

(2000) 01 AP CK 0032

In the Andhra Pradesh High Court

Case No : Writ Petition No. 24809 of 1999

R. Srihari and another

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 21-01-2000

Acts Referred:

Constitution of India, 1950 — Article 102, 14, 173, 184, 325

Legislature Enacted Act, 1950 — Section 30, 31, 32, 33, 34

Representation of the People Act, 1951 — Section 30, 33, 5, 52

Citation : AIR 2000 AP 185 : (2000) 2 ALD 113 : (2000) 1 ALT 428 : (2000) 1 APLJ 133

Hon'ble Judges : M.S. Liberhan, C.J.; R. Ramanujam, J.; J. Chelameswar, J

Bench : Full Bench

Advocate : Mr. K.R. Prabhakar, for the Appellant; Mr. B. Adinarayana Rao for Central Government and Mrs. C. Jayasree Sarathy, Standing Counsel for Election Commission, for the Respondent

Judgement

M.S. Liberhan, C.J.—General election for Andhra Pradesh Assembly to be held on 18-9-1999 was notified. On the murder of the Telugu Desam Party candidate on 15-9-1999, election for Sirpur Assembly constituency was postponed. Andhra Pradesh Government issued notification dated 26-11-1999 permitting Telugu Desam Party to nominate its candidate if so advised. Election Commission too, in exercise of its powers u/s 52 of the Representation of People Act, 1951 (hereinafter referred to as "the Act of 1951"), asked the Telugu Desam Party to nominate its candidate vide its letter dated 26-11-1999. The dates for filing nomination, scrutiny, withdrawal and holding of election were fixed and notified.

2. The petitioner challenged the vires of Section 52 of the Act of 1951. The notification scheduling the postponed election, and letter of Election Commission was impugned albeit, democracy, within the Constitution, is basic structure. Parts XV and XVI of the Constitution provide for election and its related matters i.e., eligibility conditions to be Member of Legislative Assembly by direct election by adult franchise. It is for Parliament to provide eligibility condition to be voter or

disqualification for adult franchise. Right to be voter or to be elected to Assembly is a Constitutional right. These rights could be limited within the powers conferred by Article 326 of the Constitution and laws enacted. Parliament could legislate relating to all matters in connection with elections, like electoral rolls, delimitation of constituencies, due constitution of House etc. Prescribing disqualification and restrictions to be registered voters subject to the law made by the Parliament is also the prerogative of the State legislation. Section 52 of the Act of 1951 is alleged to be violate, Part XV and Article 326 of the Constitution, of the scheme of the Act of 1951, beyond the Parliament's competence, Constitutional right of adult franchise as it denies the right to be elected under the veil of election being regulated. It is contrary to Sections 5, 30, 33 and Part II of the Act of 1951. It is discriminatory.

3. Respondents demurred it. Election, commenced on 21-8-1999, would be complete only upon declaration of the result. It was only postponed on the death of Telugu Desam Party's candidate. The remedy of writ is barred by Article 329 of Constitution. Right to elect or to be elected is a statutory right and could be exercised subject to statutory limitations. Constitution merely provides for election based on the adult suffrage, which recognises the right to be registered voter subject to constitutional provisions and the law made by the appropriate Legislatures. The Representation of People Act, 1950 (hereinafter referred to as "Act of 1950") which provides for the number of seats, the delimitation of constituencies, qualification to be registered as the voter and preparation of electoral rolls etc., while the Act of 1951 provides for conduct of elections, disqualification's for a membership, corrupt practices, election related offences and settlement of election disputes in connection with elections. Parliament has unfettered powers to enact laws regarding qualification and disqualification for the members of the Parliament and the State Legislature's, right to vote and right to contest. State has a power to similar effect with respect to State Legislature subject to law made by the Parliament and the Constitution. Prior to Ordinance of 1992, which is *pari materia* with Section 52 of the Act of 1951, death of a candidate used to result in countermanding of election. Election process was to commence *de-novo*. In order to meet changed circumstances resulting in innumerable countermanding of election on account of terrorism, physical violence, candidate of rival political parties being murdered, phenomenal increase in the number of independent candidate, danger of disruption of election process, on the recommendation of the Electoral Reforms Committee the Ordinance was issued in 1992 which was incorporated in the Act as Section 52. The Supreme Court upheld the *vires* of Ordinance. In view of the role of the party system in democracy, the right of nobody was negated by the impugned section. Political parties constitute class in themselves. Right to contest and vote has been preserved. It does not provide either qualifications or disqualifications for the candidate or the elector. Providing an opportunity to a recognised political party to nominate its candidate on the death of its candidate in the prescribed form is procedural process, though other requirements for valid nomination has

not been tampered with. Union of India averred that right to adult suffrage is not a fundamental right, it is a statutory right, governed by the statute and the Constitution. Powers of the Parliament and the State Legislature to enact laws relating to election are referable to Article 327 read with the Entry 72 of the Union List of the Seventh Schedule and the Entry 37 of the State List of the Constitution. Power to regulate the adult franchise can be made by Parliament. Impugned provisions confer a right on a political party to nominate its candidate on the death of its candidate. The political party's right to contest cannot be denied for a fault on their part.

4. The Counsel for the petitioner formulated question to be answered in verbatim is as under:

"Whether denial of nomination to certain class of people in an election while allowing the nomination by the political party in a situation where the election is postponed on account of the death of a candidate belonging to a political party can be construed as free and fair election which is essential element of the Constitution in democratic set up. There can be no free and fair election if right to vote and right to represent the people is denied."

5. The Counsel for the petitioner after referring to Articles 102, 184, 173, 325, 326, 327 of the Constitution and Section 6 of the Act of 1951 contended that in the case of the death of candidate of a recognised political party the right to nominate a candidate by that party alone would be contrary to Article 14, free and fair election, resulting in discrimination. It would not only violate the equality but also the basic structure of the democracy enshrined in the Constitution. Parliament can provide qualification or disqualification subject to Article 326 of the Constitution but cannot do so for the State Legislatures. Reliance was placed on *Anderson v. Celebrezze* 460 US 780, *Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another*, , *R.C. Poudyal v. Union of India* 1994 Suppl. (1) SCC 324.

6. The Counsel for the respondents refuting the submission contended that it is not a countermanded election but election process was postponed at the stage of voting. Parliament has unfettered powers to make laws relating to or connected with election, be it a election process, right to vote, qualification for voter, eligibility to contest subject to the conditions imposed by law etc., while the State could do with respect to State Legislatures subject to the Constitution and the law made by the Parliament. Reliance was placed on *Rama Kant Pandey Vs. Union of India*, .

7. Our democracy is vibrant, functional within the constitutional parameters. Power to legislate to meet the exigencies arising in society, for governance and for functioning democracy is conferred on the Parliament for the State Legislature to legislate.

8. The challenges of all evils from which the society suffers, be it economic, regional, communal, cast oriented etc., can be met successfully by collectives, howsoever important the right of individual may be. For the democracy without

party system may be chaotic and unimaginable.

9. By evolution of democracy in free society, right to govern oneself through one's representative is inherent. Democracy is one of the processes of governance through one's representatives. Democracy is the basic structure of the Constitution, which forestalls the manipulative politics of the democracy, respecting the rights of the individuals, minorities, against authority though it is elected. It is peaceful Governance without waging war. Democracy has inherent limitations -- be it moral, legal or on ground realities in its constitution, functioning, providing a concrete shape, methodology and mechanism to elect representatives considering the utility, viability, size, the preference for party system, ought to be represented by individual different processes can be provided. It cannot be capsuled in a fixed mould. Power is a vibrant democracy functioning within the constitutional parameters, which confers power on the Parliament and the State Legislatures to legislate to meet the exigencies arising in its functioning. All rights and their efficacy are dependent upon the efficiency and efficacy of the functioning of democracy and process of electing the representatives. Despite the democracy being the basic postulate of our Constitution, it only envisages the radical elections based on adult franchise providing a free and fair election i.e., right to freely vote and contest to be the representative.

10. Political party system has come to stand in any world's democracy. Adult suffrage for democracy does not put any embargo on the political parties, constituted of person's votary of particular school of thought or philosophy needed for the governance with ideological conceptions. The famous saying goes, the politics which is part and parcel of the democracy and the party system, have to take into account the fallibility of human nature, incompleteness of all philosophies, the incapacity of human being to see far into future, it being neither the art of possible nor the rule of majority. It cannot ignore the practicalities of governance. Reforms have no friends or vested interests. With the vastness of the country and the illiteracy of the large number of people, who could hardly understand the complicated system of democracy, no electoral process of democracy can work in the absence of the functioning of the political parties. When a recognised political party sets up a candidate in the election he gets the benefits of its name and symbol which works as a unit of development of the nation and meets the demands of the society from its Government.

11. Collectiveness can successfully meet the challenge of all evils, which the society suffers - be it economic, regional, communal, caste, etc., howsoever important the right of the individual may be. Political parties provide programme, manifestoes, schemes for uplift of society, culture, ameliorating vices of the society, unfolding the political myths, working as watchdog over the falling of the majority and minorities, providing support of light to each from the danger of falling into slumber or drifting away from the human values, thus providing a field for governance and to provide for the need of the society at particular point

of time for the people. There cannot be any dogmatism of doctrinaire approach for the adult franchise leading to the process of electing the representatives.

12. It is axiomatic and accepted in umpteen numbers of successive judgments as a principle - right to elect and to be elected is neither a fundamental right nor an equitable right nor even a common law right. It is a right created by the statute and governed by subject to the limitations provided for it. This right cannot be subjected to governed by principle of equity or natural justice. Working of democracy, elections of representatives, right to vote and to contest elections on the basis of adult franchise is an organic chemistry to be worked by the political institutions of the country representing the majority of the people of the country.

13. Under constitutional scheme based on adult suffrage, for free and fair election, working of the democracy the Legislature enacted Act of 1950 providing for determination of constituencies, allocation of seats, providing for qualification to be voter, preparation of electoral roll etc. The Act of 1951 provided for the process of election, eligibility condition for candidate, disqualification for candidate, settlement of election disputes etc.

14. Procedural process for election provides nomination of the candidate by the requisite number of the voters, scrutiny of nomination, withdrawal of nominations and in case of election the process of voting. Schedule of programme is notified. In case of death of the candidate of a recognised political party, process of election is suspended at the stage of death if it has taken place after the publication of the list of validly nominated candidates. Candidates are classified as candidates of recognised registered political parties, or candidate of registered political parties, and other candidates.

15. The Legislature under the scheme of the Act of 1951, considering the innumerable factors and delays on account of the countermanding of the elections and starting of the election process afresh, enacted Section 52, conferring a right on a recognised registered political party to nominate the candidate. It would be expedient to reproduce the impugned Section 52 of Act of 1951 which runs thus:

"Death of a candidate of a recognised political party before poll. - (1) if a candidate set up by a recognised political party -

(a) dies at any time after 11.00 a.m. on the last date for making nominations and his nomination is found valid on scrutiny u/s 36; or

(b) whose nomination has been found valid on scrutiny u/s 36 and who has not withdrawn his candidature u/s 38;

shall, upon being satisfied about the fact of the death of the candidate, by order, announce an adjournment of the poll to a date to be notified later and report the fact to the Election Commission and also to the appropriate authority;

Provided that no order for adjourning a poll should be made in a case referred to

in clause (a) except after the scrutiny of all the nominations including the nomination of the deceased candidate.

(2) The Election Commission shall, on the receipt of a report from the Returning Officer under sub-section (I), call upon the recognised political party, whose candidate has died, to nominate another candidate for the said poll within seven days of issue of such notice to such recognised political party and the provisions of Sections 30 - 37 shall, so far as may be, apply in relation to such nomination as they would apply to other nominations:

Provided that no person who has given a notice of withdrawal of his candidature under sub-section (1) of Section 37 before the adjournment of the poll shall be ineligible for being nominated as a candidate for the election after such adjournment.

(3) Where a list of contesting candidates had been published u/s 38 before the adjournment of the poll under sub-section (1), the Returning Officer shall prepare and publish a fresh list of contesting candidates under adjournment of the poll under sub-section (1), the Returning Officer shall again prepare and publish a fresh list of contesting candidates under that section so as to include the name of the candidate who has been validly nominated under subsection (2).

Explanation: For the purposes of this section, Sections 33 and 38, "recognised political party", means a political party recognised by the Election Commission under the Election Symbols (Reservation and Allotment) Order, 1968."

16. The Constitution provided the democracy as being an institution to govern. It can be said to be the basic structure of the Constitution. As observed above, to hold a free and fair election under the control of the Election Commission the Constitution provided an embargo on the right of the Legislature rendering a person to be ineligible to be registered as voter in the electoral rolls on the ground of religion, race, caste, sex, envisaging the election to be held on adult suffrage. In conformity with the adult suffrage it was provided that a person who is not less than 18 years of age and does not suffer from Constitutional disqualification or the one provided by law made by the Legislature with respect to non-residence, unsoundness of mind, crime or corrupt or illegal practices has been conferred with a constitutional right to be a registered voter at such elections in accordance with law enacted by the Parliament. The Parliament is conferred with the power to make provisions with respect to elections and all matters relating to or in connection with it.

17. While examining the validity of a law on the touchstone of the concept of basic structure, democracy presupposes the representation of people in Legislature through the methodology of election. The Parliament is constitutionally empowered to make laws and rules with respect to matters relating to or in connection with the elections, method of their enactment, the agency bound in securing its enforcement and the Tribunal to decide disputes arising out of it. The Hon'ble Supreme Court in Smt. Indira Gandhi's case

(supra), noticing the definition of Max Radin and Greeks defined democracy as the rule of poor simply because they form always and necessarily, the more numerous class. The word is only used in the sense of the rule of majority of community as a whole including the "classes" and "masses" since that is the only method yet discovered for determining what is deemed to be the will of the body politic which is not unanimous. This is expressed through election of representative. Definition of democracy by C.F. Strong is to the effect that "form of Government in which rule of the poor of the State is legally vested not in any particular class or classes "but the members of the community as a whole. This may aptly be a description rather than a definition of democracy because it is beyond human ingenuity to foresee the possible permutations and combinations of circumstances to which a generalisation may have to be applied." It is a common man's sense of justice, which sustains the democracy. There is no dispute with the proposition of law laid down in Smt. Indira Gandhi's case (supra), as well as in R.C. Pondyal's case (supra), that right to vote is central to the right of participation in democratic process. There can again be no gain saying of the principle in Anderson's case (supra), that a restriction imposed on a candidate's eligibility to ballot imposed a burden on the voters' right to choose amongst the candidates and burden the right of the voters. The candidate's eligibility requirements on voters implicate the basic right. The people can only assert their preference through candidates or parties or both though it was observed that right to vote is heavily burdened if that vote may be cast only for major party candidates at a time when the other parties or other candidates are clamouring for a place on the ballot. The exclusion of a candidate also burdens the voters. In Reynolds v. SIMS 377 US 533, it was observed that voters couldn't be classified in democracy. A right of equal representation irrespective of any consideration is inherent in democracy. Right of suffrage is a fundamental matter in free democratic society.

18. As observed in the earlier part of the judgment in order to attain the representative form of Government, Act of 1950 and Act of 1951 were enacted. A right was conferred under the Constitution on an adult citizen to get him registered as a voter in terms of the Act as made by the Parliament. It is the Electoral College, which provides the premise to constitute the representative Government. It is this mechanism which confers a right on a member of the electoral college to be elected or right to vote in the respective Legislative Assembly or Parliament. It is not disputed that the Parliament and the Legislature have been conferred with the power under the Constitution for enactment of procedural as well as substantive laws to constitute the democratically elected institutions. Specific reference may be made to Articles 326, 327, Part XV, Entry 72 of List I and Entry 37 of List II of the VII Schedule to the Constitution.

19. The learned Counsel for the petitioner has not challenged the vires of the enactment provided by Act of 1950 or Act of 1951 providing for qualification to be an elector and a representative or a candidate at an election. Articles 327,

328 of the Constitution empowers the Parliament to enact laws in connection with elections, in respect of matters relating to elections, subject to the provisions of the Constitution including the electoral rolls, delimitation of constituencies and all other matters necessary for securing the due constitution of the House. Act of 1951 as well as Act of 1950 provide for such a procedural mechanism. The process at various stages keeping in view the exigencies of the process, the consideration of right to vote and the procedure to be adopted for voting providing for the continuity of election once notified, has been provided for. It is in the wisdom of the Legislature that it conferred a right on a recognised registered political party to substitute its candidate in the event of the death of its candidate. The election is not countermanded on the death of a candidate of a recognised registered political party but is postponed from the stage where the candidate had died after the candidatures of validly nominated persons have been published.

20. The right to be representative of voters has been statutorily conferred on a registered voter. The methodology of the election for free and fair election is imbibed in the Representation of People Act, 1951. Different process for nomination with different requirements has been provided by the Act of 1951, which has not been challenged.

21. In our considered view the contention of the learned Counsel for the petitioner that Sections 52 of the Act of 1951 puts an embargo on the right of a voter to be a candidate or to elect its representative cannot be sustained. In our democracy, inspite of it being an adult suffrage, only right conferred on an adult citizen is the right to be registered as voter in accordance with the Statute and form part of the Electoral College. It is process provided to elect the representative of the majority of the voters. The Legislature in the procedural methodology adopted to elect the representatives of the majority of voters. With the development of democracy by passage of time and expediency in the governance represented by the representatives constituting a common philosophy of majority of the voters, party system has come to stand by. No democracy can succeed in the absence of any party system representing a common philosophy of the electors. Individual representation, in our opinion, may result in chaotic scene and coming to the dead end of the democracy. In we may hasten to add the people can change their governance by peaceful means through party system representing one philosophy or the other. By the smooth running through the party system all over the world in a democracy that people's faith is becoming stronger and stronger in democracy.

22. Democracy, as commonly understood, is the political community and is assumed to be virtuous, good and likely to be seen in governance irrespective of the name it bears. The political sovereignty resides in representation of the citizens as a whole representing the adult population. In democracy the centre of gravity of sovereignty lies in the people. With the progressive development of the democracy people have come to know the policies pursued by a political party,

the institution and the economic structure as also all other matters vital to the success or failure of justice and injustice propagated by a political party. In spite of the fact that political parties are not part of our Constitution but no democracy can afford to ignore their existence. The democracy neither can afford to ignore their existence or can work without them. It is a continuous evolution conscious of fallibility of human nature, impermanence and incompleteness of political philosophy and incapability of the man to see in future. People are hardly able to ignore the practicalities and enduring human values. The party system struggles to achieve equality, justice, abolition of complicated differences in status of our highly manipulative nature of people in the society and in order to avoid the tyrannical approach of various religions, bereft of various other isms, recognised political parties having common agendas, common thoughts, common objects to be attained for the welfare of the society are quite essential for the smooth working of democracy which is very inherent in the voting system. In this era of scientific development public opinion can be mobilised and people can be prepared through collective work which again leads to the formation of an association of people with similar ideas, philosophies, thoughts, ideologies, objects for attainment resulting in the party system. Party system cannot be ignored. Thus in totality one can say that a recognised registered political party will form a class in itself in a political institution of governance. The Constitution itself and the laws enacted have abridged or abrogated some of the rights to be a member of electoral college and the form of the Government required to be represented. The ground realities have to be met. Democracy of representative form does not work in isolation or govern inanimate things. It deals with human beings. There cannot be absolute equality. A right to vote and to be elected is governed by the Statute enacted from time to time by the competent Legislature. It cannot be declared to be ultra vires unless it negates or ameliorates the democracy or the electoral process itself, which is not the case in hand. Section 52 of the Act of 1951 neither puts an embargo on the right to vote nor the right to be elected.

23. Equal opportunity was provided according to the election schedule to everyone to be a candidate in accordance with the procedure established by the Act of 1951. The right conferred on a recognised registered political party in the eventuality of the death of its candidate to nominate a substituted candidate in view of the significance and importance of political party in the working of the democracy, one cannot say it is discriminatory or violates Article 14 of the Constitution. Recognised political party by itself is a class in a democratic system. Otherwise also, the premise of the argument that it will scuttle the right of the person to be representative or the right to be a voter cannot be sustained inasmuch as on the commencement of the election process a right to contest or to be representative has been conferred on every member of the electoral college in conformity with the statute. It is only during the progress of the process of election that if the candidate of a recognised registered political party dies, instead of holding a de novo election the election which was postponed at

that stage has been allowed to continue conferring a right on the recognised registered political party to nominate its candidate keeping in view the importance of the party system in the working of the democracy.

24. We are of the further considered view that Section 52 of the Act of 1951 provides only a processual methodology for election of a representative. It neither confers any substantive right under the Act of 1951 or neither the Constitution nor it takes away any right nor it interferes with any right of an elector or of a citizen. It is well established that a person has got no vested right in the procedure and if we may hasten to add, the procedure does not adversely or substantially affects in any manner the right to elect or to be elected in terms of the statute.

25. The matter is not *res Integra*. A similar Ordinance was issued, the vires of which came up for consideration before the Hon''ble Supreme Court in *Rama Kant Pandey Vs. Union of India*, , wherein the provisions of notification in verbatim represented by Section 52, came under challenge. The Hon''ble Supreme Court upholding the provisions observed:

"The challenge of the petitioner is directed against the differential treatment which the election law in India gives to candidates set up by political parties. The main thrust of the argument of the learned Counsel is that the party system and the recognition of political parties is itself detrimental to the cause of real democracy. In any event, no addition advantage ought to have been allowed to candidates set up by political parties. This stand runs counter to the Constitutional scheme adopted by the nation. It has firmly been established that the Cabinet system of Government has been envisaged by our Constitution and that the same is on the British pattern. (See *Shamsher Singh v. State of Punjab* 1974 2 SCC 381). In England where democracy has prevailed for longer than in any other country in recent times, the Cabinet system of Government has been found to be most effective. In the other democratic countries also the party system has been adopted with success. It has been realised that for a strong vibrant democratic Government it is necessary to have a Parliamentary majority as well as a Parliamentary minority, so that the different points of view on controversial issues are brought out and debated on the floor of the Parliament. This can be best achieved by the party system, so that the problems of the nation may be discussed, considered and resolved in a constructive spirit. To abolish or ignore the party system would be to permit a chorus of discordant notes to replace an organised discussion. In his book *Cabinet Government* (2nd Edition, Page 16) Sir Ivor Jennings has very rightly said, "Party warfare is thus essential to the working of the democracy system". It is, therefore, idle to suggest that for establishing a true democratic society, the party system should be ignored. Our Constitution has clearly recognised the importance of this system, which was further emphasised by the addition of the Tenth Schedule to it. The Election Symbols (Reservation and Allotment) Order is also a step in that very direction."

26. The observations of the Supreme Court squarely cover all the contentions raised by the learned Counsel for the petitioners.

27. Thus, in view of the observations made above, we find no force in the contention of the learned Counsel for the petitioners that there is any discriminatory classification provided by Section 52 of the Representation of People Act, 1951 between a recognised political party or any other party violating Article 14 of the Constitution or it adversely affects the concept of "democracy" denying the right to elect and to be elected nor it denies any right to a qualified elector to be a member of political party not to contest the election. Calling upon a recognised political party to nominate a member to contest the election does not denude the processual nature of nomination, which has to be followed in case of a political party. Thus, it denies no member of a political party to file nomination, which may result in phasing out democracy. The concept of political parties had come into being and has been even recognised by the Constitution. The contention of the Counsel that recognition of political party may create despotism in parties and result in undemocratic and arbitrary democracy is only to be noticed and rejected.

28. As observed above, a plain reading of Constitution, especially Article 327 read with Entry 72 of List I and Entry 37 of List II empowering the Parliament to enact laws in connection with elections, neither runs contrary to the power conferred on the State Legislature to provide for disqualification's which is always subject to the law made by the Parliament. Even otherwise, permitting a nomination, in case of death of a candidate of recognised registered political party, does not provide for any qualification or disqualification or ineligibility of a candidate with respect to which the State Legislature has ever enacted. It cannot be termed as a disqualification falling within the purview of the State Legislature.

29. The contention of the learned Counsel for the petitioners that Section 52 cuts Section 33 read with Section 30 is only to be noticed and rejected as we find no violation by Section 52 or Sections 33 and 30, which are procedural in nature.

30. Impugned section neither violates the scheme of the Act nor in any manner affects the free and fair election.

31. For the reasons recorded above, we find no force in the writ petition and the same is dismissed.