Prafull Goradia v. Union of India, (2011) 2 SCC 568

Manavi Belgaumkar and Sudhir Krishnaswamy *

I. Introduction

Prafull Goradia, a former Member of Parliament, resigned from the Bharatiya Janata Party in 2004 alleging that it was guilty of 'abandoning Hindutva'.[1] He was until then a significant ideologue of the party who edited the party journal 'BJP Today' and authored several self-published books titled *The Saffron Book*, *Hindu Masjids*, and *Unfinished Agenda*. His most recent book complains against a wide range of public figures including Gandhi, Nehru and M.F. Hussain who are characterized as '*Anti Hindus*'. In 2007, Goradia converted a pet ideological complaint of the Hindu Right about the injustice of the Haj subsidy into a legal and constitutional argument by filing a Writ Petition under Article 32 in the Supreme Court challenging the constitutional validity of the Haj Committees Act, 2002 (the "Act"). He sought to demonstrate that the provisions of the Act allowed the Central and the State Governments to give grants to the Haj Committees to subsidise air travel for Haj pilgrims. As taxpayers' money subsidised a specific religious pilgrimage he claimed that this violated his fundamental rights under Articles 14, 15 and 27. The court dismissed the petition on the grounds that: first, there was no discrimination on the basis of religion as the state subsidized pilgrimages of other religions; and secondly that as only a small portion of the taxes levied were used for the purposes of this subsidy, it would not violate Article 27. In this brief case note, we focus on three key issues: the existence of discrimination on the basis of religion; the constitutional validity of using the general revenues of the state to support religious activity and finally, the method of constitutional interpretation adopted by the court in this case. We will address these issues in turn.

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* Faculty Fellow and Professor of Law respectively at Azim Premji University, Bangalore. The authors would like to thank Swathi Muthukumar of NLSIU for assisting with the early research and writing of this Case Note.

1 Neena Vyas, *Praful Goradia quits BJP*, The Hindu (Sep 04, 2004) http://www.hindu.com/2004/09/04/stories/2004090409301300.htm.

II. The Existence of Religious Discrimination

The Act does not levy a tax to subsidise pilgrim's air travel nor does it have specific provisions which mandate the central or the state governments to contribute to the central or the state Haj fund. Sections 30 and 32 provide that the Central as well as the state Haj Committees shall have their own Haj funds that shall *inter alia* have to their credit "…*any sums loaned by the Central or a State Government, or any other source approved by the Government*". It is agreed before the court that a grant is made to the Haj committees out of the general revenues of the state. Hence, the petitioner's argument for religious discrimination does not rest on a discriminatory tax but on the discriminatory appropriation of state revenues.

Article 14 provides for equality before the law and equal protection of the law. The Indian courts have evolved two mediating doctrines under Article 14: reasonable classification and arbitrariness.[2] Article 15 goes further than Article 14 to prohibit specific forms of discrimination. In order to satisfy Article 15 in this case the petitioner must show (i) the existence of discrimination and (ii) that the discrimination is only on the basis of religion or one of the other prohibited grounds in Article 15(1). The judgment does not elaborate on the scope and nature of the discrimination argument in this case. The court relied primarily on the government's counter affidavit to show that the government provided funds for the Haj and simultaneously supported pilgrimage costs of Indian citizens belonging to other religious groups travelling to sites such as Manasarovar there was no discrimination *per se* on grounds of religion. Hence the court concluded that the Act was not *ultra vires* Articles 14 and 15 of the Constitution.

However, the Government's claim only supports the conclusion that the State policy on the funding of religious pilgrimages satisfies the Article 14 requirement of equality before the law. It does not address the requirements of Article 15 that the State cannot make

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2 H. M. Seervai, Constitutional Law of India 556-558 (4th ed., 1993).

any policy that discriminates between persons on the grounds of religion alone. A subsidy for Haj pilgrims may only be claimed by members of the Muslim community just as a Manasarovar subsidy may be claimed only by members of the Hindu community. Hence, in both pilgrimages the State has adopted a policy that distinguishes between citizens on the basis of their religious beliefs. Not every distinction between persons is discrimination: one needs to show that the distinction is invidious in character to be characterized as discrimination.[3] In this case, as the State confers an exclusive benefit to members of a religious community to facilitate religious observances it may be argued that this inevitably expresses a preference for one set of religious beliefs over another. Distinctions that confer benefits or impose burdens based on the religious beliefs of citizens invariably affect their sense of dignity and identity, and are considered to be discriminatory in character. Where state action discriminates between individuals under Article 15, it cannot be justified on the grounds that the State policy maintains parity among religious groups. The protection in Article 15 is against discrimination between individuals. Hence, the achievement of parity between different groups does not justify individual discrimination unless it is among the special provisions set out in the provisos to Article 15. Hence, the core question before the court was whether all such subsidies and state support to particular religions was a distinction or discrimination between citizens primarily on the grounds of religion. Justice Katju's opinion in this case fails to address this core question and focuses instead on the interpretation of Article 27. We now turn to consider this argument.

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[3] *See* Ram Krishna Dalmia v Justice S.R. Tendolkar, A.I.R. 1958 S.C. 538, 547; *see also* Sandra Fredman and Sarah Spencer, *Delivering Equality: Towards an Outcome focused Positive Duty*, in CABINET OFFICE EQUALITY REVIEW AND TO THE DISCRIMINATION LAW REVIEW (Jun. 2006) *available at* http://www.edf.org.uk/blog/wp-content/uploads/2006/04/Delivering-equality-submission-030606-final.pdf (last visited Apr. 03, 2012); Christopher McCrudden, *Review of Issues Concerning the operation of the Equality Duty* in SECTION 75 EQUALITY REVIEW - AN OPERATIONAL REVIEW (E. McLaughlin and N Faris eds., 2004).

III. State Support to Religious Activity

Article 27 declares that: "No person shall be compelled to pay any taxes, the proceeds of which are *specifically appropriated* in payment of expenses for the promotion or maintenance of any particular religion or religious denomination" (emphasis added).

Article 27 prohibits the 'specific appropriation' of the proceeds of any tax for the promotion and maintenance of any religion or religious denomination. The state may impose a religious tax in two senses: first, where the incidence of the tax is on a particular religious group; and secondly where the appropriation of general tax revenues is on the basis of religion. The prohibition of a tax whose incidence is on a particular religious community prevents the State from imposing a religious tax like a *jaziya* or *chauth* which operates as a direct levy with a religious base. Article 27 does not directly address this sort of tax as it is concerned only with the appropriation of tax revenues. However, such a religion tax would violate Article 15. In the present case, the petitioner made no claim that a specific tax was being levied for subsidising the Haj. The court cited with approval and relied upon cases such as *Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar*[4] and *Jagannath Ramanuj Das vs. State of Orissa and Anr*[5] where the court has held that Article 27 is not violated when a specific tax is used to ensure proper administration of particular religious trusts and institutions, as this does not constitute promotion of the said religion. Thus, the validity or lack thereof of the appropriation of revenues from a direct tax levy for the maintenance or promotion of a religion is settled in Indian law.

The novel question before the court in this case relates to the second type of a religious tax: one where general tax revenues are appropriated towards expenditure on specific religious groups. The question before the court was whether the prohibition in Article 27 applied to such an appropriation. Justices Katju and Mishra expressed

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4 1954 (5) S.C.R. 1005.

5 1954(5) S.C.R. 1046.

the view that if *a substantial portion* of the general revenue of a state was used for the promotion and maintenance of a particular religion, the prohibition in Article 27 would apply. The petitioner made no claim that substantial portions of general revenue of the government was used to provide the subsidy nor did the government reveal the percentage of general revenues that was being used to subsidise the Haj in its counter-affidavit. However, the court reached the conclusion that the Haj Committee Act, 2002 would not be *ultra vires* Article 27 as it does not utilize 'substantial' portions of general revenue. The court noncommittally suggests that utilisation of, for example, twenty five per cent of state revenues for such a subsidy would satisfy the substantiality requirement.[6] There is no further guidance on the quantum or percentage of revenue that must be utilized for religious purposes in order for such state action to violate Article 27. [7] In these circumstances the court's interpretation of Article 27 to apply to the appropriation of general revenue gives rise to more issues than it resolves.

While the court's inclination to restrain the state from utilizing general revenues towards religious purposes is a justifiable proposition in a secular constitution, this could be achieved in a more satisfactory doctrinal fashion by a proper interpretation of Article 15 rather than the loose extension of the scope of Article 27 in this case. In any event, the court must articulate a model of secularism that underpins and satisfactorily explains the need to invoke the idea of 'substantial' appropriation under Article 27 in this case.

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6 Prafull Goradia ¶ 18.

7 An assessment of 'substantial' appropriation under Article 27 would be necessary in the State of Karnataka where the government has funded various Hindu organizations; *see also* Mangalorean, *State Funds For Hindu Temples by the BJP run Government in Karnataka State in India*, South Asia Citizens Web (Aug. 8, 2010) http://www.sacw.net/article1578.html (last visited April 09, 2012); Anil Kumar, *BSY doles out public funds to temples outside K'taka*, Times of India, (Sep 12, 2010) *available at*, http://timesofindia.indiatimes.com/india/BSY-doles-out-public-funds-to-temples-outside-Ktaka/articleshow/6538835.cms; *State's outstanding debt is Rs 99,312 cr*, Deccan Herald (Mar 27, 2012) http://www.deccanherald.com/content/237680/states-outstanding-debt-rs-99312.html.

IV. Method of Constitutional Interpretation

Justice Katju needs to justify the basis for the 'substantial' appropriation requirement developed in this case. He emphasised the need for imparting a broad interpretation to Article 27 and relied on the majority judgment of Justice Sikri in *Keshavananda Bharati* which advocated a broad and purposive interpretation of constitutional provisions. However, this by itself does not support his approach to Article 27. The crux of the issue before the court was not whether Article 27 should be construed broadly or narrowly but rather to articulate the proper relationship between the state and religion in the model of secularism adopted by the Indian constitution.

Justice Katju makes some effort in this direction and seems to follow the precedent of *S.R. Bommai*[8] where the court clarified that Indian secularism requires that the state's role with respect to the different religions should be one of benevolent neutrality.[9] Further, he cites several Australian and American precedents on the application of the principle of secularism but these are not particularly helpful as the Indian model does not resemble the approach in these jurisdictions. Instead the court would benefit greatly by surveying the recent academic literature on secularism in India. R. Bhargava's distinction between different forms of political secularism: one that excludes religion from politics and the state and another, which advocates engagement with political neutrality[10] is one that animates the Indian precedent on the secular question. Gary Jacobsohn's comparative constitutional analysis leads him to the conclusion that India adopts an ameliorative model of secularism distinguished from the American assimilative model.[11] The Indian model tolerates greater degrees of

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8 S. R. Bommai v Union of India, [1994] 3 S.C.C. 1.

9 *Id.* ¶ 304.

10 Rajeev Bhargava, *What is Secularism For?*, *available at* http://www.law.uvic.ca/demcon/victoria_colloquium/documents/WhatisSecularismforPreSeminarReading.pdf (last visited Apr. 09, 2012).

11 *See generally* Gary Jacobsohn, The Wheel of Law: India's Secularism in a Comparative Constitutional Context (2003).

state interference in religious affairs so long as such interference is social reform. The core question before the court in this – whether the state can support religious practices through the appropriation of portions of the general revenue – was an invitation to clarify the nature of the Constitution's commitment to secularism. Justice Katju's failure to take up this invitation and engage the significant and insightful academic literature in this field has deprived the *Goradia* case of a persuasive justification.