

DEMONETISATION CASE: REFLECTIONS FROM THE DISSENTING OPINION

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ABSTRACT

The case revolves around a notification issued by the Central Government on 8th November 2016 because of which all series of Rs. 500 and Rs. 1,000 denomination notes were demonetised or ceased to be legal tender under Section 26(1) of the Reserve Bank of India Act, 1934. The contention before the Supreme Court is with regards to the exercise of power by the Central Government under sub-section (2) of S.26 of RBI Act. Sub section (2) of S.26 provides that bank notes can cease to be legal tender when the Central Government issues a notification in the Gazette of India declaring that with effect from such date as may be specified in the said notification any series of bank notes of any demonization shall cease to be legal tender. Such a notification may be issued on the recommendation of the Central Board of the Bank.

BRIEF FACTS OF THE CASE

The case revolves around a notification issued by the Central Government on 8th November 2016 because of which all series of Rs. 500 and Rs. 1,000 denomination notes were demonetised or ceased to be legal tender under Section 26(1) of the Reserve Bank of India Act, 1934. The contention before the Supreme Court is with regards to the exercise of power by the Central Government under sub-section (2) of S.26 of RBI Act. Sub section (2) of S.26 provides that bank notes can cease to be legal tender when the Central Government issues a notification in the Gazette of India declaring that with effect from such date as may be specified in the said notification any series of bank notes of any demonization shall cease to be legal tender. *Such a notification may be issued on the recommendation of the Central Board of the Bank.*

ISSUES BEFORE THE COURT

- I. Whether the power available to the Central Government under sub-section (2) of Section 26 of the RBI Act can be restricted to mean that it can be exercised only for “one” or “some” series of bank notes and not “all” series in view of the word “any” appearing before the word “series” in the sub-section, specifically so, when on earlier two occasions, the demonetization exercise was done by the plenary legislation?
- II. In the event it is held that the power under sub-section (2) of Section 26 of the RBI Act is construed to mean “all” series, whether the power vested with the Central Government under the said sub-section would amount to conferring excessive delegation and as such, liable to be struck down?
- III. Whether the impugned notification dated 8th November 2016 is liable to be struck down on the ground that the decision-making process is flawed in law?
- IV. Whether the impugned notification dated 8th November 2016, is liable to be struck down applying the test of proportionality?

CONTENTIONS BEFORE THE COURT

P. Chidambaram, on behalf of the petitioners, raised the contention that the Central Government without giving due regard to the procedure established under sub-section (2) of Section 26 of the Act, simply issued a notification in the Gazette of India on 8th November 2016 demonetizing all series of bank notes of the denominations. Senior Counsel also raised the following contentions:

1. The Central Government has the power to issue a notification however such a notification shall be subject to compliance of the procedural conditions prescribed under sub-section (2) of S.26 of the Act.

a. Before the Central Government can issue such a notification, there has to be a recommendation of the Central Board of the Bank to the Central Government.

b. The Central Government *suo moto* cannot simply issue a notification in the Gazette of India without the recommendation of the Central Board.

2. The Central Government cannot demonetize all series of bank notes, it can only demonetize a particular series of bank notes of a particular denomination.

3. The expression “any” in sub-section (2) of S.26 cannot be understood as “all”.

The expression “any” means “a particular” series of “a particular denomination” of a bank note, and not “all” series of “all” denominations.

4. The issuance of such a notification is unlawful and the exercise of power was erroneous and arbitrary.

5. The word “any” means “one of the many” and “all”.

6. The Court while interpreting sub-section (2) of S.26 should not give the Central Government a blanket power to demonetize all currency of a particular denomination.

ATTORNEY GENERAL FOR INDIA, R. VENKATARAMANI COUNTERED THE ARGUMENTS

- I. The power to demonetise any currency note or legal tender is vested with the Central Government and hence the power vested under sub-section (2) of S.26 is not arbitrary.
- II. He argued that the power is exercised by the issuance of a notification in the Gazette of India which is on the basis of a recommendation of the Central Board of the Bank.
- III. The objective of demonetisation was to eradicate black money, and the notification in the Gazette was issued having regard to the objectives sought to be achieved.
- IV. The word “any” in sub-section (2) of S.26 should be interpreted to mean “all”. The argument of the petitioners that the word “any” would not mean “all” if accepted would mean that the Government is permitted to issue separate notification for each series, however, the Government would be prohibited from issuing a common notification for all series.
- V. He contended that in the present case there was a recommendation made by the Central Board to the Central Government, recommending demonetisation.

Senior Counsel, Jaideep Gupta contended that sub-section (2) of S.26 is an enabling provision conferring authority on the Central Government to declare that any series of bank notes of any denomination shall cease to be legal tender on the recommendation of the Central Board. Reliance was placed on various cases to argue that the Courts cannot interfere with economic policy which is the function of experts. He contended that procedure under sub-section (2) of S.26 stipulates two requirements (a) recommendation of the Central Board and (b) decision by the Central Government. In the present case, both the requirements have been fulfilled.

Justice Nagarathna being mindful of the limited scope of judicial review permissible in matters concerning economic policy decisions limited her examination of the matter to determining whether the process concluding in the issuance of the impugned notification was correct or as being contrary to sub-section (2) of Section 26 of the Act. Her observations are produced below:

- I. The scheme of the act is such that the issue of bank notes, various denominations of bank notes, the design and form of the bank notes, are all to be specified by the Central Government only on the recommendation of the Central Board of the Bank.

- II. On perusal of S.24,25, and 26 of the Act, it is observed that it is only on the recommendation of the Central Board of the Bank that the Central Government would act *qua* the matters.
- III. Nagarathna J., agreeing with the contention of the Attorney General held that the Central Government could initiate demonetization of bank notes. She observed that it is incumbent on the Government to do so under the strength of Entry 36 of List 1 of the Seventh Schedule of the Constitution.
- IV. The question that Nagarathna J., focused on was whether the Central Government can proceed to issue a Gazette notification to demonetise “any” or “all” series of “any” or “all” denomination of bank notes, on the premise of sub-section (2) of S.26 of the Act. To examine this contention, two sub issues were created: Whether demonetisation can be initiated and carried but by the Central Government by issuing a notification in the Gazette of India as per sub-section (2) of S.26 of the Act?Extent of the Central Government’s power to carry out demonetisation, i.e., whether “all series” of “all denominations” may be demonetised.
- V. Nagarathna J. observed that the Central Government has the power to demonetize all series of bank notes of all denominations and such power cannot be restricted as this power is not exercised under sub-section (2) of S.26 instead it is exercised notwithstanding the said provision by the Central Government. Therefore, demonetization of bank notes at the behest of the Central Government is a serious issue having wider ramifications on the economy and the citizens because of which such power should be exercised only through a **plenary legislation** or a **legislative process** rather than by an executive act by the issuance of a notification in the Gazette of India. Given the ramifications such a notification will have on the country, it is of paramount importance that such a matter be discussed in the Parliament which consists of the representatives of the People of this country.
- VI. The Central Board of the bank may give a negative opinion or a concurring opinion however in either situation the Central Government may demonetise bank notes but only through a legislative process.

- VII. Demonetisation of bank notes cannot be by the issuance of an executive notification because - Central Government's power to initiate the process of demonetisation is *de hors* sub-section (2) of S.26 of the Act. Unlike the Central Board, the Central Government has the power to demonetise all series of bank notes. The Parliament must be taken into confidence as it is the fulcrum in our democratic system of governance.
- VIII. To maintain secrecy, the Central Government has the option of issuance of an Ordinance by the President of India and the subsequent enactment of law by convening the Parliament.
- IX. On an issue as important as demonetising nearly 86% of the currency in circulation a meaning discussion and debate in the Parliament would have lent legitimacy to the exercise. The same could not be achieved by way of issuance of an executive notification.
- X. Earlier demonetisations were through a legislative process and not through executive action alone (1946 and 1978). Also, such a legislation or Ordinance would be notwithstanding sub-section (2) of S.26 of the Act as the Central Government is proposing the demonetisation.
- XI. In such matters, Central Government cannot act in isolation and must first take the opinion of the Central Board of the Bank (the Central Board may or may not concur with the Central Government. in 1978, the Governor of the Bank did not accept the proposal to demonetise bank notes, yet the Central Government initiated the process through the Parliament, and this culminated in the passing of the Act of 1978).
- XII. Nagarathna J. accepted the view that the Central Government has the power to demonetise "all" series of bank notes "all" denominations however with a caveat that such extensive power cannot be exercised simply by issuance of a Gazette notification as if it is one under sub-section (2) of S.26 of the Act. The same must be done through a plenary legislation, by way of an enactment following a meaningful debate in Parliament.

- XIII. Section 26 is not vitiated by unconstitutionality as a plain reading of the words “any” series of bank notes “any” denomination would not imply “all series” of “all” denominations. If the contention of the Attorney General is accepted, then the Central Board will be vested with the power to recommend demonetisation of all series of current of all denominations.
- XIV. Legal principles applicable to the case: (a) “*expressio unius est exclusio alterius*”; “to do a thing a particular way or not at all”, and (b) exercise of discretion.
- XV. In the considered view of Nagarathna J., the action of demonetisation initiated by the Central Government by issuance of the impugned notification dated 8th November 2016 was an exercise of power contrary to law and therefore unlawful. Consequently, the 2016 Ordinance and 2017 Act are also unlawful.
- XVI. Questions raised by Nagarathna J., on the effect of demonetisation.
1. Whether the Central Board of the Bank visualised the consequences that would follow?
 2. Whether the Central Board of the Bank had attempted to take note of the adverse effects of demonetisation of such large volume of bank notes in circulations?