bench has settled the legal issues raised in the context of the demonetisation announced on 8.11. 2016. The dissenting opinion has laid emphasis on the language used in the correspondence 07.11.2016 and 08.11.2016 between the Government and RBI and has interpreted the same in a manner of interpreting the statute, by highlighting the expressions 'recommended by the Central Government', 'obtained', 'as desired' referred supra.

In my opinion the letter 07th November, 2016 from the Central Government can be treated akin to an 'invitation of offer' requesting the RBI to consider exercise of its statutory power in accordance with the statutory mandate. The RBI in law retains its statutory freedom to consider the same and can either act upon it by making a recommendation or refuse to give recommendation for demonetisation by application of its own institutional wisdom independently, as it had declined earlier in 1978. In either case it would still be well within its powers. In a consultative democracy institutions are free to agree or to disagree with each others points of view. In the event of disagreement the Central Government could still have lawfully gone ahead by invoking its plenary legislative powers as it was done in 1978. In the present case as it is disclosed from the affidavits of the Central Government as well as the RBI, RBI was taken into confidence at least six months prior to November 2016. The RBI upon receiving the letter dated 07.11.2016 could have in its wisdom agreed with the views of the Central Government and as was the case on hand and accordingly made the recommendations as it did on 08.11.2016 pursuant to its 561st Board Meeting. In other words in this instance the Central Government's invitation to offer led RBI to offer its recommendation. Statutorily the Central Government was still free and not bound to accept such a recommendation and it would still have been legal. However, as it transpires the Central Government accepted the recommendation, thereby concluding the chain of events while meeting the statutory requirements of Section 26(2).

Further, the majority opinion also acknowledges the need for confidentiality in policy making process and records how the events transpired prior to the demonetisation in 1978. The manner in which the consultative process between the Central Government and RBI was kept confidential even in 2016, shows even in the age of RTI, confidentiality in administration of affairs of the State policy making in matters of national importance is legally recognised.

MATRIMONIAL DISPUTE

Wife can file for maintenance u/s 125 CrPC even after receiving alimony if unable to maintain herself or children: Punjab and Haryana HC

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The Punjab and Haryana High Court in the case Sunil Sachdeva v. Rashmi and Another observed and has stated that a wife can file a plea for maintenance under Section 125 of the Code of Criminal Procedure, notwithstanding the fact that the wife already has received a payment of lump sum by way of alimony from her husband.

The present case involved a couple who got married in the year 1983. Thus, after the matrimonial dispute between the two, in 1993, they started living separately. However, by way of a written compromise which are made in 1993, the husband deposited Rs.3 lac in favour of his wife and two children as full and final alimony settlement with regards to their past, present and future claims of maintenance.

However, the wife filed a petition in 2007 under Section 125 of CrPC for maintenance, which was then eventually being ruled in her favour in 2016 by the Additional Sessions Judge, Pathankot, by which ruling the wife was being granted maintenance at the rate of Rs.15,000 per month.

The husband aggrieved by this filed the present petition under Section 482 of Code of Criminal Procedure for quashing of the judgment of the Additional Sessions Judge, Pathankot. It has been argued by the petitioner-husband that the plea filed by wife under Section 125 could not be allowed. Therefore, the same being the misuse of the process of law as the present matter was already being settled between the parties, by way of a written compromise which was being complied with by the petitioner.

On the other hand, it has been submitted by the respondent wife that she was only earning Rs. 17,000 until her retirement in 2018, and that it was not possible for the wife to provide for expenses which includes accommodation, water and conveyance, electricity, additionally, since she was being burdened with the expenses of her two children – both being college students. The Single bench headed by Justice Amarjot Bhatti, while holding that the plea under Section 125 was maintainable, despite the settlement in 1993, stated that it cannot be disputed that it was not being possible for a lady and her two children to survive in a meagre amount of Rs. 3 lacs and it is not possible to survive in a meagre salary of Rs.17,000 and to bear the responsibility of her two children who were going in professional colleges. Thus, the wife was to look-after their daily expenditure, food, clothing, transportation, medical expenditure as and when required and other social obligations. The wife was justified in filing the petition under Section 125 Code of Criminal Procedure.

Accordingly, the bench headed by Justice Bhatti found no justification for interfering of with the order of the Additional Sessions Judge, Pathankot, wherein providing for maintenance o the wife for an amount of Rs. 15,000 per month.