
(1997) 11 P&H CK 0045
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 11439 of 1997

Fazru and Another

APPELLANT

Vs

State of Haryana and Others

RESPONDENT

Date of Decision : 04-11-1997

Acts Referred:

Constitution of India, 1950 — Article 13, 14, 25, 372
Haryana Panchayati Raj Act, 1994 — Section 175(1)

Citation : AIR 1998 P&H 133 : (1998) 118 PLR 222 : (1998) 1 RCR(Civil) 111

Hon'ble Judges : Amarjeet Chaudhary, Acting C.J.;V.S. Aggarwal, J

Bench : Division Bench

Advocate : Daya Chaudhary, for the Appellant; D.R. Tikha, DAG, for the Respondent

Final Decision : Dismissed

Judgement

Amarjeet Chaudhary, Actg. C.J.—This order will dispose of Civil Writ Petition Nos. 11439, 457, 3575, 7664, 8984, 9011, 9110, 9122, 9334, 10536, 10784, 11668, 11791, 12140, 12313, 12475, 13088, 13754, 13877 and 14766 of 1997 as common questions of fact and law are involved in the same.

2. In all these cases, the petitioners have challenged the constitutional validity of Section 175(1)(q) of the Haryana Panchayati Raj Act, 1994 as it impinges upon one's right to life and liberty and also violates Article 14 of the Constitution of India. The relevant provisions are reproduced as under:--

" 175. Disqualifications (1) No person shall be a Sarpanch, Up-Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such who; (a) to (p) xx xx xx (q) has more than two living children :

Provided that a person having more than two children on or upto the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified.

3. Section 175 (1) (q) of the Act restricts the number of children which a person can have. A person can have any number of children and he should incur no disqualification on this score if he has any number of children for the office of Sarpanch or Up-Sarpanch or Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such as there is no such provision in the Representation of the People Act, 1951. It has been argued that there is no provision in the Representation of the People Act, that a person having more than two children cannot seek election to the Legislative Assembly or the Parliament. There is also no provision that if a person having more than two children gets another child on or upto the expiry of one year of the date when he gets selected shall cease to hold his seat in the Legislature or Parliament. It has also been argued that Article 14 of the Constitution of India does not prohibit reasonable classification based on intelligible differentia. Legislature could treat villages differently by incorporating this provision for making the slogan "Limit your families to two children norm" a reality.

4. On notice of motion having been issued, the respondents have put in appearance. In some of the Writ Petitions, Written Statements have been filed wherein the pleas raised by the petitioners have been controverted.

5. We have heard counsel for the parties and perused the paper book.

6. In Civil Writ Petition No. 15714 of 1996, "Lala Ram v. State of Haryana", the constitutional validity of the said provision has been challenged. The Division Bench of this Court upheld the vires of the said provision. The concluding part reads:

"Provisions of Section 175 (1) (q) of the Act are not unconstitutional. These do not violate Article 21 of the Constitution. Article 21 of the Constitution of India says that no person shall be deprived of his life or personal liberty except according to the procedure established by law. To make life meaningful, worth living, the legislature can provide (for) limiting one's family. How can the State assure one the right to work, education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want if there is no check on the growth of population. Constitutional dream inhering in Article 41 of the Constitution of India will remain only an idle dream and will never be translated into reality if there is no check on population growth through some legislative measure."

7. The constitutional validity of Section 19 of the Panchayati Raj which is pari materia was also challenged in a bunch of Writ Petitions before the Rajasthan High Court. In all these petitions, the members of Panchayati Raj Institutions were aggrieved against the imposition of the restrictions on having more than two children which was incorporated in Section 19(L) of the Panchayati Raj Act, 1994. In The State of Madhya Pradesh Vs. G.C. Mandawar, and Sant Lal Bharti Vs. State of Punjab, , the Supreme Court held (Para 5):--

"Article 14 does not authorise the striking down of law of the State on the ground

that it contrasts with a law of another State on the same subject. These provisions are neither discriminatory; nor does it contemplate a law of the Centre or State dealing with similar subject being held to be unconstitutional by a process of comparative study of the provisions of the two enactments. The source of authority for two statutes being different, Article 14 can have no application."

We are of the view that the provisions are not hit by Article 14 and the provisions of Section 19(L) could not be declared arbitrary or discriminatory even if no similar enactments have been made with respect to the Members of Parliament, Members of State Legislature, Members of Cooperative Societies or similar situate persons of other States.

8. In *L.N. Mishra Institute of Economic Development and Social Change Patna and Another Vs. State of Bihar and Others*, , it was held (Para 15)

"There can be no doubt that when nationalisation has to be done in a phased manner, all the institutions cannot be taken over at a time. The nationalisation in a phased manner contemplates that by and by the object of nationalisation will be taken over. Therefore, in implementing the nationalisation of private institutions in a phased manner, the Legislature has started with the Institute. Therefore, the question of singling out the Institute or treating it as a class by itself does not arise, for as the provisions of the Act and the Ordinance go, all the private educational institutions as defined in Section 2 (a) of the Act, will be nationalised in a phased manner."

9. It is pertinent to note that Article 14 does not prevent the Legislature for the gradual introduction of restriction. Any single institution could be chosen for the purpose of implementation of the policy. Implementation of the policy in the phased manner was not prohibited by Article 14 of the Constitution of India. The object sought to be achieved by these enactments is to implement the restriction in the growth of population. As mentioned earlier, the validity of Section 175 has already been considered by a Division Bench of this Court. The counsel for the petitioner has not brought on the record anything special which could convince this Court to come to a conclusion other than the one arrived at by a Division Bench of this Court in Civil Writ Petition No. 15714 of 1996, "*Lala Ram v. State of Haryana*".

10. The counsel for the petitioners has further argued that these Writ Petitions cannot be decided at motion stage as some other writ petitions have been admitted. The counsel further argues that some petitioners are Muslims. They are governed by personal law and as such Section 175(1)(q) cannot be applicable to them.

11. It is pertinent to note that these writ petitions are being disposed of after issuance of notice of motion. There is no bar on the powers of the Courts to decide the cases after issuing notice of motion.

12. In certain petitions where the petitioners are Mohammedans by religion like Civil Writ Petition No. 11439 of 1997, it had been argued that under the personal law applicable to the petitioners who are Mohammedans such a restriction violates the personal law of the said petitioners and, therefore is invalid. He urged that this was the law in force before the Indian Constitution, 1950 and, therefore, no law could be made contrary to the personal law of the petitioners.

13. So far as the controversy as to if this was the law in force before the year 1950 is concerned, there is little difficulty that arises that custom, usage or for that matter even the personal law would be taken to be the law in force. In this regard reference can well be made to Articles 13 and 372(1) of the Constitution which read as under:--

"13. Laws inconsistent with or in derogation of the fundamental rights-- (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires.-

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this Article shall apply to any amendment of this Constitution made under Article 368.

372 (1). Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."

It is apparent from perusal of the same that it would be the law in force before the Constitution came into being. Reference with advantage can be made to the decision of the Supreme Court in the case of Director of Rationing and Distribution Vs. The Corporation of Calcutta and Others, , while dealing with Article 372 of the Constitution of India, the Supreme Court held (Para 10) :--

"On the other hand, Article 372 of the Constitution has specifically provided that subject to the other provisions of the Constitution all the laws in force in this country immediately before the commencement of the Constitution shall continue

in force until altered or repealed or amended by a competent Legislature or by other competent authority. The expression "law in force" has been used in a very comprehensive sense as would appear from the provisions of Sub-clauses (a) and (b) of Clause (3) of Article 13 of the Constitution. If we compare the provisions of Article 366(10) which defines "existing law" which has reference to law made by a legislative agency in contradistinction to "laws in force" which includes not only statutory law, but also custom or usage having the force of law, it must be interpreted as including the common law of this country before the Constitution came into force. It is thus clear that far from the Constitution making any change in the legal position, it has clearly indicated that the laws in force continue to have validity, even in the new set up, except in so far as they come in conflict with the express provisions of the Constitution."

The same expression was again construed in the subsequent decision in the case *Sant Ram and Others Vs. Labh Singh and Others*, , and the conclusions were no different and the Supreme Court held (at p. 316):--

"In our judgment, the definition of the term "law" must be read with the first clause. If the definition of the phrase "laws in force" had not been given, it is quite clear that definition of the word "law" would have been read with the first clause. The question is whether by defining the composite phrase "laws in force" the intention is to exclude the first definition. The definition of the phrase "laws in force" is an inclusive definition and is intended to include laws passed or made by a Legislature or other competent authority before the commencement of the Constitution irrespective of the fact that the law or any part thereof was not in operation in particular areas or at all. In other words, laws, which were not in operation, though on the statute book, were included in the phrase "law in force". But the second definition does not in anyway restrict the ambit of the word "law" in the first clause as extended by the definition of that word. It merely seeks to amplify it by including something which, but for the second definition, would not be included by the first definition. There are two compelling reasons why custom and usage having in the territory of India the force of the law must be held to be contemplated by the expression "all laws in force". Firstly, to hold otherwise, would restrict the operation of the first clause in such wise that none of the things mentioned in the first definition would be affected by the fundamental rights. Secondly, it is to be seen that the second clause speaks of "laws" made by the State and custom or usage is not made by the State."

It is obvious from aforesaid that there is no difference between the expressions "existing law" and the "laws in force". This conclusion is strengthened by the consideration that custom, usage and statutory laws are so inter-mixed with personal law that it would be difficult to ascertain the residue of personal law outside them. It is thus to be held that personal law has to be taken as "existing law" or "law in force". But the Legislature can certainly change or alter the same.

14. In that event it had been urged that under Article 25 of the Constitution of India, the petitioners had the fundamental right to practice and propagate their

religion. To appreciate the said argument, Article 25 of the Constitution of India is reproduced below :--

"25. Freedom of conscience and free profession, practice and propagation of religion -- (1) subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law -

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

It is patently clear from what has been reiterated above that a person has a right to profess and, propagate his religion but it is subject to public order, morality and health. The health can be of either spouse. Even if for sake of argument it be taken that under the Mohammedan Law such a restriction could not be imposed, still we have not the least hesitation in holding that there could be a proper Legislation for the health of the weaker section and on that account the same cannot be declared to be invalid.

15. Otherwise also there is no evidence to show that holy Quran had implicitly prohibited family planning. Our attention has not been drawn to anything from the holy Quran so that further discussion could take place. It is a settled law that personal law is not a fundamental right. The fundamental right only is to practice and propagate religion. We know from the Central Civil Service Conduct Rules, 1964 that under Rule 21, no Government servant can enter into a contract of marriage with a person having a spouse living. It is applicable to all persons professing any religion. Before entering into second marriage, he has to obtain the permission of the Government. A legislation to this effect also cannot be held to be ultra vires of the provisions of the Constitution because this question is well settled. It is well known that polygamy was a recognized institution to Hindu religion and practice. The Bombay Prevention of Hindu Bigamous Marriages Act, 1946 had been passed. The Division Bench of the Bombay High Court in the case *The State of Bombay Vs. Narasu Appa Mali*, , held that such a legislation by virtue of which Hindus were to become monogamists does not contravene Article 25 of the Constitution of India. A Full Bench of the Andhra Pradesh High Court in the case *Gogireddy Sambireddy Vs. Gogireddy Jayamma and Another*, , considered the same controversy as to whether Section 11 and 17 of the Hindu Marriage Act offended the provisions of the Constitution of India or not. The argument was rejected and it was held (at p. 161):--

"In fact, Article 25(2) of the Constitution prescribes that the freedom of conscience and the right freely to profess, practice and propagate religion

guaranteed by the first part of Article 25 are subject to the making of laws by the State providing for social welfare and reform. The Hindu Marriage Act introducing as it does the principle of monogamy is undoubtedly a law providing for social welfare and reform as contemplated by Article 25(2) of the Constitution. It is a legislation intended for the benefit of the class of persons to whom the Act is applicable."

We find ourselves in complete agreement with the same and there is no reason on the logic of the same that why it cannot be made applicable to the petitioners who profess Muslim as a religion. It does not interfere in professing their religion, practice or propagating the same. Section 175(1) (q) of the Haryana Panchayati Raj Act, 1994, is a special law and shall apply to all persons irrespective of their caste and religion. The said argument must fail.

16. It is observed that the Government is spending huge amount in propagating Family Planning. In the recent years, the growth of population in the country is alarming. The Government in order to check the same has introduced various Projects to implement the Family Planning which have been entrusted to various agencies one of which is Gram Panchayat. It is expected from the Panches and Sarpanches to set good examples and they are supposed to maintain norm of two children. If they themselves violate the same, what examples they can set before the public. The population can be checked by adopting the Family Planning Measures. If the same are not adopted, then the Nature takes its own turn i.e. people die by natural calamities. In the case in hand, the State Government has put a condition that he who violates Section 175(1)(q) will be disqualified. Right to contest election is not a fundamental right. The petitioner was aware of Section 175(1)(q) and he has not intentionally complied with the Rules and Regulations. We are not oblivious of the fact that Nation's interest is supreme. Growing population is the greatest problem which the country is facing. It will not only be desirable but absolutely essential for every country to see that the Family Planning Programme is maintained at sufficient levels so as to meet the danger of over-population which, if not controlled, may lead to serious social and economic problems throughout the country. No enactment which promotes social and economic justice can be held to be ultra vires. No doubt, every citizen has a right to live with human dignity. But, how one can expect citizens of this country to live with human dignity and social equality when the population goes on increasing by leaps and bounds. If the existing rate of growth of population is allowed to continue it is bound to take the country to a dangerous stage where persons may die of hunger and may not have a roof over their heads to live.

17. The Legislature has rightly come forward by imposing reasonable restrictions in the interest of the State. It has enacted Section 175(1)(q) to curb the menace of population growth by imposing certain restrictions, in the shape of disqualifications on the members of the local bodies such as Panchayati Raj and Municipalities, to hold the office.

18. For the foregoing reasons, there is no merit in these Writ Petitions and the

same are dismissed.