Andhra High Court
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B.K. Parthasarathi vs Government Of A.P. And Others on 14 September, 1999
Equivalent citations: 2000 (1) ALD 199, 1999 (5) ALT 715
Author: M B Naik
Bench: M B Naik, J Chelameswar
ORDER

Motilal B. Naik, J.

1. An important question of law as to the constitutional validity of Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994 is raised in these writ petitions.

2. In all these three writ petitions, the individual petitioner is either an elected Chairman or some other office bearer of one of the local bodies created under the Andhra Pradesh Panchayat Raj Act, 1994.

3. For the purpose of convenience, few facts relating to each of these three writ petitions are traced as under:

In Writ Petition No. 19068 of 1997, the petitioner is the Chairman of Anantapur Zilla Parishad. He was initially elected as ZPTC member from Roddam Territorial Constituency of Anantapur District and subsequently he was elected as Chairman of Zilla Parishad, Anantapur on 20-3-1995. By the time he choose to contest the elections for the office of ZPTC member, he had four children. However, after being elected as Chairman, Zilla Parishad, Anantapur, a female child was born to him on 28-4-1997 in Gautami Nursing Home, Anantapur. It is alleged that a birth of an additional child during holding of the office under the said Act beyond permissible limits as provided under Section 19(3) of the Act disqualifies a person to hold such office. The petitioner was, therefore, issued proceedings in Rc No.2502/97/Cl, dated 3-8-1997 by the third respondent intimating about the disqualification of the petitioner.

4. In Writ Petition No.23521 of 1998, the petitioner was elected as a member of Mandal Parishad Territorial Constitutency, Epurupalem village and later on, he was elected as President of Mandal Praja Parishad, Chirala on 18-3-1995. At the time of contesting the elections, the petitioner had five children and he underwent vasectomy operation on 5-1-1995. However, as the vasectomy operation failed, while holding the post of President, MPP, Chirala, another child was born to him which attracted disqualification of the petitioner in terms of Section 19(3) of the Act. The second respondent, therefore, issued proceedings in Re No.10256/96 dated 24-2-1997 intimating that the petitioner is disqualified to continue as President, MPP, Chairala as well as MPTC member. Petitioner, however, moved the Court of the Principal Junior Civil Judge-cum-Tribunal constituted under the A.P. Panchayat Raj Act, Chairala questioning the validity of the said proceedings in OP No.2 of 1996. The said Tribunal dismissed the said OP No.2 of 1996 on 1 -8-1998.

5. In Writ Petition No.29460 of 1998, the petitioner was elected as a member of Gambheerraopet Gram Panchayat from Ward No.1. By that time, he had four children. While the petitioner was holding the said post, a fifth child was born to him on 2-8-1997. The fourth respondent, therefore, issued proceedings in A/57/98 dated 4-8-1998 disqualifying the petitioner from holding the said post in terms of Section 19(3) of the Act.

6. The Legislature of Andhra Pradesh made "Andhra Pradesh Panchayat Raj Act, 1994" in pursuance of the provisions of Part-IX of the Constitution of India, which provisions authorised the respective State Legislatures to make bylaw provisions with respect to the composition of the "Panchayats" and matters connected therewith. The expression 'Panchayat' is defined under Article 243(a) of the Constitution. The Legislature of Andhra Pradesh while making such law, prescribed various disqualifications in regard to holding of various offices created under the above-mentioned enactment. The relevant section for the purpose of deciding the issue before us is sub-section (3) of Section 19, which reads as under:

"A person having more than two children shall be disqualified for election or for continuing as member:

Provided that the birth within one year from the date of commencement of the Andhra Pradesh Panchayat Raj Act, 1994 hereinafter in this Section referred to as the date of such commencement of an additional child shall not be taken into consideration for the purpose of this section;

Provided further that a person having more than two children (excluding the child if any born within one year from the date of such commencement) shall not be disqualified under this Section for so long as the number of such commencement does not increase;

Provided also that the Government may direct that the disqualification in this Section shall not apply in respect of a person for reasons to be recorded in writing."

As indicated above, in all these three writ petitions, the Constitutional validity of Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994, is challenged, mainly on three grounds.

7. Leading the arguments on behalf of the writ petitioners, Sri S. Ramachandra Rao, learned senior Counsel, firstly, submitted that the impugned provision is in the nature of violating the right of privacy of the petitioners as enshrined under Articles 19 and 21 of the Constitution of India. It is secondly contended that the impugned provision has no nexus with the purpose which is sought to be achieved through the said Act. It is thirdly argued that the impugned provision violated Article 14 of the Constitution of India. In support of his submissions, the learned senior Counsel has taken us to few decisions of the Supreme Court of India as well as the Supreme Court of America.

8. We have also heard the learned Additional Advocate General for the official respondents as well as Sri M.R.K. Chowdary, learned senior Counsel, Sri B. Adinarayana Rao, learned Counsel and also Sri K. Venkataramaiah, learned Counsel for the implead-petitioners, and Sri A. Sudarsana Reddy, learned Counsel for the petitioner in WPNo.29460 of 1998.

9. The "right of privacy" as a constitutionally protected right is not to be found in the express language of the Constitution of India. However, the said right is recognised as a facet of Article 21 of the Constitution of India. In Kharak Singh v. Stale of Uttar Pradesh, and in Govind v. Slate of Madhya Pradesh,

, the Supreme Court while examining this aspect held that the right to privacy is only a facet of Article 21 of the Constitution.

10. The American Supreme Court, in a series of decisions considered the ambit and scope of 'right of privacy' and the various facets thereof. The broad contours of this right are 'repose' 'sanctuary' and 'intimate decision'. In the language of the learned author Laurence H. Tribe, these expressions mean:

".....repose refers to freedom from unwarranted stimulai, sanctuary to protection against intrusive observation; and intimate decision to autonomy with respect to the most personal of life choices."

11. Coming to the view of the Supreme Court of India, in a separate but concurring judgment in Kharak Singh's case (supra), Subba Rao, J., while examining the 'right of privacy' as a part of Article 21 of the Constitution of India, held thus:

".....If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated

measures....."

12. Justice Mathew in Govind's case (supra) while recognising the existence of the 'right of privacy' under the Indian Constitution and the need to protect such a right, held thus:

"The right to privacy in any event will necessarily have to go through a process of case by case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterise as a fundamental right, we do not think that the right is absolute."

13. Various attempts of the State to invade the personality-contents and process of mind either by way of bodily intrusion or control, public command or deliberate omission became the subject-matters of debate before the American Supreme Court in various cases. The laws through which Government attempted to shape the minds of the subjects in the areas of liberty and conscience, education and freedom of enquiry, screening the sources of consciousness, coercive conditioning, intrusion on the body life physical invasion or gross neglect, decisions about the birth and babies, the liberty of the individual in the areas of risk taking, vocation, travel, appearance and apparel, the reputation and records are some of the specific areas which were considered by the American Supreme Court in the context of "right of privacy."

14. The personal decisions of the individual about the birth and babies called 'the right of reproductive autonomy' is a facet of a 'right of privacy.' The American Supreme Court in Skinner v. Oklahoma, 316 US 535, characterised the right to reproduce as a "one of the basic civil rights of man."

15. The right to make a decision about reproduction is essentially a very personal decision either on the part of the man or woman. Necessarily, such a right includes the right not to reproduce. The intrusion of the State into such a decision making process of the individual is scrutinised by the constitutional Courts both in this country and in America with great care.

16. In Griswold v. Connecticut, 381 US 479, the constitutionality of a statute which sought to restrict the right of married persons to use contraceptive devices fell for the consideration of the Court. The majority of the American Supreme Court held that this statute impermissibly limited the 'right of privacy' of the married persons. Justice Doglas who delivered the majority opinion, traced this 'right of privacy' to several guarantees of the bill of rights. The Court held that the impugned statute regulated a personal marital relationship without an identifiable and legitimate relationship and would expose the married couple to an inquiry into the intimate details of their relationship.

17. In Eisenstadt v. Baird, 405 US 38, the Supreme Court invalidated a statute whih prohibited the distribution of contraceptives to unmarried persons on the ground that it violated the equal protection clause as the Court found no rationale or legitimate distinction between use of contraceptives by married or unmarried persons.

18. In Roe v. Wade, 410 US 113, the Court held that the right to have an abortion was a part of the fundamental constitutional right of privacy of the woman and such a right could be interfered with by the State only to promote a compelling interest of the State. The protection of the health of the woman was held to be a compelling interest of the State.

19. All the above-mentioned cases, of course, deal with the right of the individual either a man or a woman to take a decision not to reproduce and where the State sought to interfere with such a decision making process, Irrespective of the conclusion reached by the Court in each of the individual cases, the Court recognised in all-these decisions that the 'right of privacy' is not an absolute right and such a right could be restricted if required to promote some compelling interest of the State.

20. As discussed above, 'the right of privacy' which is held to be a facet of Article 21 of the Constitution, in this country must also be subjected to similar restrictions which are held constitutionally permissible in the context of the other facets of the right guaranteed under Article 21 of the Constitution of India. The Supreme Court in Govind's case (supra) held that even the right under Article 21 is not an absolute right.

21. Applying these principles, the challenge to the impugned provisions of the Andhra Pradesh Panchayat Raj Act, 1994 must be examined.

22. The impugned provision, viz., subsection (3) of Section 19 of the said Act does not directly curtail or directly interfere with the right of any citizen to take a decision in the matter of procreation. It only creates a legal disability on the part of any person who has procreated more than two children as on the relevant date of seeking an elected office under the Act. The substance of the provision is that it does not compel directly anyone to stop procreation, but only disqualifies any person who is otherwise eligible to seek election to various public offices coming within the ambit of the Andhra Pradesh Panchayat Raj Act, 1994 or delcares such persons who have already been holding such offices to be disqualified from continuing in such offices if they procreate more than two children.

23. On behalf of the official respondents, the learned Additional Advocate-General submitted that the object behind creating such a disqualification is to encourage some measures of birth control more particularly in the context of persons who are seeking to hold public offices as representatives of the people. Learned Additional Advocate -General submitted that practice of such birth control measures by the elected representatives to the offices under the said Act is likely to have profound influence on the people whom they represent. It is in this background, the learned Additional Advocate-General submitted that the restrictions brought out under sub-section (3) of Section 19 of the said Act cannot be held to be illegal and violative of Articles 19 and 21 of the Constitution of India. According to the learned Additional Advocate-General, right to contest to an elected office is only a statutory right and not a fundamental right and through the impugned Legislation none of the fundamental rights of the petitioners is infringed and that the petitioners have to show to this Court as to which of their fundamental rights are taken away by the impugned Legislation.

24. Sri S. Ramachandra Rao, learned senior Counsel appearing on behalf of the petitioners, however, made efforts to convince us that if at all the objective of population control is to be achieved, the Legislature could as well have included all other elected representatives like members of Legislative Assembly etc. It is submitted that Section 177 of the Act provides for the composition of Zilla Parishads. Subsection (3) thereof provides that the Zilla Parishad shall consist of persons elected under Section 179, and the Members of the Legislative Assembly of the State representing the Constituency, the Member of the House of the People representing the Constituency which comprises either wholly or partly the district concerned and the Member of the Council of the States who is a registered voter in the district and two persons belonging to the minorities to be co-opted in accordance with the procedure prescribed. The learned senior Counsel contended that though all the above-mentioned categories of persons are the members of the Zilla Parishad, but for the purpose of disqualification, only the elected members under this Act alone are sought to be disqualified under sub-section (3) of Section 19 of the Act. Learned senior Counsel submitted that there is a disparity in the classification of members which offends Article 14 of the Constitution of India.

25. Whether creation of a restriction such as the one created in this case, would in fact achieve the object sought to be achieved, cannot be demonstrated in proceedings like this, but however, the legislative measure is reasonably be connected with the object sought to be achieved. In our considered view, the inquiry must stop there and this Court would not be justified in making a further inquiry as to what extent such a purpose would be achieved. The fact remains that the population growth is one of the major problems facing this country and any measure to control the population growth unless it impermissibly violates some constitutionally protected right, must be upheld as a legally permissible exercise of legislative power. Laurence H Tribe in his "American Constitutional law" says thus:

".....To make sense for Constitutional law out of the smorgasbord of philosophy, sociology, religion and history upon which our understanding of humanity subsists, we must turn from absolute propositions and dichotomies so as to place each allegedly protected act, and each allegedly illegitimate intrusion, in a social context related to the Constitution's text and structure....."

26. What is sought to be curtailed by the Legislature in this case is not the right to procreation but the right to seek certain elected offices created under the Andhra Pradesh Panchayat Raj Act, 1994 if one begets more children than the prescribed limit. Right from the earliest decision in N.P. Ponnuswami v. Returning Officer, Namakkal, , it has always been held that the right to contest in election is a statutory and not a fundamental right. In Jamuna Prasad v. Lachhi Ram, , Base, J., speaking for the

Constitutional Bench of the Supreme Court in the context of a challenge to certain provisions of the Representation of the Peoples Act, as violating the fundamental right to freedom of speech, held thus:

"....The laws do not stop a man from speaking. They merely prescribe conditions which must be observed if he wants to enter Parliament.

The right to stand as a candidate and contest an election is not a common law right. It is a special right created by the statute and can only be exercised on the conditions laid down by the Statute. The Fundamental Rights Chapter has no bearing on a right like this created by Statute. The appellants have no fundamental right to be elected as members of Parliament. If they want that, they must observe the rules. If they prefer to exercise their right of free speech outside these rules, the impugned sections do not stop them. We hold that these sections are 'intra vires"'

27. This has been the consistent view of the Supreme Court till today. Therefore, the submission made on behalf of the petitioners 'right to privacy' is infringed, is untenable and must be rejected.

28. The next submission made on behalf of the petitioners is that the Legislature by placing the impugned restriction made an unreasonable classification. Elaborating his submissions on this aspect, Sri S. Ramachandra Rao, learned Senior Counsel submitted that the disqualification prescribed under Section 19(3) of the Act is applicable to the elected members under this Act only. Counsel submitted that the composition ofthe Zilla parishad as provided under Section 177 of the said Act consists of Members of the Legislative Assembly of the State representing the Constituency and other co-opted members within the territory of that Zilla parishad, who are not disqualified though many of them have more children than the prescribed limit or they have procreated additional child while holding office, which would otherwise disqualify them. According to the learned senior Counsel, leaving these members and bringing only the elected members under the impugned provision is discriminatory and offends Article 14 of the Constitution of India.

29. We are not inclined to accept this submission of the learned senior Counsel. The Legislature while bringing out a particular enactment need not embrace all categories within its scope. It is for the Legislature to determine as to the categories it could embrace within the scope of the Legislation. This proposition has been well settled. In Sakhawant All v. State of Orissa, , Bhagawati, J., speaking for the Constitutional Bench of the Supreme Court held thus:

"The simple answer to this contention is that Legislation enacted for the achievement of a particular object or purpose need not be all embracing. It is for the Legislature to determine what categories it would embrace within the scope of Legislation and merely because certain categories which would stand on the same footing as those which are covered by the Legislation are left out would not render Legislation which has been enacted in any manner discriminatory and violative of the fundamental right guaranteed by Article 14 of the Constitution."

30. Yet another Constitutional Bench of the Supreme Court in Superintendent and Remembrancer of Legal Affairs v. Girish Kumar, , meeting a similar contingency, at Paras 9 to 11, held thus:

"9. Often times the Courts hold that under-inclusion does not deny the equal protection of laws under Article 14. In strict theory, this involves an abandonment of the principle that classification must include all who are similarly situated with respect to the purpose. This under-inclusion is often explained by saying that the Legislature is free to remedy parts of a mischief or to recognise degrees of evil and strike at the harm where it thinks it most acute.

10. The Courts have recognised the very real difficulties under which Legislatures operate-difficulties arising out of both the nature of the Legislative process and of the society which Legislation attempts perennially to re-shape and they have refused to strike down indiscriminately all Legislation embodying classificatory inequality here under consideration. Mr. Justice Holmes, in urging tolerance of under-inclusive classifications, stated that such Legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched, See Missouri K. and T. Rly v. May (1903) 194 US 267 at P. 269. What, then, are the fair reasons for non-extension? What should a Court do when it is faced with a law making an under-inclusive classification in areas relating to economic and tax matters?

11. There are two main considerations to justify an under-inclusive classification. First, administrative necessity. Second, the Legislature might not be fully convinced that the particular policy which it adopts will be fully successful or wise. Thus to demand application of the policy to all whom it might logically encompass would restrict the opportunity of a state to make experiment. These techniques would show that some sacrifice of absolute equality may be required in order that the legal system may preserve the flexibility to evolve new solutions to social and economic problems. The gradual and piece-meal change is often regarded as desirable and legitimate though in principle it is achieved at the cost of some equality. It would seem that in fiscal and regulatory matters the Court not only entertains a greater presumption of constitutionality but also places the burden on the party challenging its validity to show that it has no reasonable basis for making the classification. This was the approach of this Court in State of Gujarat v. Ambico Mills, . The Court said;

"The piece-meal approach to a general problem permitted by under-inclusive classifications, appears justified when it is considered that legislative dealing with such problems is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what dislocations might occur. What evasions might develop, what new evils might be generated in the attempt. Administrative expedients must be forged and tested. Legislators, recognising these factors, may wish to proceed cautiously, and Courts must allow them to do so (37 California Rev.341)."

These decisions amply demonstrate that in order to achieve a particular object, the Legislature need not embrace all categories but is entitled to determine what categories of persons it could embrace within the scope of the legislation.

31. On the various propositions supporting the contentions of the learned Counsel appearing for all the parties and the learned additional Advocate-General appearing on behalf of the official respondents, we have given our consideration to the genesis of the problem vis-a-vis the Legislative intention which is brought under Section 19(3) of the A.P.Panchayat Raj Act, 1994. As is evident from the various decisions which are discussed by us, the privacy of a person to lead a life according to his desire has been well recognised by Courts. However, there is no reason for us to hold that through the impugned Legislation, the privacy of an individual is attacked or sought to be taken away. The Legislature, through the impugned legislation, prescribed certain disqualifications for a person either to hold or contest the elected office under the Act if he procreates more children than the prescribed limit. At the cost of repetition, we must say that chosing to contest an elected office is not a fundamental right but only a right arising out of a Statute. That being so, no

grievances could be made out on the ground that the right to liberty and right to privacy of an individual are deprived by the impugned legislation. The Legislature, however, has visualised a contingency arising out of birth of an additional child, during holding of an elected office, which disqualifies a person from holding such office, by empowering the Government to hold that such disqualification may not apply in respect of a person, by recording reasons in writing. Therefore, notwithstanding the fact of giving birth to an additional child than the prescribed limit by a person holding the office under the Act, still the Government is empowered to permit such person to continue in office, by recording reasons in writing. When the Legislature has provided this remedy, it cannot be said that the impugned provision is a draconian act of the Legislature whereby the right to privacy of a person is deprived and such deprivation offends Articles 19 and 21 of the Constitution of India.

32. Challenge to a similar provision arising out of the Rajasthan Panchayat Raj Act was made before the Rajasthan High Court in Mukesh Kumar Ajmera v. State of Rajasthan, AIR 1997 Raj. 251. The Rajasthan High Court repelled the contentions made against such provision and upheld the validity of the said provision while considering various decision of the Supreme Court and other High Courts.

33. For the foregoing reasons, we find no merits in these writ petitions and we accordingly dismiss the same holding that the rigour of the provision as brought out under Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994 is not violative of any fundamental rights or it is in the nature of depriving the privacy of an individual. No costs.

34. During the course of hearing of these writ petitions, Sri S. Ramachandra Rao, learned senior Counsel submitted that the petitioner in WP No.19068 of 1997 who is the Chairman, Zilla Parishad, Anantapur has submitted a representation to the first respondent-Government of Andhra Pradesh as provided under the proviso to sub-section (3) of Section 19 of the Act, requesting the Government to pass appropriate order holding that the disqualification in this Section shall not apply to him. Learned senior Counsel submitted that the Government has not passed any order on the representation of the petitioner in WP No.19068 of 1997. It is in this background, learned senior Counsel urged before us that the Government be directed to pass appropriate order on the said representation and pending passing orders on the same, status quo obtaining as on today with regard to the office held by the petitioner be maintained. Having regard to the submissions and in view of the proviso to sub-section (3) of Section 19 of the Act, we direct the first respondent-Government of Andhra Pradesh to pass appropriate order on the representation filed by the petitioner in WP No. 19068 of 1997. Pending passing of appropriate order by the first respondent, we direct status quo obtaining as on today with regard to the office held by the petitioner in WP No. 19068 of 1997 shall be maintained.

35. Immediately after delivering the judgment, Sri. S. Ramachandra Rao, learned senior Counsel appearing on behalf of the petitioner in WP No.23521 of 1998 and Sri A. Sudarsana Reddy, Counsel appearing on behalf of the petitioner in WP No.29460 of 1998 have stated that the petitioners in these two writ petitions have also submitted representations to the Government as provided under the proviso to sub-section(3) of Section 19 of the Act, requesting the Government to pass orders holding that the disqualification in this Section shall not apply to them. Both the learned Counsel stated that the Government has not passed any order on the said representations filed by the petitioners. Both the learned Counsel, therefore, urged us that the Government be directed to pass appropriate orders on the representations filed by these petitioners also and pending passing orders on the same, status quo obtaining as on today with regard to the offices held by them be maintained. Accepting the said submissions, and in view of the proviso to sub-section (3) of Section 19 of the Act, we direct the Government of Andhra Pradesh (first respondent) to pass appropriate orders on the representations filed by the petitioners in Writ Petition Nos.23521 and 29460 of 1998. Pending passing of appropriate orders by the Government, we direct status-quo obtaining as on today with regard to the offices held by the petitioners in Writ Petition Nos. 23521 and 29460 of 1998 shall be maintained.