
(2008) 01 GAU CK 0048
In the Gauhati High Court

Imkong Imchen

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 17-01-2008

Acts Referred:

Constitution of India, 1950 — Article 105, 14, 141, 168, 170

Citation : (2008) 1 GLT 682

Hon'ble Judges : M.B.K. Singh, J;B.D. Agarwal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.D. Agarwal, J.—After more than two decades of enactment of Tenth Schedule in the Constitution of India by way of Fifty-second Amendment in the year 1985, sub-paragraph (2) of paragraph 2 of the Tenth Schedule has been assailed being ultra vires of the Constitution. The appellant herein, along with three other persons, filed a writ petition under Article 226 of the Constitution of India seeking a declaration that the above portion of the 10th Schedule of the Constitution of India is unconstitutional being violative of basic structure of the same. The writ petition was registered as WP(C) No. 148 (K) of 2004, which came to be dismissed on 28.7.2005. The learned Single Judge has held that sub-para (2) of paragraph 2 of the Tenth Schedule is neither discriminatory nor violative of the basic structure of the Constitution of India and it is very much within the purview of its constitutional validity. Being aggrieved with this judgment, one of the writ petitioners has filed the present writ appeal.

2. We have heard Mr. Leonard Aier, learned Counsel for the appellant. The Union of India (respondents No. 1 and 2) were represented by Shri A. Zhimomi, learned Asstt. Solicitor General and the State of Nagaland (respondent No. 3) was represented by Shri L.S. Jamir, learned Govt. Advocate. They were also heard. The remaining three writ petitioners were also impleaded as proforma respondents but none of them showed any interest either to support the appellant or to challenge the impugned judgment of the learned Single Judge.

3. Shri Aier, learned Counsel for the appellant reiterated his argument advanced in the writ petition that paragraph 2(2) of the Tenth Schedule has imposed unreasonable restriction on the elected independent members of Legislative Assemblies by way of dis-allowing them to join any political party. According to the learned Counsel, under paragraph 2(3) of the same Schedule, nominated members of a house have been given the privilege and liberty to join a political party, albeit, within a period of six months from the date of their taking oath. It was the contention of the learned Counsel for the appellant that after entering the house of representatives both the elected and nominated members enjoy the same rights, privileges and immunities and as such, all these members form a class unto themselves and the disparity with regard to expressing political affiliation is a direct violation of Article 14 of the Constitution of India. Learned counsel also urged that there is no rationality behind making a distinction in between the elected independent members and nominated members of a house to associate with any political party.

4. In support of the aforesaid contention, learned Counsel for the appellant referred to certain decisions of Hon"ble Supreme Court to bring his point that legislation can be declared unconstitutional if there is unlawful discrimination in between two persons of the same class or category. The citations are *Cochin Devaswom Board, Trichur Vs. Vamana Shetty and Others*, , *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, ; *G. Viswanathan Vs. The Hon"ble Speaker, Tamil Nadu Legislative Assembly, Madras* and another, , *John Vallamattom and Another Vs. Union of India (UOI)*, etc. Learned counsel for the appellant also referred to the treatise of Anti-Defection Law and Parliamentary Privileges by Subhas C. Kashyap (Second Edition, 2003).

5. Per contra, learned Addl. Solicitor General and the learned Govt. Advocate submitted that the issue is no longer res-integra inasmuch the constitutional validity of the Tenth Schedule has already been declared by the Hon"ble Supreme Court in the case of *Shri Kihota Hollohon Vs. Mr. Zachilhu and others*, . Learned counsel for the respondents further submitted that the view taken in the case of *Kihota Hollohon (supra)* has been restated in the case of *Jagjit Singh Vs. State of Haryana and Others*, . According to the learned Counsel, "independent members" and nominated members" enter a house from two different sources and as such, these members cannot be considered as members of the same group or category. Learned Addl. Solicitor General emphasized that the liberty to join a political party to nominated members has been given keeping in view the fact that nominated members may not have political background or political affiliation till their entry in a House or an Assembly. Hence, it cannot be said that the distinction to independent and nominated members has been made without any basis.

6. Chapter III of Part-VI of the Constitution of India deals with constitution of State Legislatures. Under Article 168, few States have been permitted to have two houses known as legislative Council and Legislative Assembly respectively.

Composition of a Legislative Assembly has been set out under Article 170 and for Legislative Council under Article 171 of the Constitution of India. Legislative Assemblies are constituted of members chosen by direct election whereas legislative council also includes members nominated by Governors. Admittedly, the appellant is an independent member of Nagaland State Assembly, where there is no provision of nominated members. Besides this, the appellant, although being an independent member of the house, has been admitted in the council of Ministers by the Ruling party but for obscure reasons the Hon''ble Speaker of the House has not taken any action against the appellant as permitted under the Tenth Schedule. Under such circumstances, the appellant does not appear to have any cause of action to assail the validity of a part of the Tenth Schedule. Despite this, we proceed to answer the question since the writ petition has been dismissed on merit and not on the technical ground of locus standi.

7. In the case of Kihota Hollohon (supra), the constitutional validity of the entire Constitution (Fifty-Second Amendment) Act, 1985 was examined and as per majority decision, except paragraph (7), the remaining paragraphs of tenth Schedule have been held to be within the bounds of the Constitution of India. The relevant observations (per majority) with regard to paragraph 2 of the Tenth Schedule are reproduced below for ready reference:

Accordingly we hold:

that the Paragraph 2 of the Tenth Schedule to the Constitution is valid. Its provisions do not suffer from the vice of subverting democratic rights of elected Members of Parliament and the Legislatures of the States. It does not violate their freedom of speech, freedom of vote and conscience as contended.

The provisions of Paragraph 2 do not violate any rights or freedom under Articles 105 and 194 of the Constitution.

The provisions are salutary and are intended to strengthen the fabric of Indian parliamentary democracy by curbing unprincipled and unethical political defections.

The contention that, the provisions of the Tenth Schedule, even with the exclusion of Paragraph 7, violate the basic structure of the Constitution in that they affect the democratic rights of elected Members and, therefore, (sic) of the principles of Parliamentary democracy is unsound and is rejected.

8. Paragraph 2(2) read with paragraph 6 of the Tenth Schedule were again put in the scanner of the Hon''ble Supreme Court in the case of Jagjit Singh (supra). In this case, the petitioner was elected to the State Assembly as an independent member and he was disqualified by the Speaker of that house for having joined apolitical party. The writ petition was decided upholding the disqualification of the petitioner. While doing so, the Hon''ble Judges followed the ratio of the law laid down in the case of Kihota Hollohon (supra). The petitioner's challenge to his

disqualification was repelled basically on the ground that there is a fundamental difference between an elected independent members and one who is elected with declared political affiliation. Upholding of disqualification and that too referring to the case of Kihota Hollohon sufficiently indicates that there is no Constitutional infirmity in Para 2(2) of Tenth Schedule. The relevant observations made in the case of Jagjit Singh (supra) are reproduced below:

28. We have no difficulty in accepting the contention that there is a fundamental difference between an independent elected member and the one who contests and wins on ticket given by a political party. This difference is recognized by various provisions of the Tenth Schedule. An independent elected member of a house incurs disqualification when he joins any political party after election as provided in para 2(2) of the Tenth Schedule. There is also no difficulty in accepting the proposition that giving of outside support by an independent elected member is not the same thing as joining any political party after election. To find out whether an independent Member has extended only outside support or, in fact, has joined a political party, materials available and also the conduct of the Member is to be examined by the Speaker. It may be possible in a given situation for a Speaker to draw an inference that an independent Member of the Assembly has joined a political party. No hard -- and -- fast rule can be laid down when the answer is dependent on the facts of each case.

(29) It is also essential to bear in mind the objects for enacting the defection law also, namely, to curb the menace of defection. Despite defection a Member cannot be permitted to get away with it without facing the consequences of such defection only because of mere technicalities. The substance and spirit of law is the guiding factor to decide whether an elected independent Member has joined or not a political party after his election. It would not be a valid plea for a person who may have otherwise joined a political party to contend that he has not filled up the requisite membership form necessary to join a political party or has not paid requisite fee for such membership. The completion of such formalities would be inconsequential if facts otherwise show that the independent member has joined a political party. The facts of the four cases of independent elected Members are required to be examined in the light of these principles.

9. Shri Aier, learned Counsel for the appellant submitted that in the aforesaid cases, the validity of paragraph 2(2) was not examined in the light of distinction made in paragraph 2(3) with regard to nominated persons. In our opinion, this submission has no force to review the judgment passed by the Hon''ble Apex Court. Under Article 141 of the Constitution of India, the law declared by the Supreme Court of India is binding on all courts within its territorial jurisdiction. By now, it has also been accepted in the judicial field that obiter dicta views of the Hon''ble Apex Court also have binding effect in the absence of any authoritative decision on the same issue. Very recently, in the case of The Oriental Insurance Company Limited Vs. Meena Variyal and Others, , the Hon''ble Supreme Court has held that obiter dictum of the Apex Court are also binding on

the High Courts in absence of a direct pronouncement on that question elsewhere by the Hon''ble Supreme Court.

10. The authorities cited on behalf of the appellant also do not support the theory of the learned Counsel that both the independent and nominated members should be regarded as belonging to one class and the distinction regarding joining apolitical party infringes Article 14, which is a part of the basic structure of the Constitution of India. In all the judgments, the Hon''ble Apex Court has reiterated that fundamental rights are not absolute and the legislature is competent enough to make reasonable classifications even within the same category of persons.

11. In the case of Ram Krishna Dalmia (supra), the Hon''ble Supreme Court, while examining the validity of a notification being discriminatory and violative of Article 14, has held that a statute may be struck down only if no reasonable basis of classification appear on the face of it. In this case, their lordships also referred the judgment of Hon''ble Apex Court given in the case of Budhan Choudhry and Others Vs. The State of Bihar, . The relevant opinion expressed by their Lordships in the aforesaid case can be fruitfully quoted below:

It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.

12. In the case of Cochin Devaswom Board (supra), the Hon''ble Supreme Court has made the following observations to examine the alleged discrimination in the following words:

A person relying upon the plea of unlawful discrimination which infringes a guarantee of equality before the law or equal protection of the laws must set out with sufficient particulars his plea showing that between the persons similarly circumstanced, discrimination has been made which is founded on no intelligible differentia. If the claimant for relief establishes similarity between persons who are subjected to a differential treatment it may lie upon the State to establish that the differentiation is based on a rational object sought to be achieved by the Legislature.

13. In the case of State of Mysore and Another Vs. P. Narasing Rao, , the Hon''ble Apex Court has held that class legislation is forbidden but not reasonable

classification. There are umpteen numbers of decisions in this line.

14. In the light of the aforesaid observations of the Hon"ble Apex Court, we are of the view that no doubt a statute can be declared ultra-vires if it infringes a declared fundamental right of equality before law without any basis for treating two persons differently who are situated under the same circumstance. In our considered opinion, the doctrine of "situated under same circumstance" is the hallmark to treat two persons or two group of persons alike both in privileges and liabilities.

15. To ascertain whether paragraph 2(2) of the Tenth Schedule is violative of Article 14 in view of the restriction imposed upon independent elected members, it is necessary to look at paragraphs 2(2) and 2(3). For ready reference, these relevant paragraphs are extracted below:

2. Disqualification on ground of detention.--

*** ** (2) An elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election.

(3) A nominated member of a house shall be disqualified for being a member of the house if he joins any political party after the expiry of six months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188.

16. A bare look at paragraph 2(2) and 2(3) clearly indicates that elected and nominated members come from two different sources. The former enters the house by declaring that he or she would function in the house without having any affiliation with any political party whereas the nominated members do not enter such house with any such declaration. We are also of the view that elected members get the opportunity to weigh the pros and cons of becoming a member through a political party. Such members also have the opportunity to assess the political ideals and guidelines of all the political parties and having discarded their policies, choose to remain neutral. However, in the case of nominated persons, there is no such scope to study the agenda of political parties. Hence, it can be said that six months period given to nominated members to opt for any political party, if he so chooses, can be termed as gestation period to take his decision. We would like to add here that except this liberty and that too for a limited period, nominated members have not been placed on a higher pedestal. In our view, the law laid down by the Apex Court in the case of Jagjit Singh (supra) that there is fundamental difference in the elected independent members and the members elected on the basis of declared political affiliation is equally applicable between independent and nominated members.

17. The appellant has admitted in the memo of appeal that all the members of the Legislative Assembly, whether nominated or elected, enjoy equal powers,

privileges, immunities and rights as specified under Articles 194 and 195 of the Constitution of India. In other words, the admitted position is that there is no discrimination with regard to freedom of speech in the Assembly, which is the touchstone of democracy and fundamental right of members of such houses. The only distinction in between the elected independent members and nominated members is with regard to joining a political party. Here also, the nominated members are treated alike to independent members if they decline to join any political party within the statutory period of six months. We are also of the view that if the restriction of joining any political party by independent legislators is lifted even for any limited period with a view to bring these legislators at par with nominated members of the house, it would dilute the very object of enacting Tenth Schedule, which is popularly known as Anti-Defection Law.

18. For all these reasons, we are constrained to hold that the distinction made between the elected independent members and nominated members are based on sound reasoning. The distinction stands judicial test of reasonable classification and does not offend Article 14 of the Constitution of India. As a corollary it is held that sub para (2) of paragraph 2 of Tenth Schedule of the Constitution of India is intra-vires and is constitutionally valid.

For the reasons set-out hereinabove, we hold that the writ appeal has no merit. Consequently, it is dismissed.