Indira Gandhi v. Raj Narain – A Critique on the Issue of Air Force dealt by the High Court of Allahabad

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ABSTRACT: The historical case of Indira Gandhi v Raj Narain gave rise to unprecedented happenings and ultimately led to declaration of emergency. The bare reading of the case makes it is very evident that the series of events which led to emergency was driven by thirst for power. The case dealt with lot of issues dealing with the violation of provisions of Representation of People Act, 1951. This article does not deal with the issues dealt by the Supreme Court but instead narrows the scope of the article to one of the issues dealt by J Sinha when the case was before the High Court. Thus, this article seeks to go in depth and analyse the issue of whether the procurement of Air Force Planes by her to reach election meetings in furtherance of her election prospects amounted to corrupt practice u/s 123(7) of the Representation of People Act, 1951.

I. INTRODUCTION

The landmark case of ***Indira Gandhi* v. *Raj Narain***[1] is the first of many. It was the first time the election of a PM of our country was set aside and declared void on the ground of corrupt practices by the PM. It was the first time where laws were made and given retrospective effect to overcome a defect faced in the litigation. It was the first time any PM of a country had resorted to amend not only election laws but also made constitutional amendments to validate the negated election in order to remain in power even by resorting to the means of converting democracy into dictatorship. In fact, before the final verdict of SC was delivered, the last words of Kanhaiya Lal Misra, former Attorney General of UP (initially represented PM), to Shanti Bhushan (advocate for Raj Narain) was "*Democracy is dead in this country"*.[2] What transpired out of the judgement given by J Sinha in Allahabad HC while the appeal was pending in SC was a series of chaos, declaration of emergency, suspension of fundamental rights, strict press censorship and arrest and detention of 1,00,000 people in the 21 months of emergency. The ***Indira Gandhi v. Raj Narain***[3] case is a classic case for election laws. This article attempts not to go into the depth and spirit of the Indira Gandhi Election case but attempts to analyse the one of the issues dealt in the High Court, namely, whether the procurement of Air Force Planes by her to reach election meetings in furtherance of her election prospects amounted to corrupt practice u/s 123(7) of the RP Act, 1951.

[1] AIR 1975 SC 2299.
[2] Prashanth Bhushan, The Case That Shook India: A Verdict That Led To The Emergency 175 (2017).
[3] Supra Note 1.

II. WHAT LED TO EMERGENCY?

The Lok Sabha was dissolved by the President on 27.121970 and called for election in March. On 29.12.1970 Mrs Gandhi replied in a press conference that she will not be changing her constituency. Yashpal Kapoor, Mrs Gandhi's private secretary, gave his resignation on 13.01.1971 which was accepted by the President on 25.01.1971 with retrospective effect from 14.01.1971. The final decision on which constituency to contest from was announced by AICC on 29.01.1971. On 1.02.1971, Mrs Gandhi filed her nomination papers. The elections to the Rae Bareli constituency were contested by Mrs Gandhi, Raj Narain and Swami Adwaitanand. The results announced on 10.03.1971 declared Mrs Gandhi as the winner by more than 1,10,000 votes margin over Raj Narain. Aggrieved by the result of the election Raj Narain filed an election petition in the HC of Allahabad on 24.04.1971. The fact of decision made by AICC was contained in the additional written statement filed by the PM. The HC on 12.06.1975 acquitted her of the corrupt practice of procuring the services of Air Force planes on the ground that her visit to Rae Bareli was incidental and it was not her governing purpose of her visit but found her guilty in two other grounds, thereby, setting aside and declaring her election to Lok Sabha as void. Further, when the case went on appeal to SC, the SC upheld the validity of election law and stuck down the constitutional amendments.

III. IS THE HC JUSTIFIED IN ACQUITTING THE PM OF THE CHARGE U/S 127(7) ON THE USE OF AIR FORCE PLANES FOR ELECTION MEETINGS?

The essential requisites for an act to be a corrupt practice u/s 123(7) of RP Act, 1951 are:

1. The obtaining or procuring or betting or attempting to obtain or procure any assistance other than giving vote
2. By a candidate or his agent, or by any other person with the consent of the candidate or his election agent
3. Obtaining from any person whether or not in the service of the government
4. For the furtherance of prospect of elections.
5. And belonging to any of the classes listed in the section. Some of them are:- (c) members of the armed forces of the Union, (g) such other classes of persons in the service of the government as may be prescribed.

The proviso to sec 127(7)(g) provides that any person who either in the service of government or belongs to any of the classes listed in this sec, provides any facilities or does any act or makes arrangement in relation to any candidate or his agent, or any other person with the consent of the candidate or his election agent in the

discharge of his official duty, such act shall not be deemed to be assistance for the furtherance of prospect of candidate's election.

- **Procurement of Assistance of Air Force Manned by Armed Forces of the Union**

One of the criteria to be proved is procurement of assistance which is other than giving vote. In this case the PM procured the assistance for travel arrangements from Air Force planes. Air Force planes are generally made available for the heads of the state for their travel or tour. The rule and instructions for such use of Air Force planes by PM are contained in a secret document called "*Blue Book"* which is not published. Mrs Gandhi claimed that "*Blue Book"* provides for standing instructions that the PM must travel by Air Force planes even when not travelling on official duty and that it was a commercial service provided to the PM. But when asked to produce the said document in the court, it was refused on the ground of State Privilege u/s 123 of IEA and alleged that disclosure of the same will not be in public interest. The HC rejected the ground of state privilege and when appealed to the SC, it held that a mere technical lacuna cannot take away the ground of state privilege and directed the HC to call for an affidavit and if HC is not satisfied with the affidavit, it could call for the document to determine if it belongs to the privileged class. HC examined and rejected privilege in some respects and admitted it as evidence.

The standing instruction contained in "*Blue Book*" is that when the travel plans are approved by the PM, it is the obligation on the part of Air Headquarters to provide a plane at the disposal of the PM, be it official or unofficial business. This knowledge is shared by the PM and also by ordinary prudent man by giving the reason of safety of PM. Therefore, it is the duty of the PM not to misuse the power of ruling party for the purpose of electioneering. The part VII of MCC provides extensively on the code of conduct expected to be followed by the party in power during election campaigns and the ECI has from time to time issued direction to supplement the MCC. One such direction is on tours of Ministers which curbs the use of official vehicles with the exception being PM who stands on a different footing due to the "*Blue Book*". This exception is possible only because of the amendment made to the "*Blue Book"* to which Mrs Gandhi was a party. It was this amendment which included the service of Air Forces planes manned by armed forces of the union even for unofficial travel of the PM. This is a classic example where the ruling party and other candidates are not at the same equilibrium to contest elections. All a ruling party is to do is to make amendments which favour them and take advantage in the lacuna of law to avoid liability. It was to reduce this disparity and advantage of ruling party part VII of MCC was introduced.

- **Is it a Commercial Service provided to the PM?**

Air Force planes provided to the PM was argued to be a commercial service created for the PM. The HC

rejected this contention and held that a commercial service cannot be created utterly for the PM. But isn't the post of PM considered a class in itself, thereby, amounting to reasonable classification under Art 14 of the constitution of India. HC has erred in its decision of rejecting the contention of commercial service which is created specially for the PM. Just because the PM takes up the work of electioneering during the campaign period does not mean he/she ceases to the PM of the country. A person elected to be as PM by the will of the people remains so until the next PM is elected through such will. Therefore, the PM requires security during his/her tenure as PM. Hence, it is justified to say that the PM requires Air Force planes for travel for safety and security purposes. But like any commercial service, this service also has a price so consideration. The price should be applicable only for the use of service for unofficial purpose and not official purpose.

Moreover, the election code i.e., the MCC makes it mandatory for ministers to reimburse to the government in cases where its machinery is used for electioneering. This makes the HC's decision to reject as wrongful rejection. At present, RTI reply provided by Air Force to Commodore (retired) Lokesh K Batra in 2017 is that PMO has paid Rs 89 lakhs for the 128 non-official domestic trips of PM Narendra Modi wherein he had used commercial service of Air Force.[4] The official trips made by PM Modi in comparison to non-official trips were 64 international official trips. The price for the commercial service has been paid by the PMO and not by his political party i.e., BJP.[5] This disclosure at least identifies that the use service of Air Force Planes manned by the Armed Forces of the Union is a commercial service created exclusively for the PM and shows the patent defect in the observation of the HC in the 43 year old case of ***Indira Gandhi* v. *Raj Narain (Supra)***[6].

- **Was she a candidate?**

A person can fall under the radar of corrupt practices contained in RP Act, 1951 only when he becomes a candidate. In order to be a candidate, a person as to hold himself out to be a prospective candidate duly nominated or claimed to be nominated in the prospect of the election.[7] Mrs Gandhi claimed that she was nominated on 1.02.1971 on the day when she filed her nomination papers. But, the AICC announced its final decision on her constituency for contesting election on 29.01.1971. The HC held that she held herself as a candidate as on any date before 25.01.1971which is evident from the fact that she had confirmed her tour plan on 25.01.1971 which stated 1.02.1971 as the date to file her nomination papers in Rae Bareli. But it is still not clear as to how come the HC held 25.01.1971 as the date when she held herself as a candidate and not 29.12.1970 when she expressly declared that she will not be changing her constituency from Rae Bareli. The

[4] Chetan Chauhan, *PM Modi Flew Non-Official Trips to Rallies In IAF Planes at Rates Fixed in 1999*, Hindustan Times, Jul 26, 2017, https://www.hindustantimes.com/india-news/as-pm-modi-flew-to-election-rallies-in-iaf-aircraft-at-rates-fixed-in-1999/story-1G8yWDiI6ZkeyediVqxfmO.html.
[5] *Ibid*.
[6] Supra Note 1.
[7] Sec 79(b) of RP Act, 1951 as originally enacted.

reason given by counsel for Mrs Gandhi, that her statement in the press conference only meant that she had no intention of altering her constituency and did not entail holding out as candidate, is unacceptable as it is a clear indication of her plans to contest from Rae Bareli for the coming elections, especially when the Lok Sabha had been dissolved on her advice by the President on 27.12.1970. So, when it came to the question of determining as to when she held out as candidate, the HC should have held it to be 29.12.1970. The HC did indeed hold that later in its judgement but also created a blunder by observing that Mrs Gandhi held out to be a prospective candidate on 29.12.1970 and also held that she had held out to be a candidate on any date before 25.01.1971. This created a situation of ambiguity as to the date on which she held herself to be a candidate in the prospect of upcoming elections. But one thing is sure, that is, she did hold herself as a candidate. Therefore, the procurement of service of aircraft manned by armed forces does fall under the corrupt practice of sec 123(7) save the amendment made by her in "Blue Book".

The outcome of the verdict of HC led to the amendment of election laws retrospectively which was upheld by the SC and so the term candidate is now defined as a person who has been or claims to be nominated as a candidate at any election. This without doubt makes Mrs Gandhi a candidate as on 1.02.1971 retrospectively. According to this amendment, those who have filed their nomination papers within 24.04.2018 for the Karnataka Assembly Elections, 2018 are said to be candidates and come under the radar of sec 123(7) of the RP Act, 1951.

- **Furtherance of Prospect of Election**

In Webster's Dictionary the word 'prospect' has the meaning of 'anticipation, foresight, something that is expected'.[8] It was alleged by Raj Narain that the declaration made by Mrs Gandhi in the press conference was done with a view that the elections were in prospect. Though this allegation was denied by Mrs Gandhi by stating that she just made a general statement, it is very evident that it was made for furthering the prospect of her election by ensuring that prospective voters are aware of her constituency. This is because once the Lok Sabha is dissolved, elections are to be held immediately to constitute the House within 6 months. Moreover, the Lok Sabha was dissolved a year earlier by the President on the advice of the PM.

If we take up this contention as valid then elections are in prospect every 5 years as soon as the results of the present elections are declared and in a country like India, there is some or the other election happening every year such as by-election, local body or biennial election etc. This makes a candidate to never come out of campaign period or electioneering. The concept of prospective candidate is a myth in our country as it is possible for a nominated candidate to contend that it is only tentative and not absolute as he could withdraw his candidature.

[8] Supra Note 2 at 77.

- **Reduction of Election Expenses**

The HC did not add up the expenses incurred on the Air Force planes to the election expenses of Mrs Gandhi stating that her travel to Lucknow was a part of the general election tour of the country and her break at Rae Bareli was just incidental and was not the main purpose of her travel through Air Force Planes. It is surprising to note how filing of nomination papers of Mrs Gandhi was just a secondary and not the principal reason for her visit. If the HC had considered it as principal reason, then it would have amounted to furtherance of her election prospect and the expenses incurred on such travel would have been added to her election expenditure which might have crossed the prescribed limit of Rs.35.000/-[9]. Yet again amended instructions of "*Blue* Book" saved Mrs Gandhi from condescending election expenditure.

IV. CONCLUSION

Parliament can make prospective as well as retrospective laws in our country which is implied Art 13(2) of the constitution as long as it does not infringe the fundamental rights enumerated in Part III. Art 327 of the Constitution provides power to the Parliament to make laws on 'all other matters' in connection with elections. The power entrusted to the Parliament should not be plenary as it might lead to misuse of this power through incessant retrospective laws in favour of the ruling party having majority in the House. Such retrospective amendments may be in violation of Art 14, 15, 19 and even 21 of the constitution as is seen in the Indira Gandhi election case where the fundamental rights were suspended by way of emergency declared to escape resignation from the post of PM and subsequently validating the declared invalid election though the said retrospective amendments. Parliament should not be given the power to make retrospective laws in relation to election as it might no longer represent the will of the people and that they might make laws which majorly favours them in the long run and not the people. This strikes at the very essence of democracy. It results in the conversion of democracy into dictatorship. This concept can be drawn parallel to the concept of 'Agency Conflict' under business laws which depicts the conflict which arises when BOD appointed by shareholders to act on behalf of them start acting in a way to maximize their gains.

The HC's judgement with regard to the issue of Air Force planes is unacceptable as it had changed the rules of the game by giving bigger privilege to the PM, who is also an individual candidate like any other candidate contesting election, by not accepting it as a commercial service created for a price fixed by the defence ministry for the PM. If this Indira Gandhi election is considered as the precedent applicable then PM Modi need not reimburse for using government machinery for electioneering in 128 rallies. But if the use of Air Force by PM is taken as commercial service the then the Indira Gandhi case has no substance as the payment for the

[9] Rule 90 of Conduct of Election Rules, 1961 as originally enacted.

commercial service of Air Force would have increased the election expense of Mrs Gandhi beyond the prescribed limit of Rs35,000/-.

Besides the whole fiasco of emergency declared by Mrs Gandhi, was uncalled for. All that was required was to wait for the decision of the SC as it had unanimously upheld all election law amendments and struck down the constitutional amendments.

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