
(1990) 05 CAL CK 0018
In the Calcutta High Court
Case No : Matter No. 896 of 1990

Sri Bhola Nath Sen

APPELLANT

Vs

The Chief Election Commissioner and Others

RESPONDENT

Date of Decision : 02-05-1990

Acts Referred:

Constitution of India, 1950 — Article 19(1), 226

Citation : (1990) 2 CALLT 282 : 94 CWN 884

Hon'ble Judges : A.M. Bhattacharjee, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.M. Bhattacharjee, J.—The petitioner, who contested a parliamentary election without success, has filed this petition for a Writ to direct the Respondents "to supply the report submitted by the Observer appointed by the Election Commission in respect of "the said parliamentary election. The election in question was held on 24th November, 1989 and this petition has been filed on 8th January, 1990, when admittedly the period prescribed for filing an election petition challenging the election in question has already expired, the period prescribed being forty-five days from the date of election of the returned candidate.

2. The petitioner has not, as asserted by him repeatedly in the petition and also by his learned Counsel during the hearing, prayed for setting aside of the election nor for any relief in respect of the result declared. He could not obviously do so with Article 329 of the Constitution starting at the face prohibiting any challenge to such election except by an Election Petition presented in accordance with the provisions of Part VI of the Representation of the People Act, 1951.

3. But the petition and the annexures thereto contain gravest possible allegations against the election in question and if those, or even some of them, are true, the election was preposterously unfair, with mass-scale rigging, booth-capturing and

a reign of terror being unleashed by the rowdies, hoodlums and hooligans at the instance of the members of the ruling party whose candidate was eventually returned. After throwing such serious challenges against the fairness of the election throughout the petition, and asserting the allegations to be true to his knowledge in the affidavit in support of the petition, it is really difficult to appreciate as to why the petitioner, with his undisputed background of a political and public leader and a reported lawyer, did not take any step to have the election set aside in accordance with law. As would appear from the petition itself, it is only after the petitioner came to know from some News Papers that the report of the Observer appointed by the Election Commission in respect of the concerned Parliamentary Constituency was adverse, that he is straining his every nerve to get a copy of the report. But why ?

4. I have not been able to find, nor the learned Counsel for the Petitioner or the Respondents have been able to point out, any statutory provision for the appointment of such Observer. All that I get from the printed Form produced before me by the learned Advocate-General appearing for the Respondents is that the Election Commission may appoint Observers and they are "advised to visit any one of the polling stations before the commencement of the Poll and one polling station at the close of the Poll to see whether the various instructions contained in the Hand Book for Presiding Officers are being followed" and to send a "detailed report direct to" the Commission as soon as possible after declaration of the result of election" which should be "a combined report" regarding polling and counting". Let us assume argued that, as asserted by the Petitioner in paragraph 27 of the petition, "if the said report is disclosed it will be clear to everyone concerned including the voters that the purity of election process. was interfered and the election was not held free and fair and the democratic set up of holding free and fair election was frustrated", and that, as asserted also in paragraph 20 of the petition, "the Observer virtually corroborated the complaints made by the Petitioner about unfairness of the election and the rigging of election" and that "no free and fair election has (been) taken place". If the Petitioner, as the defeated candidate, filed an Election Petition, the only remedy available under the law to have the election set aside and demanded, through Court's process the production of the Observer's Report to substantiate his case, the matter would have been entirely different. The Petitioner, as his own petition and the Annexures thereto would demonstrate, fully knew about all these alleged unfairness of the election, and if the allegations are true, the entire election was a blatant perversion of the electoral process. It was obviously the duty of the Petitioner, specially with such distinguished political background, to take early and expeditious steps to ensure that the electorate and our body politic get rid and are purged of such a nefarious election and the candidate returned therein. It would be trite to say that purity of the election process is the essence of democracy as has been rightly, if I may so, emphasised by the Supreme Court in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, , to which reference has been made by the petitioner's learned

Counsel, Mr. Asoke Ganguly. The Petitioner did nothing of that sort, deliberately allowed the period prescribed to challenge the election to expire and only after coming to know from News Papers that the Observer made adverse report, has come to this Court for a Writ commanding the Respondents to supply a copy thereof. The reason put forward in paragraph 9" of his supplementary affidavit is that "the petitioner's knowledge of the contents of the Observer's report obtained by the Chief Election Commissioner is necessary in order to suggest suitable amendments in the electoral law for preservation of the democratic process". I do not think that if all these rigging, booth-capturing, and other illegal activities have, as alleged by the petitioner, actually taken place to the knowledge of the petitioner, be, with his distinguished legal and political background, can in the least be affected from making suitable recommendations for amendments to prevent such activities without the Report and whether or not the report supports his allegations. It is absurd to suggest that one, who is otherwise capable of making, cannot make effective suggestions for amendments of law to prevent the commission of electoral offences or other undesirable activities, unless those are actually committed or unless some official report as to their commission is made available to him. Even assuming that the Petitioner has a right to know the contents of the report and that right is being denied, we do not issue Writs as a matter of course for the mere infraction of right, if such issuance is not going to serve any useful purpose and is going to be almost an exercise of mere formality or of futility.

5. The learned Advocate-General appearing for the Election Commission has urged that the present petition under Article 226 is not maintainable in view of Article 329(b) mandating that no election to parliament or State Legislature "shall be called in question" except by an Election Petition under, the provisions of the Representation of the People Act, 1951. The petition, as already noted, does not seek any relief relating the election in question and does not seek any adjudication as to the validity or otherwise of the election. But, as noted hereinbefore, the petition has raised objections of the gravest nature and has asserted that there was no free and fair election and the expression "call in question" in law includes raising of objections also. If the petitioner can establish his right to know the contents of the Observer's report de hors and independently of all his allegations against the propriety or validity of the election, that would be a different matter. But his right to know, if any, cannot be grounded, founded or enforced on the basis of all those allegation, as that would in effect amount to taking cognisance of those objections raised and the propriety of the election would thereby stand questioned. I would have, therefore, to decide the question of the petitioner's right to have a copy of the Observer's report as a pure question of law divorced from all the factual allegations that he has chosen to make in his petition against the propriety or otherwise of the election.

6. I have had the advantage of listening to a very able and interesting argument advanced by Mr. Ashoke Ganguly, the learned Counsel for the petitioner, as to

whether the "right to know" or the "right to information" is also a right conferred by the Constitution under Article 19(1)(a) guaranteeing the right to freedom of speech and expression. I have not deliberately used the expression "Fundamental Right" for more reasons than one. Firstly, the expression has nowhere been used in the text of our Constitution and appears to have been used only" as the Heading of Part III of the Constitution cataloguing a number of rights generally referred to as "Fundamental Rights". Secondly, I have not, as yet, been able to appreciate the fundamentality of these so called Fundamental Rights which can be taken away by any Constitutional Amendments, except only two or three of them which are to be treated as parts of the basic structure or features of our Constitution. But even such rights, held by the Supreme Court to be basic features, e.g. Right to Equality under Article 14, have been repeatedly outweighed or overthrown by later Constitutional Amendments inserting Article 31A, Article 31B, Article 31C and one may also refer to Article 359, as it stood originally or as it stands now. And thirdly, notwithstanding Article 13 purporting to invalidate all laws taking away or abridging the so-called fundamental rights, the same result would follow in respect of any other law affecting any other right guaranteed anywhere else in the Constitution, like the rights conferred by Article 265, Article 300A or Article 326. And the only appreciable difference or distinction between the rights conferred by Part III and the rights guaranteed in any other part is that for the infraction of the former, one may (if he can afford to) move the Supreme Court direct under Article 32, while for the infraction of the latter, one has to move the State High Court. But this apparent distinction may also appear to be without any real difference for, as ruled by the Supreme Court itself, it may (not that it must) refrain to take any action under Article 32 when the remedy sought would also be equally available under Article 226. Reference may, among others, be made to the observation of the Supreme Court in *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*,

7. Be that as it may, the point so strongly urged by Mr. Ganguly that the "right to know" or "the right to information" is a right guaranteed under Article 19(1)(a) as a part of the right to "freedom of speech and expression" has evoked a forceful refutation from the learned Advocate General and he has very emphatically argued that no such right can follow, flow or emanate from any of the provision of Part III or any other provision of our Constitution. The learned Advocate-General has urged that any such right is yet to take its birth in our Indian Constitutional Jurisprudence and that the recent manifesto of the Central Government professing to have such a right included in our Constitution by appropriate Amendments would also go to show further that there is no such right as yet.

8. Placing strongest possible reliance on the observations of the Supreme Court in *Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others, , in The State of U.P. Vs. Raj Narain and Others, and in S.P. Gupta Vs. President of India and Others, ,* where the relevant

observations in *Raj Narain* (supra) have been quoted with approval, Mr. Ganguly has urged that the "right to know" has been held by the Supreme Court to emanate from the "right to freedom of speech and expression" guaranteed under Article 19(1)(a). Mr. Ganguly has also relied on the observations of the Supreme Court in *Reliance Petrochemicals Ltd. Vs. Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd. and Others*, where "right to know" has been traced to the "right to live" under Article 21 of the Constitution.

9. There is no surer way to misread a judgment than to read the observations made therein-(a) divorced from the context and (b) literally as if they are legislations. In *Reliance Petrochemical* (supra, at 202-203), there are no doubt observations to the effect that "people at large have a right to know in order to be able to take part in a participatory development in industrial life and democracy", "right to know is a basic right which citizens of a free country aspire in the broken horizon of the right to live in this age on our land under Article 21 of our Constitution", "that right has reached new dimensions and urgency", and "that right puts greater responsibility upon those who take upon the responsibility to inform". But the question of an ordinary citizen's "right to know" or "to acquire information" was not at all in issue in that case even remotely and what was in issue was the right of the Press to inform the people and whether the restriction, which was put in that case on the respondent Press by the order of injunction by the Supreme Court, was any longer required to be continued. The respondent Press published and was going to publish further a series of Articles alleging serious illegalities and infractions of law in the conduct of the affairs of the Petitioner Company which, according to the Company, would have adversely affected the public issue of debentures by the Company, even though the Supreme Court by its earlier order directed that the issuance of such debentures was to be "proceed with without let or hindrance". The respondent-press applied for vacation or variation of that order of injunction and the same was vacated by the two-Judge Bench as the "subscription to debentures was closed and, indeed, the debentures have been over-subscribed" and the publication of any article by the respondent was no longer likely to affect the petitioner and the order of injunction was not required to be continued on consideration of "balance of convenience".

10. The question at issue thus being the right of the Press to inform and not the right of the people to know or to acquire information, and the point for determination being as to whether the order of injunction directing the Press not to publish writings containing certain information required any further continuation, any observation in *Reliance Petrochemicals* (supra) relating to people's right to know or to acquire information cannot form part of the ratio decidendi of that decision. It is true that not only the ratio decidendi but even the obiter dicta of the Supreme Court is also binding on me. When there is not only enunciation of law but also application thereof in a decision, the law enunciated is treated as ratio; but, to borrow from Salmond (10th Edition) page 192, "judicial declaration unaccompanied by judicial application" is only obiter. But

even though obiter of the Supreme Court is, under our Constitution, binding on the Courts below, there must be a clear advertence to some question" of law, even though not necessary for the disposal of the case at hand and an enunciation or declaration of the law in question, so that the same may amount to declaration of law within the meaning of Article 141 to bind the other Courts. In *Reliance Petrochemicals* (supra) the question whether the people have right to know or acquire information, and if they have, whether the same emanates from Article 21 or any other Article of the Constitution, does not appear to be argued or debated or discussed. Any or every observation which a learned judge of the Supreme Court may let fall in the course of his judgment without any enunciation of and deliberation on the question of law may be a casual observation not amounting to any declaration of law on the point to be binding on the other Courts. As I stated hereinbefore, to treat each and every observation made in a decision, as if they are legislation, is to misread the same.

11. The observations of Mathew, J., in *Raj Narain* (supra at 884), relied on by Bhagwati, J. in *S.P. Gupta* (supra), on which also very strong reliance has been placed by Mr. Ganguly, are as hereunder :-

"The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security".

The matter in *Raj Narain* (supra) arose out of an Election Petition where the Election Petitioner summoned the State Government and some of its officers to produce certain documents. Privilege was claimed by the Government against such production u/s 123 of the Evidence Act which was negated by the High Court. On appeal to the Supreme Court, the majority of four learned Judges of the five-Judge Bench, speaking through Ray, C.J., set aside the judgment of the High Court and remanded the matter to the High Court to consider as to whether the documents summoned required protection from production and to order disclosure if they do not "relate to affairs of State". I may at once say that if the case before me was also such an Election Petition where the Petitioner had summoned for production of the Observer's report, I would have had no hesitation to govern myself accordingly and to direct disclosure thereof if the document could not, u/s 123 or otherwise, claim protection from production. The majority judgment has only ruled this much only without any advertence to the question as to whether the people have any basic right to know and whether any such right flows, follows or emanates from the right to freedom of speech or expression under Article 19(1)(a). But Mathew, J. however, in his separate, though concurring, judgment made the observations extracted hereinabove only to fortify the view that any claim to secrecy must make the Court wary to determine as to whether such protection from production is to be allowed in public interest. These observations, therefore, cannot, in the manner and context in which they have been made be treated as a binding authority for the

proposition that the "right to know" is also a right guaranteed under Article 19(1)(a).

12. I have already noted that the observations of Mathew, J. in *Raj Narain* (supra), extracted hereinabove, have been quoted with approval by Bhagwati, J. in *S.P. Gupta* (supra, at 233). But it must also be noted that there also the matter arose in a pending litigation and all that was decided was that the correspondence between the Chief Justice of India, the Chief Justice of Delhi High Court and the Union Law Minister could not claim protection from production u/s 123 or any other Section of the Evidence Act. As I have already said, if the question of production or disclosure of the Observer's report fell for my consideration in any pending litigation, I would not have hesitated to consider the question as to whether the claim for immunity from disclosure could be sustained under the relevant provisions of the Evidence Act. The decision of the seven-Judge Bench in *S.P. Gupta* (supra) is no doubt a binding authority on the question as to whether and how any claim for protection from production of document in a pending litigation can or cannot be allowed. But I have not been able to find anything in the several judgments in *S. P. Gupta* (supra) which can in any way be treated as any authority for the proposition that "the right to know" emanates from the right guaranteed under Article 19(1)(a). It should be noted that even in *Raj Narain* (supra), Mathew, J., in his separate opinion (at 883) made it clear that his observations were to be read in the context of a litigation pending in a Court and the last sentence in paragraph 71 to the effect that "when there are more aspects of public interest to be considered, the Court with reference to the pending litigation, be in a better position to decide where the weight of public interest predominates", would clearly demonstrate that.

13. What was decided in *Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others*, the earliest of the decisions of the Supreme Court relied on by Mr. Ganguly, was that (at 563) even though "an advertisement is no doubt a form of speech", "when it takes the form of commercial advertisement, which has an element of trade or commerce, it no longer falls within the concept of speech, for the object is not propagation of ideas-social, political or economic or furtherance of literature or human thought" and that "it cannot be said that the right to publish and distribute commercial advertisements advertising an individual's personal business is a part of freedom of speech guaranteed by the Constitution". These observations rather go to show that the right to impart knowledge of anything and everything and, therefore the right to know (since one cannot impart knowledge without knowing) may not invariably or "as a matter of course form an integral part of the right to freedom of speech and expression.

14. It has been very strenuously contended by Mr. Ganguly that since one cannot effectively exercise his right to freedom of speech and expression, without a concomitant right to know or acquire information, the latter right must be

deemed to form an integral part of the former. The contention may apparently appear to be attractive, but does not bear a closer scrutiny. And the leading judgment of Bhagwati, J. in the seven-Judge Bench decision in *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and Another, on which strong reliance has been placed by the learned Advocate-General, is a clear authority for the view that such a contention cannot be accepted as a blanket proposition.

15. As has been ruled by Bhagwati, J. in *Maneka Gandhi* (supra, at 640-641), "it is not enough that a right claimed.....flows or emanates from a named fundamental right, or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right, nor can it be regarded as such merely because it may not be possible otherwise to effectively exercise that fundamental right.....what is necessary to be seen is, and that is the test which must be applied, whether the right claimed.... is an integral Part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right "so that the exercise of such right is in reality and substance nothing out an instance of the exercise of the named fundamental right". To quote further from *Manekct Gandhi* (supra", at 641), "every activity that may be necessary for exercise of freedom of speech and expression or that may facilitate the exercise of such right and make it meaningful and effective cannot be elevated to the status of a fundamental right as if it were part of the fundamental right of free speech of expression".

16. Food, living wages, shelter, medicare and all that may be necessary to enable one to exercise or to effectively exercise the right of freedom of speech and expression or the right to life and other personal liberty. But surely all these rights cannot be dovetailed into the right of freedom of speech and expression under Article 19(1)(a) or the right to life or liberty under Article 21 as in that case, to borrow from *Maneka Gandhi* again (at 641), "practically every activity would become part of some fundamental right or other and the object of making certain rights only as fundamental rights with different permissible restrictions would be frustrated" and the striking distinction between the rights specified in Part III which have been expressly declared to be enforceable, and the rights listed in Part IV categorically branded as unenforceable, would loss all sense.

20. Applying these tests, as I must, it may be difficult to treat a bare right to know for the sake knowing, i.e. knowledge for knowledge's sake, to be a fundamental right comprehended in the right to freedom of speech and expression under Article 19(1)(a) or in the right to life and liberty under Article 21, even though it may not be possible to exercise the latter rights effectively or meaningfully without the former right. It has been brought to my notice by the learned Advocate-General and not disputed by Mr. Ganguly that there is a proposal to include the "right to know or to acquire information" as a right expressly specified in Part III of the Constitution. Obviously, a Court is not be

guided in its interpretation of the Constitution or the laws by any proposed legislative measure under contemplation of the Government. But nothing should prevent me from taking note of such a proposed measure and that, when read along with the presumption that a Legislature does not indulge in superfluity, may go to show that those who are sponsoring such an amendment are of the view that the right to freedom of speech and expression under our Constitution may not comprehend a right to know or to acquire information.

21. The American Supreme Court may be regarded to have recognised that the First Amendment embodies the right to receive information and to disseminate it to others. Reference may be made to the decision of the American Supreme Court in *Stanley v. Georgia* (1969 394 U.S. 557) where the Court has invoked the right in cases where the Government has sought to interfere with the receipt of communications and the Court has hinted that the right to know could be used to compel the Government to produce information. But notwithstanding such judicial activism by the American Supreme Court, the primary legal basis even in the United States for the Press to obtain information which the Government does not wish to divulge has to be founded on the terra firma of legislative laws like the Freedom of Information Act, 1974 and the Sunshine Act, 1976.

22. We cannot import either "freedom" or "Sunshine" from America or elsewhere and we must interpret our own Constitution in our own way, bearing always in mind that, unlike the American Constitution, most of the rights in Part III of Constitution are hedged in with specified and elaborate restraints and "absolute right" is almost an anathema under our Constitution. As one eminent Chief Justice of this Court, Dr. Justice P.B. Mukharji, warned us as early as in 1951 in *Sri Mahadeb Jiew and Another Vs. Dr. B.B. Sen*, , "the craze for American precedents can soon become a snare" and "a blind and uncritical adherence to American precedents must be avoided or else there will soon be a perverted American Constitution operating in this land under the delusive garb of the Indian Constitution". "The seven-Judge unanimous Bench of our Supreme Court, speaking through Mitter, J. in *Jagannath Vs. The Authorised Officer, Land Reforms and Ors*, , referred to by the learned Advocate-General, has also disapproved and discouraged "too much reliance" on American authorities, Judicial as well as textual, in interpreting our Constitution.

23. Be that as it may, governing myself, as I must, by the leading judgment of Bhagwati, J. in the seven-Judge Bench decision in *Maneka Gandhi (supra)*, very often referred to as the Magna Carta of our personal freedom or liberties, I, as at present advised, would like to hold that the mere acquisition of knowledge or information cannot be equated with exercise of the right to freedom of speech and expression, even though acquiring knowledge or information may "facilitate the exercise of such right and make it meaningful and effective" and "it may not be possible otherwise to effectively exercise that right". The "theory that a peripheral or concomitant right which facilitates the exercise of a named fundamental right or gives it meaning and substance or makes its exercise

effective, is itself a guaranteed right included within the named fundamental right" has been squarely rejected in *Maneka* (supra, at 643), fully endorsing the earlier unanimous five-Judge Bench decision of the Supreme Court in *All India Bank Employees' Association Vs. National Industrial Tribunal and Others*, where it was observed that it was not possible "to read each guaranteed right as involving or including concomitant rights necessary to achieve the object which might be supposed to underline the grant of each of those rights, for that construction would, by a series of ever expanding concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grotesque result".

24. In *Maneka* (supra), the Supreme Court was dealing with the right to travel abroad and Bhagwati, J. has observed (at 641) that though "it is no doubt true that going abroad may be necessary in a given case for exercise of freedom of speech and expression, but that does not make it an integral part of the right of free speech and expression". But even then denial of that right to travel abroad, though not by itself a fundamental right, may in a given case, directly and inevitably affect the right to freedom of speech and expression. To borrow from *Maneka* (supra, at 644), "if an evangelist- -has made it a mission to preach his faith to people all over the world and for that purpose, to set up institutions in different" countries" and "if an order is made impeding his passport, it would directly affect his freedom of speech and expression". Therefore, the denial of the right to know or to acquire information, though not by itself an integral part of the freedom of speech and expression, may, in a given case directly and inevitably affect one's right to freedom of speech and expression. No blanket test can be laid down, nor has been sought to be laid down in *Maneka* (supra) and all that can be said on the strength of the observations of Bhagwati, J. in *Maneka* (supra), is that if refusal to disclose information in a given case makes the exercise of the right of freedom of speech ineffective and meaningless, such refusal, having directly and inevitably affected the right to free dom of speech and expression, must pass the tests of reasonable restrictions imposed on the grounds specified in Article 19(2).

25. As I have already noted and as also would appear from the affidavit of the Petitioner, sworn to be true to his knowledge, the Petitioner is fully aware of all the alleged illegalities and unfairness of the Election in question and has also further come to know that the report of the Observer corroborates his averments. That being so, non-disclosure of the said report cannot in any way go to affect his right to free speech and expression in respect of suggesting suitable electoral reforms, that being the only avowed purpose for which the Petitioner is claiming disclosure of the report. The right of the Petitioner to freedom of speech and expression not thus being directly or inevitably affected by non-disclosure of the report, no Writ should issue directing the Respondents to disclose the said Report to him, even as-1 summing that with a copy of the Report, if the same has corroborated Ms allegations, the Petitioner could have been more vocal.

26. The petition is, therefore, dismissed, without, however, any order as to costs.