

(1987) 02 SC CK 0059

In the Supreme Court Of India

Case No : Writ Petition (Civil) No. 7698 of 1982

Bachan Lal Kalgotra

APPELLANT

Vs

State of Jammu and Kashmir and Others

RESPONDENT

Date of Decision : 20-02-1987

Acts Referred:

Constitution of India, 1950 — Article 35

Citation : AIR 1987 SC 1169 : (1987) 1 JT 520 : (1987) 1 SCALE 385 : (1987) 2 SCC 223 : (1987) 2 SCR 369 : (1987) 2 UJ 81

Hon'ble Judges : S. Natarajan, J;O. Chinnappa Reddy, J

Bench : Division Bench

Advocate : M.S. Ganesh, for the Appellant; K. Parasaran, Attorney General, Altaf Ahmed, Genl., S. K. Bhattacharya, A. Subhashini and H.C. Paonam, for the Respondent

Judgement

O. Chinnappa Reddy, J.—The petitioner is the Chairman of the Action Committee of West Pakistani Refugees. He migrated from West Pakistan to the State of Jammu & Kashmir in India in 1947 in the wake of the partition of the country. He claims to speak on behalf of the refugees from West Pakistan who migrated and settled in the State of Jammu & Kashmir. He contends that notwithstanding the fact that it is almost four decades since they migrated and settled down in the State of Jammu & Kashmir, they are denied many basic rights which other Indian citizens have in other parts of the country, such as, the right to acquire any immovable property in the State, the right to employment under the State, the right to start an industry, the right to purchase transport vehicles, the right to higher technical education, the right to be elected to the State Assembly or a local body, etc. He complains that while refugees from West Pakistan who migrated into the State of Jammu & Kashmir in 1947 and have settled down in the State are denied these rights, recently the Jammu & Kashmir Legislature has enacted the Resettlement Act, 1982 by which all these rights are given to erstwhile residents of Jammu & Kashmir who had voluntarily migrated to West Pakistan at the time of the partition of the country in 1947 and their children,

who may now choose to return to Jammu & Kashmir. The present writ petition was initially filed challenging the vires of the Resettlement Act, 1982. The vires of the Act is already awaiting the decision of this court in special reference No. 1 of 1982. The petitioner, therefore, gave up the challenge to the vires of the Act in this petition leaving the question to be decided in special reference No. 1 of 1982. For the purposes of this petition, he now proceeds on the basis that the Act is valid but claims that he and other persons situated like him should at least be given the same rights as are given to those who voluntarily migrated to est Pakistan at the time of the partition in 1947.

2. It is true that the persons in the position of the petitioner who migrated from West Pakistan to the State of Jammu & Kashmir in the wake of the 1947 partition and have settled down in the State in Jammu & Kashmir and who are citizens of India and who also have the right to participate in elections to Parliament, have very anomalous rights within the State. For example, they are not entitled to be included in the electoral roll of the State Assembly, they are not entitled to be elected to a village panchayat, they are not entitled to purchase any land and they are also not entitled to be appointed to any service under the State Government. All these denials and deprivations are the consequence of the definition of a 'permanent resident' u/s 6 of the Jammu & Kashmir Constitution. Section 6 is as follows:

Permanent residents-(1) Every person who is, or is deemed to be, a citizen of India under the provisions of the Constitution of India shall be a permanent resident of the State, if on the fourteenth day of May, 1954-

(a) he was a State Subject of Class I or of Class II; or

(b) having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than ten years prior to that date.

(2) Any person who, before the fourteenth day of May, 1954, was a State Subject of Class I or of Class II and who having migrated after the first day of March, 1947, to the territory now included in Pakistan, returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority of any law made by the State Legislature shall on such return be a permanent resident of the State.

(3) In this section, the expression "State Subject of Class I or of Class II" shall have the same meaning as in (State Notification No. 1-L/84 dated the twentieth April, 1927, read with State Notification No. 13/L dated the twentyseventh June, 1932.)

The 1927 Notification defining State Subject is as follows:

The term State Subject means and includes-

Class I-All persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Ghulab Singh Sahib Bahadur, and

also persons who settled therein before the commencement of Samvat year 1942, and have since been permanently residing therein.

Class II.-All persons other than those belonging to Class I who settled within the State before the close of Samvat year 1968,"and have since permanently resided and acquired immovable property therein.

Class III.-All persons, other than those belonging to Classes I and II permanently residing within the State, who have acquired under a rayatnama any immovable property therein or who may hereafter acquire such property under an ijazatnama and may execute a rayatnama after ten years continuous residence therein.

Class IV.-Companies which have been registered as such within the State and which, being companies in which the Government are financially interested or as to the economic benefit to the State or to the financial stability of which the Government are satisfied, have by a special order of His Highness been declared to be State Subjects.

Note 1.-In matters of grants of the State scholarships, State lands for agricultural and house building purposes and recruitment to State service, State Subjects of Class I should receive preference over other classes and those of Class II, over Class III, subject, however, to the Order dated 31st January, 1927 of His Highness the Maharaja Bahadur regarding employment of hereditary State subjects in Government service.

Note II.-The descendants of the persons who have secured the status of any class of the State Subjects will be entitled to become the State Subjects of the same class. For example, if A is declared a State Subject of Class II his sons and grandsons will ipso facto acquire the status of the same class (II) and not of Class I.

Note III.-The wife or a widow of a State Subject of any class shall acquire the status of her husband as State Subject of the same class as her husband, so long as she resides in the State and does not leave the State for permanent residence outside the State.

Note IV.-For the purposes of the interpretation of the term 'State Subject' either with reference to any law for the time being in force or otherwise, the definition given in this Notification as amended up to date shall be read as if such amended definition existed in this Notification as originally issued.

3. There is no dispute that the petitioner and others like him are not 'permanent residents' of Jammu & Kashmir within the meaning of Section 6 of the Jammu & Kashmir Constitution. It is because they are not permanent residents as defined by Section 6 of the Jammu & Kashmir Constitution, they do not have the rights and privileges mentioned earlier. Section 12(b) of the Jammu & Kashmir Representation of the People Act provides that a person shall be disqualified for registration in an electoral roll if he is not a permanent resident of the State as

defined in Part III of the Constitution, Section 8(a) of the Villages Panchayat Act provides that a person shall be disqualified for being chosen as or for being a member of a Panchayat if he is not permanent resident of the State, Section 4 of the Land Alienation Act, 1995 BK. provides that transfer of land in favour of any person who is not a State subject is prohibited and Rule 17(a) of the Jammu & Kashmir Civil Services, Classification of Control and Appeal Rules provides that no person shall be eligible for appointment to any service by direct recruitment unless he is a hereditary State subject to be known hereafter as a permanent resident. It is to be noticed here that these provisions are not open to challenge as inconsistent with the rights guaranteed by Part III of the Constitution of India because of "the Constitution (Application to Jammu & Kashmir) Order, 1954" issued by the President of India under Article 370(1)(d) of the Constitution by which Article 35(A) was added to the Constitution in relation to the State of Jammu & Kashmir. This Article states:

35-A. Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu & Kashmir, and no law hereafter enacted by the Legislature of the State,

(a) defining the classes of persons who are or shall be, permanent residents of the State of Jammu & Kashmir; or

(b) conferring on such permanent residences any special rights and privileges or imposing upon other persons any restrictions as respects:-

(i) employment under the State Government;

(ii) acquisition of immovable property in the State;

(iii) settlement in the State; or

(iv) right to scholarships and such other forms of aid as the State Government may provide,

shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provisions of this part.

The net result is that persons in the position of the petitioner, though citizens of India and entitled to the various Fundamental Rights guaranteed by the Constitution, are not in a position to enjoy many of those rights within the State of Jammu & Kashmir though they are domiciled in that State for nearly 40 years.

4. On the other hand, those who had migrated to West Pakistan in 1947 and who may choose to return to the State of Jammu & Kashmir now, appear to stand in a better position. But that is apparently because of the special position secured to them in the Jammu & Kashmir Constitution itself. Section 6(2) of the Jammu & Kashmir Constitution which has already been extracted by us, expressly provides that such persons if they were previously State Subjects of Class I and Class II shall be permanent residents of the State on their return to the State of Jammu & Kashmir from West Pakistan under a permit for resettlement in the State or for

permanent return issued by or under the authority of any law made by the State Legislature. It is pursuant to this provision that the Resettlement Act has been enacted.

5. In the circumstances, in view of the peculiar Constitutional position obtaining in the State of Jammu & Kashmir. We do not see what possible relief we can give to the petitioner and those situate like him. All that we can say is that the position of the petitioner and those like him is anomalous and it is up to the Legislature of the State of Jammu & Kashmir to take action to amend legislature, such as, the Jammu & Kashmir Representation of the People Act, the Land Alienation Act, the Village Panchayat Act, etc. so as to make persons like the petitioner who have migrated from West Pakistan in 1947 and who have settled down in the State of Jammu & Kashmir since then, eligible to be included in the electoral roll, to acquire land, to be elected to the Panchayat, etc. etc. This can be done by suitably amending the legislations without having to amend the Jammu & Kashmir Constitution. In regard to providing employment opportunities under the State Government, it can be done by the Government by amending the Jammu & Kashmir Civil Services, Classification of Control and Appeal Rules. In regard to admission to higher technical educational institutions also, the Government may make these persons eligible by issuing appropriate executive directions without even having to introduce any legislation. The petitioners have a justifiable grievance. We are told that they constitute nearly seven to eight per cent of the population of the State of Jammu & Kashmir. Surely they are entitled to expect to be protected by the State of Jammu & Kashmir. In the peculiar context of the State of Jammu & Kashmir, the Union of India also owes an obligation to make some provision for the advancement of the cultural, economic and educational rights of these persons. We do hope that the claims of persons like the petitioner and others to exercise greater rights of citizenship will receive due consideration from the Union of India and the State of Jammu & Kashmir. We are, however, unable to give any relief to the petitioners.