"Every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same."

[Case Brief] Kesavananda Bharati Sripadagalvaru and Ors V. State of Kerala and Anr

Case name: Kesavananda Bharati Sripadagalvaru and Ors. V. State of Kerala and Anr

Case number: Writ Petition (civil) 135 of 1970

Court: The Supreme Court Of India

Bench: S.M. Sikri & A.N. Grover & A.N. Ray & D.G. Palekar & H.R. Khanna & J.M. Shelat & K.K. Mathew & K.S. Hegde & M.H. Beg & P. Jaganmohan Reddy & S.N. Dwivedi & Y.V.Chandrachud

Decided on: 24.04.1973

Relevant Act/Sections: The Constitution of India

➢ BRIEF FACTS AND PROCEDURAL HISTORY:

1. Writ Petition No. 135 of 1970 was filed by the petitioner on March 21, 1970 under Article 32 of the Constitution for enforcement of his fundamental rights under Articles 25, 26, 14, 19(1)(f) and 31 of the Constitution.

2. 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 vires and void. He further prayed for an appropriate writ or order to issue during the pendency of the petition. This Court issued rule nisi on March 25, 1970.
3. During the pendency of the writ petition, the Kerala Land Reforms (Amendment) Act 1971 (Kerala Act No. 25 of 1971) was passed which received the assent of the President on August 7, 1971. The petitioner filed an application for permission to urge additional grounds and to impugn the Constitutional validity of the Kerala Land Reforms (Amendment) Act 1971 (Kerala Act No. 25 of 1971)
4. The effect of the Twenty-ninth Amendment of the Constitution was that it inserted the following Acts in the Ninth Schedule to the Constitution: 65. The Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act 35 of 1969). 66. The Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971).
5. 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. When the case was placed before the Constitutional bench, it referred this case to a larger bench to determine the validity of the impugned Constitutional amendments.

➢ ISSUE BEFORE THE COURT:

1. Validity of the Twenty-fourth, Twenty-fifth and Twenty-ninth Amendments of the Constitution
2. Validity of Section 2 of the Constitution (Twenty-fifth Amendment) Act
3. Validity of Section 3 of the Constitution (Twenty-fifth Amendment) Act
4. What is the extent of the amending power conferred by Article 368 of the Constitution, apart from Article 13(2) on Parliament ?

➢ RATIO OF THE COURT

S.M. Sikri, C.J.

1. The respondents claimed that Parliament can abrogate fundamental rights such as freedom of speech and expression, freedom to form associations or unions, and freedom of religion. On the side of the petitioners it is urged that the power of

Parliament is much more limited and the Constitution gave the Indian citizen freedoms which were to subsist for ever and the Constitution was drafted to free the nation from any future tyranny of the representatives of the people.

2. The court thoroughly examined ***Sri Sankari Prasad Singh Deo v. Union of India*** and **State of Bihar and Sajjan Singh v. State of Rajasthan** and observed that the conclusions given in ***I.C. Golak Nath v. State of Punjab*** were given in the light of the Constitution as it stood then and instead it is now necessary to decide the ambit of Article 368 with respect to the powers of Parliament to amend Article 13(2) or to amend Article 368 itself.
3. The court examined that Article 52 & 53 are not mentioned in the proviso to Article 368 but Article 54 & 55 are mentioned which are all in Part V which deals with "the Executive" and hence by creating an analogy inferred that the Constitution-makers never contemplated, or imagined that Article 52 will be altered and there shall not be a President of India.
4. This analysis of the provisions contained in Clauses (a) and (b) of the proviso to Article 368 showed the reason for including certain articles and excluding certain other from the proviso was not that all articles dealing with the federal structure or the status of the States had been selected for inclusion in the proviso.
5. The court examined articles which included the word amendment and its meaning in that article and referred to the variation in the language of the various articles dealing with the question of amendment or repeal in detail and observed that our Constitution was drafted very carefully and that every word was chosen carefully and should have its proper meaning.
6. The court traced the history of the shaping of the Preamble because this would show that the Preamble was in conformity with the Constitution as it was finally accepted. Not only was the Constitution framed in the light of the Preamble but the Preamble was ultimately settled in the light of the Constitution.
7. The court referred to the case of ***Powell v. Kempton Park Racecourse Co. Ltd.*** where it was stated, "it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms" and observed that it must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context and on reading Article 368 in the context of the Constitution, the word "Amendment" is ambiguous and is

necessary to refer to the Preamble to find which construction would fit in with the Preamble.

8. The court refereed to articles 358 and 359 and observed that that the Constitution makers contemplated that fundamental rights might impede the State in meeting an emergency, and it was accordingly provided that Article 19 shall not operate for a limited time, and so also Article 32 and Article 226 if the President so declares by order. If it was the design that fundamental rights might be abrogated surely they would have expressly provided it somewhere.

9. The court discussed on some facts which constitute the background of the process of drafting the constitution and opined that brief summary of the work of the Advisory Committee and the Minorities Sub-Committee shows that no one ever contemplated that fundamental rights appertaining to the minorities would be liable to be abrogated by an amendment of the Constitution. The same is true about the proceedings in the Constituent Assembly. There is no hint anywhere that abrogation of minorities rights was ever in the contemplation of the important members of the Constituent Assembly.

10. It was later added that it seems that in the context of the British Plan, the setting up of Minorities Sub-Committee, the Advisory Committee and the proceedings of these Committees, as well as the proceedings in the Constituent Assembly mentioned, it is impossible to read the expression "Amendment of the Constitution" as empowering Parliament to abrogate the rights of minorities.

11. After perusal of the cases; ***The Bribery Commissioner v. Pedrick Ranasinghe [1965] A.C. 172*** and ***Bribery Commissioner v. Ranasinghe [1965] A.C. 172***, the court observed that the guarantee of fundamental rights extends to numerous rights and it could not have been intended that all of them would remain completely unalterable even if Article 13(2) of the Constitution be taken to include Constitutional amendments. A more reasonable inference to be drawn from the whole scheme of the Constitution is that some other meaning of "Amendment" is most appropriate.

12. It was later added that the expression "Amendment of this Constitution" does not include a revision of the whole Constitution. If this is true, the concession was rightly made-then which is that meaning of the word "Amendment" that is most appropriate and fits in with the while scheme of the Constitution. The meaning would be appropriate which would enable the country to achieve a social and economic revolution without destroying the democratic structure of the Constitution and the

basic inalienable rights guaranteed in Part III and without going outside the contours delineated in the Preamble.

13. To examine the implied limitation on the amending power of the parliament, the court extensively observed the cases; ***The Bribery Commissioner v. Pedrick Ranasinghe [1965] A.C. 172, Mongol Singh v. Union of India [1967] 3 S.C.R. 109-112*** and ***Taylor v. The Attorney-General of Queensland 23 C.L.R. 457.***

14. The court raised a question by itself that 'What is the necessary implication from all the provisions of the Constitution ?' and observed that reading the Preamble, the fundamental importance of the freedom of the individual, indeed its inalienability, and the importance of the economic, social and political justice mentioned in the Preamble, the importance of directive principles, the non-inclusion in Article 368 of provisions like Articles 52, 53 and various other provisions to which reference has already been made an irresistible conclusion emerges that it was not the intention to use the word "amendment" in the widest sense.

15. Later added, that it was the common understanding that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state.

16. The court opined that there are implied limitations on the power of Parliament that the expression "amendment of this Constitution" has consequently a limited meaning in our Constitution and not the meaning suggested by the respondents. It was pointed out by the court the consequences if there is no limit to the powers of Parliament to amend the Constitution, a political party with a two-third majority in Parliament for a few years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the Constitution unamendable or extremely rigid. This would no doubt invite extra- Constitutional revolution.

17. The court concluded that the expression "amendment of this Constitution" in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles. Applied to fundamental rights, it would mean that, while fundamental rights cannot be abrogated reasonable abridgements of fundamental rights can be effected in the public interest. It is for Parliament to decide

whether an amendment is necessary. The Courts will not be concerned with wisdom of the amendment.

18. The court observed that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same and laid down the features of the basic structure:

- Supremacy of the Constitution;
- Republican and Democratic form of Government.
- Secular character of the Constitution;
- Separation of powers between the Legislature, the executive and the
- judiciary;
- Federal character of the Constitution.

19. Amendments made by the Constitution (First Amendment) Act, 1951, in Articles 15 and 19, and insertion of Article 31A (apart from the question whether there was delegation of the power to amend the Constitution, and apart from the question as to abrogation), and the amendment made by the Constitution (Fourth Amendment) Act in Article 31(2), would be within the amending power of Parliament under Article 368.

20. The counsel for the respondent urged that if the word "amendment" is construed in its narrow sense, then there would be uncertainty, friction and confusion in the working of the system, and should therefore avoid the narrow sense to which the court replied that ‘If Parliament has power to pass the impugned amendment acts, there is no doubt that I have no right to question the wisdom of the policy of Parliament. But if the net result of my interpretation is to prevent Parliament from abrogating the fundamental rights, and the basic features outlined above, I am unable to appreciate that any uncertainty, friction or confusion will necessarily result.’

21. In regard with the validity of the 24th amendment, the court observed that the meaning of the expression "Amendment of the Constitution" does not change when one reads the proviso. If the meaning is the same, Article 368 can only be amended so as not to change its identity completely. Parliament, for instance, could not make the Constitution uncontrolled by changing the prescribed two third majority to simple majority. Similarly it cannot get rid of the true meaning of the expression "Amendment of the Constitution" so as to derive power to abrogate fundamental rights.

22. It was also stated that the insertion of the words "in exercise of its constituent power" only serves to exclude Article 248 and Entry 97 List I and emphasize that it is not ordinary legislative power that Parliament is exercising under Article 368 but legislative power of amending the Constitution.

23. The court inferred that Article 13(2) as existing previous to the 24th Amendment as interpreted by the majority in Golak Nath's case prevented legislatures from taking away or abridging the rights conferred by Article 13. In other words, any law which abridged a fundamental right even to a small extent was liable to be struck down under Article 368 Parliament can amend every article of the Constitution as long as the result is within the limits already laid down.

24. In regard with the validity of Section 2 of the 25th amendment, the court observed that If the meaning is given to the word "amount" namely, that the amount given in cash or otherwise is of such a nature that it has been worked out in accordance with the principles which have relationship to the property to be acquired, the question arises : what meaning is to be given, to the expression "the amount so fixed". The amount has to be fixed by law but the amount so fixed by law must also be fixed in accordance with some principles because it could not have been intended that if the amount is fixed by law, the legislature would fix the amount arbitrarily. It could not, for example, fix the amount by a lottery.

25. It was pointed out by the court that the substance of the fundamental right to property, under Article 31, consists of three things: one, the property shall be acquired by or under a valid law; secondly, it shall be acquired only for a public purpose; and, thirdly, the person whose property has been acquired shall be given an amount in lieu thereof.

26. And added that Parliament has no power under Article 368 to abrogate the fundamental rights but can amend or regulate or adjust them in its exercise of amending powers without destroying them. Applying this to the fundamental right of property, Parliament cannot empower legislatures to fix an arbitrary amount or illusory amount or an amount that virtually amounts to confiscation, taking all the relevant circumstances of the acquisition into consideration. Same considerations apply to the manner of payment.

27. The court opined that While passing a law fixing principles, the legislatures are bound to provide a procedure for the determination of the amount, and if the procedure is arbitrary that provision may well be struck down under Article 14 and in view of the

above interpretation it cannot be said that Parliament has exceeded its amending power under Article 368 in enacting the new Article 31(2).

28. In regard with the validity of Section 3 of the 25th Amendment, the court noted out that the article provides that once a declaration is given, no court can question the law on the ground that it has nothing to do with giving effect to the policy; whether it gives effect to some other policy is irrelevant. Further, a law may contain some provisions dealing with the principles specified in Clauses (b) or (c) of Article 39 while other sections may have nothing to do with it, yet on the language it denies any court power or jurisdiction to go into this question.

29. The court opined that in Article 31A the subject-matter of the legislation is clearly provided, namely, the acquisition by the State of any estate or any rights therein, (Article 31A(a)). Similarly, the subject-matter of legislation is specifically provided in Clauses (b), (c) and (d) of Article 31A. But in Article 31C the sky is the limit because it leaves to each State to adopt measures towards securing the principles specified in Clauses (b) and (c) of Article 39. The wording of Articles 39(b) and 39(c) is very wide. The expression "economic system" in Article 39(c) may well include professional and other services.

30. The court opined that in effect, Article 31C enables States to adopt any policy they like and abrogate Articles 14, 19 and 31 of the Constitution at will. In other words, it enables the State to amend the Constitution. Article 14, for instance, would be limited by the State according to its policy and not the policy of the amending body, i.e., the Parliament, and so would be Articles 19 and 31, while these fundamental rights remain in the Constitution.

31. The court explained the difference between delegated legislation and the State law made under Article 31C: It is permissible, within limits, for a legislature to delegate its functions, and for the delegate to make law. Further the delegated legislation would be liable to be challenged on the ground of violation of fundamental rights regardless of the validity of the State Act. But a State legislature cannot be authorised to amend the Constitution and the State law deriving authority from Article 31C cannot be challenged on the ground that it infringes Articles 14, 19 and 31.

32. The court responding to the question whether Article 368 enables Parliament to delegate its function of amending the Constitution to another body stated that it does not and it would be noted that Article 368 of this Constitution itself provides that amendment may be initiated only by the introduction of a bill for the purpose in either

House of Parliament. In other words, Article 368 does not contemplate any other mode of amendment by Parliament and it does not equally contemplate that Parliament could set up another body to amend the Constitution. The court made reference to; ***Per Mukherjea J. in re The Delhi Laws Act, 1912***, ***Raj Narain Singh v. Patna Administration 1955***, ***Hari Shankar Bagla v. State of Madhya Pradesh 1955***, ***Vasantlal Sanjanwala v. State of Bombay 1961***, ***In re Initiative and Referendum Act (1919)*** and various other Indian and International cases.

33. The court observed that it is State legislation that effects an amendment of the Constitution. If it be assumed that Article 31C does not enable the States to amend the Constitution then Article 31C would be ineffective because the law which in effect abridges or takes away the fundamental rights would have been passed not in the form required by Article 368, i.e. by 2/3rd of the majority of Parliament but by another body which is not recognised in Article 368 and would be void on that ground.

34. It was later added that Article 31C cannot be read to be an implied amendment of Article 368 because it opens with the words "notwithstanding anything contained in Article 13" and Article 31C does not say that "notwithstanding anything contained in Article 368." What Article 31C does is that it empowers legislatures, subject to the condition laid down in Article 31C itself, to take away or abridge rights conferred by Articles 14, 19 and 31. Article 368 does not enable Parliament to constitute another legislature to amend the Constitution, in its exercise of the power to amend Article 368 itself.

35. In regard with the 29th Amendment, the court stated that a new Article 31-A was substituted by the Constitution (Fourth Amendment) Act, 1955, for the original article with retrospective effect. The new article contained original Article 31A(1) as Clause (a) and added Clauses (b) to (e) and also changed the nature of the protective umbrella. The relevant part of Article 31A(1) as substituted has already been set out.

36. The court observed that Article 368 does not enable Parliament to abrogate or take away fundamental rights. If this is so, it does not enable Parliament to do this by any means, including the device of Article 31-B and the Ninth Schedule. This device of Article 31-B and the Ninth Schedule is bad insofar as it protects statutes even if they take away fundamental rights. Therefore, it is necessary to declare that the Twenty-Ninth Amendment is ineffective to protect the impugned Acts if they take away fundamental rights.

- **DECISION HELD BY COURT:**

The minority judgement was given by Justice A.N. Ray, D.G. Palekar, K.K. Mathew, M.H. Beg, S.N. Dwivedi and Y.V. Chandrachud that the power of parliament to amend the constitution is wide and unlimited and it included the power to add, alter or repeal any provision of the Constitution.

The majority decision was delivered by S.M. Sikri CJ, K.S. Hegde, A.K. Mukherjea, J.M. Shelat, A.N. Grover, P. Jagmohan Reddy JJ. & Khanna J. It was held with a majority of 7:6 that:

1. Golak Nath's (1967) 2 S.C.R. 762 case declared that a Constitutional amendment would be bad if it infringed Article 13(2), as this applied not only to ordinary legislation but also to an amendment of the Constitution.
2. Golak Nath's (1967) 2 S.C.R. 762 case did not decide whether Article 13(2) can be amended under Article 368 or determine the exact meaning of the expression "amendment of this Constitution" in Article 368.
3. The expression "amendment of this Constitution" does not enable Parliament to abrogate or take away, fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article.
4. The Constitution (Twenty-fourth Amendment) Act, 1971, as interpreted by me, has been validly enacted.
5. 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.
6. Section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971, as interpreted by me, is valid.
7. Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 is void as it delegates power to legislatures to amend the Constitution.
8. The Constitution (Twenty-Ninth Amendment) Act, 1971 is ineffective to protect the impugned Acts if they abrogate or take away fundamental rights. The Constitution Bench will decide whether the impugned Acts take away fundamental rights or only abridge them, and in the latter case whether they effect reasonable abridgements in the public interest.

Order:

1. The Constitution Bench will determine the validity of the Constitution (Twentysixth Amendment) Act, 1971 in accordance with law.
2. The cases are remitted to the Constitution Bench for disposal in accordance with law. There will be no order as to costs incurred upto this stage.