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THE SUPREME COURT CHRONICLE ON CONSTITUTIONAL LAW

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ROMESH THAPPAR V. THE STATE OF MADRAS 1950 AIR 124

Kushal Pathak*

Citation

1950 SCR 594;

AIR 1950 SC 124;

(1950) 51 Cri LJ 1514.

Names of Parties

Appellant: Romesh Thappar;

Respondent: State of Madras.

Judges

Justice Harilal Kania;

Justice Saiyid Fazl Ali;

Justice M. Patanjali Sastri;

Justice Mehr Chand Mahajan;

Justice B.K. Mukherjea; and

Justice Sudhi Ranjan Das.

Introduction

When talks about the essential elements for a healthy democracy are mentioned "Freedom of the Press" is what comes to mind. This right is not constrained to just newspapers but to every medium by which information is communicated. The freedom of the press in one of the most celebrated rights in a democratic setup as it is this right due to which the press can provide vital information needed to be circulated to the common people, as well as the shortcomings of the government. The first case with regards to the rights of a free press was the case of "Romesh Thappar v. State of Madras", decided on May 26, 1950.

Facts

In the present case, Mr. Romesh Thappar is the petitioner. He was the editor, printer as well as the publisher of an English weekly journal named "Cross Roads". This journal was printed and published in the state of Bombay.

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The issue started when Mr. Romesh Thappar expanded his work and began to circulate the journal in the State of Madras. The Government of Madras, in the exercise of its powers under the Section 9(1-A) of the "Madras Maintenance of Public Order Act, 1949", issues an order on 1st of March, 1950. Using their power under the said section of the act stated above, they imposed a ban on the circulation and entry of the journal in the state. The reason given by the government was such that it was necessary for the objective of securing the public safety and the maintenance of public order.

Aggrieved by the order of the government, Mr. Thappar approved the court and claimed that this order goes against his fundamental right of "Freedom of Speech and Expression" that has been conferred to all the citizens of Indian under the Article 19(1)(a) of the Constitution of India. He also challenged the validity of the said section of the "Madras Maintenance of Public Order act" under which the order was passed, as being void under the Article 13(1) of the Constitution of India, which states that any such law which is in violation of fundamental rights *void ab initio*is *void ab initio*.

Issues

The primary issues involved in the present case are given below:

1. Whether the petitioner has the right to directly approach the Supreme Court of India under the article 32 of the Constitution of India without approaching the respective High Court first under the article 226 of the Constitution?

2. Whether the order of the Government of Madras under section 9(1-A) of the Madras Maintenance of Public Order Act 1949 acts contrary to the fundamental right of the petitioner to the freedom of speech and expression that has been inherently provided to him as the citizen of India under the Article 19(1)(a) of the Constitution or does the act fall within the restrictions to the right stated above, under the article 19(2) of the Constitution?

3. Whether the section 9(1-A) of the Madras Maintenance of Public Order act 1949 is void under the Article 13(1) of the Constitution of India, which declares any such law that is inconsistent with the Part III of the constitution i.e., fundamental rights, since it violated the petitioner's fundamental right of freedom of speech and expression?

Judgment

I. Issue 1: Whether the petitioner has the right to directly approach the Supreme Court of India under the article 32 of the Constitution of India without approaching the respective High Court first under the article 226 of the Constitution?

Arguments:

The Advocate General of Madras, who was appearing on the behalf of the respondent, raised an objection to the petition directly resorting to the Supreme Court of India for relief. As per the advocate general, the petitioner did not follow the orderly procedure that should be to approach the High court of Madras first.

In the advancement of his arguments, he cited criminal revision petitions under the Section 435 of the Criminal Procedure Code and applications for bails and that for transfer, that have been filed under the Section 24 of the Code of Civil procedure. He also referred to *Emperor v. Bisheswar Prasad Sinha*[1] where such a rule of practice was enforced in a criminal revision case. He used them as examples of concurrent jurisdiction having been given to the high court and lower court in certain matters. Such examples established the rule of practice that a party should approach the High court first, before approaching the Supreme Court.

Held:

The court found that Article 32 offers a "guaranteed" remedy for the enforcement of those rights, and that including this remedial right in Part III elevates it to the status of a fundamental right. In this matter, the petitioner has two options: seek the High Court under Article 226 or the Supreme Court under Article 32. It can be seen that the two therapies are similar in nature. As a result, the petitioner is not required to first approach the High Court before proceeding to the Honorable Supreme Court. The court so held that, in the context of basic rights enforcement, the petitioner has the right to approach the Supreme Court immediately and that there is no hierarchy to be followed.

II. Issue 2: Whether the order of the Government of Madras under section 9(1-A) of the Madras Maintenance of Public Order Act 1949 acts contrary to the fundamental right of the petitioner to the freedom of speech and expression that has been inherently provided to him as the citizen of India under the Article 19(1)(a) of the Constitution or does the act fall within the restrictions to the right stated above, under the article 19(2) of the Constitution?

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[1] Emperor v. Bisheswar Prasad Sinha ILR 56 All 158.

Arguments:

The term "public safety" in the contested Act, which is a law-and-order statute, was argued to refer to the security of the province, and thus "the security of the State" with the meaning of article 19 (2), because "the State" is defined in article 12 as including, among other things, the Government and the Legislature of each of the former Provinces. The case of *Rex v. Wormwood Scrubbs Prison*[2], which held that the phrase "for securing the public safety and the defence of the realm" in section 1 of the Defence of the Realm (Consolidation) Act, 1914, included protection against internal disorder such as a rebellion, was heavily cited in support of this view.

Held:

For the present issue, it was held by the Honorable Court that Anything that aids in the protection of public health could be considered a sort of public safety. The statement's meaning, however, must alter depending on the situation. Although "ensuring public safety" in the context of a law-and-order statute may not include the protection of public health, it may readily entail protecting the public from irresponsible driving on public roads and the like, rather than the security of the State. It was suggested that an enactment that provided for punitive punishments such as preventive arrest and publication bans should be applied to situations harming the state's security rather than minor offences such as reckless driving or affray.

The court further said that, in the absence of such words in the statute itself, which limit the applicability of the particular provision, its applicability and scope can't be limited to the aggravated forms of prejudicial activity that is carried out to endanger the security of the state. The objectives and the ends that the said act was intended to serve and the goals that the framers had in mind, would not affect the applicability of such limitations. There is also no guarantee that those authorized to carry out the powers will distinguish between those who act detrimentally to the security of the state and those who do not. Disruption of public calm or tranquility can have such catastrophic consequences that the state's security is jeopardized.

III. Issue 3: Whether the section 9(1-A) of the Madras Maintenance of Public Order act 1949 is void under the Article 13(1) of the Constitution of India, which declares any such law that is inconsistent with the Part III of the constitution i.e., fundamental rights, since it violated the petitioner's fundamental right of freedom of speech and expression?

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[2] R v. Wormwood Scrubs Prison Board of Visitors, ex parte Anderson 1984 (1) ALL E.R 799.

Arguments:

Under this particular issue, it was argued by the Advocate general of Madras, that the section 9(1-A) of the "Madras maintenance of public Order act" can't be declared completely void. He stated that under the article 13(1) of the Constitution of India, an existing law that is inconsistent with a fundamental right is void only to the extent of the inconsistency and not more. This is based on the doctrine of severability, which states that where the inconsistent part of the legislation can be differentiated from the valid part, they must be seen separately and only the inconsistent part should be declared void.

In furtherance of the argument, the advocate general stated that the securing of public safety or the maintenance of public order are covered under "security of the state." The impugned provision about the security of the state as applied to maintenance of public order, was covered under the clause (2) of the Article 19, which states the exceptions to the freedom of speech and expression and hence, was to be held valid and could not be declared void since it is differentiable from the rest of the provision.

Held:

In this particular issue, the court held that in defining the various criteria for determining the 'reasonable' legislations imposing restrictions on the fundamental right to freedom of speech and expression, as given in the article 19(1) of the Constitution, there is a difference between the offences that are against public order and those that aim at overthrowing the state. As per the court, they are the sole basis for the legislative restrictions on the freedom of speech and expression. As per the court, the constitution requires that a line must be drawn in the field of 'public order' and tranquility so as to roughly mark off the boundary between serious and aggravated forms of public disorder. Further, such disorders should be able to endanger the security of the state. However, relatively minor breaches of peace that are limited to the local limits are not to be treated the same as that of national significance and hence, there should be a difference in the treatment of breaches.

In the furtherance of its statement, the court also opined that the removal of the word "sedition" from the draft Article 13 itself demonstrated that such acts that criticize the government and cause disaffection or bad feelings toward it is not a justification for imposing restrictions on freedom of speech and expression for the press. Such restrictions may only be imposed if they undermine the security of the state or may cause overthrowing of the government. Hence, section 9(1-A) of the act, which gives the authority to the government of

Madras to impose such constraints with the goals of preserving public safety or maintaining public order, is defective and illegal since it falls outside the scope of the restrictions on the right to freedom of speech and expression that have been discussed under Article 19(2). Hence, the section is unconstitutional and invalid as long as it is not authorized to do so under the Constitution of India.

Dissenting Opinion

Justice Fazl delivered the dissenting judgement with respect to the present case and concluded that keeping peace and tranquility was part of ensuring the state's security. As a result, he disagreed with the majority view, claiming that the Act imposed reasonable restrictions on freedom of expression and must be upheld as legal.

Analysis

The case of Romesh Thappar v. State of Madras is a landmark judgement in the Indian judiciary when it comes to fundamental rights and the restrictions that are to be imposed on them. In order to understand the impact of the verdict, it must be remembered that at the time of its delivery, the post-independent India was still in its early stage. The logic underlying this decision established a solid point of reference for both preserving press freedom and determining the number of reasonable constraints on the fundamental rights that are guaranteed in the Part III of the constitution. The court is constituted as a guarantee and guardian of fundamental rights and it cannot properly discharge its responsibility by declining to hear applications seeking insurance against infringement of fundamental rights. By limiting the state's ability to interfere with individual rights, the court set the way for additional judgements that championed the individual against the state, causing huge confidence among the majority in the higher levels of honesty within the government's judicial branch.

In response to the judgement of the present case, the Parliament of India amended the Constitution through the first constitutional amendment in 1951. The amendment introduced 'Public order' as a reasonable restraint on the Freedom of Speech and Expression under the Article 19(1)(a) of the constitution. The amendment to the Article was proposed by the interim government by the then-Prime Minister of India, Mr. Jawaharlal Nehru. The amendment limited the right to freedom of speech and expression on the three grounds: a) Public order; b) Incitement to an offence and c) friendly ties with foreign state.

However, the amendment also attracted some criticism from the other members of the parliament. The criticism was based on the view that the amendment limited individual liberties and had laid down the groundwork for arbitrary state action which restricted free expression in the modern India. The limitations were defended as being a logical solution to the political circumstances that prevailed at the time. The members who opposed the amendment questioned the moral and legal propriety of amending the constitution by a non-elected body and that too, so soon after it was discussed, framed and implemented. To such oppositions, Prime Minister Jawaharlal Nehru answered by claiming that the provisional parliament that was enacted at the time had a moral authority to modify the constitution because the members that were part of the provisional parliament were also a part of the Constituent Assembly. Hence, they had the inherent right to review the constitution as they had an upper hand considering the insights into the vision of the constitution makers.

It was further stated by Prime Minister Nehru that the parliament hereby constituted reflected the desire of the people and that the interim government formed at the time was acting on the behalf of the future generations of the Indians. It may be seen that while Prime Minister Nehru framed the argument for the amendment to the freedom of speech under the first constitutional amendment as trusting the parliament as a legitimate voice of the people, it was still challenged by the Members of parliament as the interim government not trusting the wisdom of the people to navigate contemporary political situation and using the constitution as a tool for making the task easier for the government rather than the legal legitimacy.

One of the pillars of every civilization is freedom of expression. It is a necessary feature that should be present in every sort of governance. It might have disastrous consequences. The media are regarded as the fourth pillar of democracy. A functioning democracy requires the presence of media in a society. However, it should be noted that the mere presence of media will serve no purpose if it is denied the freedom to freely express itself through conversation and speech.

It may be hereby concluded that the comparison by the Supreme Court was valid and excellent. The Honorable Court strike the perfect balance in the delivery of this judgment. The judgement refused to rely on the American laws as an appropriate precedent for the judgement and made the decision to not aimlessly adhere to the unfamiliar law that was not equally applicable to the country of India, which is evidently different from the United States in the context of the financial and socio-political circles of the two nations. Hence, the Court

made a sound and appreciable decision in the present case, which allowed the perfect balance in the rights as well as duties of the citizens of India, allowing them their liberty but also putting unreasonable restrictions in order to protect the interest of the nation collectively.

Conclusion

In conclusion, the present case is a landmark judgement with respect to the fundamental right of freedom of speech and expression guaranteed under the Constitution of India. This case has overturned the way that the legal fraternity see Article 19 of the Constitution. Since this judgement was determined by a 5-judge bench, a bigger Supreme Court bench would be required to consider or overturn this ruling, and hence, as long as no such bench is formed, it serves as a binding precedent. As a result of this case, the wordings of the Article 19 were modified in the First amendment and "public order" has now been included as a permissible limitation to the said article. However, as also stated in the judgement, "public order" and "public safety" are two different concepts and the later cannot be included in the definition of public order.

The decision is landmark in the sense that it differentiated between 'reasonable' and 'unreasonable' limitations imposed on the fundamental rights of the citizens of India. As per the standards laid down in the present case, 'reasonable' limits to the implementation of Article 19 only constitute such speeches that pose a significant danger to the system of governance. Hence, only such speeches as stated above can be prohibited. *Shreya Singhal v. Union of India*[3] upheld and extended on this criterion. In the given judgement, the Court drew a line of distinction between "advocacy" and "incitement" to conclude that mere advocacy of hatred does not constitute the limitations imposed and does not allow the state to limit the freedom of speech and expression.

[3] Shreya Singhal v. Union of India (2013) 12 S.C.C. 73.

M. P. SHARMA AND ORS. V. SATISH CHANDRA DISTRICT. MAGISTRATE, DELHI AND ORS. AIR 1954 SC 300

Aditi Solanki*

Citation

AIR 1954 SC 300.

Names of Parties

There were two applications filed before the court. Subsequently, there were three separate parties, including the joint parties which are stated as follows:

Petitioners:

1. Petition No. 372 of 1953
    a) M.P. Sharma
    b) Delhi Glass works Ltd.
    c) Deputy-General Manager, Delhi Glass Works Ltd.
    d) Secretary, Delhi Glass Works Ltd.
    e) Stakeholder in Delhi Glass Works Ltd.
2. Petition No. 375 of 1953
    a) Messrs. Allen Berry & Co. Ltd.
    b) Asia Udyog Ltd.
    c) Shri R.K. Dalmia
    d) The secretary and General Attorney of Shri R.K. Dalmia
    e) Share Holder of Messrs. Allen Berry & Co. Ltd. And Asia Udyog Ltd. and an officer of the petitioner

Respondent:

Satish Chandra Distt. Magistrate, Delhi and 4 Ors.

Judges

Justice Mehr Chand Mahajan;

Justice B.K. Mukherjea;

Justice Sudhi Ranjan Das;

Justice Vivian Bose;

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* Aditi Solanki, (Batch 2021-26), Maharashtra National Law University Nagpur.

Justice Ghulam Hasan;

Justice N.H. Bhagwati;

Justice B. Jagannadhadas; and

Justice T.L. Venkatarama Ayyar.

Introduction

The present case is one of the first judgments of the Honorable Supreme Court related to the right to privacy in India, although it was partially overruled in the later judgement *of K.S. Puttaswamy v. Union of India*[4] by a nine Judge bench. An eight-judge bench of the Honorable court discussed the constitutionality of the search and seizure provisions of the Code of Criminal Procedure, 1898.

The judgement is primarily renowned for the discussion on the right to privacy and its interplay with the Article 20(3) of the Constitution of India. In this judgement, it was held that search and seizure of documents did not amount to "compelled testimony" and thus, it is not violative of the article 20(3) of the Constitution which talks about the right against self-incrimination and thereby states that "*No person accused of an offence shall be compelled to be a witness against himself*". It is based on the legal maxim "*nemo teneteur prodre accussare seipsum*", which means "*No man is obliged to be a witness against himself.*"

In the present case, the petitioner argued that the search and seizure by the police was a clear violation of the fundamental right to property under the article 19(1)(f) of the Constitution of India. The article contained the right to property. However, it has been repealed now. The Act also violated the right against self-incrimination by the petitioner that is guaranteed to all the citizens under the article 20(3) of the Constitution. It is determined that a person whose name has appeared in the first information report (FIR), as an accused is able to seek protection under the article 20(3). Such protection that has been granted, is accessible at the trial and the pre-trial stages. The expression 'pretrial stage' includes the stage when the police investigation in going on and the person is considered an accused. Further, the right is expanded to include such a person, who is not mentioned as an accused in the FIR, but is affected by the acts of the police.

In the present case, the issue of compelled self-incrimination was thoroughly examined by the Honorable Court. It was stated that the power of search and seizure was an overwhelming

[4] Puttaswamy v. Union of India (2017) 10 SCC 1.

power of the state. Such power is required for the protection of society and the maintenance of law and order. It was further noticed, that the power was not subjected to the right to privacy, that is a fundamental right under the Article 21 of the Constitution because the Indian Constitution does not contain any clause or article which is equivalent to the Fourth Constitutional Amendment in the United States, which forbade excessive search and seizures, as was cited and argued by the petitioner in the present case.

Facts

The Government of India ordered an investigation into the conduct of a firm after it went bankrupt in 1952 under the Companies Act 1913. The investigation was launched because the corporation attempted to embezzle funds and conceal the true state of affairs from shareholders by fabricating balance sheets and accounts. It claimed that the dishonest and fraudulent transactions will be punishable under the Indian Penal Code 1860.

As a result, a FIR was filed in 1953, and a search warrant application was made to the District Magistrate under Section 96 of the CrPC (Criminal Procedure Code 1973). The warrant was issued by the District Magistrate, and simultaneous searches and seizures took place at thirty-four distinct locations. The Petitioner petitioned the Supreme Court, requesting that the search warrants be annulled for violating Articles 19(1)(f) and 20(3), as well as the return of the materials obtained.

Issues

1. Whether the searches in question have led to the violation of the fundamental right of the petitioner against self-incrimination as under the Article 20(3) of the Constitution of India?
2. Whether the fundamental right to acquire, hold and dispose of property under article 19(1)(f)[5] is violated by the searched in question?

Judgment

I. Issue 1: Whether the searches in question have led to the violation of the fundamental right of the petitioner against self-incrimination as under the Article 20(3) of the Constitution of India?

[5] Sub-clause (f) omitted by 44th constitutional amendment, 1978.

Arguments by petitioner

As per the Article 19(1)(f) of the Constitution of India, which has been repealed by the 44th constitutional amendment of 1978, all the citizens of India have the right to acquire or dispose of any property, which is subject to the jurisdiction of any current or future law that puts the reasonable restrictions on exercising any rights that have been bestowed by it in the interest of the general public. The petitioner argues that the searches and seizures that were carried out in the current case were not reasonable in nature and thus constitution a serious restriction on the rights of the petitioner in so far as the buildings of the petitioners were invaded, their documents taken and their business as well as reputation being harmed as a result of these searches that were arbitrary in nature at the best.

Further, the law in this case can be traced to the section 96(1) of the CrPC, which says that, "*Any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture has been made under section 95, may, within two months from the date of publication in the Official Gazette of such declaration, apply to the High Court to set aside such declaration on the ground that the issue of the newspaper, or the book or other document, in respect of which the declaration was made, did not contain any such matter as is referred to in sub- section (1) of section 95*".

The section authorizes such searches and should be held invalid as it violated the constitutional right of the people.

Held

A search does not limit the right to possess and enjoy property on its own. Unquestionably, a seizure and evacuation restrict possession and enjoyment of confiscated goods. This, however, is simply a stopgap solution for the duration of the investigation. Thus, a search and seizure is merely a temporary violation of the right to keep the premises searched and the objects taken. Legislative regulation is required in this regard, and reasonable restrictions cannot be judged unconstitutional in and of themselves. If such temporary action is deemed to be in excess of legal authority, the resulting damage is a subject for further proceedings to address. The court further states that they are unable to see how any violation under the Article 19(1)(f) of the constitution could be involved in the case with respect to the warrants in question. Such warrants purport to be under the first alternative that could be found for the Section 96(1) of the Criminal Procedure Code.

II. Issue 2: Whether the fundamental right to acquire, hold and dispose of property under Article 19(1)(f)6 is violated by the searched in question?

Arguments by petitioner

According to Article 20(3) of the Indian Constitution, "*no person accused of any offence will be compelled to be a witness against himself*." The petitioner argued before the Honorable Court that a search to gather papers for investigation is a compulsory procurement of incriminatory evidence from the accused himself, which is unconstitutional and prohibited under Article 20(3). Forcible search and seizure of documents is equivalent to the person from whom they are seized being compelled to produce the documents. This would constitute searches and seizures of papers, as well as any legislation restrictions in this regard, illegal and void, in violation of the fundamental right under the article 20(3) of the Constitution of India.

Further, reliance was also placed upon the provisions of section 94 and 96 of the Criminal Procedure Code in support of the broad proposition that "a seizure of documents on search is, in contemplation of law, a compelled production of document." The alleged sections are stated as follows:

"94. (1) For the purposes of any investigation, inquiry, trial, or other proceeding under this Code by or before any court, or in any location outside the towns of Calcutta and Bombay, any officer in charge of a police station, such court may issue a summons, or such officer may issue a written order, to the person in whose possession or power such document or thing is.

96. (1) When a court believes that a party to whom a summons or order under Section 94 or a requisition under Section 95, sub-section (1), has been or might be addressed will not or would not produce the document or thing as required by such summons or requisition, when the court is unaware that the document or thing is in the possession of anyone, or when the court believes that the purposes of any inquiry, trial, or other proceeding under this Code."

Held

It was held by the Honorable court that the Article 20(3) of the Constitution of India, which talks about the right against self-incrimination, embodies the principle of protection against such self-incrimination which is one of the fundamental canons of the Common law when it

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[6] Sub-clause (f) omitted by 44th constitutional amendment, 1978

comes to criminal jurisprudence. The court further elaborated that as under the English law, the principle evolved from a feeling of revulsion against the inquisitorial methods that were adopted in the pretrial process as well as the barbarous and ruthless sentences that were imposed by the court in the exercise of their criminal jurisdiction. The principle that has been stated above, was adopted in the case of John Liburn, which brought about the wide and firm recognition of the principle that the accused should not be put under any form of oath and should not be a source of evidence in the pre-trial as well as trial process. It was also held in the case of *Weeks v. United States,*[7] that the documents or any other form of evidence that has been obtained through unreasonable searches and seizures, were not admissible in the court of law as evidences.

The court also cited English law, claiming that "the protection of accused against self-incrimination encourages active investigation from the outside sources to determine the truth and proof of an alleged or suspected crime rather than extortion of confession based on unconfirmed suspicion." Analyzing the various terms with respect to our constitution, the hon'ble court declared right against self-incrimination to consist of the following components

i. It is a right of "a person accused of an offence"
ii. It is "a protection against compulsion to be a witness" and
iii. It is "a protection against such compulsion that results in him giving evidence".

The court has also commented on the nature of the guarantee under the Article 20(3) and in that regard, it has broadly stated that the guarantee is against testimonial compulsion, which, in turn, is confined to the oral evidences. However, it has also been stated that a person can be a witness not only through giving oral evidence but also by producing any documents or merely making any intelligible gestures. This can be found in the case of dumb witnesses under section 119 of the Indian Evidence Act.

Although, Section 139 of the same act indicates that a person who is delivering documents or summons is not a witness, Section 139 is intended to restrict the right to cross-examination rather than to provide guidance on the meaning of the term "witness." Thus, it may be concluded that the protection that has been granted to an accused by the words "to be a witness" extends not just to oral evidence in court but may also apply to compelled testimony previously collected from him." As a result, it is open to anyone who has faced a formal

[7] Weeks v. United States 232 U.S. 383 (1914).

accusation of committing an offence, which could lead to prosecution in the usual run of events.

With reference to the case of *Entich v. Carrington,*[8]the court stated that they could not derive from the case, any support for the proposition that has been stated by the council that searches and seizures, in their ordinary nature, are violative of the privilege of protection against self-incrimination as stated under the article 20(3). The court, in this regard, also referred to the judgement of the Calcutta High Court in the case of *Satya Kinkar Roy v. Nikhil Chandra Jyotishopadhyay.*[9]In this particular case, it was held that the section 94 of the CrPC is applicable to the accused.

As an extension, it may be assumed that there is an element of coercion that is implicit in the whole process that has been contemplated by the section 94 because, whatever the case may be, non-compliance results in the unpleasant consequence of the police, referred to as "minions of law" invading one's premises and rummaging through a person's private paper in the shadow of a search warrant. It was thus reasoned that some searches that fall within the scope of the second and third alternative as stated in the section 96(1) would fall beyond the constitutional protection that has been guaranteed under the Article 20(3), which is an anomalous distinction for which it is not possible to establish a logical basis.

Besides the interpretation as has been given above, the court also analyzed the history of the Indian statutes and legislations regarding the search and seizure warrant and it was found by the honourable court that the legislations don't support the theory of self-incrimination as propounded under the common law. The instances of the application could only be found in the section 114 of the Criminal Procedure Code that talks about the issue of search warrant by a magistrate. However, some more related provisions also point to the absence of the theory, such the section 142 of the same code, which vests in the officer who is in charge of the police station with the power to make a search in certain circumstance, that too *Suo moto*. Further, the section 365 of the code is the earliest statuary provision when it comes to the issuance of summons, which is followed by the section 368 that is co-dependent on the section 365 as it is called "relating to the issue of search warrants."

Based on the above stated reasoning and contentions, it was concluded by the honourable court that there is no basis in the Indian law for the notion that search or seizure of a thing or

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[8] Entick v. Carrington [1765] EWHC KB J98.
[9] Satya Kinkar Roy v. Nikhil Chnadra Jyotishopadhyay AIR 1951 Cal 101.

document constitutes their compelled production before the court. Thus, the court rules that the searched based upon which the case is established, could not be said to be illegal and challenged on the same grounds on the basis that they violate any fundamental rights of the petitioner. The court stated that the search and seizures formed an essential part of the process established by the law and the applications that were filed against the same were liable to be dismissed.

Analysis

The author supports the Court's decision in terming the present case as not being one of the violations of right to privacy as well as the article 20(3), i.e., the right against self-incrimination. The present case is a matter of search and seizure, without which the ambit of criminal law would be very much restricted. It is not always possible to give the best judgement when the evidences are available. If the Court did render the case as being a violation of the article 20(3) and article 19(1)(f), which although has been struck down, plays a vital role in the present case, this would cause hindrance to the delivery of justice.

The bench has rightly stated that search and seizure is a must for the protection of social security and that search and seizure process if temporary interference for which statutory recognition was unnecessary. The power of search and seizure is an overarching state power for the protection of social security, and it must be governed by law. As a result, there is no rationale for considering the right to privacy a fundamental right when the country's constitution does not include it.

The process of search and seizure, is thus, a reasonable restriction under of the freedoms under the Constitution which could not be held unconstitutional. Further, it may also be noted that many countries such as the USA also allow the waiver of fundamental rights and reasonable restrictions in the cases where it is required. Further, the right against self-incrimination does not include evidences and witnesses as has been rightly cited by the Honorable bench. Hence, so as to deliver justice to the victim, it is a part of the necessary process that needs to be done. Hence, agree upon decision in the present case.

Conclusion

As a result, the case of MP Sharma v. Satish Chandra represents a watershed moment in India's highest Court in terms of the right to privacy. An eight-judge Constitution bench ruled unanimously that "the right to privacy is not a fundamental right under the Indian Constitution, that search and seizure is necessary for the protection of social security, and that

the search and seizure process is a temporary interference for which statutory recognition is not required. It was deemed a reasonable limitation of constitutional rights that could not be declared unconstitutional." Although the decision was partially overruled in the KS Puttaswamy judgement, it still holds as a precedent partially and aids the process of investigation by allowing seizure as a part of due process of law.

IN RE, BERUBARI UNION (I) AIR 1960 SC 845

Soniya Kawade*

Citation

AIR 1960 SC 845

Judges

Justice B.P. Sinha;

Justice J.C. Shah;

Justice K.C. Das Gupta;

Justice K. Subba Rao;

Justice M. Hidayatullah;

Justice P.B. Gajendragadkar; and

Justice S.K. Das.

Introduction

In Re, Berubari Union, has itself gained its significant importance in the Indian history. This landmark judgment given by a seven judges bench had acquired a lot more clarity on the constitutional provisions and on the Article 1(3)(C) and 368 of the Indian Constitution. The Judgement was delivered in the year 1960 focusing more on, to give a clarity and clear-cut idea regarding the articles mentioned above and the role of the parliament. Since there isn't any second party involved, the name of the case was given in reference to the particular area for which the legal suggestion was asked by the president of the country in reference to Article 143 of the Indian Constitution. On the same note, the "Re" mentioned in the name of the case denotes "in reference with the name of the place for which the legal suggestion was taken." Also, the President of India had sought advice from the SC of India on the Nehru-Noon Agreement, which had been signed by the Prime Ministers of India and Pakistan.

The issue arose because the West Bengal State Government refused to cede any area in Berubari to Pakistan. The Central Government accepted the Nehru-Noon Agreement, whereby it declares unequivocally that the area of Berubari will be divided equally between India and Pakistan. As a result, the case was eventually heard by the SC of India. The points expressed in the Berubari case were reiterated and clarified in the Kesavananda Bharati judgement. The decision also said that the Preamble to the Constitution acts as a tool to open

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the ideas of the law's framers. However, the preamble isn't the basis of all the powers granted to the government by the Indian Constitution. The following case analysis would be hereto dealing with the case history of this particular case and judgement given by the Supreme Court of India after the president of India asked for a legal suggestion under article 143 of the Indian Constitution and how the government reacted, followed and took the decision on the said matter after the judgement was being delivered.

Title of the Case

The title of this particular case is "In Re, Berubari Union (I)." The title of the case is framed in such a way that it describes the topic for what the suggestion was taken by hon'ble president of the India under article 143 of the Indian Constitution from the Supreme Court of India, during the time of partition of India and Pakistan. "In Re" which is mentioned in the title of the case resembles "in reference with," which means that the name of the case is given in reference with the location to which, where the incident took place during the partition of India and Pakistan wherein, the question of separation of the area of Berubari arose for which the President of the country seek an legal advice from the Supreme Court of India and the Judgment given by the court became one of the famous and landmark judgement of the country.

Facts

a) On 20/2/1947 since the government was under the rule of the Britishers, the British government showed its intention to handover all the powers to the Indian government by June 1948.
b) Then, on 03/06/1947 a statement regarding the method by which the transfer of powers would might get effected was been issued by the British government.
c) Then on the way to resolve the matter the British parliament had passed the Indian Independence act of 1947, which came into force on 15th of August 1947 hence by the creation of India and Pakistan.
d) Then under Article 3 clause 1 of the Indian constitution the state of Bengal was decided to be divided into two new state namely East Bengal and West Bengal.
e) Berubari is also among the small group of villages in Jalpaiguri district of today's West Bengal that falls under the two thanas of Jalpaiguri and Boda. The area of this Berubari region is 8.75 sq miles and it is having a population of about ten to twelve thousand residents which was still not specifically mentioned in the 1st schedule of the Independence act and so the act did not really came into operation at all.

f) On 30/06/1947 the Governor-General declared that the states of Bengal and Punjab should be divided into different regions of India and Pakistan and for that purpose a boundary commission was appointed and the chairman of that commission was Sir Cyril Radcliffe. Then, on12/08/1947, the formation of the Radcliffe Award took place.

g) The territorial region of the state of West Bengal was never determined under the Schedule 1 of the Indian Independence Act, just because of the reason that the Radcliffe Award came into force just before the three days of the appointment under the independence act. Hence, but still the region was determined under the Award. Then ever since the Award was formed there was no point of dispute that arose because the Berubari Union became and had formed the part of the State of West Bengal and has been governed as such.

h) West Bengal was also shown as one of the States in Part-A, also it was decided that the territory of the state of West Bengal should be comprised only of those territories which were there immediately before the commencement of the Indian Constitution. Hence, the region of Berubari was then considered to be a part of West Bengal and hence, a part of India.

i) How-so-ever the matter of dispute arose between both the countries, i.e., India and Pakistan related to the distribution of boundaries within certain areas, for which a tribunal was set up to solve the dispute and adjudicate the matter which was arose between both the countries. The tribunal was named as, "Indo-Pakistan Boundaries Dispute Tribunal-made no reference to Berubari Union."

j) Then, in the year 1952, the government of Pakistan arose another issue, questioning the Radcliffe award, that some regions of the West Bengal which are governed under the territory of India should have been a part of East-Bengal and hence shall be given back to Pakistan.

k) To solve this issue, and to remove the problems caused due to the border disputes, along with the problems caused due to the Indo-Pakistan border areas, an agreement was formed between India and Pakistan on 10th of September 1958.

l) Later the agreement was signed by both the nations, naming the argument as, "Nehru-Noon agreement," which stated that the Berubari region would be handed over to Pakistan only if the equal part of the lands would be handed over back to India.

m) But still there were various issues that remained unresolved after signing the agreement and for the same a judicial advice under article 368 of the Indian Constitution was taken by the former president of the country Dr. Rajendra Prasad.

n) Wherein the issues were raised before the under the concerns raised by the former president of the country and similarly the court presented its judgment in accordance to the issues raised before the hon'ble court. These issues and judgement are laid down below.

Issues

1. Whether there is any need for a legislative action that is to be necessary for implementing the agreement relating to the Berubari Union?

2. If so, is the situation, then to solve the purpose is Article 3 of the constitution of India sufficient for implementation of the purpose or is there any need in accordance of Article 368 of the Indian Constitution for dealing with the purpose?

3. For the exchange of the Enclave between the territories, will article 3 under the constitution of India be sufficient for applying of the same, or there is any need for an amendment in accordance with article 368 of the Constitution of India, to solve the purpose?

Judgement

To answer the first issue, stated above, then yes, it was proved by the outcomes of the third and second issues that there is a need for a legislative action that is necessary for implementing the agreement related to the Berubari Union.

1) A law of the parliament relating to article 3 of the Indian Constitution would be incompetent or amateurish.

2) It was also found that, Article 368 of the Indian Constitution is relatable to the law of the parliament and hence, is necessary and competent to be implied.

3) Similarly, a law of the parliament is relatable to both the Articles, i.e., Article 368 and Article 3 under the Constitution of India, also, it would become necessary only when the parliament first chooses to pass a law that amends Article 3 under the Constitution of the India, as indicated above. Under such a case, parliament first needs to pass a law on those lines under article 368 and then follow it with the law relating to the amendment under article 3 and then implementing the agreement.

All the points mentioned under (A), (B) and (C) answers to that of the issues raised under 1, 2 and 3. So, Article 368, on the other hand, grants the right to modify the Constitution, and

parliament could also amend Article 1 of the Constitution, but only after amending Article 368. Only then can the area be handed up to East Pakistan. This implies that the Nehru-Noon Agreement must be approved by both chambers of parliament. Any land of India can be transferred to a foreign country only by changing Article 1 with the special majority of parliament. In 1960, the Indian Parliament was forced to pass the 9th Amendment Act, which altered Schedule 1 of the constitution of India. The Nehru-Noon Agreement was ultimately executed, and the Berubari union was ceded to Pakistan.

Analysis

The landmark judgement of the Re, Berubari, Union (I), led a great impact over the judiciary, in India and also symbolised the rights of the legislature under article 368 of the Indian Constitution. The case raised various issues in front of the Supreme Court of India such as, can a territory be ceded from India and if so, then which article of the constitution permits it and if not, then what are the other ways in which if a parliament, if it wants then can ceded a part of land to other countries. Such issues were answered in such a manner that it had made easier for the parliament for taking its decision on the said matter.

Supreme Court stated that there is nowhere in the constitution mentioned that some part of the territory can be ceded away from the region of India even article 1(3)(c) also talks about adding of the other regions into the territory of India. In order to answer to the President's question, the Supreme Court construed the relevant Articles. The court believed that Article 3 proved ineffective in and of itself for carrying out the Agreement in issue. Additionally, it stated that making a statute under Article 368 is both appropriate and required for the execution. Additionally, if a modification to Article 3 was to be made first and this was to be followed by the application of the augmented Article for the execution of the agreement, a statute of the parliament would be required in connection to both Article 3 and 368.

The Supreme Court should have taken into account the fact that Article 3 constitutes one of our Constitution's founding documents. The same amendment implied that we were changing what the authors of our constitution intended for us, which would make it appear weak to other nation. The Supreme Court should have simply said that a law enacted in accordance with Article 368 would be sufficient to carry out the contract instead of giving it such a broad meaning.

Under such a situation the Supreme Court suggested that if with respect to article 3 and article 368 of the Indian Constitution if parliament amends article 1(3)(c) of the constitution

then it could cede the part of region from India as well. I feel the decision as well as the suggestion given by the Supreme Court is absolutely evident, since it gave a clearer and broader idea to the parliament while taking the decision for which the advice was seek for. Hence the parliament came to the conclusion of ceding some part of the territory to Pakistan and including the same amount of land from Pakistan into India.

Conclusion

The above-mentioned case of the Berubari Union, led a great importance on articles 1(3)(c), 3 and 368 of the Indian Constitution, by keeping its main focus on the rights of the parliament covered under article 368 of the Indian constitution. Under which the suggestion and decision given by the Supreme Court of India, helped the parliament while taking the decision as to ceding a territory from the region of India. The case would widely help the reader to understand the importance and the significance of articles mentioned in the case along with the powers that the parliament possess.

The Supreme Court of India also emphasized that Article 3(c) allows the legislature the authority to reduce State Territory but not to transfer it. It is not enough to simply practise and use this ability under Article 3. Article 358 states that Parliament must modify the Constitution using both Power and Procedure. It should be noted that whereas Article 3 can be implemented with an ordinary majority in Parliament, Article 368 requires a special majority.

INDIRA NEHRU GANDHI VS SHRI RAJ NARAIN & ANR 1975 AIR 1590

Anisha Pandey*

Citation

1975 AIR 1590

Names of Parties

Appellant (at the time of hearing of the present case):

Smt. Indira Nehru Gandhi, age 58 years, was a prominent figure in Indian politics and she served as the Prime Minister of India from January 1966 to March 1977 and further from January 1980 up until October 1984. She is the daughter of Shri Jawaharlal Nehru, former and longest serving Prime Minister of India, and Smt. Kamala Nehru. She was a leading figure of the Indian National Congress and in the present case was the appellant challenging the judgement of the Allahabad High Court. The basis of the entire case lies in the events of the 5th Lok Sabha General Elections of 1971. The appellant resided at 1, Safdarjung Road, New Delhi, India during this period.

Respondent (at the time of hearing of the present case):

Shri Raj Narain, age 58 years, was the son of Shri. Anant Prasad Singh. He was a freedom fighter and a politician who was the Opposition parties' candidate from the Rae Bareilly constituency against the appellant in the Lok Sabha General Elections of 1971. He was then a Samyukta Socialist Party (SSP) candidate but later went on to associate with different political organisations in the country. The respondent's address remains undisclosed.

Judges

Chief Justice AN Ray

Justice HR Khanna

Justice KK Mathew

Justice MH Beg

Justice YV Chandrachud

Introduction

Sir Winston Churchill once said, "at the bottom of all tributes is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper - no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the

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point." The fundamental elements of a good democracy are the rule of law and free and fair elections. Elections in a representative democracy happen to be one of the more fundamental tenets of its people's right to participate and have a say in the working of their government. All other rights, no matter how crucial, become secondary in a democracy, even going as far as to call them illusory without the ability to vote. Accordingly, the Supreme Court of India has repeatedly strengthened the value of free and fair elections. India's elections have raised a lot of questions in the legislative, judicial, and executive branches alike and affected the average individual whose ability to vote is important. Thus, by the very nature of the consequences of elections in a democracy, it becomes all the more imperative for the law and its upholders to devise a mechanism for what we call "free and fair elections", and prevent the misuse of any arbitrariness that deters such elections.

The phrase "Rule of Law" simply means that the law governs the state, not the monarch or the elected officials chosen by the populace. There is a Grund norm (Basic Law or Constitution) in states where the rule of law is observed, from which all other laws get their authority. The laws developed from the Grund norm also control the king or the people's representatives, which restricts their authority. Kings or elected representatives' behaviours must adhere to the letter and spirit of the law; it cannot be arbitrary. In the case of India, the Constitution is the ultimate law of the nation, and all other laws and statutes passed by the country's governmental bodies must comply with its requirements to be upheld by the courts. Because of this, the division of powers constitutional concept is seen as a safeguard against the misuse of power and has a lengthy history in the classic literature on constitutional theory. To prevent the abuse of power, our constitution's framers took inspiration from the existing constitutions of other nation states and incorporated this fundamental principle of separation of powers as well. The idea of separation of powers, however deeply ingrained in our Constitution, frequently becomes a source of conflict between the various democratic agencies.

Therefore, with regards to the importance that lies in the processes of electing representatives in a democracy, it has been but a frequent recurrence in Indian law and politics to have witnessed the tussle of the Parliament and the Judiciary in ascertaining who is the ultimate upholder of such laws and who can be vested with robust powers to decide and act on such matters relating to the elections. Our present case under analysis is one such example of unprecedented friction between the two organs of our Indian democracy, the Parliament and the Judiciary, concerning the powers vested to each of them in the Constitution of India. Our

present case was a case of a lot of firsts. It was the first case to apply the landmark principles of the Constitution's basic structure laid down in *Kesavananda Bharati v. State of Kerala*[10]. It was also the first time a ruling prime minister of India attended court to defend herself against alleged malpractices in the election processes. Besides the pioneering nature of this case's manner and court proceedings, this case is also one which has been termed frequently as the one leading to the National Emergency of 1975. This case analysis is an attempt to understand the underlying intentions of the Apex Court in delivering this judgement and how some aspects of the judgement are critically unsustainable with Constitutional ideals whereas some others uphold Constitutional validity.

Facts

Smt. Indira Nehru Gandhi was elected to the House of the People (Lok Sabha) from the Rae Bareli Parliamentary Constituency in March 1971. It was evident that Indira Gandhi won the Elections by securing 352 seats out of 518 seats. Her election was challenged by one of the rival candidates Shri Raj Narain, before the Allahabad High Court by an election petition.

The High Court, by its judgment and order dated 12.6.1975, allowed the election petition and declared the election of Smt. Indira Nehru Gandhi as void. According to the High Court, Smt. Gandhi had secured Shri Yashpal Kapoor's help in aiding her election campaign. Yashpal Kapoor, a Government of India Gazetted Officer of the district Rae Bareli, a magistrate and police superintendent, and the executive engineer for PWD, funded her election campaign and that Smt. Gandhi had therefore acted dishonestly in accordance with Section 123(7) of the Representation of the People Act, 1951.

Unhappy with the Allahabad High Court's ruling, Indira Gandhi appealed this case to the Supreme Court. There was also a cross-appeal submitted by Raj Narain.

While these challenges were pending, Parliament enacted the Act of 1975 amending election laws. This Amendment Act amends the Representation of the People Act, 1951 clauses which were changed, retrospectively. Additionally, Parliament approved the Constitution (39th) Amendment Act, 1975. A new Article 329-A was added to the Constitution by this Amendment Act to, among other things, state that the election to Parliament of a person who is serving as Prime Minister or Speaker of the Lok Sabha at the time of the election or who is appointed as Prime Minister or Speaker after the election, shall only be challenged before a specific authority, not the High Court in accordance with Article 329(b) of the Constitution.

[10] *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225; AIR 1973 SC 1461.

Additionally, the election of Smt. Indira Gandhi was approved by Parliament by the aforementioned Amendment Act.

The two aforementioned Amendment Acts' legality also came into being the subject of the current appeals. Many members of Parliament were placed in preventive imprisonment following the Proclamation of Emergency in June 1975, which was one of the grounds for challenging the legality of these Acts. As a result, these Acts could not have been legitimately passed by Parliament in their absence.

Issues

1. On what grounds can the constitutional validity of the Constitution (Thirty-Ninth Amendment) Act, of 1975 be challenged?
2. Is the aforementioned Amendment Act specifically clauses (4) and (5) of the inserted Art. 329(A) constitutionally valid?
3. Was Smt. Indira Gandhi's election valid and was she to be held liable for corrupt election practices as per the Representation of the People Act, 1951?

Judgement

In the current appeals, the Supreme Court maintained the Election's legitimacy, both the Laws (Amendment) Act of 1975 and the Constitution (Thirty-Ninth Amendment) Act of 1975, with the exception of the section of the latter Act that authorised the election of Smt. Gandhi. The Supreme Court affirmed Smt. Gandhi's election by applying the statute as revised retroactively by the aforementioned Election Laws (Amendment) Act, 1975. Indira Gandhi to the House of the People, accepting her appeal while dismissing Shri Raj Narain's cross-appeal. Following is an account of the judgement delivered by the 5-judge constitution bench of the Supreme Court, which has been separated issue-wise—

1. **The Court held that the constitutional validity of the impugned Amendment Acts could not be challenged on the grounds that a number of Parliament Members were in Preventive detention and therefore, barred from attending the sittings of the Lok Sabha meetings**. Citing Articles 85 and 122 of the Constitution of India, the Apex Court was very clear in determining that the sittings of the two Houses of Parliament in which the impugned Acts were passed were not valid essentially relates to the validity of the proceedings of the two Houses of Parliament. These are matters which are not justiciable and pertain to the internal domain of the two Houses. The judges unilaterally ascertained

the validity of the detentions of the Members of Parliament, which cannot be questioned automatically or on the bare statement by counsel that certain Members of Parliament are illegally detained with some ulterior object. The enforcement of fundamental rights is regulated by Articles 32 and 226 of the Constitution and the suspension of remedies under these articles is also governed by appropriate constitutional provisions.

2. **The Court was divided on the issue of the constitutional validity of the Art. 329-A (4) and (5) as inserted by the Constitution (Thirty-ninth Amendment) Act 1975**. The majority judgement delivered by Justices Matthew, Chandrachud and Khanna declared the impugned articles to be unconstitutional. Justice Matthew delivered that Article 329-A's Clause (4) might be overturned. Due to the fact that it goes against the idea of free and fair elections, which is a fundamental democratic principle, which is also a component of the Constitution's fundamental principles in that it abolishes the forum without establishing a different venue for discussing the disagreement about the affirm the appellant's election's legality and further mandates that the aforementioned election legislation shall not apply to the dispute, and the eligibility of the said choice should be final and hence not subject to challenge, and it eliminates the remedy as well as the ability to contest the legitimacy of the aforementioned election. Justice Khanna further elaborated that the fundamental idea of equality that underlies the rule of law and that is these are both seen to be the core tenets of republicanism represented by Article 14. If in Bharati's case Article 14 does not apply to the fundamental framework of the Constitution, which is the second equality tenet included in the Constitution, which may refer to the fundamental elements of the Constitution or a defining characteristic of democracy or the rule of law? Justice Chandrachud also elaborated that "It is beyond the pale of reasonable controversy that if there be any unamendable features of the Constitution on the score that they form a part of the basic structure of Constitution, they are that : (i) India is a Sovereign Democratic Republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion and that (iv) the Nation shall be governed by a Government of laws, not of man." The minority comprising of Justices Ray and Beg dissented by saying that if it is essential to give effect to the Directive Principles of State Policy, the Constitution might be amended to exclude judicial review of an issue. When such exclusion is required in the broader

interest of the State's security, a comparable authority could be accessible. The absence of judicial review in either situation does not imply a violation of the equality standards. It simply indicates that the competent legislative body has satisfied itself and determined beyond a reasonable doubt that the equality standards have not been broken. That group categorises things definitively in order to apply the equality principles.

3. **The Court declared that the respondent, Smt. Gandhi could not be charged of corrupt practices owing to the elections of 1971 and her alleged use of government machinery to promote election agendas was before she filed her 'candidature' as per the Election Laws**. Nothing in clause (7) of Section 123 suggests that the term "candidate" has been used only to designate the person who has been or would hereafter be nominated as a candidate. A defining clause is a legislative tool used to prevent making the various statute's provisions overly complicated. When a term is defined in a law and used in a provision to which that definition applies, the result is that the definition of the word is replaced everywhere the word is used in that provision. The only reasonable inference is that the person referred to as a candidate in that clause should be a person who has been or claims to have been duly nominated as a candidate at an election and not one who is yet to be nominated when reading Section 123(7) in the sense in which it has been defined as a result of the amendment made by Act 40 of 1975. A candidate must declare themselves to one elector or the electorate in a specific constituency and not to other electors in order to hold out as a "candidate" within the meaning of Section 79(b). To prove that there was a "holding out" to the voters in the constituency, there must be proof of either remarks or behaviour that amounted to unequivocal assertions made to them. Lack of evidence of a desire to alter the constituency does not constitute positive "holding out" evidence. Not what other people believe or say about what a potential candidate would do, but rather what the candidate in question has said or done to the point where it amounts to "holding out" as a candidate by the candidate from a particular constituency, is what is important.

Analysis

This judgement came at a time when Indian politics in general was moving towards unprecedented and uncalled procedures. Arbitrary use of powers started becoming evident by the ruling party and evidence of a disturbed public was on the rise. Up until Mrs Indira Gandhi was chosen to serve as Prime Minister of India on March 24, 1966, and in office for the following 16 years, Indian politics were relatively stable, and the electoral process was

mostly free and fair. According to Shalendra D. Sharma, these were the years when the institutions of government (such as the cabinet, the Parliament, the judiciary, and the civil service) were disregarded and significantly diminished in power and legitimacy.[11] The Prime Minister's office became the centre of authority, and the executive supplanted the Parliament. Under the pretence of a social revolution, constitutional rights were crushed[12] and the Constitution was frequently amended in order to further individual interests. The Judiciary had no choice but to intervene[13], but doing so cost them dearly.[14] The Congress proclaimed a state of emergency between 1975 and 1977 in an effort to get around the court's ruling; this time period was recognised as the worst for human rights in India.

The judgement of the present case Smt. Indira Nehru Gandhi v. Raj Narain paints and highlights certain aspects of interpretation which are commendable in theory while some others with which the author disagrees and questions. The author believes that the absences of several opposition members of Parliament during the sittings of the Houses when the Amendment Acts were passed, should have been very substantial grounds for declaring the Acts as void and more so, illegal. According to reports, some members of the two Houses of Parliament were imprisoned by governmental order following June 26, 1975. These people were not provided with any information about the reasons for their imprisonment or any chance to object to it. The convening of the session will be unlawful and unconstitutional, and it cannot be recognised as a meeting of the two Houses of Parliament unless the President calls a full session of the Parliament and affords all of its members the chance to attend and exercise their rights to speak and vote. The detention itself is neither lawful nor constitutional simply because a person may be denied the ability to use any court to gain his release from such illegal imprisonment by the use of a presidential order under Article 359. The significant House leaders had been barred from attending. The session's holding and the business conducted inside should have been held unconstitutional. The system of the Parliament and the presence of all members in the sitting of such sessions is vital to ensure equal recognition and participation of each elected candidate and therefore, the people who vest their interests with those candidates. This system is in accordance with democracy's basic structure and

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[11] Shalendra D. Sharma, INDIAN DEMOCRACY AND THE CRISIS OF GOVERNABILITY, Fletcher F. World Aff. p. 147.

[12] Granville Austin, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE, Oxford University Press, 2000, p. 174.

[13] In accordance to the present case, *Smt. Indira Nehru Gandhi v. Raj Narain* AIR 1975 SC 2299.

[14] With respect to the appointment of J. A.N Ray as Chief Justice of India by the then Gandhi government superseding senior judges J.M. Shelat, A.N. Grover, and K.S. Hegde due to their role in the judgement of Kesavnanda Bharti which was unsettling for the Gandhi government.

must have been recognised by the Apex Court in this judgement as an essential ground for invalidating the Acts passed in the durations of 'unwarranted absence' of the majority of Opposition members.

The judgement came at a time when it was evident that it could have very easily been to absolve Mrs Gandhi of all charges against her as held by the Allahabad High Court. The timings of the amendment acts along with the proclamation of the emergency were very evident proofs of an autocratic intention to curtail the rights and establish the supremacy of power by the Legislative head of the country and in order to relinquish all charges levelled against the political individual. Indira Gandhi abused her authority to change the law that was used to convict her of corruption, but the Supreme Court chose to remain silent. When the respondent requested equity, all the Supreme Court could do was provide him with a lengthy justification for why the issue was outside of its purview. Thus, this judgement should not have been so silent on this logical inference of the facts which clearly indicated the overall malicious intention of the respondent, Mrs Indira Gandhi towards the use of Parliamentary and constitutional powers.

However, it is important to realise and appreciate the court's application of the pioneer 'Basic Structure Doctrine' on the facts of the current case and the striking down of Art. 329-A (4). The idea of separation of powers, which creates checks and balances between the pillars to prevent invasion and breach, was upheld by the Court in this landmark case. In this decision, the court has also emphasised that free and fair elections are the cornerstone of democracy. According to the Supreme Court, democracy is not at its core in a nation whose citizens cannot choose their representatives in free and fair elections.

Conclusion

This judgement of the Supreme Court came at a time when the various organs of the sovereign of India were witnessing conflicts among their own, visibly in the drive for more power over the other. Needless to say, this was having detrimental effects on the delivery of just and fair duties towards the public by the members of these organs. This judgement beautifully described the necessity of upholding and performing the duties oneself without interfering and trying to take over the other organ. This judgement was an attempt at bringing to justice the people in power who intended to use their constitutionally granted powers unfairly and to their own advantage. However, at the same time, it is not possible to turn a blind eye toward the judiciary's fear and apprehension from political backlash which resulted

in them taking rather unfair decisions on the issues of detention of Parliament members, which in the author's opinion, was a just and valid ground to have considered the unconstitutionality of the Amendment Acts. Thus, in conclusion, we learn from this judgement the judiciary's attempt to bring the law to just application upon all citizens while also, their attempt to stray away from affairs of the Parliament which in turn can be interpreted as a gross violation of fair representation in the House of Parliament.

BACHAN SINGH V. STATE OF PUNJAB AIR 1980 SC 898

Tanuj Bhoir*

Citation

AIR 1980 SC 898.

Names of Parties

Appellant: Bachan Singh;

Respondent: State of Punjab.

Judges

Justice Y.C. Chandrachud;

Justice A. Gupta;

Justice N. Untwalia;

Justice P.N Bhagwati;

Justice R. Sarkaria.

Introduction

In the case of Bachan Singh v. State of Punjab, the Honorable supreme court of India, gave the 'Rarest of the Rare' Doctrine. The doctrine stated that the death punishment is an absolute, unique exception, and cannot be the rule. This doctrine worked as the measuring tool for the award of the death punishment to the criminal if found guilty for a particular crime. The supreme court said that "A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That is not to be done except in rarest or the rare case where the alternative opinion is unquestionably foreclosed".

This doctrine given by Honorable court justify if the death penalty must be given in a particular crime. The crime done by the accused must be horrifying towards the society for the death punishment, and it is not possible to give death penalty in every situation. Thus, the Honorable supreme court established the doctrine in regards to the death penalty and its application in law.

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Facts

Bachan Singh (Appellant) was found guilty for the murder of his wife and was sentence for life imprisonment. After undertaking the terms of imprisonment, he was inhabiting with his cousin Hukam Singh and his family, which was objected by Hukam Singh's Wife and son.

Some days prior to this incident during midnight Vidya Bai was awakened by alarm and saw the Bachan Singh (Appellant) saddling with axe on her sister's face. Vidya Bai in an attempt to stop him, got severely hurt in her face and ear with an axe making her unconscious.

Diwan Singh who was sleeping at time, woke up due to the noise and raised, seeing appellant holding an axe while standing near Desa Bai. Appellant i.e. Bachan Singh notice both of them moving towards him in defence to not get caught the appellant left the axe and ran.

Bachan Singh was tried and convicted and was sentenced death punishment under Section 302, Indian Penal Code (IPC) for the murders of Desa Singh, Durga Bai and Veeran Bai by the sessions judge. The High Court while dismissing the appeal, confirmed his death sentence given by the sessions judge.[15]

Bachan Singh then appealed to the Honorable Supreme Court by Special Leave, raised the issue, weather the circumstances in the case were setting in the criteria of 'Special reason' to punish him with death sentence.

Issues

1. Whether the death penalty for the offence of murder mentioned in Section 302 of Indian Penal Code, 1860 is Unconstitutional
2. Whether the facts provided to the lower court will be consider as "special reason" for death penalty as mentioned in section 354(3) of CrPC?

Judgment

The court dismissed the appeal in accordance with the majority opinion. The Court also held that the provision of death penalty as an alternative punishment for murder under Section 302 of Indian Penal Code is neither unreasonable nor it is against the public interest. It does not violate of Article 19 of the Constitution of India and also is constitutionally valid.

[15] https://lawlex.org/lex-bulletin/case-summary-bachan-singh-vs-state-of-punjab/.

Thus, Section 302 of Indian Penal code is Constitutional. And doctrine of 'Rarest of Rare' fulfil the 'Special reason' criteria in the case and thus, death penalty would be awarded under section 354(3) of CrPC.

Analysis

In the case of Bachan Singh v. State of Punjab Honorable Supreme court, dismissed the challenge regarding the unconstitutionality of section 302 of Indian Penal Code and 345(3) of CrPC in context to which stated that, the Constitution of India provide six fundamental rights, which are not absolute in nature.

Under Clauses (2) to (6) of Article 19 of Constitution of India, these rights are expressly mentioned are subjected to the power of the state, which can impose reasonable restrictions. This restriction might be extended in a special case. Thus, considering the above limitations a death penalty would be an exception, and would be given in rarest or rare case depending on the situation or the facts of the case.

Another situation raised in Bachan Singh v. State of Punjab was courts have unrumpled power in imposing the death penalty, and the nature and extent of the special reasons. The term 'special reasons' as stated in Section 354(3) of CrPC means exceptional reasons owing to the grave nature of the crime. In this case the court laid down the doctrine of 'Rarest of rare case".

Life imprisonment is the rule and the death sentence can be awarded as the punishment in the exceptional conditions of the case. The murder is the horrifying crime which affects not just the victim but also the people in the society, if the case consists of horrifying conditions the death penalty would be given, this is the rarest of the rare situation and shows the implementation of 'Rarest of rare' Doctrine.

The doctrine of 'Rarest of Rare' considers various aspect mentioned in the Mens Rea, for a convict to be punished with death sentence following criteria needs to be fulfilled:

a) Intention: The Intention plays a crucial role in the determining the crime, if the convict had a clear intention to committee the crime, also knew the consequence for the same. In such a case intention of the convict plays an important role.

b) Brutality: brutality is one of the grounds to determine the crime under criminal law, but is not always consider as the grounds for the providing the death punishment. Thus,

brutality is one of the grounds but not always consider in the situation of death punishment.

c) Sentimental shock: if the factual basis of case must cause sentimental shock to the victim and to the society, in such a case the convict is eligible to get death penalty.

d) Amount of harm caused: The amount of injury caused to the person (may it be in form of physical injury, mental injury, emotional injury, injury to property, or reputation) plays role for deciding upon enhancement of punishment.

Thus, under criminal law the Mens Rea is used as deciding factor for the providing the death penalty. There is a formulation under criminal which states:
Mens Rea + Actus Reus = Crime

Doctrine was applied in the case of Mukesh & Anr v. State of NCT of Delhi the bench decided based on the following criteria were the convict have intention to conduct the crime, brutality and the act of the crime added the sentimental shock in the society, thus, the punishment of death punishment in the case of Mukesh & Ors. v. State of NCT of Delhi, was valid and followed 'Rarest of Rare' doctrine.

The Doctrine given in the case of Bachan Singh v. State of Punjab has stated that the death punishment is to be given only in the rare movement depending on the case. But the as moving forward the death punishment have increase in Indian judiciary, cases like Rajendra Prasad v. State of Uttar Pradesh[16], Mukesh v. State (NCT of Delhi)[17] this are the cases were the death penalty was given, day by day due to the increase in the crime rate and facts of the case have forced the Court to award the death penalty.

Thus, though the punishment is life imprisonment but awarding death penalty to the accuse can be given under special circumstances as in the case Bachan Singh v. State of Punjab.[18]

Conclusion

In the case of Bachan Singh v. State of Punjab has given the important points relating to the constitutionality of Section 302 of Indian Penal Code (IPC) and also the case provided with the doctrine which lays the exception of death penalty given to the murder convict.

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[16] Rajendra Prasad v. State of Uttar Pradesh, 1979 AIR 916.
[17] Mukesh & Anr v. State of NCT of Delhi, (2017) 6 SCC 1.
[18] Bachan Singh V. State of Punjab AIR 1980 SC 898.

The Hon'ble Supreme Court of India has given the explanation that the section 302 of Indian Penal code is constitutional, they discuss that this cannot be consider unconstitutional as it does not violate the rights mentioned in the Article 19 of Constitution of India.

In context to the above the Court set a doctrine of 'the Rarest of Rare' thus doctrine suggested that the Life imprisonment is the punishment in the murder cases the death punishment can be an exception, if it fulfils the 'special reasons' in the case, thus, and stated that the death punishment given in the lower court in the case of Bachan Singh case is justified.

In the Bachan Singh case showed the constitutionality of 302 of Indian Penal Code and the death punishment does not violate the basic rights mention under the Constitution of India, it also introduced the 'Rarest of Rare' doctrine as there was intention to conduct the crime, and thus the decision of the death penalty was valid and not unconstitutional.

BANDHUA MUKTI MORCHA V. UNION OF INDIA AND ORS. (1984) 3 SCC 161

Manognya Devarakonda*

Citation

(1984) 3 SCC 161.

Names of Parties

Petitioner: Bandhua Mukti Morcha

Respondent: Union of India and others

Judges

Justice N. Bhagwati;

Justice S. Pathak;

Justice Amarnath Sen.

Introduction

Judicial activism that started majorly in 1970s played a major role in the way the Indian Judiciary is functioning today. Even the attitude of citizens has significantly changed. Citizens have now become well equipped with the power to file a case representing some other victims. This, in fact, did make people responsible. However, these days, several frivolous PILs are being filed which only increase the time and burden on the Judiciary. The following case, *Bandhua Mukti Morcha* is one of the pioneering judgments in the field of Public Interest Litigation. This takes us back to that era when a simple letter to an individual SC Judge has been referred to a Bench and considered as a PIL case file in the interest of justice. The case deals with bonded labour, infringement of their basic human rights and their appalling lives.

Facts

Bandhua Mukti Morcha(Bonded Labour Liberation Front), a non-governmental organisation addressed a letter to a Judge of Supreme Court urging to release the bonded labourers (many of them being migrant labourers) from two stone quarries in Faridabad district. They were working under inhuman conditions, many of them being bonded labourers who have not given consent to this type of employment.

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The petitioner also affixed the thumb impressions of the said bonded labourers in the given letter.

The Supreme Court, finding some substance in the matter, considered it as a writ petition, issued notice to the respective stone quarries and appointed two advocates as Commissioners to inquire in the matter.

The Commissioners visited the quarries, interviewed each of the persons mentioned in the letter to find out whether they were willingly working and how their conditions in the stone quarry are.

The Commission submitted the report confirming the allegations made in the letter.

The Court then directed the copies of the report to all the mine lessees and stone crushers who were the Respondents so that they have an opportunity to file their reply.

It further directed that the workmen whose names were listed in the writ petition and the report would be free to go anywhere that they liked. The Court also appointed Dr.Patwardhan of IIT to carry out a socio-legal investigation in the given matter.

Issues

1. Whether a letter personally addressed to a Judge be considered as a writ petition:
   a) as per the definition of Article 32 of the Constitution?
   b) in the absence of a verified petition?
2. Does Court have power to appoint a Commission to make a report to Court under the scope of Article 32?
3. Whether the petition attracted Article 32 as no basic fundamental rights have been infringed of the workmen.

Judgment

The writ petition was held maintainable as the Court observed that there was a violation of fundamental rights. Firstly, they were deprived of the "Right to live with human dignity and free from exploitation" under Article 21 of the Constitution.

The Court deeply examined and exposed the wide scope under Article 32. The Court has the power to appoint a commission or investigating body as it is an "appropriate" proceeding to secure the enforcement of fundamental rights. Article 32 is not confined to issuing high

prerogative writs of habeas corpus, mandamus, certiorari, quo warranto and prohibition, but is much wider to issue any directions, orders or writs.

The three-judge bench laid down the importance of a Public Interest Litigation. It stated that a letter addressed to a Judge can be considered as a writ petition where the petitioner or the one whose rights have been infringed come from a weaker social and financial background due to which they may not be expected to understand the procedures for filing a writ petition in the Supreme Court. It is also obvious that the poor and the disadvantaged cannot possibly produce relevant material or evidence before the Court. In such cases, the Court should take an active approach to gather the facts and data, which can be done by appointing Commissions or investigating body, for the purpose of ensuring justice.

It invigorated the spirit of a PIL and stated that any public-spirited person can file a PIL for the enforcement of one's or other's fundamental rights.

The Court decided that an action has to be taken on the Respondents and they are liable as they have not abided by the provisions of

- Mines Act 1952,
- Inter-State Migrant workmen (Regulation of Employment and Conditions of Service) Act 1979, and
- Labour laws of both Central and State which refer to the workmen's basic and essential rights.

The Court deliberately discussed the related provisions of Inter-State Migrant Workers Act 1979. It gave a clear understanding on who can be called as a 'principal employer', 'contractor' or 'agent' and 'who can be considered as 'workers' under this Act. The Court came to a conclusion that the mine lessee is a 'principal employer' as they employ these migrant workers. These mine lessees have a settlement with thekedars and zamindars on the output of stones laid out, thus making them as 'contractors' under the Act. According to the report of Dr Patwardhan, the 'thekedars' ask the old workers to 'inform' the young people in their respective villages (which are in other States), about the employment. Therefore, the workers come under the Act as they joined the work via 'agents'. Concluding the discussion of this Act, the Court decided that the State of Haryana must take an action on the Respondents according to provisions stated in the Mines Act and Inter-State Migrant Workers Act.

Further, the workers were also entitled to compensation under provisions of Contract Labour (Regulation and Abolition) Act 1970. The thekedars who were deemed as 'contractors' in the Inter-State Migrant Workers Act, 1970, will be fortiori 'contractors' in this Act. The 'appropriate' State here will be the State of Haryana and should take according the provisions of the Act.

The workers should be paid not less than the minimum wage stating less in accordance with the Minimum Wages Act 1948.

The Court directed the Government of Haryana to draw up a scheme or programme for a 'better and more meaningful rehabilitation of the freed bonded labourers' in the light of guidelines dated September 2,1982. The Court directed the Vigilance Committees and DMs to take assistance on non-political social action groups and voluntary agencies to search and identify forced labour to rehabilitate and free them as per Bonded Labour System (Abolition) Act 1976.

Analysis

The Court clearly states the balance of power that a legislature is empowered with. When a legislature has the power to create laws, then it also becomes its duty to check whether such laws are properly implemented or not. The Legislature did not closely monitor or inspect the implementation of the Mines Act and Inter-State Migrants Act which resulted in severe exploitation of workers and deprivation of their human rights.

In page 165 para 9, it was stated by the court that a PIL is not taken up with an intention to criticize the Government or to show its power over the executive and legislature. A public interest litigation is to protect a fundamental right of any citizen and to ensure it remains protected. In fact it is an opportunity for the Government to relook into the laws they made, monitor their implementation, ultimately to ensure human rights.

It was rightly stated by the Court that a new procedure should be taken for the enforcement of the fundamental rights for the weaker sections of the society. As they lack resources financially and lack awareness about the justice system, they are often kept at a weaker side. The opposite parties, which are usually big companies have all ways to produce evidence backed by a battery of lawyers. So in such cases, to ensure fairness, the court must move to a new procedure where such a citizen is given opportunity to be represented and present the relevant evidence. Para 13 states "But to what extent do you think the Judiciary has taken a new procedure to ensure fairness? Is the weaker section now, fairly represented?"

The question whether it was an "appropriate" procedure? Writing a letter to a Justice considered as a writ petition. The court stated any public- spirited person can file a PIL for those who are:

- In Poverty
- Socially disadvantaged and,
- Economically disadvantaged sections of the society (PARA 12)

For people who cannot produce relevant evidence, the Court voluntarily has expressed its responsibility to empower them and help them. It for this reason that a Commission consisting of advocates was set up who would look into the issue, gather the data and facts and present it to the Court. The court would then send this report to the respective parties, who can present their objections, if any. Accordingly, the Court adjudicates on the matter. This procedure seems logical and sound and so is "appropriate".

In cases where a group of people together present a PIL, there is often a scope for difference in the facts stated between the parties. And thus, in such cases the Court considering the betterment for all, shall take an appropriate procedure for revelation of facts and data unbiased.

Public Interest Litigation is great tool for the Judiciary to directly connect to the society for ensuring the citizens having their fundamental rights protected. It has a great flexibility and though a format procedure is not stated, it should be based on the principles of judicial tenets and judicial philosophy.

The court perused over rules under Supreme Court Rules, Code of Civil Procedure to check whether appointing a 'Committee' is overriding powers or not. "In view of Rule 6 of Order 47 of Supreme Court rules, Order 46 cannot detract from the inherent power of the Supreme Court to appoint a commission, if the appointment of such commission is found necessary for the purpose of securing enforcement of a fundamental rights in exercise of its constitutional jurisdiction under Article 32"19

The role of judiciary in PIL is more assertive, creative and stands out with a positive attitude. This is not an adversary litigation but a litigation to secure the fundamental rights of larger group of people.

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[19]Bandhua Mukti Morcha vs Union of India & Ors , AIR 1984 SCC 802 ,Para 14

But the question arises whether a letter written can be sent to a particular judge and request him/her to adjudicate upon the matter. Even if we consider the person involved is financially and socially disadvantaged, to what extent is it right for that person to have a choice of Judge and a forum? Isn't it against the basic principle that any person will not be given the freedom to choose their own Judge?

It was clearly stated in the Bandhua Mukti Morcha case that a letter should not be communicated to a particular Judge.

This statement can have two sides of opinions. One side, where it goes against the principles of Judiciary. Is it right to do that? An article discusses about this. In the year 1982, a lecture on "Judiciary: Attacks and Survival" in Symbiosis Law School by a learned Judge, it was expressed by him that allowing a complainant to choose a Judge or a forum of his own is clearly subversive of the judicial process which enjoins that no litigant could choose his own forum.20 At the same time, such parties might face great difficulties in directly filing a case in the Supreme Court due to lack of awareness and their very minimal wages.

However, Justice P.N. Bhagwati in his speech in a law school about the topic "Judicial Activism in India", he brought up an interesting word named "epistolary jurisdiction" meaning, a writ petition can be made by just writing epistles to the Court. Parameters have been laid down for invoking this jurisdiction. The letter should be written on behalf of the disadvantaged parties who do not have resources to come to Court and file a case.

Therefore, in my opinion, a sort of balance has to be there while deciding such situations. Each case is bound to have different facts and circumstances and using only one lens to look into them, does not only cause injustice but also loses the spirit of 'judicial activism'.

In the new Digital Era of Bharat, we can now file complaints electronically as well. As there was a technological boom, where over 700 million people use smartphones, a mere guidance of filing a case has to be given to them. Social media today is playing a critical role of bringing such incidents into limelight. However, caution has to be taken where most of the PILs today are frivolous in nature, which are not only wasting the Court's time, but also defaming the very initiative of bringing PIL into limelight. Ultimately, neither the parties nor the Judicial system should be affected but the 'justice' should prevail.

Conclusion

[20] Hegde, N. (1992). Public Interest Litigation and Control of Government. Student Advocate, 4, 1-7.

Bandhua Mukti Morcha Case has been a landmark case in the history of India that empowered citizens with the true spirit of Public Interest Litigation. The NGO, Bandhua Mukti Morcha should be commended for its great efforts in representing the voiceless people of India. The representation helped in bringing the attention of the Judiciary into the horrific lives of the many bonded labourers whose basic fundamental rights have been infringed. All the procedure required for filing a case, appealing to the Supreme Court have been relaxed by the Judiciary considering the dire situation of the labourers who did not have basic access to the legal remedies in the interest of justice. Public Interest Litigation is great tool for the Judiciary to directly connect to the society for ensuring the citizens having their fundamental rights protected. It has a great flexibility and though a format procedure is not stated, it should be based on the principles of judicial tenets and judicial philosophy. However, this easy way of filing PILs should not be misused by the public who are these days, filing frivolous cases. Such actions will only make the cause of introducing PIL in India less impactful. Therefore, let us be responsible citizens who can stand for any genuine cause in society. The amicable Judiciary shall stand by the truth, and will always deliver judgment in the interest of justice.

M. C. MEHTA V. UNION OF INDIA 1987 SCC (1) 395

Yukta Chordia*

Citation

1987 SCC (1) 395

Names of Parties

Petitioner: M. C. Mehta

Respondent: Union of India

Judges

Justice P. N. Bhagwati, Chief Justice, (assenting);

Justice Ranganath Misra, (assenting);

Justice G. L. Oza, (assenting);

Justice M. M. Dutt, (assenting);

Justice K. N. Singh, (assenting).

Introduction

With a population of almost 1.4 billion people, India is the largest democracy in the world. In a nation, so diverse, there are bound to be conflicts for a variety of reasons; political, economic, social, cultural and religious. But, at the same time, it also has a unique Judicial system to resolve these conflicts. According to the former Chief Justice of India, N V Ramana "*The Indian Judicial System is unique not only because of a written Constitution, but also because of the immense faith reposed by the people in the system. People are confident that they will get relief and justice from the judiciary. It gives them the strength to pursue a dispute. They know that when things go wrong, the judiciary will stand by them. The Indian Supreme Court is the guardian of the largest democracy*."[21] The Constitution has given various powers and wide-ranging jurisdiction to do complete justice and to bring to life Supreme Court of India's motto, "Yato Dharma Sthato Jaya", which means "Where there is righteousness, there is victory."

M.C. Mehta v. Union of India, widely known as the 'Oleum Gas Leak Case' is one such case, where the Hon'ble Supreme Court gave a decision which led to victory, victory for the people

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[21] "People Know If Things Go Wrong, Judiciary Will Be With Them: CJI N V Ramana." The Indian Express 18 July 2021. Web. 27 July 2022. <https://indianexpress.com/article/india/people-know-if-things-go-wrong-judiciary-will-be-with-them-cji-nv-ramana-7409939/>

harmed because of the Oleum gas leak inside Shriram Foods and Fertilizers' unit, victory in the form of introduction of Absolute Liability which gave a new dimension and a wider scope to the remedy of compensation for the injured and affected parties. This was possible because of the writ petition filed by a social activist and environmental lawyer, M.C. Mehta who sought closure of Shriram Foods and Fertilizers industry as it posed a hazardous risk to people's lives.

In this case, the Hon'ble Supreme Court, not only took a stand for the affected parties, but it also observed that industries like Shriram Foods and Fertilizers contribute to people's and nation's economic development and advancement. These industries support employment of people. Thus, the decision of the court was to relocate such factories to less populated areas so that they don't pose a threat to human life. The court also suggested the government to frame a policy for the location of such toxic plants and check whether such toxic plants are causing any risk to the community. Therefore, in this case, the Supreme Court, through creative interpretation and bold innovation, took into consideration the economic interests while furthering human rights and environmental jurisprudence.

Facts

- The petitioner, in this writ petition under Article 32, sought a direction for closure of various units of Shriram Foods and Fertilizers Industries on the ground that they were hazardous to the community.
- The Industry was permitted to restart its power plant along with manufacturing plants of caustic chlorine including its by-products and recovery plants like soap, glycerine and technical hard oil set out in the judgement by a three-judge bench.
- That, normally would have put an end to the conundrum raised in this petition, and then only one point of contention would have remained, that being whether the units of Shriram should be directed to be removed from their current situate leading to their relocation in another place where there wouldn't be as much human habitation so that there would not be any real danger to the health and safety of the people.
- The court stated that the government should develop a national strategy for the location of poisonous or dangerous companies and make a judgement on their relocation with the goal of eliminating risk to the community.
- The Court ordered Shriram Industries to deposit Rs 20 lakhs and include a bank guarantee for Rs.15 lakhs to pay insurance claims from victims of oleum gas if any escape from

chlorine gas occurred within three years of the date of the order, resulting in the death or injury of any worker or living public in the vicinity.

- But during the pendency of the petition, oleum gas escaped from one of Shriram's units. The Delhi Legal Aid and Advice Board and the Delhi Bar Association filed petitions for compensation for those who were harmed as a result of oleum gas release.
- The Bench of three Hon'ble Judges referred the compensation applications to this larger Bench of five Judges because issues of high constitutional importance were implicated.

Issues

1. What is the scope and ambit of Supreme Court's jurisdiction under Article 32 as the applications for compensation are sought to be maintained under that article?

2. Whether Article 21 is available against Shriram Foods and Fertilizers, owned by Delhi Cloth Mills Limited, which is a public company limited by shares and is engaged in an industry which is vital to public interest having potential to affect the life and health of the people?

3. What is the measure of liability of an enterprise, when people die or get injured by reason of an accident occurring in an industry by virtue of being engaged in a hazardous or inherently dangerous activity? Will the rule laid down in Rylands v. Fletcher[22] apply or will there be any other principle according to which the liability can be determined?

Judgment

The primary contention raised by the respondent was that the Court should not proceed to decide these constitutional issues because there was no claim for compensation made in the writ petition originally because the oleum gas leak happened subsequent to the filing of writ petition and the petitioner did not make an application for amendment of the writ petition for the same and therefore these issues couldn't have risen on the writ petition. The court dismissed this objection observing that even though the petitioner did not apply for an amendment for payment of compensation, it does not mean that the applications made by the Delhi Legal Aid and Advice Board and the Delhi Bar Association can be thrown out. This was because these applications for compensation are for enforcement of fundamental right to Life enshrined under Article 21 of the Constitution and while dealing with such applications,

[22] 1866 Law Report 1 Exchequer 265.

the court cannot adopt a hyper technical approach which would ultimately defeat the ends of justice.

Moving on to the issues of law, the court observed on the first issue that apart from issuing directions, it also has the power to forge new remedies and fashion new strategies in order to enforce the fundamental rights under Article 32. Its power under Article 32 is not confined to preventive measures when fundamental rights are threatened to be violated, rather it also extends to remedial measures when the fundamental rights have already been violated. However, this power of court is limited to cases where the violation of fundamental rights affects people on a large scale or where the affected people are poor and disadvantaged. It also observed that compensation under Article 32 may be awarded in exceptional circumstances only. The court refrained from deciding on the second issue of whether Article 21 is available against Shriram because it was of the opinion that it needs detailed discussion and can be done at a later stage if it becomes necessary to do so.

While discussing the third issue, the Court assessed the rule laid down in *Rylands v. Fletcher*, the rule laid down was that if a person brings on his land and collects and keeps there anything which is likely to cause harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused because the liability is strict. However, there are a few exceptions to this rule including natural us of land, escape due to an act of God, an act of stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority.

The court held that this rule with all of its exceptions is not applicable to all the industries engaged in hazardous activities considering the fact that this rule was laid down in the 19th century, and now, due to scientific and technological advancement, it is the demand of the century to propound a new rule; thus the court introduced the new rule of Absolute Liability which states that: "*an industry engaged in hazardous activities which poses a potential danger to health and safety of the persons working and residing near owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone. Such an industry must conduct its activities with the highest standards of safety and if any harm results, the industry must be absolutely liable to compensate for such harm irrespective of the fact that the enterprise had taken all reasonable care and that the harm occurred without any negligence on its part*." The rule for determination of compensation was noted by the court as

"*the larger and more prosperous the industry, the greater will be the amount of compensation payable by it.*" Therefore, the Hon'ble Supreme Court directed the Delhi Administration to provide necessary funds to the Delhi Legal Aid and Advice Board which was to take up the cases who claimed to have suffered due to the oleum gas leak and to file actions on their behalf in the appropriate court for compensation claims.

Analysis

(1) While deciding the first issue, the Court observed that Article 32 does not merely confer power on the court to issue direction, order or writ for enforcement of the fundamental rights, but it also lays down a constitutional obligation on the court to protect the fundamental rights of the people, for which the court has a power to forge new remedies and fashion new strategies to enforce the fundamental rights. Which means the power of the court is not only injunctive in nature, but it can also grant remedial relief including the power to award compensation in appropriate cases. The Bench, therefore, ruled for an award of compensation under Article 32, even though, ordinarily, a petition under Article 32 should not be used as a substitute to enforce the right to claim compensation for infringement of a fundamental right. But the court still granted the remedy of compensation because the fact of infringement was patent and incontrovertible, the violation was gross and its magnitude was such that it shook the conscience of the court. This shows the continuing concern of the court for socially and economically disadvantaged persons.

(2) Further the Court laid down in the matter of Public Interest Litigations or Social Action Litigations, that it is not necessary that if a fundamental right is infringed, the aggrieved can only seek redress by filing a writ, even a letter addressed to a Justice can be entertained, because as held in *S. P. Gupta v. Union of India*[23] and also in *People's Union for Democratic Rights and Ors. v. Union of India*,[24] *"procedure being merely a hand-maden of justice it should not stand in the way of access to justice to the weaker sections of Indian humanity and therefore where the poor and the disadvantaged are concerned who are barely eking out a miserable existence with their sweat and toil and who are victims of an exploited society without any access to justice, this Court will not insist on a regular writ petition and even a letter addressed by a public spirited individual or a social action group acting probono publico would suffice to ignite the jurisdiction of this Court."*[25]The Court had wholly

[23] (1981) Supp. SCC 87.
[24] (1983) 1 SCR 456.
[25] 1987 AIR 1086

endorsed this statement of law in regard to the broadening of locus standi and what has come to be known as epistolary jurisdiction.

The Court mentioned that all such letters will be processed through Public Interest Litigation Cell in the Supreme Court and after scrutiny would be placed before the Chief Justice. The future of PIL/SAL then considerably depended upon the functioning of this cell. Therefore, attention should have been paid to the administrative structure and working of a model PIL Cell with proper setting and inputs so that similar PIL Cells could be opened in each High Court and there would be uniform working amongst them. In this process, Legal Aid Cells could have been encouraged to function as catalysts or agents for the PIL Cells. The aftermath of this judgement and various other judgements led to the Supreme Court issuing a notification on 1 December 1988 regarding matters that could be entertained as PIL.

"Under this notification, letter petitions falling under certain categories alone would be ordinarily entertained. These included matters concerning bonded labour, neglected children, petitions from prisoners, petitions against the police, petitions against atrocities on women, children, and scheduled castes and scheduled tribes. Petitions pertaining to environmental matters, adulteration of drugs and food, maintenance of heritage and culture, and other matters of public importance could also be entertained. The notification set out matters that ordinarily were not to be entertained as PIL, such as landlord-tenant disputes, service matters, and admission to medical and other educational institutions. The notification also laid down the procedure: the petition would be first screened in the PIL Cell and thereafter it would be placed before a judge to be nominated by the Hon'ble Chief Justice of India for directions."[26] The reason behind analysing and predicting what should have happened and specifying what actually happened is to recognise this case's importance in furthering the human rights jurisprudence by way of PIL Cells and appreciating the stand taken by the court that *"Where constitutional fundamentals vital to the maintenance of human rights are at stake, functional realism and not facial cosmetics must be the diagnostic tool, for constitutional law must seek the substance and not the form."*[27]

(3) While dealing with the next issue, the court has considered, without finally deciding the question, whether a private corporation is covered under Article 12 to be subject to Article 21. Though the court did not have sufficient time to consider and reflect on the question, the

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[26] Sangeeta Ahuja, "PEOPLE, LAW AND JUSTICE: CASES AND MATERIALS ON PIL," Orient Longman, Delhi, 1996, Vol. II, p. 860.
[27] (1981) 2 SCR 79.

stand taken by the court to advance human rights jurisprudence is commendable. They said, "*Whenever a new advance is made in the field of human rights, apprehension is always expressed by the status quoists that it will create enormous difficulties in the way of smooth functioning of the system and affect its stability…. It is through creative interpretation and bold innovation that the human rights jurisprudence has been developed in our country to a remarkable extent and this forward march of the human rights movement cannot be allowed to be halted by unfounded apprehensions expressed by status quoists.*"

"If the stand point is that as far as the hapless helpless poor and disadvantaged are concerned it matters little if the defendant corporation is private or public, what justification remains is for retaining the rule of sovereign immunity where the defendant is the State. The effect of the injury is the same regardless of the status of the person or authority by whose negligence (or their servant's) it was caused. In any case the doctrine of sovereign immunity born of an imperialistic era is little suited for democratic socialist India."[28]

However, it is very interesting to note that, when the case was first heard by three judges and the judgement was given on the question of restarting the caustic chlorine plant,[29] there was no discussion about finding out regarding the jurisdictional basis for the court under Article 32. Violation of Article 21 was apparently assumed or it can be said that its violation was not contested and directions which affected the substantive rights of Shriram Industry were passed. There was a subsequent petition in which Shriram Foods and Fertilizer Industries made an application for clarification in respect of certain conditions set out in the order passed by the judges. However, this petition was not a review petition, but a mere clarification. Therefore, it can be observed that Article 32 was in fact exercised against a private corporation. Now the question which has left us perplexed is 'whether by ruling that this question is being left open, the present five judge bench has overruled the exercise of Article 32 against a private corporation by the three-judge bench in (1986) 2 SCC 176?'

(4) "The Court has stated that the purport to include private corporations in Article 12 and have the matter decided within the original jurisdiction of Article 32 is to subject the activity of such private corporations 'to the limitations of fundamental rights' and 'to inject respect for human rights and social conscience in our corporate structure' thereby to 'advance human

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[28] N. T. Dowling and G. Gunther, CASES AND MATERIALS ON CONSTITUTIONAL LAW, Foundation Press, 7th ed., p. 44.
[29](1986) 2 SCC 176.

rights jurisprudence'."[30] Can we understand from this and the rest of the judgement that in "appropriate cases" the entire case involving issues of fact, liability, damages and compensation would be decided by the Supreme Court in its original jurisdiction as a trial court? While damage to life and liberty would be covered under Article 21, what about the cases connected to it, involving damage to property alone, for which the right to property is no longer fundamental? Because the number of victims would be huge, the issue of awarding compensation to everyone in response to the peculiarity of injury suffered would have to be determined. The Supreme Court may establish a specific mechanism for such claims, but it will eventually have to monitor and evaluate the claims. While there is a wealth of case law on liability/ damages/ compensation for tribunals, there are few examples for the Supreme Court of India to follow, therefore comprehensive principles would have to be invented and used in the first significant case itself. Despite the Supreme Court's well-known backlog of litigation, all such matters must be given priority and determined as soon as possible.

However, the Court must take logistics into careful consideration. The location of the mishap may not be close to the Supreme Court or any of the High Courts. How will victims from remote places effectively contact upper courts and communicate with counsel at such courts? "Already the move is to decentralise justice and take it to the door steps of the victims through Lok Adalat's etc. And if as against constitutional remedies, the normal statutory remedies and common law remedies available at district Court level are really found inadequate to deal with such cases, as a long-term policy should not the further development of such remedies be informed and inspired by the provisions of the Constitution so that human rights jurisprudence may operate and flourish at grass root level?"[31] For this, in the preceding judgement in this case,[32] Bhagwati, C.J. himself had appointed Chief Metropolitan Magistrate before whom claims for compensation could be filed.[33] He also appointed District Judge, Delhi to determine the compensation in future cases.[34] He even suggested the setting up of Environment Courts on regional basis with professional judge and experts and the matter to come to Supreme Court *"only by way of appeal."*[35]

(5) The Court has taken a bold step in laying down the principle of liability for industries engaged in hazardous or inherently dangerous activities. Chief Justice Bhagwati took a stand

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[30]Supra Note 8.
[31] Ibid.
[32](1986) 2 SCC 176.
[33] SCC p. 118.
[34] SCC p. 200.
[35] SCC p. 202.

for India's judicial thinking by saying that *"We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build up our own jurisprudence and we cannot countenance an argument that merely because the new law does not recognise the rule of strict and absolute liability in cases of hazardous or dangerous liability or the rule as laid down in Rylands v. Fletcher as is developed in England recognises certain limitations and responsibilities. We in India cannot hold our hands back and I venture to evolve a new principle of liability which English courts have not done."*

Thus, the court introduced the new rule of Absolute Liability which states that: "*an industry engaged in hazardous activities which poses a potential danger to health and safety of the persons working and residing near owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone. Such an industry must conduct its activities with the highest standards of safety and if any harm results, the industry must be absolutely liable to compensate for such harm irrespective of the fact that the enterprise had taken all reasonable care and that the harm occurred without any negligence on its part*." They also pointed out that the measure of compensation must be co-related to the magnitude and capacity of enterprise because such compensation must have a deterrent effect. "*The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise*."

Two aspects which logically follow from this "onerous responsibility" are: the freedom to choose the workers in order to run such an industry and the expectation for an equally responsible functioning of regulatory government agencies. The operation of even the most complex and well-planned industrial facility is ultimately dependent on the attentiveness and care of the individuals who operate it. As a result, the management of such sectors will need to have a free hand in terms of selection and the exercise of discretion to terminate the services of individuals it does not find responsible enough or loses trust in. "What this means is a special labour law jurisprudence in respect of hazardous and inherently dangerous industries."[36] Furthermore, all government agencies and inspectorates who conduct routine inspections and verify the quality and fitness of an industrial facility may be held criminally accountable for their actions of commission and omission if an accident happens. The public

[36] Supra Note 8.

money spent on their expert inspections is useless, and their findings are deadly for the public if they are not dependable enough and fool any management into thinking everything is well. The exception would be if management keeps the inherent and potential hazards of the process hidden or are not fully disclosed to licencing or regulatory bodies. "What has been enunciated in this case is truly a rule of accountability and so must extend to its logical conclusion to include others on whom any management would necessarily rely upon to run the industry."[37]

(6) The last question which occurs to the mind in this case is 'can the opinion of the court in the above context of liability be regarded as obiter and therefore not binding?' This question comes to mind if we re-read the case of *Marbury v. Madison*.[38] Here, it is interesting to read that celebrated case on judicial review in the context as to 'what was the question for decision and what the judgement laid down and is considered an authority for?' Commenting on it, "many years afterwards, in speaking of the opinion in that case, Jefferson said: …this case is continually cited by bench and bar as if it were settled law, without animadversion on its being merely an *obiter dissertation* of the Chief Justice."[39]

However, in India, "the Supreme Court has consistently held that a decision which is neither founded on reasons nor proceeds on consideration of issues, cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141 of the Constitution. [State of UP v. Synthetics & Chemicals Ltd]. On the other hand, a case decided after properly appreciating the facts, circumstances, and questions of law involved, is without an iota of doubt, a binding precedent by virtue of Article 141."[40] In the present case, the question of liability was "seriously debated" and hence, the rule laid down must be considered as binding law according to Article 141 which states that: "*Law declared by the Supreme Court shall be binding on all courts within the territory of India*."

Conclusion

In this case, the Supreme Court of India was called upon to evolve norms and principles for determining the liability of large enterprises engaged in manufacture and sale of hazardous product and the basis on which damages in case of such liability should be quantified. The

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[37] Supra Note 8.
[38] 5 U.S. 137.
[39] Wilson, Henry H. "IS MARBURY VS. MADISON OBITER DICTUM?" American Bar Association Journal, vol. 13, no. 6, 1927, pp. 335–37. JSTOR, http://www.jstor.org/stable/25707168. (Visited on 7 Aug. 2022)
[40] Gautam, Hardik. "Observations Made by the Supreme Court in a Judgment." Bar and Bench - Indian Legal News, https://www.barandbench.com/columns/observations-made-by-the-supreme-court-in-a-judgment-binding-or-not. (Visited on 7 Aug. 2022)

Rule of strict liability upheld in Rylands v. Fletcher case has been holding the field for over a century until this path breaking judgement of M. C. Mehta v. Union of India. The court introduced Absolute Liability as the new rule for such circumstances and adopted an approach which is termed as the 'deep pocket theory.' This case brought to fore the question of extent of compensation to be given to the victims of an industrial disaster. Though the absolute liability principle attracted currents and cross currents, the Supreme Court has repeatedly ruled it as "a settled law of the land."[41] The court in this case, while taking into consideration the role of large enterprises like Shriram Foods and Fertilizers in creating employment and contributing to the nation's economic progress in this age of global free market economy has very innovatively given a new dimension to India's Tort Laws by injecting respect for human rights and social conscience in corporate structure with a view of not destroying the raison d'etre of creating corporations, but to advance the environmental and human rights jurisprudence.

INDRA SAWHNEY V. UNION OF INDIA AIR 1993 SCC 477

Yukti Shiwankar*

Citation

AIR 1993 SCC 477.

Names of Parties

Appellant: Indra Sawhney;

Respondent: Union of India.

Judges

Justice M. Kania, (Assenting);

Justice M. Venkatachaliah (Assenting);

Justice S. R. Pandian (Assenting);

Justice T. Ahmadi (Assenting);

Justice K. Singh (Dissenting);

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[41] AIR 1996 SC 1446.

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Justice P. Sawant (Assenting);

Justice R. Sahai (Dissenting);

Justice B. J. Reddy (Assenting);

Justice T.K. Thommen (Dissenting).

Introduction

Almost every Indian born after Independence has thought about, criticized, used, or is affected by India's reservation policy at some point in their lives. The term "reservations" also known as "affirmative action," or "positive discrimination," or "compensatory discrimination," refers to the justice provided to members of historically underrepresented groups.[42] Reservations required by the Constitution are implemented in India via percentage-based quotas that favour people from historically lower social strata.

The Supreme Court upheld the government rule in its decision on November 16, 1992, believing caste to be a legitimate sign of backwardness. Thus, in 1992, the recommendation for OBC reservations in central government services was eventually put into effect. The Indra Sawhney case is where the key decision on India's backward class reservation standards was made. The Court has highlighted the categories of caste, class, backward class, and several other terms in their more general senses. It has been questioned how to interpret Article 16(4) concerning reservations made for public appointments. The Court has established a 50% maximum for reservations as well as other issues that affect economically disadvantaged groups. The Court took into account the Mandal Commission's report on the backward classes.

A nine-judges Supreme Court panel considered the Mandal Commission Report and the debate that followed it when deciding the Indra Sawhney case in 1992. The case is renowned for establishing several important concepts, including the exclusion of the "creamy layer" from the scope of reservation policy and the 50% reservation level.[43] The Apex Court extended and clarified the scope and limit of India's backward class reservations. The Supreme Court's decision in India Sawhney is crucial because it establishes the caste standards, the basis for classifying people as belonging to "backward classes," and it allows members of these groups to be chosen for competitions based on merit without being counted against the quota set aside for them. Unmotivated individuals are given the authority to play

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[42] 10 judgments that changed India, Zia Mody.
[43] Indra Sawhney v. Union of India - Indian Law Portal.

fairly on the platform thanks to impartial and autonomous judgment. Additionally, this decision nullified the rulings in *General Manager Southern Railway v. Rangachari*[44] and *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*,[45] which held that reservations could be made in both appointments and promotions. Reservations cannot be used in promotions, according to the ruling in *Indra Sawhney v. Union of India*[46].

Facts

According to Article 340(1) of the Constitution, the President appointed the First Backward Classes Commission, often known as the Kaka Kalelkar Commission, in 1953 to determine the backward classes in India. According to the criteria it developed, the committee reported in 1995 that 2399 castes were socially and educationally backward groups. The report offered several explanations and advised that caste-linked social backwardness, which in turn was tied to educational backwardness, be the root reason. As a result, the study was rejected by the central government.

Later, the Mandal Commission was established to look into what might be done to progress India's socially and educationally disadvantaged groups. In its 1980 report, the panel recognized 3743 castes as belonging to socially and educationally disadvantaged strata and proposed 27% racial and ethnic discrimination in government employment and public appointments.[47]

Later, a writ petition contesting the government's memo's legitimacy in office was submitted by bar associations to the Supreme Court. Until the lawsuit was finally resolved, the court ordered the stay order.

To further address the issue, the Prime Minister issued a new office of the memorandum in 1990, making two changes to the original: I adding an economic criterion to the grant of reservations within 27% stake; and (ii) reserving an additional 10% of vacancies for socially and academically disadvantaged classes.

In the end, a nine-judge court heard the petition and ordered the government to present the standards for the planned 27% reservation policy. However, the Indian government was unable to clarify the specifications listed in the memorandum's office.

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[44] *General Manager Southern Railway v. Rangachari* 1962 AIR 36, 1962 SCR (2) 586.
[45] *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India* AIR 1981 SC 298.
[46] *Indra Sawhney v. Union of India* AIR 1993 SC 477
[47] The mandal commission and after, shodhganga.

Issues

1. Does Article 16(4) exhaust the right to reserve jobs in State service and constitute an exception to Article 16(1)?

2. What would the word "Backward Classes" mean under Article 16(4) of the Constitution? Could caste alone define a caste or class of individuals as designated by society? Could an economic criterion alone define a class for Article 16(4)? Would "Backward Classes" also refer to Article 46?

3. Whether caste on its own constitutes a different class and whether economic criteria could by itself be the determinant of a class.

4. Does Article 16(4) of the Constitution allow the division of the Backward Classes into the Backward Classes and Most Backward Classes as stated or authorize the division of the Backward Classes into the Backward Classes based on economic or other factors determined by the commission?

5. Does "any provision" under Article 16(4) for a reservation "by the State" have to be made by a bill passed by the state's legislators or by a law passed by parliament? Or may executive orders also be used to provide such provisions?

6. The designation of Backward Classes and the proportion of reservations given for them will be based on what criteria, the economic factor or caste, and will the scope of judicial review be limited or restricted in this regard?

7. Would the "in favor of any Backward Class" designation of appointments or jobs apply just to initial appointments or would it also apply to promotions?

Judgment

Arguments of the petitioner

The petitioners' attorneys, led by Nani Palkhiwala, contended that the caste system's negative effects were exacerbated by reservation and that this negative effect will impede India's progress toward becoming a welfare state. They further stated that if the reservation was kept in place, the standard would be replaced by substandard, and meritocracy would be replaced by mediocrity. Additionally, petitioners claimed that the Mandal report was essentially an attempt to change the Constitution.

Arguments of the respondent

The respondent State said that the report only provides a way for the underprivileged classes to realize their legitimate demands. They said that the study was an extension of the first minority commission, which had likewise advocated affirmative action to redress historical injustices that the underclasses had endured side by side for generations.

Held

By a vote of 6:3, the nine-judge Constitution Bench of the Supreme Court ruled that the Union Government's decision to hold a 27% reservation for socially and educationally disadvantaged segments is a lawful provision. However, the Court ruled that it was invalid to hold 10% of government jobs for members of economically disadvantaged groups among higher status, and so invalidated the second clause of the Office Memorandum. The signification statements are listed below.

- According to Article 16(4), a citizen's caste system as well as their economic standing can be used to determine their backward classes.
- Article 16(4) solely expresses the concept inherent in the primary provision itself in an emphatic manner rather than being an exception to article 16(1). A reservation may also be made in accordance with Article 16. (1).
- The Backward Classes described in Article 16(4) do not have the same social and educational disadvantages as the Backward Classes described in Article 15. (4).
- When identifying backward classes, the idea of the Creamy Layer must be disregarded.
- The requirements for a reservation should be more stringent than the 50% cap.
- The "Executive Order" and consent can give the reservation legal force.
- The reserve clause will only be used for purposes of employment or appointment, not promotion.
- To investigate complaints about the admission or exclusion of persons based on criteria for backward classes, a permanent statutory authority will be affiliated.

In the Mandal Commission case, commonly known as the Indra Sawhney case. The court in this instance fixed the maximum level of reservation at 50%. Following a general explanation of the interpretation of Article 16(4), the definition of "backward classes," or "class," and "caste" in its broadest sense, as well as the provision under Article 15(4) for socially and educationally backward classes, and the exclusion of the "creamy layer" in the determination

of backward classes, are discussed. Additionally, the connection between Article 16 (1) and (4) has been broken, and both the reservation clause and its justification have been added.

Analysis

In the Indra Sawhney case, the Court made an effort to find a suitable remedy that strikes a delicate balance between society and the rights of the underprivileged classes. A step in the right direction was also taken by eliminating economic factors as the only criterion for categorization and by excluding the creamy layer, which had already reaped the benefits of affirmative action to a sufficient degree. The Court's decision may have been compassionate, but later changes made to the reservation criteria by succeeding administrations further proved that reserve was now primarily about vote-bank politics and nothing more. The anti-reservation voices have gained strength almost three decades after this important decision, but lawmakers should be reminded of the responsibilities the Constitution's creators gave them. There is still a long way to go until all past wrongs are righted, but the phenomenon of reservations has undoubtedly assisted in pulling up the lower classes.

The Constitution's founders made a sincere effort to promote socioeconomic equality in Indian society through affirmative action, often known as reservation, and notably through the reservation in areas of public employment as stipulated in Article 16 of the Constitution. Apart from the disparities in religion, culture, and language, the writers of the Constitution were cognizant of the fact that Indian society was not homogeneous and that some individuals were, in comparison to others, weaker than others in terms of their economic, social, and cultural standing. The Constitution provided us with a system to protect the Backward Classes and Scheduled Castes to improve their living conditions and bring them on par with other parts of society. As a result, the Constitution was amended to include a reserve clause. Reservation for those who are socially and economically disadvantaged as a whole is not a recent idea that has been established in the Indian Constitution; it also existed before the constitution. It is significant to note here the reservation made on the advice of the committee formed in 1918 and approved by the former princely state of Mysore. People like Jyotibha Phule and others had previously raised the desire for affirmative action, and while the British did grant some of these classes' reservations, their motivations were never quite clear. Over time, reservations have shifted from being a sincere endeavour to create an equitable society to more of a political instrument.

Every Indian will always remember the "Mandal Commission Report" and the debate that followed. The Apex Court decision in the matter of *Indra Sawhney v. Union of India* established a central position for itself in every discussion on the touchy subject of reservations in India by supporting the execution of the Mandal Commission Report.

The establishment of an equitable society, including and especially via the abolition of caste and the caste system, is one of the stated goals of the Indian Constitution. To achieve this goal, multiple succeeding administrations have developed a variety of affirmative action programs to end caste and promote social mobility for underprivileged groups. These policies frequently entail allocating seats in representative bodies, educational institutions, or government jobs to members of groups that have historically been marginalized. These actions, however, have evolved into populist tools used to placate particular groups of people throughout time. Because of this, every time a similar policy has been proposed, it has divided the public and sparked intense debate. This conflict has occasionally turned into rioting and open protests for or against reservations.

The judiciary's job has not been simple when these fiercely debated laws have been up for adjudication; it must take into consideration societal realities while also anchoring its decision in the holy framework of the Constitution. The standards for defining backwardness to qualify for reservation have often come up for debate before the Apex Court. Several instances specifically address this issue. The 1992 ruling by the Supreme Court in *Indra Sawhney v. Union of India* is the most important of them. This case laid the path for one of the nation's most reliable rulings on OBC reservations. The Mandal Commission's proposals were viewed in several ways as being incorrect. In this decision, the Supreme Court addressed several difficult but crucial questions that would have an impact on the welfare and stability of Indian society in the future. The Supreme Court's judgment on the reserve issue covered a wide range of topics in a highly thoughtful, original, and thorough manner. It provided a forum for discussion between Indians who fall under the general category and those who fall under the reserved category. The commission's proposed reserve policies came under scrutiny, and some people chose to fight them.

Because a more deserving applicant must always be passed up for a reserved position, reservation in government services is fundamentally anti-meritocracy. However, reservation is now a reality and will stay that way for a very long time. Society may soon find it challenging to repeal the reservation policy. Even if India's backward classes are still far from

being equally represented, making the reservations reach a very high percentage seems to neglect the people who put in the effort to get a job.

One of the goals and objectives of the Constitution is to provide equality of status and opportunity to all people and to foster brotherhood among them, upholding each person's dignity and the unity and integrity of the country. The right to equality and the prohibition of discrimination against any citizen based on race, religion, caste, sex, or place of birth were insufficient to ensure that the fundamental human right was meaningful to the weaker sections of society, so the constitution's framers added additional provisions, specifically Articles 41, 45, and 46, which called for positive state action and permitted reservations in admissions to educational institutions as well as in posts and appointments as long as they didn't compromise the effectiveness of the government. Article 334 originally outlined a ten-year reserve of seats for the scheduled castes and scheduled tribes in the state legislatures and the House of the People. However, this provision has occasionally been extended up to 2010 AD by subsequent changes to the Constitution. The creation of a commission to look into the social and educational problems of the underprivileged classes and give suggestions for how to improve them is provided for in Article 340. All of these measures aim to quickly improve underprivileged groups to ensure equality of opportunity and position, which will in turn foster nationalism, brotherhood, and togetherness.

In the case of *Indra Sawhney v. Union of India*, the fundamental question of whether it was acceptable to identify backward classes based on or about caste in the secular society envisioned by the Constitution was brought up because doing so would only serve to maintain the caste system and foster animosity and hostility between castes. Identifying backward classes can undoubtedly be done concerning castes among, and along with, other occupational groupings, classes, and sections of people, the majority of justices said. The explanation is: Neither the Constitution nor the legislation specifies how to identify the economically disadvantaged. Furthermore, the Court cannot or should not establish any such approach or technique. It must be left up to the designated authorities to decide. Any method or approach that it chooses to use, as long as the population being surveyed is completely covered, is acceptable.

It is challenging to reconcile the ruling in Indra Sawhney with the court's explanation of secularism as a fundamental tenet of the Constitution in *S. R. Bommai v. Union of India*, where another bench of nine justices declared as follows: "While the citizens of this country

are free to profess, practice and propagate such religion, faith or belief as they choose, so far as the State is concerned, i.e. from the point of view of the State, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally. How is this equal treatment possible, if the State were to prefer or promote a particular religion, race, or caste, which necessarily means a less favourable treatment of all other religions, races, and castes? How are the Constitutional promises of social justice, liberty of belief, faith or worship, and equality of status and opportunity to be attained unless the State eschews the religion, faith, or belief of a person from its consideration altogether while dealing with him, his rights, his duties, and his entitlements?"[48]

It's relevant to note Nani A. Palkhivala's response to the ruling in Indra Sawhney: “The basic structure of the Constitution envisages a cohesive, unified, casteless society. By breathing new life into casteism the judgment fractures the nation and disregards the basic structure of the Constitution. The decision would revitalize casteism, cleave the nation into two - forward and backward - and open up new vistas for internecine conflicts and fissiparous forces, and make backwardness a vested interest. It will undo whatever has been achieved since independence towards creating a unified, integrated nation. The majority judgments will revive casteism which the Constitution emphatically intended to end, and the pre-independence tragedy would be re-enacted with the roles reversed - the erstwhile underprivileged would now become the privileged."[49]

As written in Prime Minister Nehru's letter to the Chief Ministers: "The only real way to help a backward group is to give opportunities for a good education .... But if we go in for reservations on a communal and caste basis, we swamp the bright and able people and remain second-rate or third-rate.... It has amazed me to learn that even promotions are based sometimes on communal or caste considerations. This way lies not only folly but disaster. Let us help the backward groups by all means, but never at the cost of efficiency."[50]

Conclusion

The disadvantaged classes cannot be let to be disadvantaged indefinitely. This is not permitted under the Constitution. The gap between the non-backward classes and the backward classes has to close as quickly as possible. To quickly advance the economic and educational interests of the weaker parts to realize the goal of a classless and casteless secular

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[48] (1994) 3 SCC 1, 233.
[49] Nani A. Palkhivala, We, the Nation 179 (1994).
[50] Lai Narain Sinha, Indian Constitution - A Fresh Look 110-111 (1993).

society, the governments of today appear to be unaware of the guiding principles of state policy. Reservations are like first aid; they are not a long-term solution to the enormous issue of backwardness. The best method to ensure that the backward classes remain forever behind is to ignore putting the directive principles of state policy into action. Fraternity continues to be an idealistic dream as a result of this widespread occurrence across the nation.

The Mandal Commission estimated the number of OBCs in India in 1979 using data from the 1931 caste census of British rule; still today, this information from eighty years ago is the sole empirical basis on which we base our reservations. The precise percentage of OBCs in India is not known; No nation can set job and education quotas for a disadvantaged portion of the population. The Union Cabinet agreed to separate the caste census from the normal population census on September 9, 2010, out of concern that the results might be exaggerated. This is a bad scenario because, in addition to the extra expense, caste statistics alone do not have any significance or relevance to the data gathered in a routine population census. Before we can truly consider solutions, we need a clear grasp of India's caste problem.[51]

It is evident that in India, the discussion over reservations centres on who should benefit from them, not whether they should exist. However, at some point, decision-makers will have to address the more fundamental issue of how and when reservations might be phased out.

[51] 10 judgments that changed India, Zia Mody.

SMT. SARLA MUDGAL, PRESIDENT VS UNION OF INDIA & ORS AIR 1995 SC 1531

Apeksha Kachhawaha*

Citation

AIR 1995 SC 1531

Names of Parties

Petitioners: Smt. Sarla Mudgal, Meena Mathur, Geeta Rani, Sunita Narula and Sushmita Ghosh.

Defendant: Union of India and Others.

Judges

Justice Kuldip Singh; and

Justice R.M. Sahai.

Introduction

Sarla Mudgal v. Union of India is a landmark case in the Supreme Court of India. It dealt with the personal laws, about second marriage, religious conversion and divorce along with the criminal offence of bigamy. The judgement of the landmark case was delivered in the year 1995 by Justice Kuldip Singh and Justice R.M. Sahai. The judgement cleared ambiguities with regards to a second marriage after conversion where two personal laws are involved and interlap with each other. The famous judgement also gave rise to the debate on Uniform Civil Code, something which has been deliberated upon since years.

Facts

In the landmark judgement of Sarla Mudgal v. Union of India, four petitions were involved. The first petitioner being Sarla Mudgal herself, she served as the head and president of the officially recognized "KALYANI" society. Her organization largely focused on the welfare of struggling families and women. Meena Mathur, the second petitioner, was married to Jitender Mathur and was the mother of three kids. The petitioner learned of her husband's second marriage in 1988, which he had solemnized with Sunita Narula alias Fathima after they both converted to Islam. The petitioner claimed that her husband only became a Muslim in order to wed Sunita Narula and to shield himself from Section 494 of the IPC.

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Sunita Narula aka Fathima was the other petitioner. She said that she and Jitender Mathur, who was already legally wed to Meena Mathur, converted to Islam, took up the religion, and later were married. She gave birth to a boy. She added that after they were married, Jitender Mathur pledged in April 1988 that he had converted to Hinduism once more and would support his wife and their kids. She asked for maintenance from her husband.

Geeta Rani, who wed Pradeep Kumar in 1988, filed a different petition. She claimed her spouse was aggressive and abusive. Her husband used to torture her and beat her up, and one day he beat her so severely that her jaw was fractured. The petitioner discovered Pradeep Kumar had married Deepa in the December of 1991, after his conversion to Islam. According to the petition, the conversion was simply done to make it easier to get married again.

In a different writ case, Sushmita Ghosh claimed that she was married to G.C. Ghosh in 1984 using Hindu customs. Her husband didn't want to live with her; therefore, he urged her to get a divorce by mutual consent in April 1992. In order to prevent divorce, the petitioner prayed that she would desire to live with him and be his lawfully wedded wife. Later on, her spouse said that he had a certificate stating that he had converted to Islam and would soon wed Vinita Gupta. The certificate was dated June 17, 1992. Therefore, the petitioner sought that her spouse be prevented from getting married a second time.

Issues

1. Whether a Hindu man married to a Hindu woman under Hindu law can solemnize his second marriage after converting to Islam?
2. Whether his second marriage after converting to Islam be valid?
3. Whether marrying another woman by converting to Islam dissolve his first marriage under the Hindu law?

Judgment

The Supreme Court held in the following case that a marriage under the Hindu Marriage Act, 1955 cannot be held to be dissolved by merely conversion of one of the parties. A person married under the Hindu Marriage Act, 1955 is conferred by some rights and status which cannot be taken away by adoption of a new personal law by one of the parties. A marriage taken place under the Hindu Marriage Act, 1955 cannot be dissolved except under the provisions given in Article 13 of the Hindu Marriage Act, 1955. The second marriage after conversion here was declared to be illegal, and the first marriage hence continued to be valid.

The first marriage could not be dissolved merely because one of the partners adopted a new personal law and married under it, however, the same can be taken as one of the grounds of divorce.

Further, the husband was to be held guilty under section 494 of the Indian Penal Code. The man having been converted to Islam could no longer be governed under the Hindu Marriage Act, 1955, however he is to be adjudged on the basis of principles of equity, justice and good conscience.

The court strongly expresses its opinion on the adopting the Uniform Civil Code which would prevent the interlapping of the personal laws amongst one another. Uniform Civil Code would ensure harmony between personal laws in cases like these and it would make sure that the fundamental right relating to religion of members of any community will not be affected.

Analysis

Sarla Mudgal v. Union of India is a landmark case where the concern for UCC arose again due to complex nature of personal laws which overlaps with one another. There are certain ambiguities in the interpretation of personal laws since the matters of marriage, adoption, inheritance, succession and a few others are still governed by personal laws. Other nations like the USA or UK function in accordance with one common law whereas a country like ours follows various personal laws. India is a diverse country where Hindus are in majority while there are certain minorities like Muslims, Parsis and so on and they are governed by different personal laws, it can get difficult to function with personal laws in a country as diverse as ours. Personal laws are better suited to countries where there is one or two common religions, overlapping of personal laws is bound to occur in a country which follows a variety of personal laws.

Herein, in the instant case wherein the husband had married the second time after converting to Islam, and not dissolving his first Hindu marriage, there was a question of which personal law would be applicable. Muslim laws allow such a conversion and marriage between the two, while according to the Hindu laws a marriage cannot be solemnised if either of the parties has a spouse living, however, if we take a closer look at section 5 and 11 of the Hindu Marriage Act, 1955, which talk about valid conditions for the solemnisation of a Hindu marriage and void marriages, section 5 would in the very beginning states “If a marriage is solemnized between to Hindus”. In Sarla Mudgal v. Union of India, it was argued that since

the husband had converted to Islam he could no longer be governed by the Hindu Laws, but at the same time that would not automatically lead to the dissolution of his earlier Hindu Marriage and absolve him of all his liabilities since a marriage performed under the Hindu Laws can only be dissolved on the grounds given under section 13 of the Act. There was a question as to which personal law would be applicable and what would happen to his previous marriage under the Hindu Laws and the women he married and also whether his second marriage under the Muslim law will be valid.

The Hon'ble Supreme Court has resolved the issue by saying that if there is a controversy between two personal laws, then such law should prevail which is serving the purpose best. So, it was held that a conversion to Islam does not amount to automatic dissolution of the marriage performed under Hindu law.[52] It was also held that his second marriage under Islamic law will be invalid since his first marriage never got dissolved.

In this case, a pattern of conversion to Islam by the men was observed wherein they would convert to Islam, and then marry another woman. A reason why the men took resort to this practice was because Islam allows polygamy, so having more than one wife was permitted, and some must have converted with the intention that changing their religion itself would absolve them of all the duties and liabilities he holds in relation to his previous marriage or first wife. Another important reason observed for the same was to not come under the purview of bigamy given under section 494 of the Indian Penal Code, since Islam allows polygamy, it must have been presumed that they would not be held liable for the offence of bigamy.

Due to co-existence of many religions along with their own personal laws the need for a Uniform Civil code was strongly advocated by Justice Sahai. Even though in the instant case it was decided that the personal law which suits better would apply there are still multiple ambiguities. There are no clear demarcations when it comes to personal laws and rightly so since there is a personal law for marriage, succession, divorce, adoption, inheritance and so on. Since it is not possible to have a clear demarcation between the personal laws and at a point or another they are bound to lapse, the need for a uniform civil code arises even more.

It was also reminded by Kuldeep Singh j in this case that even 41 years thereafter; the rulers of the country are not in a mood to retrieve Article 44 from the cold storage where it has been lying since 1949. The court further emphasized when more than 80% of the citizens have

[52]Alka Bharati, Uniform Civil Code in India- Still a distant dream, 4(2) AIJRAHSS 167, 168 (2013)

already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of "Uniform Civil Code" for all citizens in the territory of India."[53]

UCC: What's the Need?

According to the Uniform Civil Code (UCC), all religious communities in India would be subject to one legislation that would govern issues including marriage, divorce, inheritance, and adoption. The law is mandated by Article 44 of the Constitution, which states that the state must work to establish a uniform civil code for its residents across the whole Indian subcontinent. Article 44 in the Directive Principles was intended to address injustice against vulnerable communities and integrate the nation's many cultural groups.

A Uniform Civil Code should be provided throughout all of India's territory, according to Article 44 of Part IV of the Indian Constitution but it is merely a guiding concept of State policy, something which the constitute makers wished for India to incorporate in the near future. A court of law cannot enforce it. The State has the right to enact a uniform civil code. The Constitution's framers did not impose a deadline on the execution of the directive principles of public policy. This was provided because the members wanted the nation to be prepared for a shift in the personal laws and for the scars of partition to heal. Although at a few places uniform laws were applied, like that of transfer of property, still it could not be extended to personal laws which remain untouched due to the circumstances that were prevailing at the time. Dr. B. R. Ambedkar also stated that a UCC is beneficial to the country but should be voluntary for the time being when drafting the Constitution. As a result, Article 35 of the draft Constitution was included as Article 44 of the Directive Principles of the State Policy in Part IV of the Constitution of India. The Constitution included it as a clause whose fulfilment would occur once the country was ready to embrace it and the UCC could gain social acceptability.

Today, India has been independent for seventy-five years, it is time to slowly and steadily introduce India to a Uniform Civil Code. A uniform civil code will help in binding and integrating the nation under one common law for marriage, divorce, inheritance and so on. Such a law is necessary, especially today amidst the rising communal tensions, it is important that we know that ultimately, we belong to one nation and the same rules shall be applicable

[53]Alka Bharati, Uniform Civil Code in India- Still a distant dream, 4(2) AIJRAHSS 167, 168 (2013)

to everyone irrespective of their diverse religions. In a nation where secularism is given tremendous credence in addressing the serious problems of the country, there must be a uniform civil code.

Conclusion

In Sarla Mudgal v. Union of India, the debate over religious conversion for marriage got resolved and it helped in improving the position of women who were left by their husbands after conversion to Islam and starting their new lives by marrying the second time under the ambit of Muslim Laws. Fortunately, it was held that the men would also be held liable for the offence of bigamy and could not escape the same due to the conversion of religion. Therefore, the decision in this case that a person cannot change their religion and divorce their spouse from their first marriage also functions as a bright light in the darkness by giving all citizens equal status and guaranteeing that the public has faith in the legal system in place in the nation. So, it can be inferred from the above judgment that the Hon'ble Supreme Court has reiterated about the need of Uniform Civil Code again and again and has settled the controversies and ambiguities which have arisen due to the apparent conflicts in the personal laws.[54]

[54] Alka Bharati, Uniform Civil Code in India- Still a distant dream, 4(2) AIJRAHSS 167, 169 (2013)

T. N. GODAVARMAN THIRUMULPAD V. UNION OF INDIA AND OTHERS (1997) 2 SUPREME COURT CASES 267

Dhanashree Nagulwar*

Citation

(1997) 2 Supreme Court Cases 267 Civil Original Jurisdiction Writ Petitions (C) No. 202 of 1995

Names of Parties

Petitioner: T.N. Godavarman Thirumulpad;

Respondents: Union of India and Ors.

Judges

Justice J.S. Verma; and

Justice B.N. Kirpal.

Introduction

India is facing a huge loss of forest resources which is a concerning issue. Various acts, guidelines, plans, goals, etc. have been created for the protection of forest land. However, the alarming condition of forests increases day by day and it puts environmentalists in an anxious state. One such ecologist popularly called 'the green man', T.N. Godavarman Thirumulpad had accomplished a work that resulted in a landmark judgment delivered by the Apex Court regarding protection and conservation of India's forest lands. Let's now wander into the forest case and understand the genesis of this writ petition filed by T.N. Godavarman.

Facts

In September 1995, conservationist Godavarman Thirumulpad became anguished by perceiving the devastating condition of the immaculate wooded locations of Gudalur in Nilgiris forest, Tamil Nadu.[55] The tropical rainforest in Gudalur and Nilgiris was under the control of the state of Kerala. However, the state failed to take care of the forestland and it followed a severe disparity in ecology which affected the livelihoods of people residing in the nearby area. Trees were felled and logs were rolled down to the mountain slopes upsetting the highways. Encroachers trespassed on the land who have collusion with the respondents,

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[55] P.K. Manohar and Praveen Bhargava, "The Architect of an omnibus forest protection case", Opinion, The Hindu, July 05, 2016. https://www.thehindu.com/opinion/open-page/The-architect-of-an-omnibus-forest-protection-case/article14470903.ece.

aimlessly cutting down valuable trees such as Ayni trees, Rosewood, and Teak which were exclusively found in the forests of Nilgiris. To obtain more profits, encroachers who were the timber contractors along with the government agencies planned for such non-forestry activities. The loss of these precious trees was not temporary and reparable. The complete forest land was destructed by the random felling of trees. It disturbed the ecological system of that region. It had adversely affected the environment, plants, and animals living in the forest. The inhabitants residing in that region were deprived of a clean and pollution- free environment which was a violation of article 21 of the fundamental rights mentioned in part III of the constitution.

Issues

The questions in dispute were:

1. Whether the usage of timber is justified for commercial purposes?
2. Have non-forestry activities violated the new interpretation of Section 2 of the Forest Conservation Act and forest land?

Judgment

Honourable Supreme Court ordered the Central government and all the State governments to undertake the necessary remedial measures for the protection and conservation of forest land in the country without any further delay. Prior approval is necessary to carry out any non-forest activity within the area of any forest, as defined in sec. 2 of the Forest Conservation Act. Activities like the running of sawmills of veneer or plywood mills or mining of any mineral are hence not permissible without prior approval of the Central Government. These activities are prima facie violations of the provisions of the Forest Conservation Act 1980. In the forests of Arunachal Pradesh namely, Tirap and Changlang, there would be a prohibition of any type of felling of trees. All the sawmills, and plywood mills in AP and also within the distance of 100 km from its border, in Assam shall also be ceased with an immediate effect. The State Governments of both states must make sure that there is compliance with this direction. The felling of trees is to be suspended except in the situations where State Government has taken a call, as approved by the central government. Also, in absence of any working plan in a state, the felling under the permits can be carried out solely by the Forest Department of the State Govt. or the State Forest Corporation.

The Court implemented an institutional mechanism that would manage the funds regarding 'compensatory afforestation.[56] If forest land under Forest Conservation Act jurisdiction is rerouted to any non-forestry purpose, the compensatory afforestation would be in action.

The Indian Railways and the State Governments have been given the responsibility to take measures required to ensure stringent compliance of cutting down trees and timber from any of the seven North-Eastern States to any other state of the country either by rail, road, or waterways. This prohibition will exclude government projects and the movement of certified timber necessary for defence. The ban will not be applied to felling in private plantations containing trees planted in an area that is not considered a forest. SC directed various guidelines and constituted expert committees to formulate practical methodologies to protect and preserve forest land. The court also referred many cases to arrive at the decision.

The meaning of the word 'forest' here should not be taken in a dictionary sense. Because the term 'forest land' mentioned under section 2 of the Act not only includes the sole meaning of forest but the land recorded in the Government record irrespective of ownership. This aspect elucidates the provisions of the Forest Conservation Act.[57]

Each State Government was directed to constitute Expert Committee to identify areas that are 'forest' under the purview of the Section 2, to identify areas that were previously forests but stand degraded or cleared, and to identify areas covered by tree plantations belonging to Govt. or to a private entity. The State Government also needs to file a report regarding the number of sawmills, veneer and plywood mills, etc. are operating.

There are also guidelines and directions for the protection and conservation of forest lands given separately to the State of Jammu and Kashmir.

Analysis

Forests are the heart of any country. It is the source of human life. It is known as the green wealth of one's nation. The complete ecosystem is reliant on forests. Forest is a significant aspect of natural habitat. Humans know the importance of this subject but they do not understand its necessity. Mr. T.N Godavarman played a significant role in the process of protecting these amazing forests of Nilgiri. If the forests are not protected then the condition of a country will be adverse. Forests are known as Earth's greatest natural resources. They

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[56]'Compensatory Afforestation and Net Present Value Payments for Diversion of Forest Land in India', Kalpavriksh.https://kalpavriksh.org/wp-content/uploads/2022/07/KV_CAMPA_Revised_Final.pdf.
[57] Indian Forest Act 1980.

were found abundantly earlier. However, forests are decreasing gradually. Owing to illegal activities, the stooping of trees, cutting, and felling of trees, etc. have lessened the counting of trees. Illegal activities within forests which are increasing at an alarming rate, etc. have rendered the soul of the forest weak. Thus, to enforce regulation on all these activities, the Forest Conservation Act of 1980 had been enacted.

The major objective behind enacting the Forest (Conservation) Act of 1980, later amended in 1988, is to keep an eye on the drastically increasing deforestation which resulted in ecological imbalances and environmental degradation.[58] Thus, the provisions of the Forest Conservation Act must be applied to all forests regardless of classification or ownership. In the pre-independence period, the first-ever statute made was the Indian Forest Act of 1865. Its main goal was to regulate timber cutting as well as smuggling of raw materials sooner than safeguarding forests.

After independence, an ordinance was passed in 1980 and the Forest Conservation Act was enforced. The constraint had been rendered on the use of forests for non-forest purposes.

While delivering judgment, the court reviewed the National Forest Policy and the Forest Conservation Act 1980 to consider all the aspects of deforestation. Section 2 of the Forest Conservation Act 1980 regulates the State Government and other authorities on rendering laws without the prior approval of the Central Government. State Governments or any other authority shall not de-reserve any forest land or any other portion. Any forest land or portion shall not be utilized for non-forest purposes. Any forest land or portion shall not be assigned by the method of the lease to a private body or authority, non-government agency, organization, etc. Any forest land or portion of it shall not be cleared off for afforestation.

In this Supreme Court Judgement, the meaning of the word ‘forest’ was not restricted to its dictionary sense only. It was held that meaning should cover not only the green trees but also the complete forest area recorded under the Government record. Whenever the guidelines will be created or any judgment will be passed the term forest land should be interpreted as the area recorded. There should be no uncertainty in interpreting this expression in the future.

When Nilgiri forests were in atrocious condition, inhabitants living near forests were facing a lot of problems that were violating their fundamental rights. The people living there were

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[58] ‘Forest Conservation’, International Centre for Environment Audit and Sustainable Development. http://iced.cag.gov.in/?page_id=1061#:~:text=The%20main%20objective%20of%20the,to%20the%20forest%20dwelling%20communities.

being deprived of living in a clean environment. Article 21 of the Indian Constitution states the right to live in a clean pollution-free environment and this fundamental right was being violated. Forests were the major source of livelihood for those inhabitants, living around the forests. Not only the humans but also the fauna was dependent on the rainforests. Flora and fauna contained in the forest enhance the standard of life which is always loved by mankind. Protection and preservation of forests are of utmost necessity to live a peaceful life. We must conserve mother nature and present it to future generations in the purest form.

Mining carried out on a large scale was also a big threat to forest land. The Supreme court issued various guidelines for regulating mining. One of the instances was about granting permission to National Mineral Development Corporation to carry out mining in the state of Madhya Pradesh. An order has been passed regarding mining that certain conditions have to be followed after receiving permission from the Central Government laid down in the case of T.N Godavarman v. UOI. The order was passed in 1999 permitting NMDC to carry out mining only after receiving permission from the Central Government.[59] The court directed the Minister of Environment and Forest to register an exhaustive proposal for "compensatory afforestation" to be established. The compensatory afforestation proved as a new mantra for all the non-forestry wicked activities.

The Supreme Court adopted the obligations of the administrator, lawmaker, and policymaker by leaving behind the standard role of an interpreter of law. This is due to not following as well as not fulfilling the duties and functions of the State governments. Judiciary intervenes and encroaches in the matters of Legislation and Executive whenever it is highly required. In this case, Judiciary intervention can be observed through the steps taken such as the prohibition on felling and cutting of trees, regulating timber industries and sawmills, etc. The imposition of a tax called a present value for using forest land for non-forestry purposes, setting up the Compensatory Afforestation Fund (CAMPA), and money received in the fund should be utilized hence required prior approval given by the Supreme Court for carrying out a business activity, all these are remarkable steps taken by the court.

Conclusion

People now are more inclined toward luxury items and hence they are forgetting the real happiness that lies in natural resources. Natural resources are modified, changed, and transformed to render into luxury. Thus, the state of nature is degrading. Cutting and felling

[59] India's Forests and the Judiciary, 'The Godavarman Story', World Wild Fund.http://awsassets.wwfindia.org/downloads/indias_forests_and_the_judiciary_2.pdf.

trees and other various illegal activities ultimately violate the purpose of the Forest Conservation Act, 1980. The development of mankind is significant nevertheless; it must be without harming the rich biodiversity bestowed by nature.

The Court has taken this issue very seriously and it can be observed through guidelines issued, the setting up of various committees, and the conferring of additional powers on the ministry. Court's intervention was necessary to bring an end to the ill-planned developmental projects which were ceasing the nation to achieve bigger developmental goals. Because of the intervention rendered by the court, it ceased mining in the forest of Kudremukh and brought a complete prohibition on marble mining in Aravalis[60]. Commendable decisions were taken by the court on net present value, compensatory afforestation, and obtaining prior approval from the Supreme Court to carry out any commercial activities, etc. impacted society on a large scale.

Greenman's endeavors to cease deforestation and save the lives of people led to watershed legal intervention which boosted the conservation of forests.

[60] P.K. Manohar and Praveen Bhargava, "The Architect of an omnibus forest protection case", Opinion, The Hindu, July 05, 2016.https://www.thehindu.com/opinion/open-page/The-architect-of-an-omnibus-forest-protection-case/article14470903.ece.

UNION OF INDIA V. ASSOCIATION FOR DEMOCRATIC REFORMS AND ANOTHER (2002) 5 SCC 294

Tanya Bansal*

Citation

(2002) 5 SCC 294

Names of Parties

The parties involved in this case are

1. Association for Democratic Reforms (ADR): the Association for Democratic Reforms came into existence in 1999, when a group of professors for the Indian Institute of Management (IIM) Ahmedabad filed a PIL in the Delhi High Court requesting that the information of a candidate standing in an election be made public so that the voters can make an informed choice. The ADR aims to improve the governance in India through transparency and free and fair elections. The office of ADR is located at T-95, C.L. House, 2nd Floor, Gulmohar Commercial Complex,Gautam Nagar, New Delhi.
2. People's Union for Civil Liberties (PUCL): the PUCL was founded in the year 1980, when the rights of the people were put in danger by the then regime. Hence, efforts were made to once again put some life in the previously inactive PUCLDR (People's Union for Civil Liberties and Democratic Rights founded in 1976) and to bring about co-operation among various civil liberties groups. PUCL is now the largest human rights organisation in the country, striving to defend civil liberties and human rights of all members of society. The main office of PUCL is located at 270A, Patpar Ganj,opposite Anand Lok Apartments, Mayur Vihar-I, Delhi.
3. Election Commission (EC): the Election Commission of India is a constitutional body which is responsible to conduct free and fair elections in India. The body is governed and created by the Constitution of India under Article 324. It came into existence from 26th January, 1950. The office of Election Commission is located at Nirvachan Sadan, Ashoka Road, New Delhi.
4. Union of India

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Judges

Justice M.B. Shah

Justice Bisheshwar Prasad Singh

Justice H.K. Sema.

Introduction

In a democratic set-up, nothing speaks louder than the way the elections are conducted as well as the rights and choices concentrated in the hands of the voters of that country. Keeping in view this line of thought, it becomes important to understand the picture painted by textual matrix enshrined in the constitution of such democratic republic and then comparing it with what actually happens in the everyday life and instances, i.e., differing the ideal set up from the real world. A democracy is believed to be as good as the elections and procedures followed in it. If the elections start facing troubles and criticism, it is an indicator that there needs to be an assessment of the election procedure and that there is a need for some changes. However, it would be much more effective and ensure maximum efficiency if this assessment is done by the appropriate authority *Suo moto*, and without any upheaval from the people first.

In India, elections are handled, organised and overseen by the Election Commission of India, which is a constitutional body as under Article 324 of the Constitution of India. As guaranteed by the Constitution, the Election Commission is an independent body which enjoys complete jurisdiction over matters relating to the elections in the country, and this involves the entire process of elections, from announcements to the result as well as everything else in between. Further, one of the most applauded features of the Commission is that it is free from the influence of the government as well as other political parties. Further, the government or the ruling party, or the opposing parties cannot pressurise the Commission in any way. This feature unfortunately is only possible in an ideal scenario and exists only in texts. In the practical world, the ruling party or the opposition often question the procedures and decisions of the Commission and interfere in the workings of the Commission in a myriad of ways which range from openly challenging the election of a candidate or dragging trivial matters to the courts. This results in unrest among the public, and the failure of democratic ideals.

One such example of a current debatable issue is the people's right to know, which is supported by the Commission as well as the Judiciary, but questioned by the political parties and the ruling party as well. The apex court has time and again highlighted the people's right

to know when deciding upon disputes related to the election and guided the commission to amend the election procedure to accommodate this right. In the long run, this reform is intended to benefit the democracy by providing means to elect an eligible and efficient ruler, who works for the welfare of the country. However, any such reform is overruled by the government by the means of some statute or by impugnment of the guidelines issued by the commission. Such acts of the government weaken the democracy which raises a red flag as to the state that the said democracy is in.

In order to curtail any such practices and to ensure that the ideals of democracy which he founding fathers of the Constitution strived to achieve are protected, many people's organisations have come forward. One such organisation is the Association for Democratic Reforms or ADR. The ADR was born to protect the people's right to know about the candidates that they choose as their representatives and has on many occasions brought concerns regarding the same to the notice of the Election Commission as well as the Judiciary. This is an analysis of one such landmark judgement which was the result of a gentle nudge from the Association for Democratic Reforms, and which is a crowned jewel when studying about the jurisprudence of the Right to Know, the case of Union of India v. Association for Democratic Reforms and Another.

Facts

This case was brought to the notice of the Supreme Court through an impugned judgement of the Delhi High Court by the Union of India, which said that in order to hold a free and fair election, and to give the voters a right to choose their representative, they should be informed about the background of the candidates contesting the elections. Further, the high court directed the Election Commission to collect an affidavit from the candidates which contained the following information and release it to the voters: i) any case where the candidate is an accused, and whether it is pending; ii) assets in the name of the candidate, the spouse, and any person dependent on the candidate; iii) facts stating and guaranteeing the competency and suitability of the candidate to contest the election; and iv) the party which is sponsoring the candidate for the election. The appellants had contended that the Government was the competent authority to issue such guidelines and rules rather than the election commission.

The case was originally brought by the ADR in the High Court of Delhi in 1999, seeking direction to implement the recommendations made by the Law Commission in its 170th Report and to make necessary changes under Rule 4 of the Conduct of Elections Rules,

1961.[61] However, the Court considered whether or not an elector, a citizen of the country has a fundamental right to receive information regarding the criminal activities of a candidate to the Lok Sabha or the Legislative Assembly for making an estimate for himself as to whether the person who is contesting the election has a background making him worthy of his vote, by peeping into the past of the candidate.[62] Upon hearing both the sides, the High Court delivered the impugned above mentioned judgement.

Issues

1. Whether the Election Commission is empowered to issue directions as ordered by the High Court?
2. Whether the voters have a right to know about the candidates contesting elections?

Judgement

In order to decide on the above-mentioned issues, the court had to establish the requirements of a healthy democracy and the ways to achieve that. They considered that for a democracy to be deemed as healthy, voters held the utmost importance. The court said: "*... the decision of even an illiterate voter, if properly educated and informed about the contesting candidate, would be based on his own relevant criteria of selecting a candidate…. For maintaining purity of elections and a healthy democracy, voters are required to be educated and well informed about the contesting candidates.*"

Before talking about the issue at hand, the court strengthened its view through the help of the orbiter in the case of Mohinder Singh Gill v. Chief Election Commissioner,[63] where the court referred to the pervasive philosophy of democratic elections which Sir Winston Churchill vivified in matchless words: (SCC p. 413, paras 2-3): "*At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper -no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point.*" The court emphasises on the point that the basic and foundational aspect of a democracy is the protection of the rights of the voter. Further, the court by referring to many preceding judgements and their ratio came to the conclusion that by the virtue of Article 324, the Election Commission has the power to issue order in areas where the law falls silent.

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[61] *Union of India v. Association for Democratic Reforms and Anr.* (2002) 5 Supreme Court Cases 294.
[62] Ibid.
[63] *Mohinder Singh Gill v. Chief Election Commissioner* (1978) 1 SCC 405.

Further, as the court moves to the next issue at hand, it first and foremost mentions that the citizens' right to know if derived from the concept of freedoms of speech and expression enshrined in Article 19 of the Constitution of India. In its initial assessment of the issue, the court opined that: "Public education is essential for functioning of the process of popular government and to assist the discovery of truth and strengthening the capacity of an individual in participating in the decision-making process." While referring to the decision of the court in the case of *State of Uttar Pradesh v. Raj Narain*,[64] the court has remarked "*The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.*" Further, the court observes that when one intends to become an agent or representative of the larger unlicensed, there can be but few secrets.

In addition to this, the court explains the importance of the right to know by clarifying that in a democratic society, informing the public is an important aspect of ensuring an efficient government as the information might impact and influence the voters' choice of a leader and this includes the actual casting of votes as well. Hence, the court decided that by the act of casting a vote, the voters are exercising their right to freedom of expression, which cannot be possible without proper information about the candidate that they are supporting. Therefore, the right to know is a right embedded in the right to freedom of expression as under Article 19 (1)(a) of the Constitution of India.

Further, the court upheld but modified certain aspects of the decision of the High Court while directing the Election Commission to call for information on affidavit by issuing an order under Article 324. The information to be submitted was listed as under:

1. Whether the candidate is convicted/acquitted/discharge of any criminal offence in the past if any whether he is punished with imprisonment or fine.
2. Prior to six months of Bling of nomination, whether the candidate is accused in any pending case of any offence punishable with imprisonment for two years, or more, and in which charge is framed or cognizance is taken by the court of law. If so, the details thereof.
3. The assets (immovable, movable bank balance, etc.) of a candidate and of his/her spouse and that of dependents.

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[64] *State of Uttar Pradesh v. Raj Narain* (1975) 4 SCC 428.

4. Liabilities, if any, particularly whether there are any over-dues of any public financial institution or government dues.
5. The educational qualifications of the candidate.

Analysis

This case was a contribution of the Supreme Court of India towards strengthening the democracy of the country. One of the most graceful and commendable features of India is its form of government, democracy, therefore, it becomes an unsaid rule and duty of every citizen of the country to protect this democracy and keep its flow in consonance with that of changing eras and trends. The democratic theory prevalent in India is based on the concept of human dignity. In other words, the democratic structure of India strives to protect the dignity of human beings living under it above all else. In addition to this, the rule of democracy in general falls in the area of collusion between positivism and moral relativism. This can be explained by the simple fact that in a representative democracy such as India, the people are the subjects of the law, but also the makers of the law, i.e., they choose their own rule makers by performing the simple act of casting a vote. Because voters need to be informed to protect their interests, democrats advocate freedom of communication as stated: "*the basic right of free expression is one of the principal human rights ... For a free, democratic order it is a constituent element, for it is free speech that permits continuous intellectual discussion, the battle of opinions [sic] that is its vital element... In a certain sense, it is the basis of any freedom... the matrix, the indispensable condition of nearly every other form of freedom.*"[65] Hence, from a brief overview of the mere definition of democracy, it becomes clear that to ensure human dignity, and to uphold the basic ideals of democracy, the voters or the little man should be kept in the know of the people he chooses to elect as his ruler, and to be given information about the laws he is subjecting himself to.

"*Democracy is the basic feature of the Constitution. Elections conducted at regular, prescribed intervals is essential to the democratic set up as envisaged in the Constitution. So it is the basic need to protect and sustain the purity of electoral process that may take the quality, efficacy and adequacy of the machinery for resolving electoral disputes.*"[66] In a democracy, the elections are one of the many facets that ensure that the ideals and the basic concepts are acknowledged and respected throughout the country.

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[65] Andrew Reynolds, "*Electoral Systems and Democratisation in Southern Africa*", OXFORD SCHOLARSHIP, 1999, p. 147.
[66] *Kihoto Hollohan vs. Zachillhu and others* AIR 1993 SC 412.

Hence, for one to analyse the situation of a democracy, the first step would be to analyse the election procedure and the attitude of the people to that procedure. As Montesquieu discussed, in the case of elections in either a republic or a democracy, voters alternate between being the rulers of the country as well as being the subjects of the government. By the act of voting the people operate in a sovereign (or ruling) capacity, acting as "masters" to select their government's "servants". The unique characteristic of democracies and republics is the recognition that the only legitimate source of power for a government of people, by the people and for the people is the consent of the governed- the people themselves.[67]

Hence, it would be safe to say that associating the case at hand with the ideals of democracy, and the value of the 'little man' is a welcome step. This indicates that the Judiciary not only studied the facts at hand, but also the impact any decision would have on the larger working mechanism of the country.

The elections in India are overlooked and controlled by an independent Election Commission as granted by Article 324 of the Constitution of India. The Indian Constitution is derived from many other constitutions throughout the world. The constitution has its roots in constitutions of the USA, UK, Canada etc. This is how one knows that the powers and functions of the Election commission of India (ECI) are based on the Canadian model. As stated earlier, the ECI is an autonomous body formed by the constitution. The constitution bestowed the Election Commission with three basic powers: 1) Advisory powers; 2) Administrative powers; and 3) Quasi-judicial powers.

The first set of powers as evident from the title empowers the commission to advise the President and the Vice-President on the competence of the cabinet ministers and who to choose or disqualify. Under the second set, the commission is given the authority to devise the regions for elections, as well as control and conduct the election. It also gives the commission us discretion to take decisions which have a direct to nexus to the procedure of the elections. Under the third set of powers however, the Commission has the jurisdiction to decide on the disputes related to elections and between two or more political parties. As the case at hand also clarified, the Election Commission is empowered by Article 324 to have superintendence, direction and control of elections. Hence it was in nature of protecting the democracy that the court decided that it was well within the rights of the commission to issue an order regarding an affidavit from the candidate willing to contest the elections.

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[67] Vaibhav Goel Bhartiya, "*Election Reforms in Modern Democratic Set Up: An Evaluation*", CHOTANAGPUR LAW JOURNAL, Vol. 4 No. 4 2011-12, pp. 127-137.

From the above account of the powers in the hands of the Election Commission, it is fairly certain that the Commission plays quite a significant role in the democratic functioning of India. Therefore, it is also the duty of the Commission to ensure free and fair elections, where the voters get to exercise their right to vote and the leaders chosen are rightfully appointed. The importance of free and fair elections was also highlighted by the Supreme Court, As Justice Hans Raj Khanna expressly held that "the principle of free and fair election is an essential postulate of democracy which in turn is part of the basic structure of the Constitution of India."[68]

In P.R Balagali v. B.D.Jatti,[69] the highest court viewed that the entire election law is to safeguard the purity of elections and to see that the people do not get elected by flagrant breaches of election law. The right to elect and the right to be elected are statutorily protected. In N.P Punnuswami v. Returning Officer,[70] Ramkumar Pandey v. Union of India,[71] Mohinder Singh Gill v. Chief Election Commissioner,[72] Election Commission v. Shivaji.[73] Hence, due to the importance of free and fair elections, it becomes imperative that there exists a check on the powers in the hands of the Commission and the Chief Election Commissioner.

As for the restriction on the powers of the chief Election Commissioner, he forms a part of the Commission. He is not the superior person but his word and advise is valued and all the well discussed decisions of the commission are issued under his name, but he is not in a dictatorial capacity. The Supreme Court held that it is desirable to have Multi-Member Election Commission. If it is held by one man, he may become dictatorial, but the Election Commission cannot be equated with Chief Election Commissioner and do not enjoy the same Constitutional protection provided to the Chief Election Commission.[74]

As for the aggregate powers of the entire Election Commission, the decision of the Election Commission can be questioned in the Supreme Court of India, because of the fact that a balanced judicial approach of implementing the laws relating to franchise is the mandate of the Supreme Court, as was held in the case of Indira Nehru Gandhi v. Raj Narain.[75] The

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[68] Ibid.
[69] *P.R Balagali v. B.D.Jatti* AIR 1971 SC 1348.
[70] *N.P Punnuswami v. Returning Officer* AIR 1952 SC 64.
[71] *Ramkumar Pandey v. Union of India* (1993) 2 SCC 438.
[72] Supra 3.
[73] *Election Commission v. Shivaji* (1998) 1 SCC 277.
[74] *Chief Election Commission S.S.Dhanoa vs Union of India* AIR 1991 SC 1745.
[75] *Indira Nehru Gandhi v. Raj Narain* AIR 1975 SC 2299.

supreme Court held that Election Commission, as any other Tribunal, is required to give reasons while making any order and those reasons alone will determine the validity of that order made. It is also required to give hearing to the effected parties so far as practicable.[76]

As we discuss the powers and duties of the Election Commission, in the present case as well, the court expanded on the degree of control and superintendence that the Commission has very the election procedure of India. The phrase "conduct of election" was expanded in its amplitude to include making all necessary provisions for conducting free and fair elections. In addition to this, having superintendence and control over elections now meant that the Commission could scrutinise the expenses made by political parties during elections, could do background checks on the candidates to ensure that the law breakers don't become the law makers. It also meant that the political parties now had to submit to the rule and regulations aid down by the Commission in order to be able to contest elections.

Further, one of the most celebrated aspects of the case was the declaration of the voters' right to know as a fundamental right. As a result, the candidates now had to release information that they would rather keep to themselves if there was something to hide. Therefore, to counter this new threat to their political status, the Parliament first asked for an extension to the time given by the curt, and then passed an Ordinance to nullify the new notifications sent by the Election Commission despite having public ally supported the judgement. This was due to the fear of being punished (which was well within the rights of the Commission) for giving the wrong information.

Hence, the ordinance severely limited the information that was earlier compulsory to release so as to prevent the unlicensed from knowing about the candidate. The government was so concerned about voter coming to know so much about the candidate's background that it included a clause in the ordinance which required the candidate to declare only as much information as required in the Ordinance. This clause exempted the candidate from obeying the order of the Supreme Court as well as he directives of the Election commission.[77] This Ordinance was again challenge in the Court, where a three judge bench of the Supreme Court upheld that the sanctity of the voters' right to know and declared once again that Parliament could not make laws or change existing ones in order to take away from citizens fundamental

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[76] Mohana Rao Pedada, "*Election Commission of India*", INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES, Volume 2, Issue 5, 2019.
[77] Maja Daruwala, Bibhu Mohapatra and Venkates Nayak, "*The Right to Know- A Voter's Guide*", COMMONWEALTH HUMAN RIGHTS INITIATIVE, 2003.

rights.[78] Following this, the Election Commission released a new order in consonance with the latest order of the court.

However, despite all the efforts of the Commission, the Judiciary and the people's organisations, the elections in India still continue to remain sorry state. The elections in India continue to be a hot-headed affair, where the politicians are more often than not fighting for power and dominance rather than the betterment of people. In addition to this, many of the candidates who contest the elections are either convicted criminals or money launderers who use the loopholes of the law to enter into the government. This misuse of law happens due to the fact that the voters right to know is not a statutory law and also because giving false information is nor a serious offence yet. In addition to this, bribery is also a well-known evil which maligns the Indian election procedure. To add to these grave issues is the growing number of question son the authenticity of the elections by the opposition parties. Therefore, there is an urgent need for reforms in the Indian election laws.

Conclusion

The drafters of the Indian Constitution were an educated and well experienced group who knew that the law could not remain static. Similarly, hey also knew that in rider to sustain a democracy, one would need to select the leaders wisely. This was evident in the concluding address of Dr. Rajendra Prasad, where he said:

"*I feel however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called upon to work it, happen to a good lot… whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the Country administered. That will depend upon the men who administer it. If the people who are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the Country. The word "these" signifies" capable and men of Character and integrity*".

Therefore, in order maintain the democratic ideals, the political leaders need to be elected on the basis of merit and not based on popularity alone. To ensure that the candidates are in fact eligible for the election, there may be the need for a test[79] which checks for the competency of the candidate. This test may be divided in stages. The first stage being the registration of

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[78] Ibid.

[79] Jeevan S. Hari, "*The need for a political eligibility test for elected representatives in the Indian political framework*", REVUE LIBRE DE DROIT, 2020, pp. 1-19.

candidature along with the necessary detailed as per the orders of the Election Commission and the Supreme Court, followed by a background check and verification of the information. This stage would prove to be efficient in weeding it the candidates who may criminalise the governmental structure, thus ensuring that only the credible candidates remain.

This may be followed by a second stage where the candidate may be ester on the basis of their knowledge about the region they are contesting for and the general issues of India. It would test the decision-making skills of the candidate in the form of a mock stimulation. The information collected from the two stages may be released to the public as per the discretion of the Election Commission, thus enabling the right to know of the voters. The third and the final stage would be the actual voting and announcement of result. This would ensure transparency and efficiency of the election procedure.

Another suggestion of tackles the current issue of transparency and right to know in elections can be using the election manifestos. The voters ought to have a right to know as to what happened to those promises made in the election manifestos. A failure on the part of the political party or for that matter a candidate in disclosing the status of the promises made in their election manifestos before the next elections deprive a voter his right to know and thereby denudes him from making an informed choice.[80]

Hence, the Election Commission may intervene in form of new guidelines directing the parties to inform the voters about the status of the promises made by them during the previous election, and also the average expenses they make during the election propaganda, so that the voters may decide their representative based on past actions. This may have a deterring effect on the extravagant expenses made to bribe voters and also would push the elected party to accomplish their promises if they want to be elected again.

Through elections the citizens participate in a collective process in which they express their beliefs, judgments and perceptions by casting their vote. It would not be out of place to say that voting is a means of expression and the fundamental right to speech and expression thus protects the right to vote.[81] Hence, there must be efforts made to make the process of voting more efficient and secure by ensuring that no one's stopped from casting their votes by any means of threat or violence. Stringent punishment may be devised for someone who performs or condones such acts.

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[80] Akshay Bajad, "*Election Manifestos and the Voters' Right to Know*", JOURNAL OF POLITICS & GOVERNANCE, Vol. 8 No. 4, 2020, pp. 12-14.
[81] Manmeet Singh Rai, "*Tracing a Meaningful Right to Vote*", INDIAN J. CONST. L, pp. 127-159.

The voters' right to know can also be protected and ensured by the means of EVM. Recently the Supreme Court held that the voter has a right to know his voting in the Electronic Voting Machines (EVMs) and he can have a proof of it.[82] As a result of this order, VVPAT units have been attached with the EVMs. With the help of these the voter can ensure that he has exercised his right to vote according to his/ her will.[83] Hence, the EVMs can be updated from time to time. Further, a database can be created of all the voters, and they can be sent a digital receipt of the date and time that their vote was cast, much like the vaccination certificates issued during the pandemic.

Hence, to conclude the analysis of the case, it can be said that the judgement was a welcome development to the strengthening of the democracy. The judgement by declaring the fundamental right to know gave a new direction towards increasing the accountability and transparency of governance in India. This judgement was followed by many more landmark cases which if incorporated with a few reforms can make India a near perfect democracy.

[82] *Chief Information Commr. & Another v. State of Manipur and Another*, SLP (Civil) no 32768 -32469 /2010 order dated 12 December, 2011.
[83] Dr. Poonam Sharma, "*Voter's Right to Know the Antecedents of the Candidates*", INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES, volume 5, Issue 2, 2022, pp. 1334-1345.

PRAKASH SINGH V. UNION OF INDIA (2006) 8 SCC 1

Aashna Uke*

Citation

Writ Petition (civil) 310 of 1996

Names of Parties

Petitioner: Prakash Singh and Ors.;

Respondent: Union of India and Ors.

Judges

Justice Y.K. Sabharwal;

Justice C.K. Thakker;

Justice P.K. Balasubramanyan.

Introduction

A senior police official in Maharashtra has filed a writ petition with the Supreme Court, bringing the topic of police reforms back into the public eye. Whenever there is resonance of an interaction between police amendments and the courts, it is useful to recall the Apex Court judgement in the matter of "*Prakash Singh v. Union of India* (2006) 8 SCC 1."[84] Retired IPS officer Prakash Singh filed a public interest writ petition with the Supreme Court of India in 1996, seeking to remove political interference in police matters, such as promotions and transfers.

The decision of the court has been heralded as a watershed moment in legal history. The judgement and the orders that pretended to execute it on the ground have had a devastating impact, notwithstanding the fact that this may be the view of those who are observing the situation. Even the fundamental idea of seniority, which kept up a pretense of empirical objectivity in the police force, has been washed away, which demonstrates that political control over the police is not nearing its end.

Facts

As well as other positions, Prakash Singh held the position of director general of police in both UP and Assam. After retiring in 1996, he petitioned the Supreme Court for police reforms. The Supreme Court issued a major ruling in September 2006 ordering all states and

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* Aashna Uke, (Batch 2020-25), Student of Maharashtra National Law University.

[84] *Prakash Singh v. Union of India*, (2006) 8 SCC 1.

UTs to implement reforms to their police forces. In the verdict, the courts mandated a number of actions that the respective governments must perform. All of these were in keeping with the goal of letting law enforcement operate free from political intervention.

Issues

1. The major issue which this case gave rise to was the interference of politics.
2. As we all know the lower rank officers, such as constables are not given enough power and resources to work but the irony being, most of the rigorous and preliminary investigation is done by them.
3. How to ensure the work of police or power of police, how to ensure the democracy of the State?
4. No balance between the lower rank officers and higher rank officers.
5. Corruption and working hours of the police officers.
6. A need for a separate investigation department

Judgement

The Supreme Court's ruling in the Prakash Singh case, which mandated the necessity of change. States and territories were given seven mandatory directions to implement to get the reform process rolling. All of the progress made since 1979 was brought together in these guidelines. For the Court's rulings to take effect immediately, either new legislation or executive directives had to be issued concerning the police force.

Directives Implemented after Judgement

- The first order of business is to establish a State Security Commission (SSC) with the following objectives: (i) preventing the state administration from exerting improper control or pressure over the police; and (ii) Establish general policy parameters, and (iii) assess the state police's effectiveness.[85]
- Second Order Make sure the Director General of Police is selected through an open and merit-based procedure and has a guaranteed two-year contract.
- Third Directive Ensure that all operational police officers (including District Superintendents and Station House Officers) be given a minimum of two years in their positions.

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[85]Mohammed Thaver, "*Explained: The 2006 Supreme Court ruling on police reforms; how states circumvent it to influence postings"*, THE INDIAN EXPRESS, Mumbai, Wednesday, March 31, 2021, https://indianexpress.com/article/explained/explained-2006-sc-ruling-police-reforms-states-circumvent-influence-postings-7251526/, (visited on September 2, 2022).

- Fourth Order Split the Police's Investigative and Law Enforcement Roles.
- Directive Five Create a Police Establishment Board (PEB) to decide promotions, postings, and other service-related matters for police officers with ranks of Deputy Superintendent of Police and lower, and to make recommendations for postings and transfers for officers with ranks higher than Deputy Superintendent of Police. This directive applies to all ranks of police officers, including those with ranks higher than Deputy Superintendent of Police.
- Opinions apart, the judgement and instructions purporting to apply it on the ground have been devastating. Even seniority, which preserved a pretense of scientific objectivity in the police, has been eroded, suggesting that political control over the police is far from ending.
- The Seventh Directive was to establish a National Security Commission (NSC) at the union level to organize a panel for the selection and placement of Chiefs of the Central Police Organizations (CPO) with a term length of at least two years. This commission will be responsible for preparing the panel.

Article 32 of the Constitution, when read in conjunction with Article 142, gives the Apex Court the authority to issue and pass such orders "as is necessary for doing complete justice in any cause or matter pending before it." Any order that is issued in this manner is stated to be enforceable throughout India, and all authorities are required by Article 144 to act in aid of the orders that are issued by the Supreme Court. The judgement in the case of *Vineet Narain*[86] mentions several previous decisions of the Supreme Court in which guidelines and directives to be followed were given in the absence of law and were put into effect until the legislature passed legislation that was appropriate.

Impact of the Judgment

The formation of establishing boards inside the states to monitor the movement and posting of police officers was one of the several suggestions made by the court. The fixed term of office for the Director-General of Police (DGP) in each state was determined to be for a period of two years. This was the primary component of the decision. They needed to be chosen among the three IPS officers in the state who held the most senior positions. In contrast to the acclamation of the general public and the laypersons, the actual consequence

[86] *Vineet Narain v. Union of India*, (1998) 1 SCC 226.

has been unsettling. Before this verdict, the ability to suggest transfers rested solely with the Director General of Police in each state.

It was within the purview of the state government to make the ultimate decision about the subject. The Director General of Police (DGP), who was once the true uniformed top executive of the force, has been reduced to a mere member of the committee with the establishment of the establishing board, which comprises the DGP and four other senior police officers. In this case, the DGP is in the minority. All four of the other policemen he is in charge of do not report to him, but rather work independently. In effect, this has diminished the DGP's ability to offer recommendations.[87]

A further order in the same instance, dated July 3, 2018, delivered an additional blow to the defendant. It is now required that states provide the Union Public Service Commission (UPSC) with the names of potential nominees for the position of Director General of Police. The UPSC will select three names from among all qualified names provided by the state. The state government has the option of selecting any one of the three candidates to serve as the Director of State Police. Another change to this order resulted in the condition that the person selected for the position of DGP should have at least six months left of their current commitment.

It was decided by the Supreme Court that in order to prevent any temporary arrangements from becoming permanent, it would be required that the names be provided to the UPSC in a timely manner, and that no DGP would ever be appointed with extra responsibilities to fill the role of "acting DGP." The practice of appointing deputy governors general (DGPs) on the verge of their retirement in order to reward them with a guaranteed two-year term was the mischief that needed to be fixed.

There is not a single other service in India that has qualifying requirements as stringent as these ones. For instance, some chief justices are appointed to serve in the role of "acting" chief justices. Similarly, chief secretaries of states are sometimes allotted for terms that are shorter than two years, and there is no requirement that they maintain a certain length of residual service after leaving office.

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[87] Yudhishtir, "*Police reforms via Prakash Singh judgement: A boon or a bane?*", THE LEAFLET, https://theleaflet.in/police-reforms-via-prakash-singh-judgment-a-boon-or-a-bane/, (visited on September 4, 2022).

Second, the UPSC regularly receives names of officers from three to four batches. The inclusion of persons three to four years junior to the senior-most person has rendered seniority to the DGP job null and useless and enlarged the market for currying favour with political masters among police personnel.

Third, the winner-selection process is not objective. In selection concerns, the state is normally represented by an IAS official. In their capacity as chief executive of the civil administrative service, they represent the political class. It's a heady prize to strive for and pamper elected officials, even if a DGP is two to three years junior to the state's top cop.[88] In conclusion, the series of instructions that were issued in the Prakash Singh case did not take into account at least two actual scenarios that are currently in vogue. The first one is when the DGP's tenure of two years comes to an end, and the second one is when the DGP is transferred to a different position.

Analysis

When a DGP's two-year term ends, what steps should be taken? Similarly, the state is forced to directly violate the Supreme Court's order in this matter by appointing an acting DG if the DGP is transferred for any reason. The State's discretion is respected in such cases, and the State's choice of candidates to submit to the UPSC for consideration is final. As a result, all of Prakash Singh's hard work has undermined the efficiency of the police. As a result, DGPs are now effectively powerless and serve only as rubber-stamps for board decisions. "*In a uniformed and disciplined police force that has a direct impact on society, seniority is a significant empirical criterion. In order to avoid having to deal with a potentially contentious officer, it is possible to manipulate their tenures until they no longer meet the six-month minimum residual service requirement.*"

Prakash Singh and his attorney, Prashant Bhushan, vigorously pursued the PIL, while his joint petitioners, Common Cause, a civil society watchdog, and former IPS officer NK Singh supported him. The PIL is an excellent example of legal drafting and is taught at several law schools and universities.

We must not forget that the 2006 ruling was a welcome change from the past. It ordered the states to establish nonpartisan State Security Commissions for the independent operation of the police, as well as Establishment Boards for transfers, postings, and promotions. The directives included the establishment of Police Complaint Authorities and a distinct

[88] Ibid.

investigative arm. In a perfect world, the landmark ruling would have halted the political executive's misuse and manipulation of the police. It also mandated fixed terms for operational police chiefs to resist undue political influences and the establishment of a panel to pick the leaders of central forces.

The book demonstrates how individuals in authority manipulate the system at every turn. Initially, the petition for police changes was associated with *The Best Bakery case (National Human Rights Commission v. State of Gujarat, 2003).* When the issue was finally brought up, after a six-year delay, the petitioner's attorney argued that if police reforms had been addressed, atrocities such as the Best Bakery would not have occurred. The list of things that could have gone wrong in the absence of police reforms is endless and ominous.

Even though this judgement might have brought a limited number of reforms, the interference of politics and imbalance between the higher and lower officials and a lot of issues remains unsolved and the police system still somehow happens to remain corrupt.

Conclusion

Prakash Singh v. Union of India, is a landmark judgement in the constitution, which brought reforms in the police system but even after a lot of committees being formed there are several lacunae which still remains unresolved. In my opinion, these lacunas can be brought down if we can have inputs of public in the legislation reforms. For police to be efficient, effective, and accountable, it is crucial to have input from the community and civil society they serve. This is because communities are both the primary benefactors of and primary victims of police actions.

Therefore, it is imperative that state governments make known their intention to revise police legislation. This will make sure that the people's wants and expectations for a police force are reflected in the law. There are a number of ways to accomplish this, including: Including members of the public and civil society on committees responsible for writing legislation, seeking input from the general public on what kind of police service the public wants, seeking input from police officers on what kind of police force they would like to serve in and by making sure that any legislation proposed to state legislatures and Parliament has been released to the public.

M.NAGARAJ AND ORS. V. UNION OF INDIA AND ORS. (2006) 8 SCC 212

Dakshita Dhage*

Citation

(2006) 8 SCC 212.

Names of Parties

Petitioner: M Nagaraj;

Respondent: Union of India.

Judges

Justice Y. K. Sabharwal;

Justice K.G. Balakrishnan;

Justice S.H.Kapadia;

Justice C.K.Thakker;

Justice P.K. Balasubramanyan.

Introduction

As the expression goes, everyone is treated equally in the eyes of the law. Some sections of the public believe that everyone should be treated equally and without distinction because India is a secular and democratic country. There has always been unrest in society when people believe they are entitled to reserves because they are not treated fairly and that getting reservations will help them achieve their due status.

In the Indra Sawhney Case,[89] the Supreme Court's Constitutional Bench came to the conclusion that under Article 16(4), caste rather than economic factors might be utilized to determine whether persons belong to the backward class. According to Article 16(4), the socially and educationally disadvantaged strata were different from those in Article 15(4).[90] A class of citizens cannot be established solely on the basis of economic criteria. There shouldn't be more than 50% of reservations. The Executive Order can be used to make reservations. Investigating complaints of inclusion that are either excessive or inadequate is under the purview of the permanent statutory body.

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* Dakshita Dhage, (Batch 2021-26), Maharashtra National Law University Nagpur.

[89] Indra Sawhney Etc. v.. Union of India and Others AIR 1993 SC 477.
[90] Constitution of India.

Most people thought it wasn't necessary to weigh in on whether or not the Mandal Commission's exercise was accurate or sufficient. The only court with the power to resolve disagreements over new standards is the Supreme Court. Nagaraj's[91] critics claim that Indra Sawhney, a nine-judge bench ruling that specifically said that SCs and STs are homogeneous and cannot be divided, was inadvertently and subtly disregarded. M. Nagaraj v. Union of India is one such illustrious case in which the Supreme Court rendered its decision regarding reservations for advancement in government jobs for the Scheduled Castes and Scheduled Tribes. The quota policy is one of the constitutional mechanisms India implemented to address the issues of centuries of oppression meted out to specific castes that have led to a wide range of imbalances.

In view of the modifications made possible by Article 368, the case is relevant. The Framers believed that Article 368 struck a delicate balance between rigidity and flexibility, allowing them to stay safely away from the issues that existed in stiff and flexible arrangements in the amendment. The constitution's structures vary in rigidity and flexibility depending on their significance and nature. anytime the necessity to adapt the Constitution to the evolving socio-economic and political landscape is being discussed.

Facts

- The petitioner in the aforementioned case filed a complaint and used Article 32 of the Indian Constitution to request the issuance of a writ of certiorari, which included a declaration that Article 16(4A) of the Indian Constitution was unconstitutional and violated its fundamental principles.

- The petitioners contend that using the modification power conferred by the violated amendment, the same legislator has violated the fundamental tenets of the constitution by acting as both a legislative body and a judge, overturning judgments rendered by this court. Therefore, the aforementioned change is unconstitutional[92] and will probably be undone.

- The right to equality, which is a key tenet of the Constitution, is also allegedly one of the amendment's other goals, according to petitioners. According to the petitioners, "equality" in the sense of Article 16(1) refers to "rapid promotion" rather than "consequential seniority."

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[91] M. Nagaraj & Others v. Union of India 2006 8 SCC 212.
[92] www.scconline.com.

- The petitioners argue that under Article 16(4), reserving for members of the impoverished classes is only authorized during initial recruitment and not during promotion, contrary to what this Court decided in the instance of Indra Sawhney.
- The 1995 constitution, according to petitioners, was passed in violation of the court's injunction. Article 16 of the aforementioned amendments, restored the carriage exception (4A).
- The petitioners contend that it would be terrible to grant accelerated seniority to promotions achieved with roster points. By the time he is 45 years old, a graduate stream roster-point promotion will have advanced him to the fourth level.
- He would achieve his goal at the age of 49 and remain there for nine years. While the general merit promotion would complete the third level of six at the age of 56 and be out of employment by the time, he was qualified for the fourth level, the general merit promotion would not.
- The petitioners claim that because the 85th Amendment is in question and allows for seniority-based reservations in promotions, officers from reserved categories will face unfair treatment in higher-level positions.

Issues

1. Does it hold true that the decisions made in reaction to the Supreme Court's ruling on promotions were implemented retroactively?
2. Are equity and equality a part of the fundamental qualities, underlying framework, or both of the constitution?
3. How much have the disputed constitutional amendments increased the power of the legislature, if at all, to the point where all constitutional restraints have been lifted?

Judgment

The Bench determined that the contested constitutional amendments incorporated Articles 16(4A) and 16(4B) while removing Articles 16(4A) and 16(4B) from Article 16(4). They make no changes to the format of Article 16(4) in any way. In line with Article 335, they uphold the guiding principles or essential aspects of backwardness and inadequacy of participation that allow governments to offer reservations while taking into account the overall efficacy of governmental administration. The disputed amendments only apply to SCs

and STs. The 50 percent limit, the concept of the "creamy layer," the subclassification of OBCs and SCs/STs as decided in the Indra Sawhney case, and the idea of a post-based roster with an implicit notion of the substitute as decided in the R.K. Sabharwal case[93] are all still legal requirements under the constitution, demonstrating that the Article 16 system of equal opportunity will not function without the 50% threshold, the creamy layer hypothesis, and the arguments of backwardness, inadequate representation, and overall administrative effectiveness.

The Court came to the judgment that before enacting a provision for reservation, the concerned State must demonstrate the existence of compelling factors, such as backwardness, lack of participation, and overall administrative efficacy, in each case. The challenging part is only an enabling provision, according to the Hon'ble Bench, and the government is not required to apply reservations for SC/ST in promotions. But if the State decides to use its discretion and establish such a provision, it must also abide by Article 335 and compile quantitative proof of the class's deprivation and under-representation in the workforce. The Bench determined that even though the State has a strong legal basis for its reservation regulations, as described above, it must be careful to prevent excess, remove the creamy layer, or extend the reservation indefinitely.

The state must demonstrate the underdevelopment of the group receiving benefits from the reservation, the lack of adequate representation in the position for which the reservation in promotions is to be granted, and how the reservation in promotions will improve administrative effectiveness, according to a report. The Court maintained the contested constitutional amendment's legality. The acknowledged court claims that social justice is concerned with how rights and obligations are distributed. Where rights, needs, and means converge is where distribution should take place. These three needs could be classed as either "proportional equality" or "formal equality," where formal equality means that everyone is treated equally under the law.

Analysis

In M. Nagaraj v. Union of India, a five-judge Supreme Court panel confirmed the legality of Articles 16(4A) and 16(4B). However, there are numerous legal problems with the justifications used to uphold the Articles' legitimacy. In this instance, the reason for the reservation was based on weighing the interests of applicants in the general category against

[93] R. K. Sabharwal and Ors. v. State of Punjab and Ors. 1995 AIR 1371, 1995 SCC (2) 745.

those of candidates in the reserved group. There is no mention of balancing in any of the Constitution's Article 15 or Article 16 clauses.

By advancing such a claim, the focus of reservation is shifted away from socioeconomic discrimination, the problem that Article 16 was intended to solve. Instead, the attention shifts to public employment, which, according to the judgment, must be dispersed among general and reserved candidates while maintaining balance. For the first time, the Court connected the concepts of equity, justice, and merit in M. Nagaraj. For the first time, the Court stated that these principles are applied in the form of "quantifiable facts in each case" in public employment. When interpreting Article 16(4), the equality of the facts as opposed to the equality of the law is given priority.

The Court also determined that Article 16(4) is an enabling clause as opposed to Article 16 and operates in completely different domains. The State government acts in compliance with Article 16 due to the Scheduled Castes and Scheduled Tribes' under-representation and social backwardness. The Court acknowledged that while the State government's ability to enact reservation policies is constitutionally valid, the State government's use of that power in a particular circumstance can be arbitrary and must therefore be assessed on a case-by-case basis in order to distinguish between the rule of law and the rule of facts. As a result, the Court understood Article 16(4) to be a question of factual equality.

In M. Nagaraj, the Court applied Article 335 to its interpretation of Article 16(4) of the Constitution. This opinion held by the Court is incorrect, especially in light of Article 320(4) of the Constitution. As a result, it is possible to argue that Article 320(4) of the Constitution makes a distinction between the application of Article 16(4) and Article 335 and forbids the Public Service Commission from interfering in either situation. When it is essential for one provision to be limited by or read into the reach of another provision, the Constitution clearly provides for this to happen. That clause controls how Clauses 3, 4, 4-A, 4-B, and 5 of Article 16 are implemented. For the purpose of establishing their scope, none of these clauses make reference to Article 335. Since the Constitution's framers did not express a desire for this limitation to be made, Article 335's restriction of Article 16 is a strong restraint on the former.

Additionally, the court emphasized the Statement of Objects and Reasons of the Constitution (Seventy-Seventh Amendment) Act, 1995 in upholding the legality of Article 16(4A). According to the Statement, it is essential to keep giving Scheduled Castes and Scheduled Tribes reservations because their representation in public services has not reached the

intended level. The Court asserted that Clause (4A) follows the same precise pattern as Article 16's Clauses (3) and (4), which are predicated on the State's perception of inadequate representation. The Court ruled that insufficient representation must be proven with quantitative evidence in each case involving promotion. In this way, the M. Nagaraj ruling established equality of fact as a standard for judging whether or not reservations are lawful. Equality before the law and equal protection under the law is guaranteed by Article 14 of the constitution.

The equality of fact did not have much significance prior to M. Nagaraj. M. Nagaraj established Article 335 as another important criterion for the application of reservations. Three significant patterns were established by the M. Nagaraj judgment in establishing[94] the legitimacy of SC and ST promotion reservations. First, it stipulated that the issue of equity in promotion is one fact, to be resolved on a case-by-case basis.

Second, the Court missed the fact that Indra Sawhney had only permitted the sub-classification of OBCs into the creamy layer and not in any other way, even though it had implied the validity of both Articles 16(4A) and 16(4B). For SCs and STs, this classification was forbidden. The M. Nagaraj judgment aimed to establish Article 16(4A) as an enabling provision that is dependent on real equality. According to this proposal, the State has the right to judge whether reservation programs are necessary to execute. As a result, the State may determine who is eligible to use these programs.

However, the Supreme Court upheld the Court's authority to decide on reservation policies under Article 16 of the Constitution in the same ruling. M. Nagaraj, therefore, adheres to both beliefs, which are in conflict. The application of Article 16 was significantly hampered by these discrepancies (4-A). It might be claimed that the failure to apply Articles 16(4A) and 16 is not solely the responsibility of the courts. The lengthy obiter produced in the cases under discussion exemplifies the style of judicial review that was applied to the subject matter.

Along with the legislative and judicial branch's hostile and paranoid reactions to one another's rulings, this has contributed to Article 16(4A) becoming a toothless provision. According to some, the stringent scrutiny principle was covertly inserted by the Supreme Court[95] after M. Nagaraj. The Court has since applied this theory to factually decide equality. As a result, the State's regulations relating to promotions have been overturned. Since the

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[94] www.lawyerservices.in.
[95] www.legitquest.com.

State now could foresee the unavoidable consequences of reserve policies if challenged in court, the dubious States were prompted to forego data collecting and, as a result, to establish reservation-related schemes.

Conclusion

The founders of the Constitution wanted to utilize it to bring about a socio-economic revolution in a free India, therefore they designed it to be an instrument for social change. In an effort to provide security for the tiller of the soil and promote equality of status and opportunity to all parts of the rural population, numerous laws enacted in several States involving land reforms have led to a significant number of litigations. The Supreme Court supported the Parliament's decision to broaden reservations for SCs and STs to include promotional offers with three riders in this case. The conclusion of this case, in my opinion, will have a significant influence on how the less fortunate elements of society evolve.

The rules that have been implemented to enable reservations in promotions, even though it will only be a temporary process, will surely encourage SCs or STs to participate in work more productively. Because it required the state to take into account the SCs and STs' underdevelopment in the framework of promotion quotas, it quickly raised concerns that it failed to acknowledge that the SCs and STs have continued to face discrimination for millennia. Even though some of them do not meet the requirements for efficiency, insufficient presence in services, or backwardness, much alone their non-membership in the creamy layer group within the SCs and STs. In the 4th, 39th, 40th, 42nd, and 76th amendments, where the Parliament attempted to abuse and misuse its power by inserting some contentious laws into the Schedule and weakening the Constitution's text to show its supremacy, the power of Parliament to enact numerous amendments to the Constitution with regard to the Ninth Schedule was justiciable.

I R COELHO V. STATE OF TAMIL NADU AIR 2007 SC 861

Shree S. Shingade*

Citation

SCC Online SC 71;

1 KLT 623;

AIR 2007 SC 861.

Names of Parties

Appellant: I.R. Coleho (Dead) By Legal Heirs;

Respondent: State of Tamil Nadu.

Judges

Justice Y.K. Sabharwal (CJ) (Assenting);

Justice Ashok Bhan (Assenting);

Justice Dr. Arijit Pasayat (Dissenting);

Justice B.P. Singh (Assenting);

Justice S.H. Kapadia (Assenting);

Justice C.K. Thakker (Assenting);

Justice P.K. Balasubramanyan (Dissenting);

Justice Altamas Kabir (Assenting);

Justice D.K. Jian (Assenting).

Introduction

After the Supreme Court invalidated the Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act 1969, in *Balmadies Plantations Ltd. & Anr. v. State of Tamil Nadu, 1972,* a five-judge constitutional panel was given this case in 1999. The Act was included in the Ninth Schedule of the Constitution by the *Thirty-fourth Amendment Act,* which was passed in 1974. Due to its arbitrary nature, the Calcutta High Court annulled *Section 2(c)* of the *West Bengal Land Holding Revenue Act 1979.* The 66th Amendment Act, passed in *1990,* also included this Act to the Ninth Schedule. The bench of five judges heard a case concerning these amendments.

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When the Constitution (First Amendment) Act of 1951 inserted Article 31-B with 13 articles in the Ninth Schedule, it was a one-time measure and it was legal as a one-time measure:

i. It's crucial to compare and contrast Article 31-A's marginal notes (*Saving of Laws Providing for Acquisition of Estates, etc.)* with Article 31-B's marginal notes (Validation of Certain Acts and Regulations).

ii. *Article 31-B* was not meant to be a general saving of legislation that was going to be written in the future, as evidenced by the use of the phrase *"none of the Acts and Regulations Specified in the Ninth Schedule" rather than "none of the Acts and Regulations Specified and to be Specified in the Ninth Schedule". Sankari Prasad* decided to emphasize this in 1952.

iii. The declaration and any of its contents that apply to the Acts and regulations listed in the Ninth Schedule *"will be regarded to be void or ever to have become void"* due to significant historical events described in the *Sajjan Singh from 1965 judgement.*

The Supreme Court's *1981* ruling in *Waman Rao & Ors v. Indian Union and Others* was cited by the constitutional bench. On *April 24th of 1973,* the day the *Keshvananda Bharati* case judgement was delivered, it was also decided that laws added to the Ninth Schedule through amendments may be challenged on the grounds that they contradict the essential structure. The guiding principles of *Articles 14, 19, and 21* serve as an example of this. As a result, a larger bench of nine judges was assigned to the *Waman Rao case* to examine the verdict and determine the Supreme Court's final attitude.

As a result of the majority ruling in *Kesavananda Bharati that Article 368* does not allow Parliament to alter the fundamental structure or framework of the Constitution, there was no longer any justification for adding to the *Ninth Schedule* in order to provide a broad protection to the laws included therein, and the mechanism of making what was void by a deeming 9 fiction ***Article 31-B*** was itself in violation of one of the most fundamental features of the Constitution *(viz. the High Courts under Article 226 and the Supreme Court under Article 32).*

Legacy left behind by Kesavananda Bharti

Since Kesavananda Bharati in 1973, it is not legal to claim as Justice Patanjali Sastri did in Sankari Prasad that a constitutional amendment is necessary to make a statute that violates the Constitution legitimately valid.

The Waman Rao, Waman b Rao v. Union of India Supreme Court order from *May 9th of 1980* stated that the various constitutional amendments that added to the Ninth Schedule on or after *April 24th of 1973* were subject to challenge on the grounds that they, or any one or more of them, are outside of Parliament's constituent power because they change the fundamental a key component of the Constitution's structure. The clauses in the chapter on fundamental rights, with the exception of those relating to property rights in *Articles 19(1)(f) and 31,* did not meet the criterion of "basic or essential portions" of the Constitution.

Although they wouldn't be restricted to that section alone, the essential or prerequisite elements of the Constitution would in reality have to contain Part III.

Functional Deficit

In the *1975 Indira Gandhi Election case*, which was heard by *Khanna, J.,* the provisions of the Thirty-ninth Amendment Act of 1975 were put through the *"basic structural test."* He soon realized that his own somewhat ambiguous language in Kesavananda Bharati had contributed to the perception that the fund did not cover fundamental rights, and that they were not *"essential or necessary aspects of the Constitution."* (Himself a member of that Bench) had made it plain that he did not mean to imply that other fundamental rights were not included in the essential framework, only that property rights were never a part of it.

If it were determined that something other than what is stated in the fundamental rights chapter must be established in order for ***constitutional validity*** of constitutional amendments placing ordinary laws in the *Ninth Schedule (post-April 1973)* to be established, this would significantly increase legal uncertainty, almost like the *"Chancellor's foot,"* and it would lead to spiraling litigation. Respectfully, it is suggested that the *"basic framework"* criteria should consider the rule of law, the separation of powers, secularism, and federalism in addition to other fundamental rights.

It is respectfully contended that doing so would not in any way prohibit Parliament from passing constitutional modifications that are both effective and legal. Acts added to the Ninth Schedule after April 1973 might still be challenged on the grounds that they violated fundamental rights. This point is amply illustrated by the Minerva Mills and Waman Rad decision. For instance, in Minerva Mills, the Court categorically rejected applying *Article 31(C)* to the entire field of directive principles (1980).

Facts

The Gudalur Janmann Estates (Abolition and Conversion into Ryotwari), Act 1969 was deemed invalid by the court in Balmadies Plantations Ltd and Anr because it invested forest tracts in the State of Tamil Nadu in the Janman estates. Agrarian reform strategies covered by Article 31-A of the Constitution did not apply to this method, it was determined. v. State of Tamil Nadu. The Calcutta High Court ordered Section 2(c) of the West Bengal Land Holding Revenue Act 1979, to be unlawful because it was arbitrary and hence unconstitutional. The State of West Bengal's request for special leave to appeal the ruling was also denied.

The Constitution *(Thirty-fourth 34th Amendment) Act*, the *Constitution (Sixty-sixth 66th Amendment) Act*, and the *West Bengal Land Holding Revenue Act* are to blame. The Ninth Schedule now includes the complete year 1979. A bench of five judges heard a challenge to these insertions. It is supported by two things: Because judicial review is a key component of the Constitution, adding an Act or a portion of an Act to the Ninth Schedule would interfere with or undermine the Constitution's basic structure. *In Waman Rao and v. Union of India,* the Constitution Bench made that determination. On the grounds that they, or a combination of them, exceed the constitutive authority of Parliament because they change the fundamental principles or framework of the Constitution, any amendment to the Constitution made on or after *April 24th, 1973*, as well as the inclusion of various Acts and regulations therein, are subject to challenge. However, decisions in *Minerva Mills Ltd. v. Union of India followed.*

Another instance is *Maharao Sahib Shri Bhim Singhji v. Union of India, i*t was mentioned that the *Waman Rao* decision needs to be reviewed by a larger Bench and that it is unclear whether the Ninth Schedule can contain any acts, rules, or regulations that are found to violate ***Articles 14, 19, and 31,*** or whether only constitutional amendments that amend the Ninth Schedule can be declared invalid that harm or destroy the Constitution's basic framework.

This judgement by a nine-judge panel led by *Chief Justice Sabharwal* was based in part on the Kesavananda Bharti case, popularly known as the Ninth Schedule Case. It backed up the validity of the doctrine of fundamental structure. The Court also upheld the judiciary's ability to review any statute that, in its opinion, may in any way compromise the core tenets of the Constitution. The ongoing discussion regarding the applicability and application of the basic structural idea was effectively ended by this decision.

In *Balmadies Plantations Ltd. & Anr. v. Tamil Nadu State,* the Supreme Court issued a decision. It was unconstitutional to enact the *Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act in 1969.* It was discussed collectively in the operational state by a Constitution Bench of five judges in *1999.*

Issues

This has to be made clear that there were multiple layers of issues in the case, which were all together not but in fact solved in the stages of the case. Some of the issues where the question of law was discussed and yet some issues were decided in the functional deficit of the things. The Indian Constitution is a living, biological document. The framers of the Constitution were fully aware that changes in the times and societal demands would require amendments to the document. The legislature was given the authority to change the Constitution. India must be liberated from the zamindari system. In 1951, when the Ninth Schedule was added to the Constitution, the First Amendment was ratified. A list of federal and state legislation that are immune from judicial review is included in it.

The Ninth Schedule contains a detailed explanation of *Article 31-B* of the Indian Constitution. It used to only have 13 laws that dealt with land reforms, but now there are 284 laws that include topics including mines, trade, and reservations. In India, governments started utilizing the technology as a garbage can to enact land reforms. a constitutional trash can with endless capacity.

i. As a result of the Kesavananda Bharati ruling, the Court's principal inquiry was whether it was proper for the Parliament to add laws to the Ninth Schedule, exempting them from judicial review in conformity with the basic structural principle.

ii. It is significant to note that ever since the Ninth Schedule was introduced, different agrarian reform-related pieces of legislation have been included in it. Even though the majority of these laws had nothing to do with agrarian or socio-economic reforms, more laws were arbitrarily and randomly put to the Ninth Schedule over time in an effort to conceal them from judicial examination.

iii. It was abundantly plain that the legislature was attempting to avoid not only the restrictions imposed by the fundamental structure concept but also the judicial examination of legislation that was obviously outside the bounds of the Constitution by using the Ninth Schedule as a cover.

In hand the functional of the issues which were discussed in the respective case, it has to combined in particular views of the thing in all in one:

i. If statutes under the Ninth Schedule should be exempt from judicial review in light of the Keshvananda Bharati judgement, noting that it breaches the fundamental structure, that was the central question before the Apex Court.

ii. The Ninth Schedule of the Constitution was designed to bring about legislative improvements in the agrarian sector, but over time, lawmakers started to utilize it as a way to evade judicial review. The Ninth Schedule offers how much legal immunity?

Judgement

Justices Ashok Bhan, Arijit Pasayat, B.P. Singh, S.H. Kapadia, C.K. Thakker, P.K. Balasubramanyan, Altamas Kabir, and D.K Jain (JJ*.).* were also on the bench in addition to Justice Y.K. Sabharwal. Jain. Later, the Court decided that it is the responsibility of the judiciary to protect citizens' fundamental rights. It was also brought up that Article 368 does not refer to the legislature as the first Constituent Assembly. ***Article 368*** has a restriction that has to do with fundamental structure. The core framework could not be damaged or changed by any changes. Any law that goes against the core tenets of the Indian Constitution cannot be justified legally. The Court continued by emphasizing that Article 31-B was intended to facilitate legislative advances rather than serve as a defense against laws that violated people's rights and obviated the need for judicial review.

i. The Indian Constitution's fundamental structure serves as its core foundation. Any legislative change that is determined to be in violation of Part 3 of the *Indian Constitution even though it is contained in the Ninth Schedule will be overturned by the Courts.*

ii. Every constitutional amendment that is being considered must be judged on its own merits. When deciding if a law is harming or obliterating the fundamental structure, one should take into account the "effect and influence" criteria. According to the "Effect and Impact Test," the effect of the amendment on the entire Constitution, not just the part that is being modified, will be the decisive factor.

iii. *Article 21* outlines the fundamental principles of the Constitution, which must be preserved by all constitutional modifications passed after *April 24th of 1973,* when read in connection with *Articles 14 and 19.*

iv. As a component of the essential structure, no statute may be shielded from judicial review. The legitimacy of the Ninth Schedule has already been confirmed by this court;

hence it will not be challenged in accordance with the guidelines outlined in the decision. A statute that was added to the Ninth Schedule after April 24, 1973 that contradicts Article 21 read with Article 19 and Article 14, as well as the guiding principles thereunder, may be questioned.

According to the court, the legislature could not avoid being examined under the basic structural concept. Because it is a cornerstone of the Indian Constitution, no act, rule, or regulation that violates its essential tenets can be permitted in this way. The Court may strike down any laws in the 9th schedule that clash with Part III. Thus, the court has the authority to review Schedule 9 as of *April 24th of 1973.*

Detractors of the judiciary claim that it is only aiming to limit the legislative branch's authority enact laws including the Policies for citizens. Every time a new theory or doctrine is proposed, it not only makes the job of the legislator more difficult but also increases the level of ambiguity and uncertainty already existent in the fundamental structural doctrine. The judiciary has never provided a detailed breakdown of the structure's essential components or a comprehensive inventory of all it truly consists of. Justice Mathew declared in the Indira Gandhi case that the Constitution, with some exceptions, case that *"the concept of basic structure as a brooding omnipresence in the sky is too imprecise and undefined to offer a benchmark for the legitimacy of an ordinary statute"* in 1975.

Analysis

IR Coelho v. State of Tamil Nadu is one of the Indian Supreme Court's most important decisions to date *(2007).* It defended the necessity of judicial review and the court's jurisdiction in this case. The case, also known as the *9th Schedule Case*, was a lengthy discussion of ***Article 31-B of the Indian Constitution.*** The legislature's attempt to prevent judicial scrutiny of laws that violate fundamental rights was failed as a result of this action. The *1973's case Kesavananda Bharati v. State of Kerala was cited as a precedent.* The judiciary's role as the last arbitrator of legal interpretation was then restored.

9th Schedule Laws Not Beyond Judicial Review

In a landmark decision in *I.R. Coelho (dead) by LR v. State of Tamil Nadu,* a 9-judge Constitution Bench led by *Chief Justice Y. K. Sabharwal* held that any laws added to the Ninth Schedule after *April 24th of 1973,* when Keshvananda Bharati's decision was handed down, will be subject to challenge. The bench also included *Ashok Bhan, Arijit Pasayat, B.P. Singh, S (JJ.).* The Court ruled that even if an Act is added to the Constitution's Ninth

Schedule, its provisions could still be challenged on the grounds that they undermine or destroy its core component if the fundamental rights pertaining to it are removed or repealed. The Ninth Schedule was introduced through *Article 31 (b)* by the First Constitution (Amendment) Act, 1951.

The Ninth Schedule was developed to stop the Court from invalidating state-level land reform legislation. Later on, it was broadened to cover all laws, such as those governing elections, mines and minerals, labor relations, property requisition, monopolies, nationalization of the coal or copper industries, general insurance, sick industries, acquiring the *Altcock Ashdown Company, the Kerala Chilies Act, Tamil Nadu* reservations of ***69%,*** and many others.

Supreme Court Intervention

No principle underlies this selection, the addition of the Tamil Nadu Act was made possible by the Supreme Court's ruling in the Mandal case, which indicated that the overall amount of reservation could not exceed 50%. The petitioners in the current case questioned the legality of many Central and State laws included in the Ninth Schedule, including the Tamil Nadu Reservation Act. However, if a law is found to violate fundamental rights included in the Ninth Schedule after the date of the judgement in the *Keshavananda Bharati case,* such a violation will be subject to further challenge on the grounds that it undermines or damages the fundamental structure. The court stated that since the Apex Court had upheld the legality of any *Ninth Schedule law, it would not be subject to further challenge in law mentioned in the Constitution of India.*

The Supreme Court's judgment in L.R. Coelho case has rightly taken the concerted efforts of the Centre and State political class trying to thwart (destroy) the very edifice of our Constitution to increase their vote banks. The framers of the Constitution had never dreamt of such a provision which would totally ban the judicial review of such a vast mass of legislation destroying the basic feature of the Constitution by making the fundamental rights of citizens a nullity. "To distrust the judiciary marks the beginning of the end of society" Justice *Krishna Iyer* said in a judgment in *1981 (4) SCC 387, quoting a leading western scholar.*

Differences In the Systematics

The Court in *I.R. Coelho v. State of Tamil Nadu,* presided over by *Chief Justice Y.K. Sabharwal, and consisting of Justices Ashok Bhan, Arijit Pasayat, B.P. Singh, S.H. Kapadia,*

C.P. Thakkar, P.K. Balasubramanyan, Altmas Kabir, and D.K. Jain, held that any laws added to the Ninth Schedule after April 24th of 1974 The Court ruled that even if an Act is added to the Ninth Schedule as a result of a Constitutional amendment, its provisions might still be challenged on the grounds that they impair or destroy the Constitution's core characteristic if the corresponding fundamental rights are removed or repealed.

The Ninth Schedule was added to the Constitution by *Article 31(B)* of the *First Constitutional (Amendment) Act of 1951.*In order to stop the Court from invalidating state-enacted land reform laws, the Ninth Schedule was developed. Later, it changed into an omnibus that contained all legislation pertaining to elections. the nationalization of the coal or copper industries, labor relations, property confiscation, monopolies, general insurance, and ill industries acquiring the Altcock Ashdown Company. Put Kerala Chilies to use, other measures were included in addition to the 69% reservation for Tamil Nadu. ***This decision was not inspired by any particular principle. Currently, 284 Acts have been added to it.***

The Tamil Nadu Act was incorporated as a result of the *Supreme Court's Mandal case ruling,* which stated that the total percentage of reservations may not be *higher than 50%.* The situation at hand. One of the Central and State laws listed in the Ninth Schedule that was questioned by *MPs was the Tamil Nadu Reservation Act.* After the Keshawanand Bharti case verdict, however, if a statute is determined to infringe one of the fundamental rights listed in the Ninth Schedule, the violation may be challenged on the grounds that it weakens or harms the Constitution's core principles. The Court declared that the Apex Court had upheld the legality of all **Ninth Schedule laws, hence they would no longer be subject to further dispute.**

Conclusion

In a system of constitutional law that is always evolving and necessitates new adjustments, the decision has strengthened the fundamental structural theory even more. It was emphasized once more how important judicial review is as a potent tool for protecting people's rights. The ninth schedule was initially just meant to bring about land reforms, but it quickly became a tool in the hands of the legislature, which took advantage of its position of power, and it lost its original intent. The judiciary made it quite clear through this case that anything that goes against the fundamental principles will be overturned. Removing the shield that emphasized the idea of fundamental structure.

Rather from the begging the Government of India, whether it's any particular party tries to take over some of the functions of Judiciary or the Executive from there hand, or would like to make some of the statues or laws to put in kind of retractation which should not be disturbed by the virtue of Judicial Review which some time will also violate the Fundamental Rights of the citizen, rather disturbing the Basic Structure of the Indian Constitution which needs to be followed-studied and Stopped from being in state of Monopoly.

Though the case of *I.R. Coelho v. State of Tamil Nadu,* it was decided by the Supreme Court of the Country that the Ninth Schedule does comes under the amt of the Judicial Review. If any law made by the Union or the State, if it violates the Basic Structure of the Constitution will be held Void Ab Initio with in the Ambit of the Constitution of India.

LILY THOMAS V. UNION OF INDIA (2013) 7 SCC 653

Kirti Bajaj*

Citation

(2013) 7 SCC 653

Names of Parties

Petitioner: Lily Thomas

Respondent: Union of India

Judges

Justice A.K. Patnaik;

Justice S.J. Mukhopadhaya.

Introduction

One of the important foundations of a democracy is opportunity given to the citizens to represent the larger Section of the country. This right is subject to certain limitations as stated under the Constitution of India and the Representation of People Act 1951. However, the representatives are often seen abusing the rights and privileges awarded to them through law. According to the Association for Democratic Reforms' (ADR) 2021 study, which was based on an examination of 2495 candidate affidavits, 363 Members of Parliament and Members of the Legislative Assembly have criminal proceedings pending against them.[96] The analysis presents an important issue to the forefront as sitting Members of the Parliament and State Legislatures continued their tenure even after having convictions against them. Further concerns are raised by the fact that the average pending age of criminal cases against MPs being seven years and against MLAs being six years.

Facts

Petitions concerning the disqualification of sitting Members of Parliament and Members of State Legislatures through Public Interest Litigations (PIL) by Basant Kumar Chaudhary in 2004 and Lily Thomas and Lok Prahari in 2005. These petitions challenged the validity of Section 8(4) of the Representation of People Act 1951 (The Act) as claiming it to be ultra

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[96] Association of Democratic Reforms, "Analysis of MPs, MLAs and Ministers against whom charges have been framed by the court for offences falling under Section 8 (1) (2) & (3) of the Representation of People Act 1951", Press Release, 2021, p.3.
[adrindia.org/content/363-mps-mlas-have-criminal-charges-framed-against-them-courts-adr-report#:~:text=Over%20350%20MPs%20and%20MLAs%20out%20of%20nearly,ten%20years%20ago%2C%20a%20new%20study%20has%20said.]

vires of the Constitution. Article 102 and Article 191 discusses the provisions for disqualification of membership from the Parliament or Legislative Assembly or Legislative Council of a State respectively. The Articles are provided herewith:

"102. Disqualifications for membership. — (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

[(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;]

(b) if he is of unsound mind and stands so declared by a competent Court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

(2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule."

"191. Disqualifications for membership. — (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State — (a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

(2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule."

Section 8 deals with the disqualification of representatives upon the conviction for certain offences. Sub-clauses (1), (2) & (3) list the various offences under different statutes,

conviction under which would lead to disqualification of the member and in case of imprisonment disqualification would continue for further six years and Sub-clause (4) amended through the Amendment Act of 2003 gives immunity to sitting members of the Union and State Legislature from immediate effect of disqualification based on conviction of offences stated in the previous sub-clauses. The Section is as follows:

8. Disqualification on conviction for certain offences. —

(4) Notwithstanding anything 8 in sub-Section (1), sub-Section (2) or sub-Section (3) a disqualification under either sub-Section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Through the PIL, the petitioners question the legitimate power or authority of the Parliament to include sub-clause 4 and the validity of such provision.

Issues

1. Whether the Parliament is conferred with the authority or power to enact Section 8(4) in the Act?
2. Whether the provisions of Section 8(4) violate the principles provided in Article 14 of the Constitution?
3. In case Section 8(4) is considered invalid, what are the implications on pending proceeding under Section 8(4)?

Judgement

Contentions of the petitioners:

- Firstly, one of the important contentions of the petitioners was based on the reading of constitutional provisions for disqualification of Members of Parliament or State Legislatures under Article 102 and Article 191 respectively. The petitioners submitted that Sub-clause (1) of Article 102 and Article 191, "*A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament*", clearly states the same disqualifications for a person being chosen as a Member of the Legislature or for a person already being a Member of the Legislature. Hence, Section 8(4) cannot provide for a different disqualification procedure for sitting members. In support of this contention reliance was laid upon the judgment of the Constitution Bench in the case of

Election Commission v. Saka Venkata Rao[97], which held that Article 191 lays down the same set of disqualifications for to-be-elected and sitting members. Therefore, based on these submissions Section 8(4) contradicts the provisions in Article 102 and Article 191.

- Secondly, reference was made to the Constituent Assembly debates on Article 83 of the Draft Constitution which corresponds to Article 102 of the present Constitution. An amendment was moved by one of the members of the Constituent Assembly to provide a separate disqualification procedure for persons who upon conviction were already Members of the Union or State Legislatures.[98] However, this amendment was not accepted by the Constituent Assembly, instead the provision under Article 102(1)(e) was adopted which authorises the Parliament to make relevant laws on the subject. The petitioners presented an argument that despite the fact that a different disqualification procedure for sitting members was not accepted by the Constituent Assembly, Parliament enacted a similar provision under Section 8(4) of the Act.
- Thirdly, it was asserted that there is no provision under Article 102 or Article 191 which confers the Parliament with the power or authority to protect sitting Members of Parliament of Members of the State Legislatures from disqualification. Hence, it was submitted that Parliament has no legislative power to enact Sub-clause (4) of Section 8 and therefore the same is ultra vires of the Constitution.
- Next, the petitioners rebut the legal basis for Section 8(4) which is based on the judgment of Manni Lal v. Parmai Lal[99], which provided that when a conviction is set aside the acquittal takes place retrospectively, i.e., from the date they were recorded. This judgment is countered by the judgment of B.R. Kapur v. State of Tamil Nadu[100], which reversed the order in Manni Lal by reasoning that the conviction and sentence operate in complete rigour until set aside, hence any disqualification attached to such conviction would also operate in full rigour. The petitioners further submitted that this view accepted in the case of K. Prabhakaran v. P. Jayarajan[101]. Therefore, based on the presented reasoning the petitioners argued that a person convicted under Section 8(1), (2) & (3) immediately becomes disqualified from continuing as a Member of Legislature irrespective of whether an appeal is filed or not.

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[97] Election Commission v. Saka Venkata Rao AIR 1953 SC 210.
[98] Amendment No.1590 moved on 19-05-1949.
[99] (1970) 2 SCC 462.
[100] (2001) 7 SCC 231.
[101] (2005) 1 SCC 754.

- Additionally, the petitioners submitted that even if a sitting Member of Parliament or State Legislatures is aggrieved by the disqualification, he has the remedy to move to the appellate Court for obtaining the stay over the order of conviction. Supporting this contention, the decision in the case of Navjot Singh Sidhu v. State of Punjab[102] was cited. While deciding the case, the Supreme Court held that the appellate Court has been conferred with powers under Section 389(1) of the Code of Criminal Procedure, 1973 (CrPC) to suspend the operation of an order, which includes conviction as well. Therefore, the petitioners raised the argument that the appellate Court can appropriately use its power to suspend orders of conviction if found wrong. However, providing a blanket-protection as provided under Section 8(4) is invalid.
- Further, it was contended that the validity of Section 8(4) was not upheld in the case of K. Prabhakaran, as the validity of Section 8(4) was not discussed in the case. The petitioners provided that only a reference was made by the Court and the opinion of the Court in the case was obiter dicta, not a binding ratio on the issue of validity of the provision in question through the present PIL.
- Lastly, it was submitted that the classification made by Section 8(4) between persons to be elected as Members of Parliament or State Legislatures and the persons who are sitting Members of the Parliament or State Legislature is violative of Article 14 and arbitrary. Upon conviction under Section 8(1), (2) & (3) no person whether sitting member or to be elected Member of the Parliament or State Legislatures should enjoy the special privilege.

Contentions of the respondents:

- One of the foremost contentions raised by the respondents was the decision in the case of K. Prabhakaran v. P. Jayarajan[103]. It was submitted that the validity of Section 8(4) was already discussed and upheld in the case of K. Prabhakaran, where it was provided that the purpose of enacting sub-clause (4) of Section 8 was not to confer privileges on the sitting Members of Parliament or State Legislatures but to protect the government and the legislative body. The respondents highlighted the two major consequences of disqualification from membership of sitting members which was discussed in the case as well. First, the strength of the membership of the house and the political party reduces. In particular cases, such disqualification can cause the government to lose majority in the house leading to serious effects on the functioning of the government. Second, the by-election conducted for filling the vacancy post disqualification can lead to complications

[102] (2007) 2 SCC 574.
[103] Supra at n.6.

if the convicted member is acquitted by the Court. The respondents argued that in order avoid such complexities the provision of Section 8(4) was necessary. The respondents also emphasised on the nature of Indian Judicial System where acquittals in High Court are very common and hence Section 8(4) helps in protecting the seat of a person who becomes the Member of Union or State Legislatures.

- Next, discussing the power of Parliament to legislate the matter, the respondents submitted that the source of legislative power to enact Section 8(4) is gained from Article 102(1)(e) and Article 191(1)(e). Also, reliance was also laid on the Article 246(1) read with Schedule VII List I Entry 97 and Article 248 of the Constitution which confers the Parliament with powers to legislative over residuary matters, i.e., matters not included in the State or Concurrent List.
- Further, it was contended that Section 8(4) provides the same disqualifications as laid down in Sub-clause (1) (2) & (3) of Section 8 irrespective of whether the person is to be elected or sitting Member of Parliament or State Legislatures. The only difference being that for sitting Members of Parliament or State Legislatures the effect of disqualification takes place after the revision or appeal filed against the conviction is decided.
- The respondents referred to Article 101 (3) (a) and Article 191 (3) (a) which provides that a member may only vacate seat of the legislature once he is disqualified with respect to the provisions laid down in Article 102(1) and Article 191(1) respectively. Consequently, since Article 102(1)(e) and Article 191(1)(e) provides the Parliament with the power to decide when disqualification would take effect, therefore a combined reading of the given provisions provides that a member may vacate seat only once his revision or appeal is rejected by the appellate Court and a decision confirming the disqualification of the member is taken by the President or Governor as the case maybe, in accordance with procedure provided under Article 103 and Article 192 of the Constitution.
- Lastly, the respondents rejected the remedy provided by petitioners to approach the appellate Court under Section 389 of CrPC by presenting the argument that the appellate Court does not has the power to stay disqualification which would take effect from date of conviction. Therefore, Section 8(4) is a necessary provision.

Reasoning of the Court and decision:

- Discussing the issue of the legislative power with the Parliament to enact Section 8(4), the Court accepted that the issue was not discussed or considered by the Constitution Bench in the case of K. Prabhakaran v. P. Jayarajan. Hence, must be discussed at depth in

the present case. The Court refers to the case of R. v. Burah[104] which laid down the fundamental principles of interpreting the Constitution in cases where the legislative powers are to be decided. The case provided that while deciding the limit of a power, the courts must delve into the instruments that specifically create or restrict the legislative powers. These principles of interpretation are further reaffirmed in the case of Keshavananda Bharti v. State of Kerala[105]. Therefore, the court must investigate the provisions and the terms that positively or negatively affect the legislative powers.

- First, the Court considers the argument from respondents which provided that Parliament is given legislative powers to enact Section 8(4) from Article 246(1) read with Schedule VII List I Entry 97 and Article 248 of the Constitution. Article 246(1) confers the Parliament with exclusive power to make laws on all the subjects enumerated under List I of the Seventh Schedule and under Schedule VII List I Entry 97 the Parliament has exclusive power to make laws not subjects that are not enumerated in List II and List III. Similarly, Article 248 confers the Parliament with the powers to make laws on subjects that not included in List II (State List) and List III (Concurrent List). Therefore, Article 246(1) read with Schedule VII List I Entry 97 and Article 248 confirms the residuary power of the Parliament, i.e., the exclusive power to make laws on subjects that are not specifically mentioned or cannot be reasonably comprehended to be part of any entries in the Lists. However, the residuary power only comes into action if it is proven that the subject-matter is not assigned to any legislature. However, Article 102(1)(e) and Article 191(1)(e) specifically confer the Parliament with the power to make laws on matters related to disqualification of members. Hence, the contention of the respondents cannot be accepted. The power to enact Section 8(4) is not vested in Article 246(1) read with Schedule VII List I Entry 97 and Article 248 of the Constitution and Article 102(1)(e) and Article 191(1)(e) are the only source of legislative power to make laws on disqualification of members.
- Second, the Court accepted the contention of petitioners as well as the opinion presented in the case of Election Commission v. Saka Venkata Rao by stating that the reading of Article 102(1)(e) and Article 191(1)(e) clearly provide that the same set of disqualifications must be present for persons to be elected as members and already sitting members of the Parliament or State Legislatures. The Court held that language of given provisions state if a person cannot be chosen as a member due a disqualification, for the

[104] (1878) 3 AC 889.
[105] (1973) 4 SCC 225.

same disqualification he cannot continue to be a member of the Union or State Legislatures.

- Third, the Court delves upon the contention of the respondents that the same set of disqualifications are applied, however only the effect of disqualification is different under Section 8(4). The Court reasoned that the procedure of vacating seats under Article 101(3)(a) and Article 190(1)(a) is an after-effect of the disqualification that take place under Article 102(1), Article 191(1) or any law of the Parliament in accordance to Article 102(1)(e) and Article 191(1)(e). According to this reasoning, if a person is disqualified under Article 102(1) and Article 190(1) then the seat automatically falls vacant under Article 101(3)(a) and Article 190(3)(a). Therefore, the Parliament cannot enact a provision that defers the date on which disqualification of a sitting member would take effect. Further, the contention that seat of a disqualified member would not be vacant until a decision is passed by the President or the Governor, is rejected by the Court. The filling of vacant seat awaits the decision of the President or the Governor, and if the President or Governor decides that the member is not subject to disqualification in accordance to Article 102(1) and Article 191(1) then it is to be seen that the seat of the member who is held to be not disqualified does not become vacant.
- Fourth, the Court recognised that Article 102(1)(e) and Article 191(1)(e) confer positive powers on the Parliament to make laws for "same" disqualifications of persons to be elected as members and sitting members of the Parliament and State Legislatures. However, the interpretation of Article 103(3)(a) and Article 192(3)(a) applies a restriction on these legislative powers of the Parliament as it prohibits the Parliament to enact law which would defer the effect of disqualification from the date on which it occurs. Hence, a reading of these provisions together would provide that provisions provided under Section 8(4) go beyond the limits of the powers conferred to Parliament.
- Fifth, while discussing the possible remedies the Court rejected respondents' contention that a person would be remediless if Section 8(4) is not provided to him. Reference is made to the judgment of the Court in the case of Rama Narang v. Ramesh Narang[106], which held that an appeal preferred under Section 374 of CrPC is against the conviction and sentence both. Hence, following this opinion, the appellate court can use its powers under Section 389(1) and stay the order of conviction. The High Court can also do the same under its inherent jurisdiction under Section 482 of CrPC. Further, citing the

[106] (1995) 2 SCC 513.

decision in the case of Ravikant S. Patil v. Sarvabhouma S. Bagali[107], which held that an order of stay would make the conviction non-operative from the date of such order, but not non-existent. Therefore, following the said rationale a person convicted under Section 8(1) (2) or (3) would not be left remediless as he would have the chance to appeal his conviction and obtain a stay order, which would render his disqualification non-operative.

- Subsequently, as Section 8(4) is held ultra vires of the Constitution the issue of the provision violating Article 14 of the Constitution is of no importance. Hence, the Court decided not to pursue the issue.
- Lastly, while deciding the implication of the judgment on the pending appeals or revisions under Section 8(4) the Court cited the opinion of Chief Justice Subba Rao in the case of Golak Nath v. State of Punjab[108] where he held that "*Court has the power to declare law and also restrict the operation of the law so declared to future transactions*". Further, it was also observed in the case of Harla v. State of Rajasthan[109] that punishing or penalising a person through laws of which he had no knowledge or had no opportunity to exercise reasonable diligence to acquire the knowledge would be violation of the principles of natural justice. Therefore, in accordance with the principles of natural justice and the decisions above-mentioned the sitting members of Parliament or State Legislatures who have pending appeals under Section 8(4) would not be affected by the judgment. The judgment would only be applicable prospectively.

Analysis

The decision of the Supreme Court with respect to the present issue is sufficiently backed by precedents and logical interpretation of law. The judgment ultimately renders Section 8(4) of the Representation of People Act 1951 as beyond the powers and limits of the Constitution, thus providing that the Parliament has no legislative power to enact such provision. This judgment is necessary and landmark in limiting certain undue privileges of the sitting members of the Parliament and the State Legislatures. It is imminent that the organs of the government that are responsible for handling the Nation and its affairs must be free from any illegal activity and hence no special privilege must be given to these members, especially in cases where they are convicted of serious criminal offences. The report analysis by the Association for Democratic Reforms (ADR) is an apt example of how the protection under Section 8(4) was abused for wrong reasons by the Members of Parliament and State

[107] (2007) 1 SCC 673.
[108] AIR 1967 SC 1643.
[109] AIR 1951 SC 467.

Legislatures. However, there are a few issues that the Court entirely missed in its discussion. The Court in its judgment did not touch upon the reference made by the respondents on the judgment of K. Prabhakaran v. P. Jayarajan which highlighted two important issues if Section 8(4) is removed. The first contention raised was that the disqualification of sitting members from the house upon conviction would significantly reduce the strength of the legislative body. Apart from this, it would also be detrimental to the ruling party which can lose its majority in the legislature due to disqualification of its members. Although, the Court discussed the implication of the judgment on pending appeals under Section 8(4), it ignored the other implications of the judgment such as possible abuse of the provisions due to the lack of any protection to the sitting members. Immediate disqualification of membership through conviction can be used as a tool to break governments, leading to various problems in the smooth functioning of the Government of India irrespective of which political party rules. The second contention was relating to the confusion and complexity that may be caused if the convicted and disqualified members vacant seat is filled through by-elections and later the convicted member is acquitted by the Court. There is a high probability of confusion if such scenario occurs and the issue of rightful membership for both the convicted (and later acquitted) person and person elected through by-elections would be raised. One of the alternative approaches to the issues in the case for more appropriate public policy, could have been to provide for a procedure in the issue of conviction of both the persons to be elected as members and sitting members of the Parliament and State Legislatures where a preliminary investigation is made by the appropriate authorities upon which the conviction and disqualification can take place. The preliminary investigation would help in affirming the seriousness of the conviction and the effect of disqualification that would ensue.

Conclusion

The judgment in the case Lily Thomas v. Union of India (2013) deals with the validity of Section 8(4) of the Representation of People Act 1951 which provides a special privilege to Members of Parliament and State Legislatures against disqualification from the membership upon conviction under Article 102, Article 191 or Section 8 (1) (2) & (3) of the Act. In accordance with the interpretation of the provisions of the Constitution under Article 102(1)(e), Article 191(1)(e), Article 101(3)(a) and Article 190(3)(a), the Court held that the Parliament has no powers to enact the provision under Section 8(4) and hence the provision is *ultra vires* of the Constitution.

The judgment of the Court is right to a certain extent as the special provision to the sitting members of the legislative body is unfair in nature. Since, the Constitution under Article 102 and Article 191 provides that same set of disqualifications must be provided for the persons to be elected as members and the persons who are already members of the Parliament or the State Legislature. This case would limit the privilege of Members of Parliament and State Legislature and also ensure that persons convicted for crimes under Section 8 (1) (2) & (3) of the Act would no longer be part of the legislative organ of the Union or State government. However, there certain fallacies with the judgment as it fails to discourse upon the important implications of rendering Section 8(4) as invalid. The issues of concern such as likelihood of abuse of conviction towards Members of Parliament or State Legislatures and subsequent disqualification from membership and the complexities of acquittal and by-election are not addressed by the Court. Therefore, leaving space for more development on the matters and also contentions that will be raised against this judgment.

T.S.R. SUBRAMANIAN & ORS. V. UNION OF INDIA & ORS. AIR 2014 SC 263

Sparsh Bhondekar*

Citation

AIR 2014 SC 263.

Names of Parties

Petitioners: T.S.R. Subramanian and others.

Respondents: Union of India and others.

Judges

Justice K. S. Radhakrishnan; and

Justice Pinaki Chandra Ghose.

Introduction

A Public Interest Litigation (PIL) was filed by 83 retired bureaucrats, including former Cabinet Secretary T.S.R. Subramanian, to the Apex Court for shielding the bureaucracy from the political influence.

In the case of T.S.R. Subramanian & Ors. v. Union of India & Ors., the landmark decision was made by the Honorable Supreme Court of India, that issued directions to unshackle the civil servants from the political control and consequences of it. It ordered the government to make a proper statute on this subject.

The move by the Supreme Court is with the intention of improving the quality of the governance at both Union and State level.

Facts

T.S.R. Subramanian and 82 other retired civil servants invoked the Article 32 of The Constitution of India and made a writ petition for the need of certain reforms, as directions by Honorable Supreme Court, for safeguarding the integrity, fearlessness and independence of the civil servants from the political intrusion, at both the Centre and the State level in the country.

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The petition's prayers are backed up by a number of reports and suggestions from committees established to improve public administration.

The relief sought in the writ petition are:

i. Creation of Independent Civil Service Board.
ii. Fix tenure for civil servants.
iii. Mandating civil servants to record all formal communication received, not only from the seniors but also from the other parties, such as political authorities, enterprises, legislators and others having interest.

Issues

1. How can the issue of the influence of authorities higher to civil servant, politicians and businesses on the civil servant for the selfish motive be dealt?
2. How can frequent transfer of the civil servants be avoided and their minimum tenure be assured?
3. How the oral/verbal and informal orders given by the higher authority to the civil servant to be handled, in order to protect the integrity of the position of civil servant and also fulfilling the objective of The Right to Information Act (2005)?

Judgement

While considering the public interest writ petition, the Supreme Court accepted the suggestions provided by numerous reports that the petitioners sought and issued a number of directives to the respondents.

As per Article 309 of the Constitution, the Bench asked the Parliament to create a Civil Services Act that would establish a CSB (Civil Service Body) and provide direction and advice to the political administration about transfers and postings, disciplinary actions, etc.

The Bench directed the Centre, States, and Union Territories to provide the necessary directives to ensure that all civil servants receive the minimum duration of employment within three months.

The Bench issued directives to the Centre, State governments, and Union Territories to establish such Boards within three months, if not already established, until the Parliament brings proper Legislation to establish CSB, performance comparable to Rule 3(3)(iii) of the All India Services (Conduct) Rules, 1968.

The Supreme Court also ruled that civil servants must only abide by written orders/instructions from superiors.

Analysis

On the ground level, in many instances it was found that the civil servants are not free from political influence and have been involved. by will or coercion, in the malpractices, by following the informal orders of the seniors or of any influential person. When such orders or demands are not fulfilled by a civil servant, due to any reasons such as, being against their ethics or any other reason, then such civil servants may get an early transfer from their tenure and the civil servant that may ease by adhering to the influential party's demand can be brought to that position.

Senior Haryana-cadre IAS officer Ashok Khemka was transferred 47th time in nearly 25 years of service as of 2016.[110] IAS officer Pradeep Kasni transferred for 68th time in 33 years as of 2017 with 13 transfers in just two and a half year.[111]

It was stated that frequent transfers of officers go against good governance and that they should have a set tenure to help them become competent and successful at carrying out public policies. Recurrent officer turnover or transfers are detrimental to effective administration. Minimum assured service tenure ensures efficient service delivery and also increased efficiency. It also gives priority to a range of social and economic projects that aim to benefit the underprivileged and disadvantaged groups in society.[112]

The Bench noted that there is now a lack of tenure security for civil servants, notably in State governments where frequent transfers and postings are done for selfish reasons and unethical motives other than those in the public interest.

Therefore, the Bench was right to direct the Union, State Governments, and Union Territories to provide the necessary instructions to ensure that all civil servants get the minimal tenure of service within a three-month period.

Before this case, with a set term of three years, the Centre and State governments each have their own regulations that govern officer transfers and postings. The majority of these rules

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[110] "Haryana moves IAS officer Khemka again: 47th transfer in 25 years". Hindustan Times. Indo-Asian News Service. ISSN 0972-0243. OCLC 231696742. Last visited: 22 October 2022.

[111] Sehgal, Manjeet (12 April 2017). "Chandigarh: Haryana IAS officer Pradeep Kasni transferred for 68th time in 33 years". India Today. Chandigarh: Aroon Purie. ISSN 0254-8399. Last visited: 22 October 2022.

[112] Venkatesan, J. (31 October 2018). "In major reform, SC orders fixed tenure for bureaucrats". The Hindu. New Delhi. ISSN 0971-751X. OCLC 13119119. Last visited: 22 October 2022.

have a clause that permits "administrative grounds" to be used to avoid the need of a fixed tenure. Therefore, misuse of this clause should be fixed with the new directions given in the case that the Union, State Governments, and Union Territories have to follow.

The establishment of a civil service body to make appointments to top government positions was recommended by the Second Administrative Reforms Commission in 2008.

The Bench directed that board should be established within three months to decide on transfers, postings, and disciplinary actions for civil servants until Parliament introduces suitable legislation to establish the Civil Services Board.[113]

The court decided that CSBs would serve as the final authority, insulating the bureaucrats from political influence. Importantly, the government must provide the same justifications when choosing to dissent from the CSB's recommendation. According to the directive, the CSB is made up of high-ranking service members who are professionals in their domains, with the cabinet secretary at the national level and the chief secretary at the state level, who serve as the state government's guide and advisor.

The CSB is expected to play the better role than the previous system in which the political side had the authority in this matter, even now they shall be having authority, but for their actions, for example – transfer, they have to state the reasons. Also, having the people from the same domain in the CSB authority makes it better, as they would understand and handle the set-up well as compared to previous set-up.

The Hota Committee's (2004) recommendations and the Santhanam Committee report were referenced by the bench of justices K.S. Radhakrishnan and Pinaki Chandra Ghose, who emphasised the importance of documenting instructions and orders by civil servants.

In an effort to promote transparency, the Supreme Court of India stated that civil servants must be shielded from improper and arbitrary pressure from their administrative superiors, the political executive, business, and other vested interests. Civil servants cannot work properly on the basis of verbal or oral instructions, orders, suggestions, proposals, etc. If the decision was not made by the public servant, there must be documents to show how he performed; but, if he is acting in accordance with oral instructions, he should document those instructions in the record.

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[113] "Civil services board to oversee officers' postings". The Hindu. Special Correspondent. Thiruvananthapuram: N. Ram. 1 May 2014. ISSN 0971-751X. OCLC 13119119. Last visited: 22 October 2022.

The Supreme court held that civil servants cannot follow verbal or oral instructions from their higher authority and political executive because doing so encourages favouritism and corruption and violates the rights that citizens are guaranteed by the Right to Information Act (2005). Oral and verbal instructions, if not recorded, could not be provided and hence it would defeat the purpose of RTI Act. It mandates the preservation of records of all oral instructions given to civil servants.[114]

The right direction is given by the Supreme Court for having the formal record for every order/instruction received by the civil servant. This shall help in protecting the integrity of the position of civil servant and in case of bad consequence, such as conviction, for the action verbally/orally instructed by the higher authority, the civil servant would have the defence that they were merely following the told instructions and couldn't be held liable. Having a record of everything would help in making the situation clear and serving justice, also the order with absurdity and bad intentions could also be caught in this.[115]

Conclusion

The Supreme Court provided the right directions to the Centre, State government and Union territories.

In order to manage postings, transfers, and disciplinary proceedings, the court ordered that officials have a minimum fixed tenure, that they not have to follow verbal commands from politicians, and that civil service boards be established at the national and state levels within three months. It also asked that a complete legislative act be passed by the government. These changes would increase accountability and transparency in how civil servants operate, who frequently have to make choices with broad repercussions.

Their decisions must be transparent and must be in the public interest. They should be fully accountable to the community they serve. Of course, civil servants must be accountable to their political executive, but they also must carry out their duties in accordance with the Constitution, as they are also responsible to the citizens of this nation.

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[114] Venkatesan, J. (1 November 2013). "Oral instructions undermine accountability: Supreme Court". The Hindu. New Delhi: N. Ram. ISSN 0971-751X. OCLC 13119119. Last visited: 22 October 2022.

[115] Banik, Dan (1 June 2001). "The transfer raj: Indian civil servants on the move". The European Journal of Development Research. 13 (1): 106–134. doi:10.1080/09578810108426783. ISSN 0957-8811. OCLC 55042966. Last visited: 22 October 2022.

RAJBALA V. STATE OF HARYANA (2016) 2 SCC 445

Muskan Mishra*

Citation

(2016) 2 Scc 445.

Names of Parties

Petitioners: Rajbala & Others;

Respondents: State of Haryana & Others.

Judge

Justice Jasti Chelameswar.

Introduction

"It is only education which gives a human being the power to discriminate between right and wrong, good, and bad. Therefore, prescription of an educational qualification is not irrelevant for better administration of the panchayats."

The Supreme Court on December 10 2015, rendered people desirous of contesting elections ineligible on basis of five criteria. It upheld the Haryana Panchayati Raj (Amendment) Act 2015 which disqualified the common, poor, and disadvantaged people living in rural areas of Haryana on the basis of five categories. Although the Supreme Court has ruled that it is legitimate to place some limitations on people's ability to vote and choose the candidates they choose, there are concerns that these limits may further marginalize many underprivileged populations.

Facts

The petitioners filed a writ petition challenging the legal validity of the Haryana Panchayati Raj (Amendment) Act 2015 (hereafter referred to as impugned act). The act amended Section 175 of the Haryana Panchayati Raj Act 1994 which stipulated disqualification criteria that rendered people ineligible to contest Panchayat elections. The Act of 2015 establishes two kinds of voters: those who are qualified to vote in panchayat elections based on their educational achievement and those who are not.

The impugned act inserted five conditions. If a person befalls in any of these, he will be disqualified to contest elections. These conditions are as follows:

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1. Section 175 (1) (a) Persons against whom charges are framed in criminal cases for offences punishable with imprisonment for not less than ten years,
2. Section 175 (1) (t) Persons who fail to pay arrears, if any, owed by them to either a Primary Agricultural Cooperative Society or District Central Cooperative Bank or District Primary Agricultural Rural Development Bank,
3. Section 175 (1) (u) Persons who have arrears of electricity bills,
4. Section 175 (1) (v) Persons who do not possess the specified educational qualification and lastly
5. Section 175 (1) (w) Persons not having a functional toilet at their place of residence

The petitioners later filed a writ petition questioning the legitimacy of the 2015 Amendment, alleging they wanted to contest in the Panchayat elections but were barred from doing so because they did not have the necessary educational credentials.

The amendment was challenged greatly on the grounds that it gravely causes gross injustice to the people wishing to contest panchayat elections and goes against the spirit of Constitution by breaching the right to equality guaranteed under Article 14. Furthermore, the petitioners challenged the impugned act based on following contentions:

1. Firstly, the disqualifications are unreasonable, arbitrary and creates unreasonable restrictions on the right to contest elections.
2. Secondly, it creates an artificial and unnecessary classification amongst the candidates whereby this classification has no nexus or relevance to the object of the main act and moreover it serves no purpose to improvise the process of elections.

Article 243F of the Constitution of India contains different disqualifications of members from contesting Panchayat elections. the petitioners raised the issue whether the State Legislature is authorised or entitled to lay down *"qualifications"* in contrast to "*disqualifications"* mentioned in the given Article.

The Supreme Court determined that there is only a conceptual difference between qualification and disqualification, and that there is no actual legal separation between the two.

The Supreme Court later decided, citing its earlier decisions, that there is a settled legal position that the right to contest elections is a fundamental right, despite the Respondents' contention that there is neither a constitutional right to do so nor a Fundamental Right to do so.

The State claimed in its submissions that even if there were a constitutional right to run for office, that right should be subject to the conditions or disqualifications specified in Article 243F, which gives the State Legislature the power to establish requirements.

Issues

Main issues raised in the present case questioned the validity of the Haryana Panchayati Raj (Amendment) Act 2015. The major issues were:

1. Whether the right to vote and right to contest elections is statutory constitutional right?
2. Whether the State Legislature is authorised or entitled to lay down "qualifications" in contrast to "disqualifications"?
3. Whether an Act can be declared unconstitutional on the ground of being "arbitrary" in nature?
4. Whether the Haryana Panchayati Raj (Amendment) Act 2015 creates unreasonable classification among people belonging to same class without any nexus to the object being sought?
5. Can an Act become unconstitutional if it is disqualifying a section of society?

Judgment

The Supreme Court quashed the petitions holding the Haryana Panchayati Raj (Amendment) Act 2015 reasonable and non-arbitrary. The court, while dealing with all the issues, reached the decision that the amendment is the need of the hour and the disqualifications mentioned in it will prove to be very helpful and will result in enhancement of the administrative bodies of rural areas. Let us analyse all the issues separately along with the contentions of both parties and the judgement.

1. Whether the right to vote and right to contest elections is statutory constitutional right?

Determining whether the right to contest elections is a **statutory right or constitutional right** is necessary in order to identify the extent to which this right can be curtailed or regulated by the government. For instance, constitutional rights are supreme rights guaranteed by constitutions whereas statutory rights emanate from a statute.

Contentions of the Respondents

The respondents contended that the rights to vote and contest elections are not ***constitutional but purely statutory***. The respondents based their arguments on the precedent cases. In

Shyamdeo Prasad Singh v. Nawal Kishore Yadav,[116] "*it has to be remembered that right to contest an election, a right to vote and a right to object to an ineligible person exercising right to vote are all rights and obligations created by statute".* Furthermore, in *K. Krishna Murthy (Dr) & Others v. Union of India & Another*,[117] it was observed by the court, *"…… it is a well-settled principle in Indian Law, that the right to vote and contest elections does not have the status of fundamental rights. Instead, they are in the nature of legal rights."* Another case that the Respondents relied upon was *Krishnamoorthy v. Sivakumar & Others*.[118] The court in this case observed this court observed that the right to contest an election is a plain and simple statutory right.

Court's decision

Going a step beyond the contentions of the respondent, court peeled into the layers of the issue of right to vote and contest election as being statutory or constitutional. The court observed in the case of *People's Union for Civil Liberties (PUCL) & Another v. Union of India & Another*,[119] the constitutionality of the Representation of Peoples Act 1951, which requires anyone running for office to automatically provide personal information before submitting a nomination form, was questioned. As a result, it was determined that the right to run for office is a constitutional right. Furthermore, in *Desiya Murpokku Dravida Kazhagam (DMDK) & Another v. Election Commission of India*,[120] the regional party allegedly demanded an electoral symbol indefinitely, but the honourable court ruled that no party could receive a symbol permanently unless the party complied with the requirements of the symbol order. The finding that the right (to vote and the right to contest) is a constitutional right was also unanimously accepted.

The court analysed various Articles of the Constitution stipulating rights to vote and contest election for various administrative bodies such as Articles 54 and 66 (election for president. Vice president and Parliament), 325 and 326 (limitations on voting rights), 84 and 173 (qualifications to contest), and 102 and 191 (disqualifications to contest).

The court in the strict sense held that the right to vote and contest election is a constitutional right after examining the layout of these several. Articles reveals that not everyone who is

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[116] *Shyamdeo Prasad Singh v. Nawal Kishore Yadav* (2000) 8 SCC 46
[117] *K. Krishna Murthy (Dr) & Others v. Union of India & Another* (2010) 7 SCC 202 para 77
[118] *Krishnamoorthy v. Sivakumar & Others* (2015) 3 SCC 467
[119] *People's Union for Civil Liberties (PUCL) & Another v. Union of India & Another* (2003) 4 SCC 399
[120] *Desiya Murpokku Dravida Kazhagam (DMDK) & Another v. Election Commission of India* (2012) 7 SCC 340

eligible to vote due to the declaration in Article 326 is automatically authorized to vote. The right of a voter to run in elections for any of the entities is further restricted in some ways. By inference, these numerous clauses ***provide a constitutional right*** to run for election to these various bodies and offices. This conclusion is unavoidable since there would be ***no need to impose constitutional restrictions on a non-existent constitutional right***. Therefore, these are undoubtedly constitutional rights and not statutory rights as contended by the respondents.

2. Whether the State Legislature is authorised or entitled to lay down "qualifications" in contrast to "disqualifications"?

The court observed, *"Articles 84 and 173 purport to stipulate qualifications for membership of Parliament and Legislatures of the State respectively. Articles 102 and 191 purport to deal with disqualifications for membership of the above mentioned two bodies respectively. All the four Articles authorise the Parliament to prescribe further qualifications and disqualifications, as the case may be, with reference to the membership of Parliament and Legislatures of the State as the case may be. There is no clear indication in any one of these four Articles or in any other part of the Constitution as to what is the legal distinction between those two expressions."*

The court concluded that there is not a logical pattern in both sets of Articles nor any other signal that would allow one to tell the two statements apart legally. As a result, there is no connection between the distinction between qualifications and disqualifications and it is solely semantic or theoretical.

3. Whether an Act can be declared unconstitutional on the ground of being arbitrary in nature?

Contentions of the Petitioners

The petitioners argued that any rule that is incompatible with the Constitution's stated goal of establishing a democratic, republican system of government is unreasonable and thus "arbitrary". They contended that this was promised in the Preamble of the Constitution. Petitioners placed reliance upon *Kesavananda Bharati Sripadagalvaru v. State of Kerala & Another*,[121] and *Indira Nehru Gandhi v. Raj Narain*.[122]

In support of the proposition that a statute can be declared unconstitutional on the ground that it is arbitrary and therefore violative of Article 14, petitioners relied upon judgments of this

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[121] *Kesavananda Bharati Sripadagalvaru v. State of Kerala & Another*(1973) 4 SCC 225 para 1159
[122] *Indira Nehru Gandhi v. Raj Narain* (1975) Supp SCC 1, paras 563 and 578

Court reported in *Subramanian Swamy v. Director, Central Bureau of Investigation & Another*,[123] *Indian Council of Legal Aid v. Bar Council of India*,[124] *B. Prabhakar Rao & Others v. State of Andhra Pradesh & Others*[125] and *D.S. Nakara & Others v. Union of India*[126] and certain observations made by Justice A.C. Gupta in his dissenting judgment in *R.K. Garg v. Union of India*.[127] But the court held that it is not permissible for this Court to declare a statute unconstitutional on the ground that it is 'arbitrary.'

Placing reliance on the Prabhakar Rao case,[128] petitioners brought the attention of judges on the statement "action of the Government and the provisions of the legislation were plainly arbitrary and discriminatory" to strengthen their submission that an Act must be declared unconstitutional on the ground that it is arbitrary.

Decision of the court

The court held that the judiciary do not take on the task of declaring a piece of legislation unconstitutional on the grounds that the legislation is "arbitrary" because doing so implies making a value judgment, and courts do not look at the wisdom of legislative decisions unless the legislation is also in violation of a specific constitutional provision. Therefore, The Courts in India have no authority to declare a statute invalid on the ground that it violates the "due process of law" or is "arbitrary."

4. Whether the Haryana Panchayati Raj (Amendment) Act 2015 creates unreasonable classification among people belonging to same class without any nexus to the object being sought?

Contentions of the Petitioners

The petitioners argued that the requirement of a minimum educational qualification would have the effect of disqualifying more than 50% of people who would have otherwise been qualified to run for office in panchayats under the law in place prior to the impugned act by citing various statistics from the National Population Register 2011. It is further argued that those from lower socioeconomic statuses, women, and members of scheduled castes would be the most negatively impacted by the contested provision because the majority of them are the least likely to meet the impugned act's minimal educational requirements.

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[123] *Subramanian Swamy v. Director, Central Bureau of Investigation & Another* (2014) 8 SCC 682
[124] *Indian Council of Legal Aid v. Bar Council of India* (1995) 1 SCC 732
[125] *B. Prabhakar Rao & Others v. State of Andhra Pradesh & Others* 1985 (Supp) SCC 432
[126] *D.S. Nakara & Others v. Union of India* (1983) 1 SCC 305
[127] *R.K. Garg v. Union of India* (1981) 4 SCC 675.
[128] Supra note 10

Less than 50% of the otherwise eligible women (all women, regardless of caste) would be permitted to run for office, while 68% of women from scheduled castes and 41% of men from scheduled castes would not be permitted to run for panchayat office. How many literate men would be eligible to run for panchayats at different levels depends on the data for men, which is not entirely clear. There is no information on the record that specifically identifies their individual educational backgrounds.

Contentions of the Respondents

The Respondents cited Section 21 of the act, which lists the 30 main categories of responsibilities that Gram Panchayats must fulfil. It is said that the legislature, in its wisdom, decided it was appropriate to set a minimum educational requirement considering the duties that members elected to the Gram Panchayat must do. This requirement cannot be argued to unfairly categorize voters, risking the wrath of Article.

Decision of the court

The court held that the impugned act does not create any unreasonable classifications and does not lack any nexus to the object sought in the impugned act. The goal of this classification is to make sure that candidates for panchayats have a basic education that will enable them to carry out the many responsibilities that fall on the elected representatives of the panchayats more successfully. One cannot claim that the goal being pursued is illogical, unlawful, or unrelated to the objectives of the act or the provisions of part IX of the Constitution. Only through education can a person acquire the ability to distinguish between good and bad. Therefore, requiring a certain level of knowledge is necessary for improved panchayats management.

5. Can an Act become unconstitutional if it is disqualifying a section of society?

The impugned act is disqualifying a section of society on the basis of various grounds from contesting election by the virtue of clauses (t), (u), (v) and (w) of section 175 (1).

Contentions of the Petitioners

1. The petitioners contended that the educational qualifications mandated under the clause (v) create unreasonable qualification disqualifying a major section of the society.
2. Additionally, clause (u) places an unjustified burden on voters who would otherwise be eligible to run for office, creating an artificial classification that has no connection to the goals that the act seeks to accomplish. Agriculturists, who make up the majority of our rural population, are particularly highly indebted, according to the petitioners, and a

considerable number of them have apparently been committing suicide because they are unable to handle their debt. Because the Panchayati Raj Act's constitutional purpose is to give the rural population more power by allowing them to participate in the decision-making of the units of local self-government, the prescriptions under clauses (t) and (v) of Section 175(1) of the Act are therefore an arbitrary prescription that creates a class of people who would become ineligible to run in Panchayat elections. This classification also has no rational connection to the object of the Act.

3. The petitioners said that many rural residents simply cannot afford to have a toilet at their home since it is out of their financial reach. Making them unable to run in panchayat elections would be unfair and discriminatory since it would place a group of people who would otherwise be entitled to do so in an unjustified classification.

Contentions of the Respondents

1. The respondents contended that object sought to be achieved is to have "model representatives" for local self-government for better administrative efficiency which will happen when there will exist an educational bar.
2. It is the submission of the respondents that although it is a fact that there have been cases in various parts of the country where people reportedly commit suicides unable to escape the debt trap but such incidents are very negligible in the State of Haryana as the agricultural sector of Haryana is relatively more prosperous compared to certain other parts of the country.
3. The respondents argued that if someone in the State of Haryana does not have a working toilet at their residence, it is not because they are unable to afford one, but rather because they do not wish to have such a facility there. This is because the government has provided the people with all required resources to assist in building toilets at their residences. The respondents make the very strong argument that a beneficial rule created as a step toward ending the dangerous practice of defecating in public in rural India should not be rejected.

Decision of the court

1. The court held that in order to administer properly, basic education is must. Thus, if an act is making it a necessary criterion for a person to contest election, it is neither unconstitutional nor arbitrary.
2. The court ruled that it is useless to discuss statistics on how many individuals commit suicide or are in debt in rural areas. It also noted that those who are so deeply in debt are

unlikely to be interested in running in elections, whether at the panchayat level or elsewhere. The court noted that elections in this nation, regardless of their level, are costly events. In addition, they are costly affairs not just in this nation but everywhere else as well. In this situation, it should be uncommon for someone who is heavily in debt to run for office because doing so would be beyond their financial means. The challenge, as the court described it, is more hypothetical than real. Furthermore, nothing in the law prevents a person who is so indebted and meets the requirements of Section 175(1) of the Act's clauses (t) and (v) from running in the panchayat elections after making the necessary arrangements to pay off their debt.

3. The Court reiterated the respondents' arguments and concluded that the reason why some persons still lack access to a toilet is not because they are poor but rather because they lack the necessary will. Keeping the area under its jurisdiction clean is one of a civic body's essential responsibilities. Those who wish to lead those civic bodies by being voted to them must serve as role models for others. To this end, if the legislature rules that people who do not adhere to basic hygiene standards are not eligible to serve as administrators of the civic body and are not eligible to run for office as members of the civic body, the court believes that such a policy cannot be justified as creating a class based on illogical criteria or as having no relation to the goal of the Act.

Analysis

Before he was known as the "Father of the Indian Constitution," Dr Bhimrao Ambedkar wrote a landmark paper to the Simon Commission in 1928 that set the standard for Indian nationalists arguing for universal suffrage. He stated in his now-classic memorandum.

"Those who insist on literacy as a test and insist upon making it a condition precedent to enfranchisement, in my opinion, commit two mistakes. Their first mistake consists in their belief that an illiterate person is necessarily an unintelligent person. Their second mistake lies in supposing that literacy necessarily imports a higher level of intelligence or knowledge than what the illiterate possesses."

The Supreme Court in this case observed, "It is only education which gives a human being the power to discriminate between right and wrong, good, and bad. Therefore, prescription of an educational qualification is not irrelevant for better administration of panchayats." by doing so, it has completely cancelled out the capability of uneducated populace of the country to discriminate between right and wrong, good, and bad. It has given zero value to the

experience and social intelligence of a person. Moreover, particularly at the panchayat level, there is little factual evidence to support the notion that individuals with formal education may serve as stronger public representatives and administrators than those without education.

Ironically, anecdotal data appears to suggest the contrary. Due to their comprehensive awareness, many elected officials, particularly female panchayat leaders, can address problems more successfully by drawing on their personal struggles and those that their families encounter on a daily basis. This is when compared to those who have always had power, the former appears to be better able to tolerate poverty and a lack of opportunity. Thus, the attributes essential for effective and competent political and administrative leadership are unrelated to formal education.

Conclusion

India is a democratic nation where each voter is free to select their own representative. As a result, when you argue that those who lack a formal education should not be allowed to run for office, you are really arguing that you do not trust the public to pick who will best represent their interests. This is conceited and condescending.

The court observed that there is a difference between the right to vote and the right to contest election and that the right to vote is not being restricted. They are inevitably co-related. By limiting the pool of candidates, the electorate can choose from, entrance barriers to running for office effectively restrict the right to vote. Even though it is implemented covertly, it still constitutes a vote limitation. Furthermore, because people who have been denied access to or chances for education are often the most disadvantaged members of society, this amendment discriminates along the lines of gender and caste.

Additionally, there are many members of Parliament and state legislatures who lack a basic education. Therefore, if a filter based on a minimum education requirement were to be implemented at higher levels of government, many members would be at risk of disqualification and being prevented from running for office again. It is injudicious to attribute the lack of formal education on the populace when, in reality, it reflects the state's ineffective performance of its constitutional duties.

The negligence of the state and societal inequality are the causes of deprivation. State governments would do better if they concentrated more on guaranteeing fair educational opportunities and respecting and enhancing the authority of the local entities rather than acting like an ostrich and hiding their heads in the sand during dire circumstances.

KRISHNA KUMAR SINGH & ANR. VS STATE OF BIHAR & ORS. (2017) 3 SUPREME COURT CASES (SCC) 1

Sheel Singhal*

Citation

(2017) 3 Supreme Court Cases (SCC) 1.

Names of Parties

Appellant: Krishna Kumar Singh and Another;

Respondent: State of Bihar and others.

Judges

Justice Dr T.S. Thakur, C.J. (Concurring);

Justice Madan B: Lokur (Dissenting);

Justice S.A. Bobde (Majority);

Justice Adarsh Kumar Goel (Majority);

Justice Uday U. Lalit (Majority);

Justice Dr D.Y. Chandrachud (Majority);

Justice L. Mageswara Rao (Majority).

Introduction

Ordinance is a law-making power which is conferred upon the President of India, who on the recommendation of Union ministers can promulgate ordinance which has same legal force as of any law but a prior condition before promulgating ordinances is that the house should not be in session. The most important feature or object of ordinances is that when the nation requires any immediate action or law in critical situation and if the parliament is not in session, then ordinances come to rescue. It is important to note that an ordinance will cease to operate if it is not passed within 6 weeks from beginning of new parliament session. Article – 123 and 213 of the Constitution deals with ordinance making power. *Article 123 of the Constitution of India gives the power and authority to the President of India to issue an ordinance only when both the Houses of Parliament are not in session.*[129] In addition, it states that any ordinance can have the same force and effect as a statute of Parliament only if it is

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[129] M.R. Madhavan, *The ordinance route is bad, repromulgation worse*, THE HINDU, April 20,2021 , https://www.thehindu.com/opinion/op-ed/the-ordinance-route-is-bad-repromulgation-worse/article34361919.ece (Visited on September 02,2022).

laid before both the houses of the Parliament. It is important to note that with respect to power of Governor in promulgating ordinance is given under article 213.

An ordinance has to be promulgated keeping in mind the dissemination of powers as given in the concurrent, union and state list and further the ordinance has power or the ability to be promulgated on any issue on which Parliament has control on. The most important aim and objective of writing this article is to understand the main issue of what happens to the actions which were made under the ordinance but later that ordinance ceases to operate. The clarification regarding the same was given in the landmark judgement of Krishna Kumar Singh case. So before analyzing the questions in the case, first let us delve into the facts of the case.

Facts

The Bihar Government in 1989 passed an ordinance named *the Bihar Non-Government Sanskrit Schools (Taking over of Management and Control)*.[130] This ordinance stated that around total of 429 Sanskrit schools which are private controlled will be now taken over by the Government. Due, to which large amounts of employees and teacher who were part of these private schools, in a shift were transferred to became the employee of the state government.

This ordinance was re-promulgated many a times and no law could ever be passed related to this ordinance as it was not presented in the state legislature, not even a single time. Therefore, for the payment of salary and other dues, the teacher and employees filled petition before the High court of Patna. The main question which the Patna High Court dealt was with regarding whether the re-promulgation of ordnances seven time was illegal or unconstitutional. In this judgement, the Hight court while dismissing the petition held that successive ordinance promulgation without any cogent reason is not valid in the eyes of law.

The Patna High Court relied on the judgement of *D.C. Wadhwa v. State of Bihar*[131] and held that the basic scheme of constitutionalism is violated by the re-promulgation of ordinance by the Bihar government and thus it is unconstitutional in the eyes of law. The High court also held that 305 schools are genuine which must be paid their salary by the government till 30-04-1992 (last validity of ordinance). Also, now the private school management of schools

[130] The Bihar Non-Government Secondary School (Taking over Management and Control) 1989.
[131] *D.C. Wadhwa & Ors vs State of Bihar & Ors* 1987 AIR 579.

would be governed in the same manner that prevailed prior to the promulgation of first ordinance.

Against the above order, an appeal was filled in the apex court. The bench (2judge) of the Apex court also held that the basic scheme of constitutionalism is violated by the re-promulgation of ordinance by the Bihar government. *The apex court in concurrence held that the entire exercise of promulgating ordinance is a fraud on the power conferred by article 213 of the constitution.*[132] However, they differed on the validity of the first Ordinance and hence the matter was referred to a 3-judge bench. In 1999, this bench (comprising of 3 judges) further referred it to a 5-judge bench, considering that the matter raised substantial questions related to the Constitution. On 2nd January, 2017, the Apex court (7 Judge Bench) decided the Krishna Kumar case.

Issues

1. Whether any rights, duties, obligation created by an Ordinance will exist even after that particular ordinance ceases to operate?
2. Whether the Bihar government ordinances was legally valid in its nature?
3. Whether Article 123 or 213 makes out mandatory obligation on the part of the executive to present the ordinance in the Parliament and State Legislature respectively?
4. Whether re-promulgation of an Ordinance goes against the basic spirit of constitutionalism?

Judgement

The Apex court in the present case gave a landmark judgement on the issue of whether re-promulgation of ordinance goes against the basic feature of constitutionalism while relying on the judgement of *DC Wadhwa v. State of Bihar*[133] held that re-promulgation of ordinances goes against the basic spirit of constitutionalism in the ratio of 5:2 and gave two reason to support above reasoning that-

a. The purpose of the power which is given in article 213 and 123 to the Governor and President respectively to issue ordinance is defeated.
b. Such re-promulgation by-passes the supreme law-making authority (Legislature).

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[132] Cottrell, Jill. "*Re-Promulgation of Ordinances in India: A Note*." The International and Comparative Law Quarterly, vol. 37, no. 4, 1988, pp. 1044–45. JSTOR, http://www.jstor.org/stable/759870.
[133] *D.C. Wadhwa & Ors vs State Of Bihar & Ors* 1987 AIR 579.

It is a well-known principle of Indian constitution that article 213 and 123 provides power to President and Governor respectively to promulgate ordinances and the Apex court held that this power of President and Governor is not immune from any kind of judicial review. Also, it is important to note that as the executives are collectively answerable to the Parliament/ State Legislature, this power is in control of legislature. The court categorically held that not placing ordinances before the legislature and instead re-promulgating it is a blatant misuse of the law and also it is subversion of legislative process of law making by the Parliament as well as State Legislature. It is important to note that Justice D.Y. Chandrachud, who authored the majority judgement held that the power of promulgating ordnance which is given to the President and Governor should be used only when the legislature is not in session and also this power is a kind of conditional power.

The judgement made it clear that it is mandatory constitution obligation on the part of the government to lay down ordinance before the legislature, so that the legislature could decide on the following:

a) The need, validity, and expediency to issue the Ordinance;

b) Whether the Ordinance should be approved;

c) Whether a Statute must be enacted in furtherance of the Ordinance.[134]

The judgement stated that all ordinance which are re-promulgated again and again and are not placed before the Legislature are against constitutionalism and therefore the salary which has already been given to the teachers must not to be recovered from them as they are not given the status of government teacher. The important aspect that court addressed is that the power of the President or Governor to promulgate ordinance must not be construed as a law-making body parallel to the legislature and court also delve into the different expressions used in the constitution of India *such as repeal, void, cease to have effect and cease to operate and stated that the express ceased to operate and void*[135] used separately in the same provisions of Article 123 and 213 is not used to convey the same meaning.

Another important observation was that any right, privilege, obligation or liability provided by the Ordinance will only survive if it fits within any of the three tests mentioned below:

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[134] Cottrell, Jill. "*Re-Promulgation of Ordinances in India: A Note*." *The International and Comparative Law Quarterly*, vol. 37, no. 4, 1988, pp. 1044–45. *JSTOR*, http://www.jstor.org/stable/759870.
[135] Noorani, A. G. "*Ordinance Raj*." *Economic and Political Weekly*, vol. 33, no. 50, 1998, pp. 3173–74. *JSTOR*, http://www.jstor.org/stable/4407461.

a) the effect of the Ordinance should be irreversible in nature

b) reversing of the consequences of the Ordinance should be impractical

c) a compelling public interest must exist in order to continue the effect of the Ordinance.

The then Chief Justice of India T.S. Thakur gave a concurring opinion and stated that the interpretation related to the question of Article 123 and 213 which made it obligatory on the government to place the ordinance before the legislature open as of now as there might be some sort of situation in which re-promulgation of ordnance would be necessary without placing it before state legislature or there might be other scenarios which requires deeper deliberation.

On the other hand, Justice Lokur Madan opined that it is not mandatory for an ordinance which is promulgated by President/Governor to be presented before the legislature and also as ordinance has the force of law in real sense, therefore the validity of ordinances cannot be challenged on whether it was laid down before the legislature or not. He also made contrary views to the judgement of *Venkata Reddy v. state of A.P*[136] and *state of Orissa v. Bhupendra Kumar Bose*[137] and held that enduring right theory cannot be created for a citizen.

In conclusion/relief the court stated that the first three ordinances are valid and their benefit given to the employees till these ordinances ceased to operate are valid and the employee will not get any enduring right from these ordinances. The court also held that the directions given by the High court with regard to the salary and interest are valid.

Analysis

Legislative Debates and deliberation form the most important aspect of any legislature. These important deliberations in many ways improves the quality of democratic decisions. It mainly makes government accountable to opposition to make laws with correct assertions as well as reasoning. These debates between opposition and government helps in making law based on critical reasoning.

But many a times, we see that government debases this constitutional scheme of deliberation through the route of ordinances and re-promulgating it again and again but the landmark judgement of Krishna Kumar clearly solved this issue by opening the judicial scope to review the ordinances which will help in promoting transparency as well as in improving the

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[136] *T. Venkata Reddy and Ors. v. State of Andhra Pradesh* AIR 1985 SC 724.
[137] *State of Orissa v. Bhupendra Kumar Bose* AIR 1962 SC 945.

functionality of ordinances. The judgment in correct sense has enabled the courts with the power of judicial review of President and Governor power to promulgate ordinances.

Another positive implication which this judgement provides is that it categorically held that the principle of parliamentary supremacy stands to be at odd with the idea of re-promulgation of ordinances without tabling it before executive. It makes executive supreme over the parliament. Many a times, it seems through re-promulgation of ordinance that the government has made the ordinance route a parallel law making which is very much opposite to the scheme as envisaged in the constitution but the Krishna Kumar judgement rightly invalidated this parallel law-making scheme.

The Court has provided sufficient reasoning in creating a check on the power of executive by this judgement on the executive as earlier the practice of re-promulgating of ordinance was done time to time by the executives which basically violates the basic principle of Constitution.

Though the overall majority judgement written by Justice Chandrachud is logical and well versed but the opinion related to the public interest test which is to be applied to judge whether the rights, privileges, obligation etc. should prevail or not when the ordinance ceases to exists in terms of its effect on public interest is bit problematic as in future there might be some instances where an ordinance would create rights, duties and obligation which would clearly be irrecoverable, even though the public interest would be to cease those rights. Even though it is a lacuna left in the judgement but it would not weaken the judgement as a whole.

The reasoning given in the case of Krishna Kumar was largely based on the Apex court judgement of *D.C. Wadhwa v. State of Bihar*[138] which held that re-promulgation of ordinances without placing it before the legislature is clearly violative of the basic spirit of constitutionalism. By upholding the D.C. Wadhwa case the Supreme Court has opined that Parliamentary supremacy will never cease over the executive and helped in allowing court to review the decisions of executive in issuing ordinances, which is a welcoming step by the judiciary.

Conclusion

While carefully analyzing the issue of promulgation of ordinance by the Governor/President under article 213 and 123 of the Indian Constitution respectively, the 7-judge bench of the

[138] *D.C. Wadhwa & Ors vs State of Bihar & Ors* 1987 AIR 579.

Apex Court delivered a landmark judgement which in my opinion was very much needed. The Court prevented the re-promulgation of ordinance system which goes against the basic spirit of constitution and condemned the Ordinance Raj which was subverting the legislative or parliamentary supremacy.

In summarizing the whole judgement it could be said that the majority judgement which was delivered by Justice Chandrachud held Parliament/State Legislature is a competent body before which placing of ordinance is mandatory , on the other hand, the then Chief Justice in his partly concurring and partly dissenting judgement held that this question of interpretation is open and Justice Lokur in his dissenting opinion held that placing ordinance before the legislature is not a mandatory condition and it is directory in nature. Though the lacuna is still left with reference to public interest test which is to be used to judge the effect of rights, obligation after the ordinance ceases to exists but this would not weaken the judgment. Therefore, the author opines, any point to remove the route of ordinance as a whole as it has its benefits too but it is equally important that this right should be provided to executive with a variety of barriers (checks and balances) so that the misuse of ordinances could be prevented and the Krishna Kumar case has made right way forward towards it.

SHAYARA BANO V. UNION OF INDIA AIR 2017 9 SCC 1 (SC)

Arya Hartalkar*

Citation

AIR 2017 9 SCC 1 (SC).

Names of Parties

Petitioner: Shayara Bano;

Respondent: Union of India, Ministry of Law and Justice, Ministry of Women and Child Development, Ministry of Minority Affairs National Commission for Women, AIMPLB, Ahmad (Bano's Husband).

Judges

Justice Jagdish Singh Khehar Justice;

Justice S. Abdul Nazeer Justice;

Justice Rohinton Fali Niraman Justice;

Justice Uday Umesh Lalit Justice;

Justice K.M. Joseph Justice.

Introduction

The practise of Muslim divorce by triple talaq was deemed unlawful by the Indian Supreme Court on August 22, 2017. Triple talaq (talaq-e-biddat) allowed Muslim males to divorce their wives with a single proclamation, bypassing the courts and legal authorities.

Shayara Bano, the petitioner, and other women who had an arranged divorce brought the case to court. A number of Muslim women's organisations came to their aid. The Judges panel was split 5-4 on the verdict. All three majority judges agreed that triple talaq is unenforceable, but they did so for different reasons. When it comes to the practise of triple talaq, Justices Rohington Nariman and U. U. Lalit ruled that the 1937 Muslim Personal Law (Shariat) Application Act violates Article 14 of the Indian constitution, which guarantees the right to equality between men and women. Instead, Justice Kurian Joseph argued that the practise of triple talaq is not sanctioned by Islam and is therefore forbidden by law. Chief Justice Jagdish Singh Khehar and Justice Abdul Nazeer formed the minority, arguing that although triple talaq was undesirable, the courts could not strike it down and that only parliament could rule on the topic.

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This decision is a watershed moment for the Indian women's movement, which has been fighting for equal treatment under the country's religiously-based personal laws[139]. However, the issue of gender equality did not receive as much attention in the discussion as it deserved, and the judgement does not offer a clear road map for dealing with additional discriminatory features of the personal law system in the future.

Facts

Shayara Bano and Rizwan Ahmed enter into a marriage that would last for 15 years. In 2016, he gave her the talaq e biddat, also known as the immediate triple talaq, which is a form of divorce. She then went on to file a writ petition with the Supreme Court, arguing that the following three practises should be disregarded as unconstitutional on the grounds that they are in violation of Articles 14, 15, and 25 of the Constitution.

- Talaq –e – biddat
- Polygamy (multiple spouses)
- Nikah – halala

The practise of Nikah Halala, also known as tahleel marriage, is one in which a woman, after having been divorced by means of triple talaq and having consummated her marriage to another man, then, in order to remarry her first husband, she goes through the motions of securing a second divorce.

On February 16, 2017, the court requested that Shayara Bano, the Union of India, numerous groups promoting women's rights, and the All-India Muslim Personal Law Board provide written arguments about the aforementioned grounds of Talaq-ebiddat, Polygamy, and Nikah Halala. Ms. Bano's petition received support from the Union of India as well as organisations working exclusively for the rights of women, such as the Bebaak collective and the Bhartiya Muslim Mahila, Andalon (BMMA). Their argument was that these practises violate the constitution. On the other hand, the All-India Muslim Personal Law Board issued a statement arguing that Article 25 of the Constitution protects the fact that these are some of the fundamental tenets of the Islamic religion, and that Article 13 of the Constitution states that uncodified Muslim Personal Law is not subject to the concept of constitutional judicial review.

[139] Mengia Hong Tschalaer, Muslim Women's Quest for Justice.

Shayara Bano's petition was granted on March 30, 2017, when the Supreme Court established a constitutional bench with five judges and accepted the petition. The five-judge constitutional bench reached their decision on the constitutionality of the practise of immediate triple talaq on the 22nd of August 2017, with a majority vote of three judges to two judges.

Issues

- Is the practise of talaq-e-biddat, in which the Instantaneous Triple Talaq is particularly mentioned, an important component of the Islamic faith?
- Does the use of instantaneous triple talaq violate any of the fundamental rights guaranteed by the constitution?
- Is it true that Article 25 of the Constitution protects the practise of Triple Talaq?
- Does the Shariat Act have any applicability regarding the triple talaq?

Judgement

The Court conducted a multi-pronged analysis of the constitutionality of triple talaq. We first needed to determine if the Muslim Personal Law (Shariat) Application Act, 1937 made triple talaq a legal requirement. In that event, it would be open to review under the principle of fundamental rights. If this were not the case, then the next logical question would be whether or not the constitutionality of triple talaq could be tested in the context of uncodified personal law. All of the judges came to different conclusions about the first question.

The 1937 Act, according to Justices Nariman and Lalit. They concluded that the 1937 Act upheld and acknowledged all kinds of Talaq recognised and implemented by Muslim personal law. Therefore, Triple Talaq must be included. (Paragraph 18). The 1937 Act was passed before the Constitution went into effect, so it is not currently a law but would be "struck by Article 13(1) if judged to be inconsistent with the provisions in Part III of the Constitution" (Paragraph 19).

This view was rejected by Justices Joseph, Khehar, and Nazeer. "The 1937 Act simply renders Shariat relevant as the norm of decision," as stated by Justice Joseph. Thus, while talaq is regulated by Shariat, the 1937 Act does not codify the particular grounds and processes for talaq[140] (paragraph 4).

[140] Mengia Hong Tschalaer, Muslim Women's Quest for Justice.

The next point that sparked varying opinions was whether or not triple talaq was a part of Muslim personal law that had never been formalised. Justice Joseph responded negatively, but Justices Khehar and Nazeer both answered yes. The Supreme Court's Justice Joseph reached his conclusion after studying the Quran and Islamic legal literature. According to his interpretation of the Quran, talaq is permissible only after an attempt at reconciliation has been made. In the event of triple talaq, however, reconciliation is not an option, hence the procedure must be deemed to be "against the essential precepts of the Holy Quran and, accordingly, it breaches Shariat"[141] (Paragraph 10). These arguments are similar to those found in the aforementioned Guwahati High Court rulings and the Supreme Court's decision in Shamim Article 34 For example, Justice Joseph observed, "Merely because a practise has existed for a long time, that alone cannot make it lawful if it has been specifically proclaimed to be impermissible." (Paragraph 24) He then draws the following conclusion: "What is deemed to be terrible in the Holy Quran cannot be good in Shariat and, in that sense, what is wrong in theology is bad in law as well" (paragraph 26).

On the other hand, Justices Khehar and Nazeer considered triple talaq to be an element of uncodified Muslim personal law (for Sunni Muslims belonging to the Hanafi school) (paragraph 145) and so had to decide whether or not it could be challenged against the constitution. Both judges gave a negative response to this query. In their view, this was so because "protected from invasion and breach, except as provided for and under Article 25" personal laws of any religious group (paragraph 146). Specifically, this view has been criticised since it treats a statute, rather than a human, as being protected by Article 25. Due to their conclusion that Article 25 rights only applied to State action against persons, the justices saw no purpose to discuss the relationship between Article 25 and Articles 14, 15, and 21 as "other provisions of this chapter,"[142] to which religious freedom is "subject to" (Article 25(1)). (Paragraph 165). After much deliberation, they came to the conclusion that "what the constitution decrees us, not only to safeguard, but also to enforce, cannot be nullified and declared as unacceptable in law." In Article 25, the Constitution mandates that all Courts must uphold "personal laws" and not find fault with them. It is very evident that the courts have no business meddling in 'personal law.' (Paragraph 195). The court "directs

[141] BBC, Triple Talaq: How Indian Muslim Women Fought, and Won, the Divorce Battle, August 22, 2017, http://www.bbc.co.uk/news/world-asia-india-40484276 (last accessed on 18 September 2017).
[142] For instance, Danial Latifi v. Union of India (2001) 7 SCC 740; Shah Bano, John Vallamatom v. Union of India (2003) 6 SCC 611.

the Union of India to consider relevant legislation, particularly with reference to talaq-e-biddat." (Paragraph 199).

In light of the decision by Justices Nariman and Lalit, who held that the 1937 Act had enshrined the practise of triple talaq into statutory law and thus made it subject to fundamental rights scrutiny, the next question was whether Section 2 of the 1937 Act, to the extent that it authorised triple talaq, actually violated any constitutional provisions and was therefore insofar unconstitutional and void. In a move reminiscent of Justices Khehar and Nazeer above, the justices first established whether or not triple talaq was "saved" by Article 25 before addressing a breach of Article 14. However, both Nariman and Lalit disagreed with their colleagues' judges and said that Article 25 could not be used in this way. Instead, they argued that theologically problematic triple talaq did not qualify as an "essential religious practise" and hence lacked protection under Article 25(1). (Paragraph 25). The court ruled that it did not need to "bounce the ball back to the legislature" (paragraph 25) and instead made the decision. In this light, the Supreme Court's decision in Ahmedabad Women Action Group case was criticised for having "no ratio" and being internally inconsistent (paragraph 30)

After making this statement, the judges moved on to the meat of the matter, which was whether or not the 1937 Act was a violation of any constitutional provision, in this case Article 14. It was contended by the justices, citing numerous Supreme Court decisions, that "legislation might be knocked down on the premise that it is arbitrary and, consequently, violative of Article 14 of the Constitution" (paragraph 54)[143]. This "test of manifest arbitrariness" was then applied to the situation at hand. The judges found that "this kind of Talaq is plainly arbitrary in the sense that the marital tie might be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it (paragraph 56) since triple talaq is lawful without any "reasonable cause." Therefore, it is imperative that Article 14 of the Indian Constitution be interpreted to prohibit this type of talaq because it violates the rights of women. Therefore, we hold that the 1937 Act falls under the definition of "laws in effect" in Article 13(1) to the extent that it tries to recognise and enforce Triple Talaq, and that it must be declared null and void to that degree (paragraph 57).

[143] BBC, Triple Talaq: How Indian Muslim Women Fought, and Won, the Divorce Battle, August 22, 2017, http://www.bbc.co.uk/news/world-asia-india-40484276 (last accessed on 18 September 2017).

As a result, the practise of triple talaq was overturned by a majority of 3:2, with Justices Nariman and Lalit agreeing with Justice Kurian Joseph despite their differing lines of reasoning.

Analysis

Given the court's history of avoiding detailed engagement with the personal laws, this judgement is unusually courageous and may be called a "landmark decision", which represents "a marker moment of the women's movement in India." It was also admirable that the bench was made up of people of different faiths in order to present a neutral and nuanced perspective on the issue. This is not to downplay the need for more women on the bench, though (and of the Indian Supreme Court in general).

Feminist academics have noted that the gender angle was underdeveloped in the verdict. Although Articles 14 and 15 were referenced in various arguments, the verdict did not address the junction of gender and religious identity. There were numerous citations from Islamic legal scholars in the decision, but no women's rights or feminist legal specialists were included. Triple talaq was criticised because "the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it," as Ratna Kapur points out. The lauded opinion of Justices Nariman and Lalit was ultimately concerned with the preservation of marriage, not women's rights[144] (paragraph 57).

Therefore, while the decision was an improvement, it fell short of what could have been accomplished if efforts to promote gender parity had been prioritised. Although the Court spent much time discussing whether or not triple talaq was "protected" under Article 25, it did not take a firm stance on how gender equality (Articles 14 and 15) related to religious freedom (Article 25). Similarly, it refrained from explicitly rejecting Narasu Appa Mali's authority. Since the court only invalidated one type of talaq, the other two types, talaq-e-ahsan and talaq-e-hasan, are still in effect, and Muslim men can still legally divorce their wives with the talaq pronouncement over a period of a few months. However, these variations of talaq still fail to meet the norms of gender equality since they offer Muslim husbands a unilateral authority to divorce their wives while denying Muslim women the same right. Because of its narrow focus, the judgement cannot serve as a benchmark against which

[144] Ratna Kapur, Triple Talaq Verdict: Wherein Lies the Much-Hailed Victory? The Wire, 28 August 2017, https://thewire.in/171234/triple-talaq-verdict-wherein-lies-the-much-hailed-victory/ (last accessed on 18 September 2017).

future challenges to discriminatory personal law rules can be measured and is thus restricted in scope.

Long explanations of Islam and Muslim personal law (particularly in the opinion of Justices Khehar and Nazeer) raise questions about whether or not they were truly essential. It appears that the justices also wanted to reassure the Muslim community that their worries were being taken seriously by devoting so many pages to Islam and Muslim personal law. But this comes with its own set of problems: the longer the judgement and the more internal contradictions its argumentation contains - and there are quite a few contradictions in this judgement - the more it can be (mis)used by cherry picking those arguments that were made in obiter dictum statements of this case[145]. In the grand scheme of things, this verdict was a positive development. However, that was just the beginning, and more work is required. It's encouraging to see that this case has spurred discussions on discriminatory characteristics in other legal domains, such as other personal laws and the Indian rape law[146].

Conclusion

In my view the judgment was correct, but it didn't throw light on many related issues. The judges gave a landmark judgment however, many relevant and important points were not highlighted. Court passed the correct judgment but the ignorance to look in detail with some issues of personal laws can be observed. The legal position of talaq-e-biddat was not changed by the court in the complete sense thus it created some confusion regarding the personal law's constitutionality in India. The judgment could have been thrown light on all issues would have made it a ground-breaking judgment.

This case is one of the important cases in India regarding the personal laws. It can be definitely observed that the Supreme Court has made many corrections while declaring the triple talaq unconstitutional.

If the issues of gender inequality in personal laws was highlighted in the judgment, it could have been served a holistic purpose of solution to all the problems related personal laws in India of the same nature.

The Supreme Court made an appreciable job by declaring triple talaq unconstitutional. It made the married life of Muslim women secured and protected them from any divorce of

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[145] Subhashini Ali, The Triple Talaq Ruling Is a Step Forward, but There Is a Long Way to Go for Gender Justice Laws, The Wire, (24 August 2017).
[146] Maya Mirchandani, Triple Talaq and Marital Rape: Politics and Patriarchy Trump Gender Justice, The Wire, (31 August 2017).

unilateral nature. This judgment gave rise to voice of the women who were oppressed and couldn't openly speak under the undue influences. This judgment has definitely increased the faith on Indian judiciary that the courts are to protect the rights of the people. This judgment has definitely severed its primary purpose to give justice to the victims of practice of triple talaq.

SUBHASH KASHINATH MAHAJAN V. STATE OF MAHARASHTRA (2018) 6 SCC 454

Shrishti Verma*

Citation

(2018) 6 SCC 454.

Names of Parties

Appellant: Dr. Subhash Kashinath Mahajan;

Respondent: State of Maharashtra, Bhaskar Karbhari Gaikwad.

Judges

Justice Adarsh Kumar Goel;

Justice Uday U. Lalit.

Introduction

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 was passed with the objective of protect the interest of the oppressed community and prevent discrimination against the weaker sections of the society. In the present case under consideration, the Supreme Court attempted to dilute the provisions of the Act which was met

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with criticism from the masses. The Supreme Court, later, in a review petition filed by the Union Government, reversed this decision, however, this decision still remains an important landmark considering the abuse of the provisions of the Act, to prevent which this judgment was passed.

Facts

The facts leading to the present appeal are as follows:

a) Bhaskar Karbhari Gaikwad, the complainant, was an employee of the Department of the College of Pharmacy. His seniors, Dr. Satish Bhise and Dr. Kishor Burade made some adverse remarks in his Annual Confidential Report.

b) Both of the seniors were non-scheduled caste, while the complainant was a member of a scheduled caste. The adverse entry suggested that his integrity and character were not good.

c) Aggrieved by this, the complainant lodged an FIR with the Karad Police, however since the above two persons were Class-I officers, the investigating officer applied for a sanction under S. 197 of the CrPC.

d) This sanction was refused by the appellant, Dr. Mahajan.

e) The complainant then lodged an FIR against the appellant contending that he was not the competent authority to grant or refuse a sanction and only the State Government could do so.

f) The High Court of Bombay refused to quash this complaint against the appellant due to which this appeal has been preferred.

Issues

1. Whether a unilateral allegation of mala fide can be a ground for prosecution of an officer who acted in official capacity to deal with the matter?

2. Whether directions can be issued to protect fundamental right under Article 21 against uncalled for implications and arrests?

3. Whether there is an absolute bar to the grant of anticipatory bail as envisaged in the provision of Section 18 of the Atrocities Act?

Judgement

The court answered the first question in negative observing that there should be procedural safeguards for prosecution under the Act on the basis of unilateral allegation. Moreover, there cannot be a complete bar on the provision of anticipatory bail because this would lead to abuse of the process of the court.

Even if there is no provision for anticipatory bail in the statute, the court may still grant interim bail depending upon the circumstances in each case. The court also formulated guidelines for conducting preliminary enquiry in cases where arrest was to be made.

Submissions of the learned Amicus:

The learned Amicus noted that the FIR was lodged five years after the order was passed by the Appellant. It was observed that no offence was made out under Sections 3(1)(ix), 3(2)(vi) and 3(2)(vii) of the Atrocities Act, and Sections 182, 192, 193, 203, and 219 of the Penal Code. He submitted a table to elaborate his point, explaining that denying sanction cannot amount to false or frivolous information, or disappearance of evidence, so Section 3 cannot be attracted. Similarly, it cannot fall under the provisions of the IPC providing false information, fabricating false evidence, or making a corrupt report. Thus, the High Court ought to have quashed the proceedings in light of this.

He added that one sided version before a trial cannot displace the presumption of innocence. There needs to be a just and fair procedure before taking away the liberty of a person. Reference to section 41(1)(b) of the CrPC was made, where it was said that the police must have a reason to believe and there should be credible information. The arrest should be made only after complying with the safeguards under sections 41 and 41-A of the CrPC. He submitted that a preliminary enquiry should be a must to prevent the exercise of arbitrary power of arrest. Where there is an arrest to be made, and the approval of the appointing authority must be taken if the arrest is in relation to a public servant, whereas in cases of non-public servants, approval of the Senior Superintendent of Police must be taken.

He observed that Section 18 of the Act excludes Section 438 CrPC, and is violative of Articles 14 and 21 of the Constitution. Reliance was placed on Gurbaksh Singh Sibbia v. State of Punjab. Taking away the grant of anticipatory bail is discriminatory and violative of Article 14. The test of reasonableness and fairness is implicit under Article 21.

Submissions of the Learned counsel for intervener supporting the appeal

Placing reliance on the Sixth Report of the Standing Committee of Social Justice and Empowerment, the counsel said that the Act should include provisions for securing justice to those who are falsely implicated within it. Safeguards like preliminary inquiry and sanction of the Magistrate were suggested by the counsel for the intervener. Emphasis was laid on the judgment in NT Desai v State of Gujarat stating that the court cannot be a mere spectator to the liberty of a person being surrendered to a malicious complaint.

Even an accused of a heinous crime like murder, dacoity, or rape etc. can pray for anticipatory bail pleading that he is falsely implicated, but not a person under the Atrocities Act because of the bar of Section 18. Numerous judgments were supplied as illustrations to show how the abuse of law was rampant. To balance the societal interest with the rights of victims of false allegations, it was suggested that there should be the formation of an internal committee in every department where a complaint should be lodged in these matters with supporting evidence. Such committee may be vested with the power of conducting preliminary enquiry into the matter.

Because of the provision of monetary incentive being provided under S. 12(4) of the Act for lodging a case, the Act becomes more prone to abuse because individuals might lodge complaints only for the monetary incentive. The Counsel also relied on NCRB data how numerous false cases were found to be filed.

Interventions against the appellant

The counsel appearing for intervener pointed that the atrocities against SC/ST continue to happen because of procedural hurdles such as non-registration of cases, procedural delays in investigation, arrests and filing of charge sheets, and delays in trial and low conviction rate.

Submissions of the learned Additional Solicitor General

The National Crime Records Bureau data was again cited alleging misuse of the provisions of the Act. He also pointed out how anticipatory bail has been granted in genuine cases where no prima facie case was made out.

Observations of the Court

The court is the ultimate interpreter of the Constitution. Article 14, 19, and 21 form the basis of the rule of law. Rights under Article 14 and 21 must be protected from unreasonable procedure even if the procedure is laid down by the Legislature. Any violation or abrogation

of these rights can be nullified by the court. The expression "procedure established by law" under Article 21 implies just, fair, and reasonable procedure.

The court cannot be expected to be a mere bystander to the violation of fundamental rights. The role of the court may sometimes be perceived as legislative in nature when it issues directions to enforce fundamental rights. It can issue directions when they are not in conflict with a valid statute. "The power to declare law carries with it, within the limits of duty, to make laws when none exists." The court in various instances has issued directions for the enforcement of fundamental rights.

The court has been instrumental in issuance of directions for the regulation of power to arrest in numerous decisions including Joginder Kumar v. State of UP[147] (which expanded the horizon of human rights), Arnesh Kumar v. State of Bihar[148] (which regulated the power to arrest, noting that "power of arrest is a lucrative source of corruption"), DK Basu v. State of West Bengal[149] (to check the abuse of arrest and drastic police power), Subramanian Swamy v. Union of India[150] (to check the validity of the provisions creating defamation as an offence), Siddharam Satlingappa Mhetre v. State of Maharashtra[151] (where it laid down the parameters for exercise of discretion of anticipatory bail) and many more.

The Report of the National Commission to Review the Working of the Constitution, which was also quoted in PUCL v. Union of India[152] stated that one of the failures of the Constitution was that the elections continued to be fought on caste lines. The court then went on to conclude that the interpretation of the Atrocities Act should be to promote the constitutional values of fraternity and integration.

Regarding the issue of granting anticipatory bail, the court observed that in State of MP v. Ram Krishna Balothia[153], Section 18 was held not to be violative of Articles 14 and 21 of the Constitution, and that the bar to anticipatory bail had to be viewed in the context of prevailing social conditions. If anticipatory bail is granted in such cases, the accused can terrorize the victim and prevent investigation. However, the court went on to note that the judgment in Balothia may need to be revisited in light of the Maneka Gandhi case, and that the exclusion of anticipatory bail should be applied to genuine cases and not false ones.

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[147] Joginder Kumar v. State of UP 1994 4 SCC 260.
[148] Arnesh Kumar v. State of Bihar 2014 8 SCC 273.
[149] DK Basu v. State of West Bengal 1997 1 SCC 416.
[150] Subramanian Swamy v. Union of India 2016 7 SCC 221.
[151] Siddharam Satlingappa Mhetre v. State of Maharashtra 2011 1 SCC 694.
[152] PUCL v. Union of India 2003 4 SCC 399.
[153] State of MP v. Ram Krishna Balothia 1995 3 SCC 221.

The court affirmed the contention of the ASG that there cannot be an absolute bar on the grant of anticipatory bail. Despite the statutory bar, a constitutional court is not debarred from grant relief. Hence, the exclusion of court's jurisdiction is not to be read as absolute. A literal interpretation of the provision cannot be preferred since it would be misused to make a person surrender his civil rights on the basis of a mala fide allegation. Hence, a unilateral mala fide allegation cannot be used to deprive a person of his liberty. The exclusion can only apply where a clear prima facie case is made out. If the prima facie story of the complainant is found to be doubtful, the arrest would be unjudicial. The court overruled Pravinchandra N. Solanki v. State of Gujarat[154] which took a contrary view to the present interpretation.

The court emphasized due process. It observed that presumption of innocence is a human right. There can be no presumption of guilt to deprive a person of his liberty without opportunity to be heard. The court referred to Noor Aga v. State of Punjab[155] to hold that an accused is entitled to show to the court that the case of the complainant was motivated if he apprehends arrest. The court observed that the intent of the legislature was not to term innocent persons as accused. Because of rampant abuse of the provisions of the Act, false complaints are being filed for satisfaction of vested interests.

The court finally held that cases under the Atrocities Act fall under the exceptional category where preliminary inquiry must be held and should be done in a time-bound manner where it should not exceed seven days in line with Lalita Kumari v. State of UP.[156] Moreover, even if a case is registered after preliminary inquiry, arrest is not a must.

Analysis

When the matter was under consideration in the High Court, the court observed that a public servant administering his duties should not apprehend frivolous or false prosecution as it would jeopardize the administration, however, such prosecution cannot be quashed merely because it would lead to the abuse of the provisions of the Act. The quashing would send a wrong signal to the downtrodden and backward sections of the society.

The Supreme Court differed from this view. The difference was visible in the judgment which significantly diluted the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 in order to prevent its abuse. It observed that the abuse of the Act would prevent public servants from exercising their duties. They might have

[154] Pravinchandra N. Solanki v. State of Gujarat 2011 SCC OnLine Guj 6848.
[155] Noor Aga v. State of Punjab 2008 16 SCC 417.
[156] Lalita Kumari v. State of UP 2014 2 SCC 1.

apprehension in mind which would prevent them from giving genuine remarks. This is the reason why in its judgment, the Supreme Court held that in order for an FIR to be lodged, there has to be a preliminary investigation and a prima facie case. Moreover, sanction from appointing authority or SSP will have to be taken as the case may be. However, the court failed to take into consideration the number of atrocities that still take place frequently against these sections of the society in the form of harassment, illegal land encroachments, forced evictions, etc.

"In doing so, we are not diluting the efficacy of Section 18 in deserving cases where court finds a case to be prima facie genuine warranting custodial interrogation and pre-trial arrest and detention". The court relied on NCRB data to note how there are a high number of acquittals in cases filed under the provisions of this act. However, it failed to note that acquittals do not necessarily mean innocence. The main factor owing to acquittals may be poor investigation and incompetence of the prosecution.[157] These guidelines do attempt to punish abuse of the process of the court. However, they are also a significant deterrent from filing genuine cases in a country where the upper castes already have an upper hand at resources. The court also failed to take into consideration the indifferent attitude of the Authorities because of which the provisions of the Act were not complied with properly. The power in the hands of the upper caste may prevent the administration from finding a prima facie case. The indifference of the police and the administration with respect to cases like these is not something new.

The Supreme Court itself in National Campaign on Dalit Human Rights v. Union of India[158] noted that "there has been a failure on the part of the authorities concerned in complying with the provisions of the Act and the Rules. The laudable object with which the Act had been made is defeated by the indifferent attitude of the authorities". Dalits have to struggle extra hard to get their complaints registered. Their complaints are routinely disregarded. And even when it is registered, many complainants and witnesses eventually turn hostile because of the political and economic power of the socially dominant. In light of all these findings, the contention of misuse of the provisions of the Act cannot stand.

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[157] Guha, Ayan, and Neha Chauhan. "Debate, Discourse and Dilemma: Putting Dr. Subhash Kashinath Mahajan vs State of Maharashtra in Context." Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America, vol. 51, no. 3, 2018, pp. 381–91. JSTOR, https://www.jstor.org/stable/26630274. Accessed 10 Sep. 2022.

[158] National Campaign on Dalit Human Rights v. Union of India 2017 2 SCC 432.

The Central Government eventually filed a revision petition against the judgment. The revision petition was accepted and the Apex Court overturned the judgment in this case. The condemnation of the judgment was so severe that the Parliament did not wait for the review petition to be heard, instead, it passed the amendment to include Section 18A. Now, this section has been recognized by the Supreme Court. Through the amendment, the provision of bar on anticipatory bail was restored in order to undo the repercussions of the judgment. The amendment also mentioned that preliminary investigation is not a pre-requisite for an FIR. Furthermore, the investigating officer shall not require sanction or permission for making an arrest, and the provision of S. 438 CrPC will not apply to any case under the provision of this Act notwithstanding any court order or judgment.

Observing the present sorrow state of affairs of SCs and STs, the Supreme Court in its review judgment 'Union of India v State of Maharashtra', overturned the judgment in Subhash Kashinath Mahajan v State of Maharashtra. The Supreme Court relied on the premise that it cannot breach the solemn doctrine of separation of powers. Furthermore, there cannot be a presumption of abuse of the provisions of the Act. The caste of a person cannot be said to be the cause for lodging a false case. The members of SC and ST have been discriminated against for a very long period of time. Due safeguard against this has to be given to them and they cannot be placed at disadvantageous position because of the law. They hardly muster up courage to speak up against the atrocities committed against them by the upper caste. This is the sole reason why the beneficial provisions of the Act have been made by the way of the amendment.

Conclusion

The contention of the court that the provisions of the Act may be misused was the reason why the court made provisions for safeguard against false cases. But, the marginalised and downtrodden sections of the society are being discriminated against and oppressed to this day. For this reason, the court in its review petition overturned the judgment, and the Central Government However, the Supreme Court's perspective cannot be dismissed altogether, for, the lack of economic resources and weaker social connections are the reason the Dalits face discrimination; but the ones having government jobs cannot be said to be absolutely lacking in resources. Thus, there needs to be a mechanism for improving the social justice system and providing immunity to those suffering from the complexities in the institution.

The Supreme Court noted “the Constitution envisages a cohesive, unified and casteless society” in the judgment. In September 2022, Justice DY Chandrachud in a lecture in IIT Delhi (2022) spoke about how we do not need to make a casteless society, but instead, one should come face to face with the discrimination that still pervades and permeates in our society, and find justice for those who are discriminated on the ground of caste.

INDIAN YOUNG LAWYERS ASSOCIATION AND ORS. (SABARIMALA TEMPLE, IN RE) V. THE STATE OF KERALA AND ORS. (2019) 11 SCC 1

Dharini Ranganathan*

Citation

(2019) 11 SCC 1.

Names of Parties

Petitioners: Indian Young Lawyers Association and Others (Sabarimala Temple, in re);

Respondents: The State of Kerala and Others.

Judges

Justice Dipak Misra (assenting);

Justice Rohinton Fali Nariman (assenting);

Justice AM Khanwilkar (assenting);

Justice D Y Chandrachud (assenting);

Justice Indu Malhotra (dissenting).

Introduction

The discourse on human rights has in its practical application, remained a monologue of the male majorly, downplaying the on par relevance of females, as well as the other genders. There is severely a lack of perspective on enforcement of rights to all identities of the society. Customs, considered to consist a significant chunk of the source of law has held its iniquity in determining and setting contemporarily impractical differentiations for humans of various genders. Religious freedom, by ingraining secularism in its most foundational tenets, the Constitution has kept itself away from the equation between man and God, keeping a certain aloofness from treating one religion over another. However, within religion itself, the right of persons to hold certain practices has abominably trapped the vision of an equal and practical society with antediluvian ideas and obstacles.

In the case of Indian Young Lawyers Association[159], popularly called the Sabarimala judgment assessed one such belief and customary practice of religion that had since time immemorial kept an entire part of people denied from what they can call their right. By lifting the ban for menstruating women from visiting the revered Sabarimala temple, the Supreme

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[159] (2019) 11 SCC 1.

Court in this judgment attempted to tread upon the constitutional guarantees for the people of India that are equal for all genders, even in matters of religion, and the interplay between religion and law, religion and morality, and religion and relevance within the meaning of the constitutional provisions under Article 13, 14, 15, 17, 25 and 26.

Although the judgment has, dauntlessly put forth the right of menstruating women to enter into the temple that had its doors closed, it however proved to be much ahead of what the classes of people surrounding the beliefs and the matters of the temple and the women in question themselves had a view upon. This again raises the question of the rapport of the constitution to the diversity of human beings, and how the vision of the constitution to ensure a society that does not rely on social evils to justify its behaviour, instead gives room to all the characters under the common identity of human beings, under an accepted and relevant constitution.

To assess this aspect, it is important to understand the rationale and the justifications involved in the Sabarimala case, the facets of the assenting and the dissenting opinions in lieu of the constitutional guarantee of the right of religious identities and freedoms for retaining and to carry forth the same through traditions and customs, and what kind of effect it has on the people as a whole, whether the interpretation of the constitutional rights have shed enough light in justifying what has been called a historic judgment in established the equality of genders in religion, an attempt of which has been made through this case analysis.

Facts

The entire discussion and judgment on the right of women in the course of religious practices and customs has arisen from the writ petition preferred by the petitioners, Indian Young Lawyers Association, under Article 32 of the Constitution. The writ petition sought to guarantee the admittance of female devotees between the ages of 10 and 50 into the Lord Ayyappan Temple at Sabarimala in the State of Kerala. The temple which is believed to be of an eternal celibate symbolizing purity and abstinence is managed by its Dewasvom Board, established by Section 4 of the Travancore-Cochin Hindu Religious Institutions Act, 1950 under the state, partly funded by the State government.

The petition also sought to declare Rule 3(b) of the Kerala Hindu Places of Worship (Authorization of Entry) Rules, 1965 (hereinafter referred as Rule 3(b)) made under the Kerala Hindu Places of Worship Act, 1965 (hereinafter referred as the Act) as unconstitutional and violative of Article 14, 15, 25 and 51A(e) of the Constitution of India,

1950 for it prohibits the exercise of religious freedom of women between 10-50 age group from entering the temple premises.

The case drew the erudite opinions of amici curiae senior counsels Mr Raju Ramachandran and Mr K Ramamoorthy, respectively for the petitioners and the respondents. Delving into the origins, prevalence and the social and religious perception that has enlivened the prohibition from entering a place of worship. The primary reference was made to the case of S Mahendran v. the Secretary, Travancore Dewasvom Board, Thiruvananthapuram & ors.[160] (hereafter referred as the Mahendran judgment) that, on a similar contention held that the ban on entry of women into the Sabarimala Temple was a religious affair, not one to be governed by the law and was not discrimination in the sense that it infringes the fundamental rights of the women.

The justification of the Mahendran judgment as well as the contentions of the respondents in the present case has traced the practice to the belief that women in the menstruating span of life can cause a deity to deviate from celibacy and the shrine to lose its austerity. Furthermore, the contentions went to define the Sabarimala temple as a religious denomination that has its exclusive rights to manage its own affairs and follow distinct and necessary practices. The facts of this case are at a constant interplay between the constitutional aspects of religious freedoms, the perspectives on religious denominations, the existence of customs and practices at the fault-lines of other basic fundamental rights, and the relevance in the present context.

Issues

The Court had summed up the following issues to be addressed by to give ratio and justification to the prayer raised by the petition. These are:

1. Whether the customary exclusion of women in the age group of 10-50 based on the biological factor of menstruation and fertility is discriminatory and redundant, violating the fundamental rights as under Articles 14, 15 and 17 and immoral in the usage of Articles 25 and 26 of the Constitution;
2. Whether as a religious institution, it can make a claim under the guise of the freedom to regulate its own affairs in issues of religion to justify the exclusion of women as essential to the religious practices and fundamentals;

[160]AIR 1993 Ker 42.

3. Whether the Ayyappan temple is a separate denomination in the concept of religion, and if it is, whether it can continue upholding the customs that do not conform with constitutional principles;
4. Whether it is permissible for a "religious denomination" to forbid access of women between the ages of 10 and 50 according to Rule 3 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules? If so, would banning access for women based only on their violate Articles 14 and 15(3) of the Constitution.
5. Whether Rule 3(b of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 is ultra vires to the Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965 and the fundamental rights.

The High Court of Kerala, in the Mahendran judgment, formed three questions in this aspect that have also been taken as relevant to address which were rather directly worded,

a. Whether woman of the age group 10 to 50 can be permitted to enter the Sabarimala temple at any period of the year or during any of the festivals or poojas conducted in the temple.
b. Whether or if the refusal to let that group of women enter the country constitutes discrimination and a violation of Articles 15, 25, and 26 of the Indian Constitution.
c. Whether it is possible for the High Court to give the Devaswom Board and the Keralan government instructions to limit the entry of such women to the temple?

Judgement

With Justice Indu Malhotra dissenting, the bench had held that the prohibition of women of the age group 10-50 into the Sabarimala temple was against constitutional principles and against the fundamental rights that are bestowed to all classes and sections of the society.

The petitioners have contended that the Sabarimala temple does not become a separate religious denomination abstract from Hinduism. It has been argued that for a religious denomination, there must be certain distinctiveness from an already existing religion, hence right to hold property and retain certain rituals and practices and all the other rights under Article 26 of the Constitution. Referring to the Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thritha Swamiar of Sri Shirur Mutt[161] where it had been described that although the ceremonies, rituals and rules in a religion for the mere reason that they partake in economic activities do not become secular in nature, at the same time, it need

[161] [1954] SCR 1005.

not be essential to the existence of the religion. For a religion described by certain practices, these practices need to be so essential to the religion to come under the protections given to religious denominations. Also, there is the three criteria test for determining whether an institution or a section is a religious denomination as it was laid down in the SP Mittal v. Union of India & ors.[162] In the matter of entry into the temple, the practice, as the petitioners claimed was not fundamental to the Hindu Religion that the Sabarimala temple formed a part of.

Citing Sri Venkataramana Devary v. State of Mysore & ors.[163], that albeit being protected by Article 26(b), a denomination's right to completely bar members of the public from participating in temple worship must give way to the supreme right established by Article 25(2)(b) to allow members of the public to attend a temple for worship. The fact that custom and usage does not ban women at any and all times to enter the temple makes it a weak claim to exclude only a particular age group of women from entering the temple when men and women are already classes that cannot be divided into further classes. This can be found in Rule 3(b) that does not completely exclude any woman and the interpretation of the same as barring only particular women would be naturally unconstitutional. Referring to Deepak Sibal v. Punjab University & anr.[164] that segregating the entire class of women based on a biological factor is not a reasonable differentiation without any valid objective and hence is a discriminating aspect on basis of sex, against the dignity of a female, quantifying her fertility, in other words menstrual discrimination.

It is necessary that practices that need to be cognized as unfit for the evolved society, and also on the basis of evidence that this practice of exclusion was not consistent throughout what history has laid down, and hence, it amounted to an erratic notion of untouchability that menstruating women are subjected to rather explicitly in the patriarchal society reinforced through religion in the name of customs hence, violative of Article 14, 15, 17 and 21.

Along these lines, the learned Amicus Curiae, Senior Advocate Mr. Raju Ramachandran who submitted that the Sabarimala temple is a public temple, for the purpose of worshipping the deity, to enter the premises of which is a legal right more than a permissive right. Article 25(1) which declares equal entitlement to religious and divine pursuits is non-discriminatory. The Amicus has argued that the exclusionary practice's application causes women to reveal both

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[162] 1983 SCR 729.
[163] 1958 AIR 55.
[164] (1989) 2 SCC 145.

their age and menstrual status against their will, which amounts to compelled disclosure and, as a result, breaches their right to dignity and privacy guaranteed by Article 21. Further, he went he contended that the practice of barring women from entering the Sabarimala temple must be demonstrated by the respondents to be so essential to religious belief that it is necessary for the survival of the faith. Contrarily, the respondents in this case have not presented any scriptural support for their claim that the exclusion of women is a fundamental tenet of their religion.

The Amicus Curiae of the respondents, learned senior counsel Mr. K Ramamoorthy contended that a religious belief was one that was in practice and consideration of the people for a long time and hence it would be enough basis to consider the Sabarimala temple as a religious denomination with the practice of keeping women in the age group of 10-50 as one essential to the beliefs of the denomination. A perspective was pointed about that if Article 25 were to be viewed solely, then many religious practices from all prominent temples would be violative of the fundamental rights.

They further contended that the nature of the nature of worship and practices observed by the temple, Ayyappan Temple is also a denomination as defined by Article 26 and likewise, devotees of Ayyappan Temple would also constitute a denomination if they accepted the contested religious practice based on a belief that has been in vogue for many centuries unbroken and accepted by all sections of Hindus. Referring to the Shrirur judgment[165], the respondent said that the common faith of the followers of Ayyappan and the custom of the 41 day penance that excludes women because for not trekking the forests, hence the collection of individuals can be identified distinctly, addressed as Ayyappans the individuals in the penance whose intent is to visit the Sabarimala temple.

At this juncture the bench opined that in the additional temples dedicated to Lord Ayyappa, and this restriction is not present, and the Ayyappans do not form a distinct sect and hence, held the Sabarimala temple is a public place of worship and that the religion has no unique identifiable adherents. Referring to the doctrine of the Hindu religion, the court firmly believed that barring women from entry into the temples is not a part of the Hindu doctrines, and allowing access to the Sabarimala temple would not change the essence of the Hindu religion.

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[165]Supra, note 3.

In the dissenting opinion of Justice Indu Malhotra, who relied on the contention of the respondents that the government is not empowered to establish an independent direction against prevalent customs or accord notions of rationality in religious matters. Whether a particular custom is to be tested for its validity, it must be assessed through the tenets of the religion that have created it. The explanatory reference of the respondents through the legends and the narratives that have directed the steps to visit the Sabarimala Shrine and the importance of these directions that the practice of prohibiting women in the age group is justified and for this only differs the manner of worship.

Against the claim that menstrual taboo had prevailed a tradition and practice of untouchability against women at their menstruating period of time, where the learned judge had observed that no traditions followed by devotees at the Sabarimala Temple related to untouchability as defined by Article 17 merely on the terms of the penance to be carried out as per tradition. The tradition has nothing to do with any purported impurity or incapacity, hence, Rule 3(b) not being ultra vires of the Constitution.

In the question of enforceability of fundamental rights under Article 25(1) against the Travancore Dewasvom Board, the court had held the view that the right under 25(1) is irrespective of gender and exclusion of women from entry to religious premises of which has to be non-discriminatory and upon one's conscience. It was held that the rule of exclusion in question cannot be justified on the grounds that allowing entry to women in the specified age group would, in any way, be harmful to public order, morality, health, or, for that matter, any other provisions of Part III of the Constitution.

The assenting opinion had hence laid down that the definition of morality cannot be narrowed down to sections or religions, and neither can public order, or health, besides morality be used to discriminate against women's right to freely practice religion and Rule 3(b) is ultra vires to the Act as well as Constitutionally invalid to be enforced.

Analysis

Customs, Morality and Constitutional morality

Article 51A(e) of the Constitution of India has made it a part of fundamental duties that to safeguard the basic dignity of a woman is a basic respect to both humanity and religious diversities of the nation. At the same time, the Constitution of India has guaranteed that all religions will be respected in an equal manner and there shall be no state religion, hence, giving freedom to these religions to retain their customs and traditions that on an analysis

with respect to the present times will bring many of them against the basic safeguard of a woman's dignity. Although this varies from region to the socio-cultural perspective, an objective assessment will surely give such a result. There are many more religious standards that women have to conform to in the name of customs. When one makes an attempt to hold constitutional morality against customary principles, the legitimacy of each comes on whether it must be sectionalized or individualized. The morality formed by the constitutional vision, as phrased in the judgment relied on whether the fundamental guarantees that puts each individual on an equal level is upheld and at the same time, the essences of religion are not disrespected.

Referring to the Devaru judgment[166], the learned judge pointed out that the right to practice, profess religion, pursuing this by entering public premises of temples, is an individual right given "to all classes and sections of Hindus". The learned Justice DY Chandrachud highlighted that simply because custom, usages, and personal law contain associational characteristics of a religious nature does not give them constitutional immunity. Denying the supremacy of the constitution would mean exempting these actions from constitutional review. Such a view implicates the supremacy of the Constitution, quoting the observation in the case of Manoj Narula v. Union of India, "The democratic values survive and become successful where the people at large and the persons-in-charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints".[167] By directing the view of the case in such a direction, the judgment attempts to respect the pluralism and the expansiveness of constitutional guarantees to be the 'living document' that is dynamic to the needs of the society.

A relevant judgment of the Acharya Jagadishwarananda Avadhuta & ors. v. Commissioner of Police, Calcutta[168], where it was held that performing the Tandava dance part of the followers of Ananda Marga was restricted only on the basis that carrying skulls and daggers posed a significant risk on public health and morality, because the interests of the general public was compromised, however, this did not take away the right of the Ananda Margis to practice their Tandava dance in closed premises. Reading the situation of prohibition of entry of women to the temple, although the judgment implies that there is no infringement of public order, morality and health if women are allowed to enter the Sabarimala.

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[166] Supra, note 5.
[167](2014) 9 SCC 1.
[168](1983) 4 SCC 522.

This perspective however is too generalized to be applicable on communities in the Indian society. It is difficult to ascribe a meaning to the expression morality for it goes down to its source which is again not uniform. Quoting the judgment, "Practices or beliefs which detract from these foundational values cannot claim legitimacy"[169], does not justify the instance that morality and the foundational values can become transient, even if the concern has been raised, differing in beliefs that can be strongly protected as a religious denomination, again putting morality above basic human dignity. Allowing the entry of women into the Sabarimala temple will raise conundrum on other customary practices on the lines of the newly perceived morality, popular cultures, and the ambiguity of an evolving society.

The Discussion on Religious Denominations and Individual Right to Religion

Through the interpretation of the SP Mittal case[170], the judgment has interpreted how the Auroville Emergency Provisions Act is not a credible exercise of the right of religious denominations under Article 26 since it did not form a separate religious denomination. No outside authority has the authority to intervene with a religious denomination's or organization's judgement regarding whether rituals and ceremonies are necessary in accordance with the principles of the religion they practice. The three conditions for a religious denomination must include "*i. A collection of individuals who have a system of beliefs or doctrines that are common to guide their spiritual well-being, ii. It must have a common organization and iii. It must be recognized by a distinct name*". The Sabarimala judgment interprets these tests for the Sabarimala temple holding that the faith inextricably forms a part of the Hindu religion, and cannot be attributed the status of a distinct religious denomination, and has rightly pointed out that the persons who prescribe to the Sabarimala temple visit's 41-day penance and the trek do not cease to be Hindus, and Hinduism along with the Constitutional provisions do not bar any class or caste or genders from entering the premises of a Hindu religious institution.

The Court has rightly pointed out that since the Sabarimala temple comes under statutes that apply on many Hindu temples in the territorial application. Laying ground on the existing law and the policy that the temple in question is not abstract from Hindu practices, and even if it were, it would come under the stipulations of fundamental rights and the safeguard against discrimination, untouchability and harm to the basic dignity of women. This reasoning is similar to the cases where a 'society' or an 'organization' sought to establish themselves as a

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[169]Supra, note 1.
[170]Supra, note 4.

religious denomination but failed on the grounds that it has not departed from an existing religion, hence comes under the same.

A religion is fundamental to a religious denomination, not the notions of caste, social status, class or sex. This interpretation is both logical and consistent with the explanation that supports it- Article 26 does not contain language that would make its provisions subordinate to the other fundamental freedoms, hence prevents either giving the right granted to religious denominations a precedence that supersedes other freedoms or allowing that freedom to live in a vacuum. This justifies the Constitutional ambition to not let religious rights override humanistic behaviors and equality of all before the law.

The judgment in the light of menstrual taboos

Rule 3(b) of the Act of 1965, in its wordings have refrained from bracketing the age group of women in order to segregate them as a class, however their attempt to keep this vagueness in justifying the customary usage has resulted in its interpretation into a more fearful and restrictive segregation. "Women, at such time during which they are not by custom and usage allowed to enter a place of public worship", has attempted to retain the practice of keeping women away from religious premises during that time, a custom forbids them to do so.

This custom that a woman must not enter a place of public worship when in her menstrual period has existed for a long time in the belief that menstrual blood is impure and there is a period of impurity attached with the woman. However, science today has established that the menstruation is not exclusive to women, but also the other recognized sexes, and the blood that is associated with menstruation is only by custom and belief impure, otherwise, it constitutes a very natural process of the biological construct of a person who has a womb and is capable of reproducing.

With respect to the judgment, the learned judges have perorated upon the time-immemorial downplaying of women on the basis of their biological difference and the taboo that is attached to menstruation resulting in a very uninformed and unhealthy gray area for women. Rule 3(b) although reinforces the custom that women do not participate in religious activities when not in physical, mental and emotional 'normalness', the judgment and the opinion of the judges has given a positive implication on this narrow perspective towards women, a more practical and contemporarily significant turn. The judgment in this perspective has the capacity of changing the narrative on menstrual taboos and the stigma against women that has persisted in the subtle form of untouchability, however it has been contented that

untouchability under Article 17 of the Constitution is limited to untouchability based on caste, which should not be constrictively used to ignore the untouchability practiced against women.

However, such a pioneering attempt of the judgment in a culturally diverse India will not percolate in the same manner. This can be seen as how the judgment had not materialized in the society, instead had led to religious anger and chagrin on the reality. Even women in a larger context themselves believe that menstruation is something that must naturally be kept away from religious activities. The contention of the respondents that no woman had to this date questioned the custom is an important point that emphasizes on the same.

Fundamental Rights: Articles 14, 15, 21

Although the respondents assert that they do not aim to discriminate on the basis of gender, it is imperative for the court must determine whether or not there has been a breach of basic rights based on the impact of the allegedly unlawful action rather than the respondents' purpose. The intricacies in the fundamental rights discussion in the women in Sabarimala dialectic, the judgment has held a rather utopian view of against discrimination. Conservative retention of religious practices contrary to fundamental rights have been rightly pointed out in the light of the gender notions giving a light of common sense to the variable of perspective.

The decision has not necessarily changed the existing situation of patriarchy and religion, however has paved the way to not let fundamental rights be downplayed by religious rights on the fundamental strata. Justifying the same by synonymizing constitutional morality with the need to enforce fundamental rights on instances of violation. The Constitution does not tie these fundamental principles of equality to the other provisions of Part III, even though it guarantees equality and the equal protection of the laws in Article 14 and its emanation, Article 15, which forbids discrimination on the basis of religion, race, caste, sex, or place of birth.

Quoting,"*Dignity of the individual is the unwavering premise of the fundamental rights Autonomy nourishes dignity by allowing each individual to make critical choices for the exercise of liberty.*", in the sense establishes that using a natural, biological phenomenon of menstruation as a bar against certain freedom of movement, or the segregation from activities, would encroach upon the liberty to live life with liberty, dignity, privacy, by choice. This perspective of interpretation sheds light on all the statutory provisions and rules that can create a divide against certain sections in this manner and how these are unconstitutional to be enforced under the garb of custom or religion.

Doctrine of Essential Religious Practices

The court pointed out that the protection of essential religious practices for restriction of entry to women into the temple must be so profound in the religious belief that the very definition of religion will change with the removal of this practice. Referring to the case of N Adithayan v. Travancore Devaswom Board & ors.[171] that, "the protection under Article 25 and 26 extend a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice" hence raising a question as to whether essential practices of a religion can conflict with their autonomy to hold on to these practices against fundamental rights and their legal validity.

Again, by separating an essential religious practice and secular activities, the judgment has focused on the debate of religious and fundamental rights, that is, the rights of communities against the rights of an individual. However, from the perspective of a community, the practice that goes against what binds the community and gives them a common cultural meaning to abide by, the deviation to individuals does not fall as practical as it can be. The intention of the Constitution when it extends into personal aspects of an individual's life is to ensure that the person is peacefully a part of the society, while retaining their individual choices and freedoms. For example, in the case of Mohd. Hanif Qureshi v. State of Bihar[172], cattle slaughter was held not essential to the religion of Islam, or of the ceremony of Bakr-Id.

However the respondents claimed that the exclusion of women was an essential religious practise and that it was consistent with the deity's nature as a Naishtika Brahmacharya, the judgment has held that exclusion of women of the age group of 10-50 is not essential religious practice, by giving direction to the positive change that women need not be held by customs to not pursue their divine calling, instead, they can bring about a change in the belief system to establish that women have the right to enter the temple unrestrained by unreasonable factors. The highlight of this observation is the fact that the judiciary worded the difference between superstition and religious beliefs.

This must percolate to each and every section of the society be it the modern perception of religion, or the persisting beliefs in societies that have not seen the light of scientific and social evolution, leading to the understanding that superstition that women in the menstrual

[171] AIR 2002 SC 3538.
[172] (1959) SCR 629.

period are impure and must not be a part of religious activities. The reasoning and the judgment are both relevant, yet will not apply uniformly in the society, because the explanations given for the exclusion of women vary from the smell of menstrual blood attracting wild animals in the trek to the temple, and the mythological source that a certain god made an arrangement with the women in exchange of giving them periods. These are ingrained in the beliefs across various communities, and the credibility of the same become a hassle to refute at the constitutional level.

The Dissenting Opinion

In the dissenting opinion, learned Justice Indu Malhotra, had opined that the rationality cannot interfere with matters of religion, and the Honorable court does not have the authority to assess the same. The followers of various sects must not interfere with the faith and accordance of their religion. Religion-related equality and non-discrimination cannot be evaluated in isolation, but between the followers and the propagators of the faith in question. Relying on the power of judiciary to conduct the judicial review, the dissenting opinion attempts to keep the validity of determining religious matters away from the same.

Whether a practice is valid or not must be with respect to the worshippers and the believers of the faith. However, this opinion is more restrictive and makes faiths and practices more at the behest of certain individuals or groups. In a recent example, the Panchayat, which is a form of legal government had applied a fine on a married woman who had failed a virginity test, because the village and the community believed that the losing virginity was wrong and against the beliefs of the community, which is against fundamental rights of the woman, her dignity, privacy and the right to life and liberty.

The opinion also attributed that the restriction on entry into the premises is subject to a religious denomination's freedom to control its own affairs regarding religion. When the legislature drafted enabling legislation pursuant to Article 25(2)(b) that was made expressly subject to religious practices unique to a denomination under Article 26, Section 3 must be considered in the context of the Constitution. However, the aspect that ‘religious denomination’ should be examined more liberally in a secular society on the lines of peculiar features, however, in a diverse nation as India, this will lead to much chaos and conundrum, completely changing the identity and individuality of religious groups, impractical to the secular and fraternal promise of the constitution.

Conclusion

A quote from the book titled *Renowned Goddess of Desire: Women, Sex, and Speech in Tantra*, authored by Loriliai Biernacki goes, "…a recognition of the difference women present offers the possibility of a choice not to objectify women. This recognition recodes gendered relations inscribing woman discursively in the place of the subject...", emphasises that the perspective of women through the lens of religion and religious beliefs would not rely on an objective view towards them with in religion and reality. In Hinduism, although women as goddesses are revered on the highest pedestal, their existence in reality and practical to the evolved sense of the society, a worse situation. The entry of women to the Sabarimala temple is one such differentiation action that has affected the perception of women and their biological segregation.

The Sabarimala case has at length discussed whether women can be segregated from the entry of women into the Sabarimala temple in Kerala on the basis that the deity cannot be put in the presence of fertile women. Four against one, the judgement had affirmed that reinforcement of rigid stereotypes against women and the taboo on menstruation cannot exactly be justified by a section of a religion as a separate section alone. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the fact that India is a party to this Convention emphasise that it is the responsibility of the State to end taboos surrounding menstruation based on customs or traditions, and further that the State should refrain from invoking the plea of custom or tradition to avoid their responsibility.

It is well within law that regressive practices be questioned and reviewed and removed from the society for the future generations. Religion is a choice and hence a right, which is not restrictive to genders or classes. However, if the law encroaches upon the religions and religious aspects, the choice of religion becomes constrictive. Hence, there is a need that there is a systemic and organised understanding to the interaction between religion and constitutional morality, which is the basic doctrine for the citizens of India.

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