

MANU/BH/0016/1972

Equivalent Citation: AIR1972Pat49, 1971(4)PLJR518

**IN THE HIGH COURT OF PATNA
FULL BENCH**

Civil Reference No. 1 of 1967

Decided On: 30.08.1971

Appellants:**Banarsi Yadav
Vs.**

Respondent:**Krishna Chandra Dass and Ors.**

Hon'ble Judges/Coram:

N.L. Untwalia , S.N.P. Singh and Kanhaiya Singh , JJ.

Counsel:

For Appellant/Petitioner/Plaintiff: J.C. Sinha and Indra Bhanu Singh, Advs.

For Respondents/Defendant: Shreenath Singh, Ram Madan Singh and Madan Mohan Prasad Singh, Advs. and S.K. Jha, (Government Pleader II)

ORDER

1. In an appeal filed before the Commissioner of Bhagalpur Division under Section 30 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act 12 of 1962) hereinafter called the Act, to challenge an order made by the Additional Collector under Section 16 (3) of the Act, the constitutional validity of the latter provision was challenged. Some decisions of the Supreme Court with reference to the customary law of pre-emption were cited before him. Learned Commissioner thereupon directed a reference to be made to this Court, without expressing under what provision of law it was being made; but presumably it was under Section 113 read with Order 46 of the Code of Civil Procedure, hereinafter called the Code. When this reference came up for hearing before a Division Bench of this Court, feeling that there are some conflicting decisions on the point the case was referred to a larger Bench. That's how it has come before us for answering the reference.

2. Mr. J. C. Sinha, appeared in support of the reference and submitted that the reference is competent and Section 16 (3) of the Act is constitutionally invalid as being violative of Articles 14 and 19 of the Constitution. Mr. S. K. Jha, learned Government pleader II, appeared on behalf of the State and Mr. Shreenath Singh for the party against the reference.

3. Having heard learned Counsel for the parties, we are of the opinion that the reference is incompetent. The Commissioner is not a Court which can make a reference to this Court under Section 113 read with Order 46 of the Code. Section 113 reads as follows-

"Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit:

Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefore and refer the same for the opinion of the High Court".

But the conditions and limitations which have been prescribed under Order 46 are that a reference on any of the questions mentioned in Rule 1 of that Order can be made by a court hearing a suit or an appeal or where in execution of any decree any such question arises -- not otherwise. In our opinion, the said provision is exhaustive and does not cover a case where the matter does not crop up in a suit or an appeal in the suit or in an execution proceeding. In support of this view reference may be made to a Bench decision of the Madras High Court in *K. Damodara Menon v. Kittappa Menon* ILR (1913) Mad 16 Rule 4-A says.

"The provisions of Rules 2, 3 and 4 shall apply to any reference by the Court under the proviso to Section 113 as they apply to a reference under Rule 1."

It is, therefore, manifest that a court, in order to clothe itself with the power of making a reference even in regard to any of the matters given in the proviso to Section 113 of the Code, which includes the matter of testing the constitutional validity of any Act, Ordinance or Regulation, has got to satisfy and fulfil the conditions mentioned in Rule 1. This question we have answered on the assumption that the Commissioner is a court within the meaning of Section 113 of the Code. We do not propose to decide whether Commissioner is a court or not.

4. Mr. J. C. Sinha placed reliance on a Bench decision of the Allahabad High Court in *Satendra Kumar Gupta v. Banaras Improvement Trust* MANU/UP/0134/1959 : AIR 1959 All 513. The difference between the Allahabad case and the instant case is that under Section 33 of the Act certain provisions of the Code have been made applicable to a proceeding under the Act while in the Allahabad case the Tribunal was declared to be a court under Section 63 of the U. P. Town Improvement Act, 1919 which was under consideration there and the provisions of the Code were made applicable to the proceedings before the Tribunal being a court. In that view of the matter, the Tribunal was functioning like a court of reference under the Land Acquisition Act and, therefore, the reference by such a Tribunal which was a court was held to be competent,

5. The reference being incompetent, no other question arises. But since the question of constitutional validity of Section 16 (3) of the Act was argued before us, we may briefly indicate that the Act is a protected legislation introduced in the 9th Schedule of the Constitution by the 17th Amendment. That being so, no part of the Act can be challenged on the ground of alleged violation of Articles 14 and 19 of the Constitution.

6. Mr. J. C. Sinha placed reliance on some observations of Hidayatullah, J. as he then was, in *L.C. Golak Nath v. State of Punjab* MANU/SC/0029/1967 : AIR 1967 SC 1643 in support of his argument that if the constitutional validity of Section 16 (3) of the

Act cannot be protected with reference to Article 31A, Article 31B of the Constitution cannot save it from the attack. We do not feel persuaded to discuss this point in any detail as in the majority decision of Subba Rao, C. J. the 17th Amendment Article 31B or any of the Acts of the 9th Schedule of the Constitution was not declared ultra vires.

7. For the reasons stated above, we hold that the reference is incompetent and even assuming that it is competent. Section 16 (3) of the Act cannot be held to be constitutionally invalid. There would be no order as to cost.

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