International Journal of Trend in Scientific Research and Development (IJTSRD)
International Open Access Journal
ISSN No: 2456 - 6470 | www.ijtsrd.com | Volume - 2 | Issue – 5

Case Analysis on Kehwananda Bharti V/S State of Kerala and ANR, On 24th April, 1973

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INTRODUCTION

Exactly forty years ago, on April 24, 1973, Chief Justice Sikri and 12 Judges of the Supreme Court assembled to deliver the most important judgement in its history. The case of Kesaavananda Bharti v/s State of Kerala had been heard for 68 days, the arguments commencing on October 31, 1972, and ending on March 23,1973. The hard work and scholarship that had gone into the preparation of this case was breathtaking. Literally hundreds of cases had been citied and the then Attorney-General had made a comparative chart analysing the provisions of the Constitutions of 71 different countries. The 703-page judgement revealed a sharply divided court and, by a wafer-thin majority of 7:6, it was held that Parliament could amend any part of the Constitution so long as it did not let or amend "the basic structure or essential features of the Constitution." This was the inherent and implied limitation on the amending power of Parliament This basic structure doctrine, as future events showed, saved Indian democracy and Kesavananda Bharti will always occupy a hollowed place in our constitutional history. The Kesavananda Bharti case was the culmination of a serious conflict between the judiciary and the government, then headed by Mrs. Indira Gandhi. In 1967, the Supreme Court took an extreme view, in the Golak Nath case, that Parliament could not amend or alter any fundamental right. Two years later, Indira Gandhi nationalized 14 major banks and the paltry compensation was made payable in bonds that matured after 10 years. This was struck down by the Supreme Court, although it upheld the right of Parliament to nationalize banks and the other industries. A year later, in 1970, Mrs. Gandhi abolished the Privy Purses. This was a constitutional betrayal of the solem assurance given by sardar Patel To all the erstwhile rules, this was also struck down by the late Madhavrao Scindia, who later joined the Congress party, The Kesavanada case had its roots in Gokalnath vs State of Punjab, in which the Supreme Court in 11-member bench, ruled that Parliament could not curtail any fundamental right guaranteed under the constitution were unrestricted and unlimited. Two years after Golaknath, Indira nationalized a big portion of the banking and unlimited. Two years after Golaknath, Indira nationalized a big portion of the banking system but he compensation to existing shareholders was paltry, in fact, almost extortionate.

Two years after *Golak Nath*, the Government under the Prime Minister Mrs. Indira Gandhi nationalized 14 banks, with a provision for minimal compensation. This decision was immediately challenged in the Supreme Court. In *R.C. Cooper v. Union of India* the Supreme Court struck down the Bank Nationalized Act, 1969 because of the compensation component of the enactment, while upholding the right of Parliament to nationalize banks. The Government then attempted to abolish Privy Purses, while were payments promised to the erstwhile princes by the Indian government at the time of independence in *Madhav Rao Scindia v. Union of India,* the supreme court again struck down the Presidential order, which resulted in the above abolition. What the Supreme Court faced in 1973 was a struggle for supremacy. *Kesavananda Bharati* created a check on Parliament's attempts to eliminate judicial review and seek absolute power to amend the Constitution. But it also conceded to Parliament the widest latitude to institute socio-economic policies. It refused to recognize the right to property as a basic feature of the

Constitution, overruling *Golak Nath* and paving the way for land reforms. Prior to *Kesavananda Bharati*, nearly 30 Constitutional amendments had already been passed since the Constitution came into effect in 1950, and there have been nearly 70 amendments since *Kesavananda Bharati*. [15] In comparison, the United States has had 27 Constitutional amendments (33 proposed, but only 27 ratified by the States) in its 230 year history. However, despite the larger number of amendments made to the Indian Constitution, the hopes and ideas of its framers remain intact and identifiable as the Constitution adopted by the Constituent Assembly in 1949. We owe this principally to the Supreme Court's decision in Kesavananda Bharati. Thanks to Kesavananda Bharti, Palkhivala and the seven judges who were in the majority , India continues to be the world's largest democracy. The souls of Nehru, Patel Ambedkar and all the founding fathers of the nation and that of our constitution can really rest in peace.

Facts

The factual summary of this case is as follows-

- In February 1970 Swami HH Sri Kesavananda Bharat, Senior head of "Edneer Mutt"- a Hindu Mutt situated in Edneer, a village Kasaragod District of Kerala, challenged the Kerala government's attempted, under two state land reform acts, to impose restrictions on the management of its property.
- Although the state involved its authority under Article, 21 an Indian jurist, Nanabhoy palkhivala, convinced the swami into filing his petition under Article 26, concerning the right to manage, religiously owned property without government interference.
- The big fight was anticipated. a major amendments to the Constitution (the 24th , 25th, 265thand 29th) had been enacted by Indira Gandhi's government through Parliament to get over the judgments of the Supreme court in R.C. Cooper (1970), Madhavarao Scindia (1970) and Golak Nath.
- The first had struck down bank nationalization, the second had annulled the abolition of privy purses of former rulers and the third had held that the amending power could not touch Fundamental Rights.
- All these amendments were under challenge in Kesavananda. Since Golak Nath was decided by eleven judges, a larger bench was required to test its correctness. And so, 13 judges were to sit on the Kesavananda bench.
- Even though the hearings consumed five months, the outcome would profoundly affect India's democratic processes.
- 9th schedule was there due to which Judiciary scrutiny was imposed. And also under it, would not be considered under judicial review or scrutiny, absolute power to judiciary was in question.

Issues Raised

- Whether constitutional amendment as per article 368 applicable to fundamental rights also?
- Whether 24th amendment act is valid in 1971?
- Whether section 2(a), 2(b) and 3 of 25th amendment is valid?
- Whether 29th amendment act 1971 is valid?

Judgment of the Case

The Supreme Court reviewed the decision in Golaknath v. State of Punjab, and considered the validity of the 24th, 25th, 26th and 29th amendments. The case was heard by the largest ever Constitutional Bench of 13 Judges. The Bench gave eleven separate judgments, which agreed on some points and differed on others. There are 11 separate judgments of each judge; however the summarized form of the same is-

Writ Petition No., 135 of 1870 was filed by the petitioner on March 21, 1970 under Article 32 of the constitution for enforcement of his fundamental rights under Aricle 25, 26, 14, 19(1) (f) and 31 of the constitution. He prayed that the provisions of the Kerala Land Reforms Act, 1963 (Act 1 of 1964) as amended by the Kerala Land Reforms (Amendment) Act 1969 (Act 35 of 1969) be declared unconstitutional, ultra virus and void. The constitution (Twenty-fifth Amendment) Act came into force on November 5, 1971, he Constitution (Twenty –fifth Amendment) Act came into force on April 20, 1972 and the Constitution (Twenty-ninth Amendment) Act came into force on June 9, 1972. The effect of the Twenty-ninth Amendment of the Constitution was that it inserted the following Acts in the Ninth Schedule to the Constitution: The Kerala land Reforms (Amendment) Act 1969(Kerala Act 35 of 1969). The Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971), the petitioner then moved an application for urging additional grounds and for amendment of the writ petition in order to challenge the above constitutional amendments.

Before proceeding with the main task, judges review: what was decided in I.C. Golak Nath v. State of Punjab (1967) 2 S.C.R. 762. In order to properly appreciate that case, it is necessary first to have a look at Sri Sankari Prasad Singh Doe v. Union of India and State of Bihar(1952) S.C.R. 89 and Sajjan Singh v. State of Rajasthan (1965) 1 S.C.R. 933. The Constitution (First Amendment) act, 1951, which inserted inter alia Articles 31A and 31B in the Constitution, was the subject matter of decision in Sankari Prasad's (1952) S.C.R. 89 case. The main arguments relevant to the present case which were advanced in support of the petition before this Court were summarized by case. The main arguments relevant to the present case which were advanced in support of the petition before this court were

Summarized By Patanjali Sastri, J., As He Then Was, As Follows:

Firstly,
The power of amending the Constitution provided for under Article 368 was conferred not on Parliament but on the two Houses of Parliament as designated body and, therefore, the provisional Parliament was not competent to exercise that power under Article 379. Secondly, in any case Article 368 is a complete code in itself and does not provide for any amendment being made in the bill after it has been introduced in the House. The bill in the present case having been admittedly amended in several particulars during its passage through the House, the Amendment Act cannot be said to have been passed in conformity with the procedure prescribed in Article 368.

Secondly,
The Amendment Act, in so far as it purports to take away or abridge the rights conferred by Part III of the Constitution, falls within the prohibition of Article 13(2). The view that Article 368 is a complete code in itself in respect of the procedure provided by it and does not contemplate any amendment of a Bill for amendment of the Constitution after it has been introduced, and that if the Bill is amended during its passage through the House, the Amendment Act cannot be said to have been passed in conformity with the procedure prescribed by Article 368 and would be invalid, is erroneous. Although "law" must ordinarily include Constitutional law there is a clear demarcation between ordinary law which is made in the exercise of legislative power and Constitutional law, which is made in the exercise of constituent power. In the context of Article 13, "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power with the result that Article 13(2) does not affect amendments made under Article 368.

The Chief Justice came to the conclusion that "as a matter of construction, there is no escape from the conclusion that Article 368 provides for the amendment of the provisions contained in Part III without imposing on Parliament an obligation to adopt the procedure prescribed by the provisional significance. This judgement ruled that Article 368 does not enable Parliament in its constituent capacity to delegate its function of amending the Constitution to another legislature or to itself in its ordinary legislative capacity. This ruling made all the deemed constitutional amendments stipulated under the legislative powers of the parliament as void and inconsistent after the 24th constitutional amendment. These are articles 4 (2), 169 (3)-1962, 239A2-1962, 244A4-1969, 356 (1) c, Para 7(2) of Schedule V and Para 21(2) of Schedule VI. Also articles 239AA(7)b-1991, 243M(4)b-1992, 243ZC3-1992 and 312(4)-1977 which are inserted by later constitutional amendments and envisaging deemed constitutional amendments under legislative powers of the parliament, should be invalid. The Supreme Court declared in the case 'A. K. Roy, Etc vs. Union of India and Anr on 28 December 1981' that the article 368(1) clearly defines constituent power as 'the power to amend any provision of the constitution by way of an addition, variation or repeal'. It reiterated that constituent power must be exercised by the parliament itself in accordance with the procedure laid down in article 368. The government of Indira Gandhi did not take kindly to this implied restriction on its powers by the court.

On 26 April 1973, Justice Ajit Nath Ray, who was among the dissenters, was promoted to Chief Justice of India superseding three senior Judges, Shelat, Grover and Hedge, which was unprecedented in Indian legal history. Advocate C.K. Daphtary termed the incident as "the blackest day in the history of democracy". Justice Mohammad Hidayatullah (previous Chief Justice of India) remarked that "this was an attempt of not creating 'forward looking judges' but 'judges looking forward' to the office o the Chief Justice. The 42nd Amendment, enacted in 1976, is considered to be the immediate and most

direct fall out of the judgment. Apart from it, the judgment cleared the deck for complete legislative authority to amend any part of the Constitution except when the amendments are not in consonance with the basic features of the Constitution. The basic structure doctrine was adopted by the Supreme Court of Bangladesh in 1989, by expressly relying on the reasoning in the Kesavananda case, in its ruling on Anwar Hossain Chowdhary v. Bangladesh (41 DLR 1989 App. Div. 165, 1989 BLD (Spl.) 1).

Observation

The judgment refused to consider right to property as fundamental right, under basic structure doctrine. It was later deleted in 44th amendment. Also it was held that there was recognition of supremacy of Constitution. Judicial review can't be stopped by any provision. As a reaction to this judgment, Indira Gandhi elevated A.N. Ray to CJI. And during emergency, he set up bench to review Kesavananda Bharti case though at last bench dissolved. On the side of the petitioners it is urged that the power of parliament is much more limited. The petitioners say that the Constitution gave the Indian citizen freedoms which were to subsist forever and the Constitution was drafted to free the nation from any further tyranny of the representatives of the people. It is this freedom from tyranny which, according to the petitioners, has been taken away by the impugned Article 31 C which has been inserted by the Twenty–fifth Amendment. If Article 31C is valid, they say, hereafter Parliament and State Legislature and not the constitution, will determine, how much freedom is good for the citizen. Respondent had words, whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

Bibliography and References Cases

1. Kesavananda Bharati V. State Of Kerala, (1973) 4 Scc 225, Air 1973 Sc 1461.2
2. Sankari Prasad Singh Doe V. Union Of India, Air 1951 Sc 458
3. Sajjan Singh V. State Of Rajasthan, Air 1965 Sc 845.
4. I.C. Golaknath V. State Of Punjab, Air 1967 Sc 1643

Article Referred

1. Article 368 of the Constitution
2. Article 39 (B) And (C) of the Directive Principles Of State Policy]
3. Article 31, Article 13 (2) of the Constitution.
4. Article 39 (B) & (C) In the Directive Principles of State Policy.
5. Article 21 of the Constitution
6. Article 31c