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Law once declared to be violative of Part-III of the Constitution to have retrospective effect

The Constitution Bench of the Supreme Court of India (“**Constitution Bench**”/“**Supreme Court**”) recently in the case of *Central Bureau of Investigation vs R.R. Kishore*¹ held that its decision in *Subramanian Swamy vs. Central Bureau of Investigation*² that Section 6A of Delhi Special Police Establishment Act, 1946 (“**DSPE Act**”) being unconstitutional, will have retrospective effect. Section 6A of the DSPE Act is held not to be in force from the date of its insertion i.e., September 11, 2003.

Brief Background

1. The present judgment arises out of an FIR registered by Central Bureau of Investigation (“**CBI**”) on December 16, 2004 for offences under the Prevention of Corruption Act, 1988 (“**Corruption Act**”) against the R.R. Kishore (“**Respondent**”) who was then a Joint Secretary level rank officer.
2. At such time, Section 6A of the DSPE Act was applicable which mandated prior consent of central government to conduct any investigation or inquiry under the Corruption Act against officials of the rank of Joint Secretary and above.
3. The Respondent challenged the entire proceedings on non-compliance of Section 6A of DSPE Act. In 2006, the High Court of Delhi (“**Delhi HC**”) upheld such contentions of the Respondent and set aside the proceedings against him under the Corruption Act. CBI challenged the Delhi HC’s order by way of a special leave petition which was subsequently converted into a Criminal Appeal in 2007.
4. During the pendency of the present matter in 2014, Section 6A of the DSPE Act was held to be unconstitutional by the Supreme Court being violative of Article 14 of Constitution of India (“**Constitution**”)³.
5. Accordingly in the present matter, the issue arose if the Constitution Bench findings would apply retrospectively or prospectively.

Findings and Observations

The entire issue was examined by the Supreme Court on the touchstone of Article 13 and Article 20 (1) of the Constitution. The Supreme Court held that Section 6A of the DSPE Act is mere procedural in nature. It does not

¹ 2023 SCC OnLine SC 1146, Pronounced on 11-09-2023.

² (2014) 8 SCC 682.

³ *Id*

introduce any new offence, nor it enhances the punishment or sentence. Therefore, a challenge to Section 6A of DSPE Act being applicable *ex-post facto* will not lie as there is no vested right in procedure.

However, after declaration of a statute as unconstitutional by a court of law, it is *non-est* for all purposes. Once a law is declared to be unconstitutional, being violative of Part-III of the Constitution, then it would be held to be void *ab initio*, still born, unenforceable and *non-est* in view of Article 13(2) of the Constitution and its interpretation by authoritative pronouncements.

Conclusion

The judgment reiterates the settled position of law that there is no vested right in procedure. However, to save past transactions, the Supreme Court can give prospective overruling in exercise of power under Article 142 of the Constitution.

Accordingly, unless held otherwise in situations like the present one, if prosecution is vitiated for want of sanction under Section 6A of DSPE Act, it would be liable to be set aside being premised on unconstitutional law.

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