
(1996) 10 MP CK 0018

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 511 of 1990

Satyapal Anand

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 31-10-1996

Acts Referred:

Constitution of India, 1950 — Article 226, 370, 370(3)

Citation : (1997) 2 MPLJ 459

Hon'ble Judges : N.K. Jain, J;A.R. Tiwari, J

Bench : Division Bench

Advocate : Party in person, for the Appellant; P.K Saxena and Jain, for respondent No. 1; Surjeetsingh, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

A.R. Tiwari, J.

ACTING Pro-bono publico, the petitioner has filed this petition on 1-5-1990 under Article 226 of the Constitution of India for the under noted reliefs. -

(a) The Respondent No. 1 may be directed to exercise the power under Article 370(3) and declare that Article 370 has ceased to be operative immediately w/o loss of any further time, as it has already outlived its just life,

(b) The Respondents Nos. 1 and 2 may be directed to take immediate steps to provide the migrants from the valley good living conditions i.e. accommodation, food and all other facilities as are provided to a State Guest to un keep their dignity and to take care of interest of students in particular and other children of theirs,

(c) Such other relief as deemed fit and cost of the petition is kindly allowed.

X X X- The petition is supported by the petitioner"s own affidavit dated 2-5-1990 which states that contents are "true to my own knowledge and belief" and affidavit dated 2-5-1990 of one Shri Moolchand Jain. Detailed affidavit, running

into 119 pages, is filed by the petitioner on 29-7-1992 in support of the petition and prayer for ad interim writ.

The Deputy Secretary to Government, General Administrative Department (GAD), Jammu and Kashmir, Jammu has filed the affidavit in opposition. The petitioner filed the rejoinder on 18-7-1995. Respondent No. 1 filed the reply with affidavit. Respondent No. 1 also filed the counter-affidavit, dated 4-6-1993. Respondent No. 2 also filed detailed return on 23-2-1995. The petitioner has filed I. A. No. 225/96 for compensation to the families of those killed by the militants. This application is also opposed. Petitioner has filed IA 5424/96, which is opposed.

We have heard the petitioner, Shri P.K. Saxena learned counsel for Respondent No. 1 and Shri Surjeet Singh, learned counsel for Respondent No. 2.

The petitioner has placed reliance on number of decisions which need not be cited here in view of the facts, factors and features.

We proceed to consider the submissions. -

The historical background leading to incorporation of Article 370 of the Constitution of India may be stated first. The State of Jammu and Kashmir was an independent State headed by Maharaja Hari Singh as its ruling monarch. Soon after independence of India, the State was invaded by the hostile organised groups. Maharaja then rushed to Delhi to seek accession of his State to the Indian dominion. The accession came about on Article 370. Part of the State is still occupied by the neighboring State and is known as POK (Pakistan Occupied Kashmir). The assurance was given in UNO about plebiscite, albeit on certain conditions. The conditions were not fulfilled. Hence, assurance became ineffective. In view of peculiar situation, still not receding, Article 370 continues to be retained.

Article 370 is placed in Part XXI of the Constitution of India, captioned as Temporary, transitional and special provisions. This Article begins as "Temporary provision with respect to the State of Jammu and Kashmir". Article 370 reads as under. -

"370. Temporary provisions with respect to the State of Jammu and Kashmir -
(1) Notwithstanding anything in this Constitution.-

(a) the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State shall be limited to -

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the said List as, with the concurrence of the Government of the State, the President may by order specify.

Explanation. - For the purpose of this Article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

(c) the provisions of article 1 and of this article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order, specify;

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (1) of sub-clause (b) shall be issued except in consultation with the Government of the State;

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify;

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification."

-X- -X- -X- Luculently, this provision enables the President to declare by public notification that this Article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify on recommendation, as mandated by the Proviso, of the Constituent Assembly of the State as referred to in clause (2).

What emerges is that the provision which was intended to be temporary in principle is permitted to become permanent in practice.

The question that springs is as to whether our Constitution is bad or man is vile? It appears that neither the Constitution is bad, nor is man vile. The controversy

is political and can be sorted out only politically.

12 Thoreau once elegantly observed that "Things do not change, we change". In our view, declaration as sought cannot be issued. The people and situation have to change to get rid of Article 370 of the Constitution of India.

Dr. Ambedkar spoke in Constituent Assembly on 25th November, 1949 thus :-

"What would happen to her independence?

Will she maintain her independence or will she lose it again? This is the first thought that comes to my mind. It is not that India was never an independent country. The point is that she once lost the independence she had. Will she lose it a second time? It is this thought which makes me most anxious for the future. What perturbs me greatly is the fact that not only India has once before lost her independence, but she lost it by the infidelity and treachery of some of her own people. In the invasion of Sind by Mahommed-Bin-Kasim, the military commanders of King Dahar accepted bribes from the agents of Mahommed-Bin-Kasim and refused to fight on the side of their King. It was Jaichand who invited Mahommed Ghori to invade India and fight against Prithvi Raj and promised him to help of himself and the Solanki Kings. When Shivaji was fighting for the liberation of Hindus, the other Maratha noblemen and the Rajput kings were fighting the battle on the side of Moghul Emperors. When the British were trying to destroy the Sikh Rulers, Gulab Singh, their principal commander, sat silent and did not help to save the Sikh kingdom."

-X- -X- -X- The status to a particular State depends on political will and policy decision suiting the conditions and in turn these depend on factors prodigious in number.

In Sampat Prakash Vs. The State of Jammu and Kashmir and Another, , it is held that, -

"Article 370 of the Constitution has never ceased to be operative in Jammu and Kashmir. The President, therefore, could validly pass Constitution (Application to J and K) Orders in 1959 and 1964 extending time for giving protection to any law relating to preventive detention in Jammu and Kashmir against invalidity on the ground of infringement of any of the fundamental rights guaranteed by Part III of the Constitution, from five years under Article 35(c) to ten years and fifteen years respectively. The J and K Preventive Detention Act (18 of 1964) is immune from being declared void on the ground of inconsistency with Article 22."

-X- -X- -X-

In Maharshi Avadhesh Vs. State of U.P., , it is held as under :-

"The next prayer of the petitioner is to command the concerned authorities to abrogate Article 370 of the Constitution or to extend its benefit to other States also so as to remove the existing discrimination. Discrimination, if any, existing on account of Article 370 is a constitutional discrimination and no exception can

be taken to it. Discrimination is prohibited by Article 14 of the Constitution but that provision cannot be applied to nullify a discrimination recognised by the Constitution itself. Further, the petitioner's prayer involves amendment of the Constitution. The Constitution provides a procedure for amendment of the Constitution. That amendment can be carried out only by the Parliament exercising constituent power. This Court cannot issue a mandamus to a legislature to frame a particular law. Similarly, this Court cannot command the Parliament to exercise its constituent power of amending the Constitution. For amending the Constitution a Bill will have to be brought before the Parliament and that Bill will have to be passed by the requisite majority prescribed in the Constitution. This Court cannot control the will of the Parliamentarians. If the Parliamentarians do not give the Bill the requisite majority for its passage the Constitution will not be amended. If this Court cannot control the voting pattern of a Bill seeking to amend the Constitution, this court obviously cannot command any authority to abrogate Article 370 of the Constitution or to extend its benefit to other States also."

-X- -X- -X- The petition does not fall in the category of rarest of rare cases. In W. P. No. 1269/95, Jawarchand Dassani v. State of M.P., W. P. No. 1641/95, Prakashchandra v. Commissioner of Indore Municipal Corporation, W. P. No. 805/96, Smt. Prabhawati Singh v. Union of India, and W. P. No. 866/96, Kamal v. The Assistant Settlement Officer, Ujjain decided by common order dated 5-7-1996, we have held that public interest litigation should disclose and manifest public injury to class of persons who suffer some kind of disability to seek judicial redress or demonstrate public injury of enormity so as to fall in the category of rarest of rare cases.

The Government have to find the solution sooner than later because the provision, special as it is, is supposed to be temporary and transitional only. But we should leave it to the Government. In Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others, , it is held that. -

"We may only observe that the Government is expected to act and must act in a way which would make it consistent with the good administration. It is they, and no one else - who must pass judgment on this matter. We must, therefore, leave it to the Government."

-X- -X- -X- Shri Jefferson, the great American Statesman and player of great-part in the making of American Constitution expressed thus. -

"We may consider each generation as a distinct nation, with a right, by the will of the majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country."

It is thus, clear that will of the majority can alone call the tune and decide the tone.

It is thus, at once clear that the matter is either political or administrative or one

of propriety and does not permit issuance of any writ, direction or order. I. A No. 225/96 is also held to be inappropriate and too obscure to require consideration. And now there is an elected Government through Ballot-Box. Ballot is proper answer to bullet. There is no scope to issue writs.

In the result, we conclude that although the spirit of the petitioner to serve the cause may be laudable, the remedy, if any, lies else where.

In view of the aforesaid view, we hold that I. A. No. 225/96 and I. A. No. 5424/96, presented as a result of reply submitted to the aforesaid application, are not irrecusable and deserve to be rejected. We accordingly reject both these applications.

The petition, in view of the aforesaid conclusion as noted, particularly in paras 11, 14 and 20 above, is dismissed, but with no orders as to costs.