

**NOTE ON OPINION AND RELEASE FROM CONFIDENTIALITY**

*The person that raised this query is an eminent journalist who wishes not to be named. However he has given written unqualified consent for the opinion I rendered to be published or circulated anywhere in any form. In any event the facts dealt with here are already in the public domain.*

*At the time the query was raised, neither the querist nor I had the benefit of reading the Bill concerned. The contents thereof were gathered by the querist as the events were unfolding. As such, the opinion is broad based and could not have been rendered with the desired precision.*

**THE QUERY**

**Legality of validation clause in the Indian Finance Bill, 2012 with reference to VODAFONE judgment**

The querist states that he understands from various independent sources, including well researched and reliable early media reports that the central government has just introduced the Finance Bill containing a validation clause that seeks to negate the effect of a recent Apex court judgment that would otherwise operate in favor of VODAFONE by declaring that the concerned judgment shall be deemed to be inoperative or something along those lines.

The querist wishes to know the impact, legality and possible outcome of action of such action of the central government in endeavoring to render toothless a judgment of the Supreme Court by making a law declaring the Apex Court judgment to be deemed inoperative.

In specific, an opinion on the likely outcome if VODAFONE chooses to litigate and challenges validity of the clause before the Apex Court is sought.

**OPINION**

In order that the matter is better understood, a brief overview is given hereunder of some aspects of related jurisprudence.

### **What is validation clause**

There are numerous laws that contain what is well known as “Validation clause”. Such clauses generally commence with a “Non Obstante” clause (meaning a clause with overriding effect on other provisions of the same law or other laws which may otherwise apply). Such a validation clause would generally validate something beginning with the following words or words to that effect:

“Notwithstanding anything contained...”

When it is desired to make it applicable to acts of the judiciary, it would read:

“Notwithstanding anything contained in any judgment, decree or order of any Court or Tribunal or any authority, ...”

The legal sustainability of such a clause will depend on the interpretation placed on such a clause. For an understanding of the same, a general statement of some basic doctrines of law is set forth hereunder.

### **Power of Supreme Court and High courts to interpret the law VERSUS power of legislature to make laws**

The power of the Supreme Court and the high courts to interpret laws is derived under the constitution. This power cannot be taken away even by a constitutional amendment because this is a power that is part of the basic structure of the constitution and it is well settled that while the constitution may be amended, it cannot be so amended as to adversely impact the basic structure of the constitution. In any event this is a plenary power and does not owe its existence to any formulated words in any law but is rather one that is considered existing of necessity and cannot be wished away.

Be that as it may, the question here is, can the legislature take away a power conferred under the constitution by enacting an ordinary law?

The answer is a definitive no. Reason being, Constitution is the mother of all laws. The power of the Supreme Court (and High courts) to interpret laws and the power of the legislature to make laws are derived under one and the same the constitution. That being so, in exercising a power derived under the constitution, one such body-the legislature just cannot go as high as the very constitution that gave it the power to make law and hijack the power vested on another such body created and clothed with power by the constitution-the writ courts. If an executive or legislative seeks to do so, it will definitely be unconstitutional and hence null and void to the extent to which it seeks to do so.

Besides this, it is impossible to countenance a situation where the legislature can take away a power vested on court by the constitution by enacting an ordinary law where it cannot do so even by a constitutional amendment.

### **Interpretation of laws**

When the legality of a law or a provision therein is challenged before the Supreme Court or the High court, the courts will first try to place a harmonious interpretation that will save the law from invalidity. In other words, the court will try its best to place an interpretation that will be consistent with the constitution and the rule of law. This is because it is to be presumed that the law maker (legislator) knows his law and could not have meant to make a law that is illegal, invalid or unconstitutional. This is a thumb rule in interpretation of laws. In endeavoring to do so, the courts may place a narrower meaning to the letter of the law than one that may seem to be the plain meaning on a mere reading of the law in question.

If and only if the courts cannot find an interpretation that will save a law from invalidity, it would go on and strike it down as invalid. In short, striking down a law or a provision therein is the weapon of last resort.

### **Interpretation of Validation clauses**

This is not a new situation. About as long as validation clauses have existed, interpretation thereon has also existed. There have been innumerable situations where validation clauses have been challenged and consistently the courts have given it a harmonious interpretation and saved it from invalidity by placing an interpretation to the effect that such clause is NOT INTENDED TO OPERATE AGAINST JUDGMENTS OF COURTS EXERCISING POWERS UNDER THE CONSTITUTION (in the Indian context, the Supreme court and the High courts) and is meant to apply only to judgments of other courts and tribunals.

### **Judicial precedents on legislative acts that affects operation of Judgments**

It is necessary to briefly point out the position of judicial precedents relating to legislative acts that affects operation of Judgments since this opinion is rendered on the basis of assertion that all that the Bill seeks to do is to render inoperative a judgment of the Supreme Court by a blanket declaration to that effect without altering the foundation whereon the judgment was based. If the situation is otherwise, matters may well be impacted differently. A few of the precedents that are self explanatory of the position of law in this regard are mentioned hereunder.

In *Union of India and Ors. v. Tushar Ranjan Mohanty and Ors.* (1994)5SCC450, it was held that “The legislatures and the competent authority under Article 309 of the Constitution of India have the power to make laws with retrospective effect. This power, however, cannot be used to justify the arbitrary, illegal or unconstitutional acts of the Executive. When a person is deprived of an accrued right vested in him under a statute or under the Constitution he successfully challenges the same in the court of law, the legislature, cannot render the said right and the relief obtained nugatory by enacting retrospective legislation.”

In **S.R. Bhagwat and Ors. v. State of Mysore** (1995)6SCC16, reiterating the well settled proposition that a binding judicial pronouncement between the parties cannot be made ineffective with the aid of any legislative power by enacting a provision which in substance overrules such judgment and is not in the realm of a legislative enactment which displaces the basis or foundation of the judgment and uniformly applies to a class of persons concerned with the entire subject sought to be covered by such enactment having retrospective effect, it was observed that “this is a case where on interpretation of existing law, the High Court had given certain benefits to the petitioners. That order of mandamus was sought to be nullified by the enactment of the impugned provisions in a new statute. This in our view would be clearly impermissible legislative exercise.” It is however to be noted that it was conceded by the State that the impugned Act did not displace the basis or foundation of the judgment.

In **State of Haryana and Ors. v. Kamal Co-op. Farmers' Society Limited and Ors.** (1993) 2 SCC 363, the Court concluded that while a legislature has the legislative power to render ineffective earlier judicial decisions, by removing or altering or neutralizing the legal basis in the unamended law on which such decision was founded even retrospectively, it does not have the power to render ineffective the earlier judicial decision by making a law which simply declares the earlier judicial decisions as invalid or not binding for such power if exercised would not be a legislative power but a judicial power which cannot be encroached upon by a legislature under our Constitution.

A judgment that may be of particular significance in the facts of this case would be the one rendered in Shri Prithvi Cotton Mills case. Relevant portions are extracted below.

In **Shri Prithvi Cotton Mills Ltd. and Anr. v. The Broach Borough Municipality and Ors.** (1969)2SCC283 it was held that "When a Legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. ... Granted legislative competence, it is not sufficient to declare merely that the decision of the court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. ... Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometime this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law"

#### **Validity of Validation clause**

Taken as a fact that all that the Bill seeks to achieve is to merely render the judgment inoperative, there would be hardly any room for two views in the matter. The Validation clause will not operate against the Judgment of the Supreme Court in question as the same will be read down if the words permit such interpretation. If otherwise, the same is liable to be declared unconstitutional.

#### **Likely outcome if VODAFONE challenges validity of the clause before the Apex Court**

In the event an aggrieved party, in the fact of this case, possibly VODAFONE, challenges the validation clause on the ground that it takes away the benefit of a judgment of Apex court that operates in its favor, it is likely, in the current

scenario or judicial precedents and concerned jurisprudence that the court will uphold the validity of the validation clause by giving it a watered down interpretation as outlined above while at the same time in the event the executive is taking steps to proceed against VODAFONE on the premise that it does not have the benefit of the judgment, the court is likely to restrain it by an appropriate order commanding them to forebear from proceeding.