

ANURADHA BHASIN VS UNION OF INDIA

Aisika Basu*

CASE NO: WP (CIVIL) NO.1031 OF 2019

PETITIONER: ANURADHA BHASIN AND ORS.

RESPONDENT: UNION OF INDIA AND ORS.

BENCH: Hon'ble Justice N.V Ramana, Hon'ble Justice R. Subhash Reddy, and Hon'ble Justice B.R. Gavai

BACKGROUND AND FACTS OF THE CASE

The constitutional validity of internet shutdown and movement restrictions was challenged on the grounds of infringing citizen's essential Fundamental Rights pertaining to the Constitutional Order 272^[1] issued by the President as a Constitution (Application to Jammu and Kashmir) Order whose scope and ambit extended all provisions of the Indian Constitution to the State of Jammu and Kashmir following the abrogation of Article 370^[2] and 35A^[3]. The issue began after 5th August 2019 when internet services, landline connectivity, mobile networks, and other modes of communication were suspended for an indefinite period of time which led to a separation from the rest of the Country. The District Magistrates invoked powers vested under Section 144^[4] of the Code of Criminal Procedure which restricted the freedom of movement and public gathering of more than 5 people on the apprehension of breach of law, order, and tranquility. The aggrieved, Executive Editor of Kashmir Times, Ms. Anuradha Bhasin filed a petition against the restrictions imposed on movement and communication which had been hindering their right to profession and thereby sought a writ to quash the unreasonable restrictions and to ensure that the rights and means of media personnel to report and publish news is not unreasonably curtailed. She argued that the Government did not enough consider the reasonability and proportionality of public interest while imposing the internet shutdown. The aim of the Government was put to question as to what "public interest" actually

*BA LLB, SECOND YEAR, ADAMAS UNIVERSITY, KOLKATA.

¹ Constitutional Order, 272 of 2019.

² Indian Constitution, Article 370.

³ Indian Constitution, Article 35A.

⁴ Code of Criminal Procedure, Section 144.

encompasses and the State did not quite clarify the necessity of such overriding restrictions. The “blanket ban” restriction was considered as violative of Article 21^[5] under which the Right to the Internet can be proclaimed as Fundamental Right. Article 19(1) (a)^[6] and subsequently Article 19(1) (g) was also claimed to be violated as such restrictions came as a direct intervention to the Freedom of the Press which comes under the purview of Freedom of Speech and Expression and Right to Profession. Another subsequent petition, filed by Mr. Ghulam Nabi Azad, MP, belonging to the largest opposition party in the Upper House, was that the state cannot claim any exemption from producing orders as it is necessary to publish order being a component of natural justice and Right to Information to the general public. He also demanded the clarification of such restrictions in accordance with Article 356 of the Constitution of India.^[7] The basis of the claims made was that the state should strike a balance between the Fundamental Rights of Citizens and the Safety of the nation.

ISSUES RAISED

- Whether the Government can claim an exemption or can be allowed to bar from producing orders passed under Section 144 CrPC and other orders under Suspension rules?
- Whether Freedom of Speech and Expression and Freedom to Practice any Profession or to carry out any occupation or trade or business over the internet is a part of the Fundamental Rights under Part III of the Constitution
- Whether the prohibition of internet services and imposing Section 144 of Crpc is valid?
- Whether the Freedom of the Press of the Petitioner is violated due to such aforementioned restrictions and reviewing the nature of the test of reasonability.

CONTENTION

ARGUMENTS BY PETITIONER

The petitioner argued that the internet is crucial for the modern press, without which print media has come to a “grinding halt”^[8]. It was also contended that the petitioner has not been able to carry out her work/ profession post 5th August 2019 due to various restrictions imposed

⁵ Indian Constitution, Article 21.

⁶ Indian Constitution, Article 19, cl 1(a)

⁷ Indian Constitution, Article 356.

⁸ Legal Services India <<https://www.legalserviceindia.com/legal/article-3164-anuradha-bhasin-v-s-union-of-india>> (last visited:24/10/22)

by which she was not able to publish her newspaper. It was argued that some trades are completely co-dependent on the internet and a slight intervention consequently affects the liberty to practice any profession, trade, or occupation. The Right to Trade through the internet also promotes increased consumerism and provides wide availability to choose goods and services widening the range of viable options in present society. That Freedom of trade and commerce via the medium of the internet is protected under Article 19(1)(g) of the Indian Constitution, however, subject to reasonable restrictions. The restrictions imposed in the state under Section 144 were neither reasonable nor proportional to the aim of public policy and in turn, were affecting the public good of citizens in Jammu and Kashmir barring them from the bare minimum. It was seen that “public order” is different from “law and order”. It was contended that neither of the two expressions was at risk before the order of section 144 and that the restrictions were to be imposed on a temporary basis, but they have been enforced for more than 100 days pertaining to an indefinite period of time which were contrary to Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017^[9] applying that there was no reasoning justifying the restrictions. It was also argued by the subsequent petitioner Mr. Ghulam Nabi Azad that the state cannot claim any privilege before the court for not producing any order as it is an integral part of natural justice. It was also stated that such a condition of national emergency can only be declared in a handful of cases, whereas in this case neither “internal disruption” nor “external aggression” exists referring to Article 356 of the Indian Constitution. There should be a balance between human rights and the national security of the country. It was also contended that there was no review committee set up in analyzing the legality of the imposed restrictions or the time period of the shutdown which impacted Freedom of Speech and Expression, Freedom to carry trade, Occupation, and Profession, Right to Health and ^{Rights} to Education, since Right to the Internet is considered inclusive within the ambit of Article 21 of the Constitution as laid down in Faheema Shirin vs the State of Kerala.^[10]

ARGUMENTS BY THE RESPONDENT

On the respondent side, Mr. K K Venugopal, Attorney General submitted that the condition of Jammu and Kashmir having militancy should be taken into account. The Historical backdrop was fundamental in determining the validity of the restrictions imposed. He stated that the order

⁹ Public Emergency or Public Safety Rules, 2017.

¹⁰ WP (C) NO.19716 Of 2019(L)

imposed was in cognizance of the prevailing conditions of the state, prevention of terrorist acts, cross border militancy, and other activities which are likely to cause disruption in public order and is a question of security of the nation. The mere reason was to take preventive measures knowing about the history of internal and external militancy. It was claimed that the internet is very fast and useful for communication from both sides unlike the newspaper and can be used as a weapon to instigate violence and fake messages and has been used before the abrogation of Article 370. Thereby, it was also contended that the restrictions were being put on threat perception and were also relaxed where they were not required like in the case of Ladakh and Jammu proving that suspension rules were not imposed without application of mind. The intention of restricting the internet was not only social media but also the dark web which allows the sale and purchase of illegal weapons. It was concluded that the orders passed were in a procedure followed under Suspension Rules and were reviewed strictly by the competent authority.

JUDGEMENT AND RATIONALE

The Supreme Court held that freedom of speech and expression through the internet is one of the integral and inclusive parts of Article 19(1)(a). In the case of *Indian Express vs Union of India*^[11] which declared freedom of print medium essential right under Article 19(1)(a) and as well as under Article 19(1)(g). Thus, the Court engaged in the view that there is a fundamental proximity between Freedom of the Press as to Freedom of Speech and Expression and Freedom to practice profession, trade, or occupation which are explicitly mentioned in Part III of the Indian Constitution and contravention to them is ultra vires to the Constitution. Referring to the judgement of *Faheema Shahrin R.K vs State of Kerala*, the Right to the Internet was considered cohesive of the Right to Privacy and Right to Education under Article 21 and as a fundamental right. The Government can impose restrictions on the interest of the nation as a whole and has to be laid down by Article 19(2)^[12] and 19(6)^[13] of the Constitution. The Apex Court was of the view that suspension of internet services would be illegal if, for an indefinite period of time, the object nexus or the reasonable classification behind the indefinite period of time is in the lacuna pertaining to the order implemented. The Hon'ble Judges stressed the importance of the test of necessity and proportionality which the Order must satisfy. Regarding the contention about whether freedom of the press was violated, the Court rejected the view as

¹¹ AIR 1986 515

¹² Indian Constitution, Article 19 cl.2

¹³ Indian Constitution, Article 19 cl.6

the claim could not be justified on evidence and the petitioner had already resumed publication. The Court held that mere disturbance in law and order of the state may not necessarily lead to a breach of public order. The Court also took the view that the State had to produce orders imposing the restrictions as it was crucial to uphold the principles of natural justice. Referring to the precedent, *Ram Jethmalani vs Union of India*^[14], where the Court explained that the State had an obligation to disclose information in order to satisfy the right to remedy under Article 32 of the Constitution. The Court also held that it had to consider both procedural and substantive elements to determine the Constitutional Legality of the internet shutdown. Section 5(2) of the Telegraph Act^[15] permitted suspension orders only in case of public emergency or for the safety of the public. Although for passing such an order determination of emergency is required which did not satisfy in this case. The suspension rules did not explicitly mention the maximum duration and Review Committee must be there to make sure it does not exceed a certain period necessary otherwise it would be a license to infringe the Right to the Internet and thus ordered for reviewing the provisions. The Court discussed enormously on the geo-political conditions of the State of Jammu and Kashmir and related to the reasonable restrictions mentioned in Article 19(2) and Article 19(6). Citing the reference of *CPIO Vs Subhash Chandra Agarwal*^[16], the Court dwelled on the term “proportionality” “as the condition in which neither right is restricted to a greater than necessary to fulfill the legitimate interest of the contravening interest in question.” It was held by the Court that the orders must be in accordance with the “rule of law” and to be reviewed. The Court held that the internet is essential in today’s life and imposition of restrictions affects the rights of people and hence, have to follow the test of proportionality and to seek that there stands no violation of natural justice. The judgement delivered widened the interpretation of the scope of freedom of speech and expression by including the right to access the internet and provided the light of perception to the development of “personal liberty” as contained in Article 21 of the Constitution.

DEFECTS OF THE LAW

The Court did not provide immediate relief to the citizens affected due to the orders by removing the restrictions on the internet and movement of people but laid down principles for future suspension orders and their procedure to prevent the abuse of state power laying the groundwork for the further solution of issues concerning rights of individuals and integrity of

¹⁴ WPC NO.176 OF 2009

¹⁵ Indian Telegraph Act, 1885, Section 5 cl.2

¹⁶ AIR 2010 DELHI 159

the nation. The extent and scope of reasonability needed to be assessed by the Court to define the boundations of reasonable restrictions needed to be ascertained from a strict peripheral view in accordance with the rule of law and judicial review.

INFERENCE

This Judgement has set a landmark legacy in the history of cases associated with considering the Internet as a fundamental Right. It has provided a long-drawn path in the present socio-cultural dynamics. The internet has become an essential instrument for spreading news both necessary and unnecessary for two-way transmission of information, unlike print media. There are still 60% of people who are deprived of this Right to the Internet. 1 out of every 10 individuals has been restricted in specific content in access to the internet. The more important question which arises here is whether there should be absolute access to the internet or not. In 2016, the UN passed a non-binding resolution that condemned the disruption of the internet as a human rights violation.^[17] The judgement of *Anuradha Bhasin vs Union of India* provided an Indian context to the Right to the Internet that ruled that the internet is a medium of exercising the right to freedom of speech and expression under Article 19(1)(a) and right to carry out trade and occupation under Article 19(1)(g) and is constitutionally protected under Part III of the Constitution of India. The Court also held that the Government cannot claim any exception from producing any order before the Court as it is violative of natural justice. There should be a reasonable and proportional basis in reference to the imposition of restrictions under Section 144 of Crpc on the apprehension of danger in relation to the sovereignty of the nation but it cannot suppress the legal opinion of the public otherwise it would lead to abuse of power. According to Internet Shutdown Tracker Report, there were 56 internet shutdowns between 2013-2019 which have been a ground for violation of the democratic rights of the citizens. The internet shutdown in Jammu and Kashmir was for 219 days and holds the record of the largest shutdown across the globe. Such shutdowns for an indefinite period can not only violate Fundamental rights but forbids them from exercising individual liberty and will, creating an autocratic atmosphere against the principle of the Rule of Law. This case provided a ray of hope in the darkness of times, where the Right to the Internet is as fundamental as any other right especially in as Socio-global village we reside, setting a precedent for growth and

¹⁷ <https://globalfreedomofexpression.columbia.edu/cases/bhasin-v-union-of-india/> (last visited: 25/10/2022).

opportunities arising out of the Right to the Internet and preserving the democratic nature of the country.

