

SUPREME COURT OF INDIA

J & K National Panthers Party

Vs.

The Union of India

C.A.No..... of 2010

(G.S.Singhvi and Asok Kumar Ganguly JJ.)

09.11.2010

JUDGMENT

GANGULY, J.

1. Leave granted.

2. Jammu and Kashmir National Panthers Party, a recognized political party in the State of Jammu and Kashmir has filed this appeal before this Court seeking to impugn the judgment of Jammu and Kashmir High Court, dated 2nd of June 2009.

The High Court dismissed both the writ petitions which raised identical questions. They were heard together and disposed of by the impugned judgment.

3. The main thrust of the challenge before the High Court, as well as before this Court is on the following question: whether or not the action of the government in postponing the delimitation of territorial constituencies of the State pertaining to the Legislative Assembly until the relevant figures published after the first census taken after 2026 is legally sustainable?

4. In fact the appellant is aggrieved by an amendment to the Jammu and Kashmir Representation of the People Act 1957, especially the amendment in Section 3 thereof. This amendment has been brought about in 2002. Section 3 of the Jammu and Kashmir Representation of the People Act 1957 (hereinafter the said Act), as amended from time to time, is set out below:-

"3. Constitution of Delimitation Commission (1) {As soon as may be after the completion of each census} the Government shall constitute a Commission to be called the Delimitation Commission which shall consist of three member as follows:

(a) two members, each of whom shall be a person {who is or has} been a judge of the Supreme Court or of a High Court in India; and

(b) a Deputy Election Commissioner nominated by the Chief Election Commissioner:

{Provided that until the relevant figures for the first census taken after the year 2026 have been published, it shall not be necessary to constitute a Commission to determine the delimitation of

Assembly Constituencies in the State under this sub- section}

(2) The Governor shall nominate one of the members appointed under clause (a) of sub- section (1) to be the Chairman of the Delimitation Commission.

(3) The Delimitation Commission shall determine the delimitation of Assembly Constituencies in the State within such period as may be specified by the Governor."

5. There has been a corresponding amendment also in the sub-section 3 of Section 47 of the Constitution of Jammu and Kashmir, 1957, (hereinafter referred to as Constitution of J & K). Section 47 (3) as amended is set out below:- "47(3) Upon the completion of each census, the number, extent and boundaries of the territorial constituencies shall be readjusted by such authority and in such manner as the Legislature may by law determine:

Provided that such readjustment shall not effect representation in the Legislative Assembly until the dissolution of the then existing Assembly {;Provided that until the relevant figures for the first census taken after the year 2026 have been published, it shall not be necessary to readjust the total number of seats in the Legislative Assembly of the State and the division of the State into territorial constituencies under this sub- section}."

6. The main grievance of the appellant seems to be that in view of the postponing of the delimitation of the constituencies as a result of the aforesaid amendments, the growing imbalance in the matter of composition of various constituencies would continue despite the census operation being carried out. It has been argued before this Court that normally the delimitation exercise is consequent upon a census operation. As a result of the census operation the composition of the population is reflected. That gives rise to an exercise in delimitation for a proper representation of rights of the people in a democratic polity. The further contention is that without these demographical changes being properly reflected in the composition of constituencies by way of a delimitation exercise, the essence of democracy will be defeated in the election. The appellant, therefore, urge that without an exercise in delimitation immediately upon the completion of census operation, the election in the State of Jammu and Kashmir will not reflect the true voice of democracy and the popular view would, therefore, be gagged and would not find a proper representation.

7. In this case we are not concerned much with any factual controversy. In this case the Court has been called upon to decide the correctness or otherwise of contention of the appellant in the context of the relevant laws and the constitutional provisions.

8. Admittedly, in the State of Jammu and Kashmir, the census operation was completed in 2001, but the delimitation was done in 1995.

9. At present in the State of Jammu and Kashmir there are 87 constituencies. Out of that 46 are in Kashmir Valley, 37 in Jammu and 4 are in Ladakh region. Under Section 47(1) of the Constitution of J & K, it is provided that the Legislative Assembly shall consist of 111 members chosen by direct election from territorial constituencies of the State. Under proviso to Section 47 of the Constitution of J & K, it is provided that if the Governor is of the opinion that women are not adequately represented in the assembly, he may nominate not more than two women members. However, it is provided in Section 48 of the Constitution that until the area of the State which is under the occupation of Pakistan ceases to be so occupied and the people residing in that area elect their

representatives, those 24 seats in the Legislative Assembly shall remain vacant for Pakistan occupied Kashmir and will not be taken into account for counting the total membership of the assembly. The said area would be excluded in delimiting the territorial constituencies of the state.

10. The learned Counsel, Professor Bhim Singh, appearing for the appellant submits that of the 37 constituencies in Jammu, some are reserved for Scheduled Castes and Scheduled Tribes whereas of the 46 constituencies in Kashmir valley, not a single one is reserved for Scheduled Castes and Scheduled Tribes. But if the census operation is properly perused, it becomes clear that some of the constituencies in the Kashmir valley should also have been reserved for Scheduled Castes and Scheduled Tribes, had a delimitation exercise been conducted on the basis of census operation. The impugned amendment is, therefore, unfair, undemocratic and unconstitutional as it seeks to defer the delimitation exercise only upon the declaration of census results after 2026.

11. In the writ petition filed before the High Court no substantial challenge has been made to the amendment of the Constitution of the J & K. In the writ petition in paragraph 16, very vaguely this challenge has been made and which is set out below:

"16. If no Delimitation Commission is constituted till 2026, it would mean that there will be no rotation of the Assembly constituencies till the census in 2031. It would mean that reserved Assembly constituencies shall not be rotated from 1996 to 2031 i.e. for 35 years reserved seats shall not be changed. This is an unparallel (sic) instance of the massacre of the rule of law, the principles of the natural justice and of course, denial of justice and equity guaranteed by Article 14 and Article 21 of the Constitution of India. This Act violates the letter of spirit of Section 47 among other provisions as well as that of the J & K Representation of the People Act."

12. In the prayers made in that Writ Petition, prayers B and C have become infructuous. Prayer D is aimed at Section 47 of the Constitution of J & K but we do not find adequate pleading challenging the amendment to Section 47 of the Constitution of J & K.

13. Professor Bhim Singh submitted that he was arguing this case on behalf of about 10, 143, 700 people (as per 2001 Census) of Jammu and Kashmir. He stated that on 27th October 1947, Jammu and Kashmir became a part of India and on 26th January 1957, the Constitution of Jammu and Kashmir was adopted. He also urged that in view of Article 370 of the Constitution of India, autonomy has been granted to the State of Jammu and Kashmir. The learned counsel repeatedly harped on the question that not holding of a delimitation exercise immediately after the completion of the census as a result of the aforesaid amendment is unconstitutional. In fact, the learned counsel argued that the said amendment to the Constitution of J & K was itself violative of the Basic Structure of the Constitution of India as applicable to the State of Jammu and Kashmir, as well as the Constitution of J & K.

14. Dealing with the aforesaid arguments of the appellant (petitioner before the High Court), the Division Bench of the High Court, inter alia, held that delimitation for the purpose of dividing the State into single member territorial constituency maybe a Basic Feature of democracy contemplated in the Constitution. However, High Court opined that the readjustment of the extent and boundaries of such territorial constituency upon completion of each census was neither a mandate of the Constitution, nor the essence of democracy as per the Basic Structure doctrine of the Indian Constitution.

15. The High Court dealt with the decision of the Supreme Court of the United States of America in the case of Charles W. Baker vs. Joe C. Carr reported in 369 US 186. In this decision, the plaintiffs who were entitled to vote to elect members of Tennessee legislature filed a class action for a declaration that Tennessee Apportionment Act of 1901 was unconstitutional as it violated the 14th Amendment of the Constitution of the United States. It was alleged that the impugned act sought to bring about a gross disproportion of representation to the members of the public in respect of their voting right. Thus, the Act placed the plaintiffs in a position of constitutionally unjustifiable equality. Initially the District Court, where the case was filed, held that it lacked jurisdiction to decide the issue.

Thereupon, on appeal the Supreme Court reversed the judgment and remanded the case to the District Court holding, inter alia, that the District Court has the jurisdiction in the matter and also held that the plaintiffs had the locus to challenge the Tennessee Apportionment act.

16. However, Justice Frankfurter and Justice Harlan dissented and held that the nature of controversy is unfit for federal judicial action, and that the existing apportionment was not so unreasonable so as to offend the equal protection clause. The majority opinion in that case was, however, based on the principle of approximate equality in the voice of every voter.

17. In the judgment impugned herein, the High Court held that our Constitution never contemplated equality in the value of vote in view of the several other provisions of the Constitution. Supporting the judgment, the learned Solicitor General of India drew the attention of this Court to the various provisions of the Constitution of India namely, Articles 81, 82 and 170. The learned Solicitor General also referred to a decision of the Constitution Bench of this Court in R. C. Poudyal and others vs. Union of India and others, (1994) Supp 1 SCC 324, wherein this Court examined Article 170 (2) while dealing with the reservation of 12 seats for Sikkimese of Bhutia-Lepcha origin in the State of Sikkim. One of the main questions which were raised in that case is as follows: "Whether Section 7(1-A) and Section 25-A of the Representation of the People Act, 1950 [as inserted by Election Laws (Extension to Sikkim) Act, 1976 and Representation of the People (Amendment) Act, 1980 respectively] and section 5-A (2) of the Representation of the People Act, 1951 [as inserted by the Representation of the People (Amendment) Act, 1980] providing for reservation of 12 seats, out of 32 seats in the Sikkim Legislative Assembly in favour of Bhutias- Lepchas, are unconstitutional as violative of the basic features of democracy and republicanism under the Indian Constitution?" (Para 85, page 373 of the report)

18. While deciding the said issue, this Court took into consideration the decisions of the Supreme Court of the United States in Charles W. Baker [supra], and B. A. Reynolds etc. vs. M. O. Sims - 377 US 533.

19. This Court relied on the opinion of Chief Justice Earl Warren in B.A. Reynolds (supra). At page 536 of the report the learned Chief Justice held as follows:-

".....We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."

20. The learned Chief Justice also relied on historical factors in support of his opinion and held:-

"History indicates, however, that many States have deviated, to a greater or lesser degree, from the equal-population principle in the apportionment of seats in at least one house of their legislatures. So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." (page 537 of the report)

21. After relying on the aforesaid judgments and noticing the position in Australian Constitution the majority opinion of this Court was rendered by Justice Venkatachaliah (as His Lordship then was). By a remarkably erudite formulation of principles, His Lordship held:-

"It is true that the right to vote is central to the right of participation in the democratic process. However, there is less consensus amongst theorists on the propriety of judicial activism in the voting area. In India, the Delimitation Laws made under Article 327 of the Constitution of India, are immune from the judicial test of their validity and the process of allotment of seats and constituencies is not liable to be called in question in any court by virtue of Article 329 (a) of the Constitution." (Para 119, page 383 of the report)

22. It was repeatedly held in Poudyal (supra) that "a perfectly arithmetical equality of value of votes is not a constitutionally mandated imperative of democracy and, secondly, that even if the impugned provisions make a departure from tolerance limits and the constitutionally permissible latitudes, the discriminations arising are justifiable on the basis of the historical considerations peculiar to and characteristic of the evolution of Sikkim's political institutions."

23. In this case the same is true of the evolution of the political institutions of Jammu and Kashmir. This position has been again reiterated in para 126 in Poudyal's case in the following words:

"An examination of the constitutional scheme would indicate that the concept of 'one person one vote' is in its very nature considerably tolerant of imbalances and departures from a very strict application and enforcement. The provision in the Constitution indicating proportionality of representation is necessarily a broad, general and logical principle but not intended to be expressed with arithmetical precision...The principle of mathematical proportionality of representation is not a declared basic requirement in each and every part of the territory of India. Accommodations and adjustments, having regard to the political maturity, awareness and degree of political development in different parts of India, might supply the justification for even non-elected Assemblies wholly or in part, in certain parts of the country. The differing degrees of political development and maturity of various parts of the country, may not justify standards based on mathematical accuracy." (Page 385 of the report)

24. Even Justice S.C. Agrawal, who partly dissented with the majority, agreed with the majority opinion on this aspect of the matter by holding as under:-

"The principle of one man one vote envisages that there should be parity in the value of votes of electors. Such a parity though ideal for a representative democracy is difficult to achieve. There is some departure in every system following this democratic path. In the matter of delimitation of constituencies, it often happens that the population of one constituency differs from that of the other constituency and as a result although both the constituencies elect one member, the value of the vote of the elector in the constituency having lesser population is more than the value of the vote of the

elector of the constituency having a larger population...". (para 182, page 402 of the report)

25. On a perusal of the aforesaid principles as laid down by this Court in the Constitution Bench judgment, we are of the opinion that a right to caste vote is a valuable right but to demand any uniform value of one's voting right through the process of delimitation, disregarding the statutory and constitutional dispensation based on historical reasons is not a justiciable right.

26. In the context of this question we must keep in mind the constitutional scheme in Part XV relating to election. Article 327 of the Constitution empowers the Parliament to make a law relating to delimitation of constituencies. The mandate of Article 329A is that any law relating to the delimitation of constituencies or the allotment of seats to such constituencies shall not be called in question in any Court. Identical provisions have been made in Section 142 of the Constitution of J & K. Section 142(a) is set out below:-

"142. Bar to interference by courts in electoral matters. - Notwithstanding anything in this constitution-

(a) the validity of any law relating to the delimitation of territorial constituencies for the purpose of electing members of the Legislative Assembly or the allotment of seats to such constituencies, made or purporting to be made under section 141, shall not be called in question in any court;"

27. It is, therefore, clear that there is an express constitutional bar to any challenge being made to the delimitation law which is made under Constitutional provisions. Therefore, the substantial challenge of the appellant in this proceeding is not to be entertained by any Court, including this Court. The other aspect of the question is that the amendment to Section 47(3) of the Constitution of J & K violates Basic Structure of the Constitution. This challenge is also not based on a sound principle.

28. The judgment of this Court in His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and another, (1973) 4 SCC 225, which introduced the concept of Basic Structure in our constitutional jurisprudence is the spontaneous response of an activist Court after working with our Constitution for about 25 years. This Court felt that in the absence of such a stance by the constitutional Court there are clear tendencies that the tumultuous tides of democratic majoritarianism of our country may engulf the constitutional values of our nascent democracy. The judgment in Kesavananda Bharti (supra) is possibly an "auxiliary precaution against a possible tidal wave in the vast ocean of Indian democracy".

29. But we must have a clear perception of what the Basic Structure is. It is hazardous to define what is the Basic Structure of the Constitution as what is basic does not remain static for all time to come. However, the basic features have been culled out from various pronouncements of this Court. In the 14th Edition of Shorter Constitution of India by D.D. Basu, these features have been noted as under:- "(a) Supremacy of the Constitution. (a) Rule of law.

(b) The principle of Separation of Powers.

(c) The principles behind fundamental rights.

(d) The objectives specified in the Preamble to the Constitution.

- (e) Judicial review; Art.32.; Arts.226/227.
- (f) Federalism
- (g) Secularism.
- (h) The sovereign, democratic, republican structure.
- (i) Freedom and dignity of the individual.
- (j) Unity and integrity of the Nation. (k) The principle of equality; not every feature of equality, but the quintessence of equal justice
- (l) The rule of equality in public employment.
- (m) The `essence' of other Fundamental Rights in Part III.
- (n) The concept of social and economic justice-to build a welfare State;
part IV in toto.
- (o) The balance between Fundamental Rights and Directive Principles.
- (p) The Parliamentary system of government.
- (q) The principle of free and fair elections.
- (r) Limitations upon the amending power conferred by Art. 368.
- (s) Independence of the judiciary; but within the four corners of the Constitution and not beyond that.
- (t) Independent and efficient judicial system.
- (u) Powers of the Supreme Court under Arts. 32, 136, 141, 142.
- (v) Effective access to justice." (see page 2236-2238)

30. Of these features `free and fair election' in Clause (r) comes closest with the question discussed in this case.

31. This Court has already held relying on the Constitution Bench judgment in Poudyal (supra) that ensuring uniformity in the value of votes is not a constitutionally mandated imperative of free and fair election under our constitutional dispensation. Therefore, the argument on the question of Basic Structure is also without substance and is rejected.

32. For the reasons aforesaid, this Court does not find any merit in the appeal and which is

accordingly dismissed. Parties are left to bear their own costs.