
(1979) 03 OHC CK 0009

In the Orissa High Court

Case No : Original Jurisdiction Case No's. 653, 714, 742, 782, 1184, 1186 and 1250 of 1974 and 174 and 1270 of 1975

Manpure Math and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 09-03-1979

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226, 26, 31
Orissa Estates Abolition (Amendment) Act, 1970 — Section 7
Orissa Estates Abolition Act, 1951 — Section 13A, 13A(1), 2, 3, 3A

Citation : (1979) 48 CLT 433

Hon'ble Judges : R.N. Misra, J;P.K. Mohanti, J

Bench : Division Bench

Advocate : M.N. Das, in O.J.C. Nos. 653, 1184 and 1186/74, S.C. Mohapatra, in O.J.C. 714/74, P.C. Misra, in O.J.Cs. 742 and 782/74, S.C. Roy, in O.J.C. 1250/74, R.N. Sinha, in O.J.C. 174/75 and K.C. Ray, in O.J.C. 1270/75, for the Appellant; Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—The Orissa Estates Abolition Act (1 of 1952) (hereinafter called the principal Act) was amended by Orissa Estates Abolition (Amendment) Act (5 of 1963) and special provisions for public trusts were made by inserting Chapter II-A therein. Section 13A(e) defined "Trust estate" to mean:

an estate the whole of the net income whereof under any trust or other legal obligation has been dedicated exclusively to charitable or religious purposes of a public nature without any reservation of pecuniary benefit to any individual.

Explanation. The salary, remuneration or any allowance payable to a Mutawali in the case of a Wakf or to a Trustee in any other case including a sebayat of a Hindu Religious trust not exceeding fifteen per cent of the income dedicated exclusively to charitable or religious purposes shall not be deemed to be a reservation of a pecuniary benefit to any individual within the meaning of this

clause;

The Chapter made provision for excluding from the operation of the vesting notification of estates declared as trust estates. The principal Act was further amended by Orissa Act 33 of 1970 which became operative from 7-12-1970. Chapter II-A was repealed and a provision for savings and removal of doubts running to the following effect was inserted:

(1) Notwithstanding the repeal of Chapter II-A of the Principal Act all estates in respect of which claims and references made under the said Chapter were pending on the date of coming into force of this Act, shall be deemed to have been excluded from the operation of the vesting notification.

(2) For removal of doubts it is hereby declared that nothing in Sub-section (1) shall be deemed to debar the State Government from vesting any such estate by the issue of a notification u/s 3 or Section 3-A.

The Principal Act was further amended by President's Act 3 of 1974 which came into force from 26-2-1974. By the amendment definition of trust estate occurring earlier in Section 13-A(e) of the Principal Act was reintroduced in Section 2(oo) Provision to the following effect was made u/s 7-A of the Act:

If the State Government are of the opinion that any land or building (being part of a trust estate) vested in the State Government is, needed for carrying out the purposes of the trust efficiently, then, notwithstanding anything contained in any other law for the time being in force or in any other provision of this Act, the State Government may settle such land or building with the person who immediately before such vesting was an intermediary in respect of such land or building, subject to the payment of such fair and equitable rent as may be determined by the Collector in the prescribed manner and subject to such other terms and conditions as may be prescribed.

Provided that no such land or building shall settled under this section

(i) after the expiry of a period of three years from the date of vesting; or

(ii) If such land or building is hereby by a tenant.

After President's Act 3 of 1974 became operative, a blanket notification was issued on 18th March, 1974, by the State Government to the following effect:

Revenue Department Notification. The 18th March, 1974.

SRO. No. 184/74 - In exercise of power conferred by Sub-section (1) of Section 3-A of the Orissa Estates Abolition Act, 1951 (Orissa Act 1 of 1952), the State Government do hereby declare that (i) the intermediary interests of an intermediaries whose estates have been declared as trust estates under chapter II-A of the said Act and (ii) those in respect of which claims and references made under the Act the said chapter were pending on the date of commencement of the Orissa Estates Abolition (Amendment) Act, 1970 (Orissa Act 33 of 1970) and

(iii) the intermediary interests of all intermediaries in respect of all estates other than those which have already vested in the State have passed to and become vested in the state free from all encumbrances.

Soon after this notification, several applications under Article 226 of the Constitution were filed in this Court on behalf of trust estates both temples and Maths-challenging the vires of the amending Act and the notification. This Court directed maintenance of status quo and/or stay of dispossession contemplated u/s 5(h) of the Principal Act. Common grounds were taken in these writ applications for challenging the vesting notification and vires of the President's Act. During the pendency at these writ applications by the Fortieth Amendment of the Constitution of Orissa Estates Abolition Act was included in the Ninth schedule as item No. 161 with effect from 27-5-1976. The Principal Act was further amended by Orissa Estates Abolition (Amendment) Act of 1978 and certain concessions were extended in respect of trust estates belonging to deities of religious institutions which had vested on or after 18th March, 1974. The benefit was however, not available in respect of Math. After this Amending Act became operative, the writ applications filed on behalf of trust estates belonging to deities were not pressed. These applications which have now been heard are on behalf of trust estates belonging to Maths.

2. At the request of counsel for the parties, all these applications were heard at a time, and common grounds were advanced. By a common judgment, we are, therefore, disposing of all these cases.

3. The following are the contentions of the Petitioners (i) In view of Section 7 of the Orissa Act 33 of 1970, the notification dated 18th March, 1974, in regard to estates which have been declared as trust estates is without jurisdiction. (ii) The President's Act 3 of 1974 is ultra vires the Constitution as it contravenes Articles 14, 19, 26 and 31 thereof (iii) The Amending Act of 1974 is also violative of Article 26 of the Constitution. (iv) Section 7-A is unconstitutional as there has been an excessive delegation of essential legislative function.

Learned Government Advocate appearing for the State has taken the stand that even if the impugned Act and the notification were open to challenge on the grounds indicated, the Principal Act with these amendments having been included in the Ninth schedule, the vires of the Act is no longer open to challenge on these grounds. We think it appropriate to deal with this submission of learned Government Advocate first and decide as to whether any of the contentions advanced by the Petitioners survives for examination, after the Act has been incorporated in the Ninth Schedule. Article 31-B of the Constitution provides:

Without prejudice to the generality of the provisions contained in Article 31-A none of the Act and regulations specified in the Ninth schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act. Regulation or provision is inconsistent with or takes away or abridges any of the rights conferred by any provisions of this part and

not withstanding any judgment, decree or order of any Court or tribunal to the contrary, each of the said Acts, and regulations shall subject to the power of any competent legislature to appeal or amend it, continue in force.

In the case of *The Godavari Sugar Mills Ltd. Vs. S.B. Kamble and Others*, the effect of Article 31-B and incorporation of an Act in the-Ninth Schedule of the Constitution was considered. Khanna. J. speaking for the Court stated:

The above article was inserted in the Constitution by the first amendment. The object of this article is to give a blanket protection to the Acts and Regulations specified in the Ninth Schedule and the provisions of these Acts and Regulations against any challenge to those acts, regulations or the provisions thereof on the ground that they are inconsistent with or take away or abridge any of the rights conferred by Part III of the Constitution. The result is that however violative of the fundamental rights may be the provisions of an Act or Regulation once the Act or Regulation is specified in the Ninth schedule it would not be liable to be struck down on that score. This immunity against the above challenge would be available notwithstanding any judgment, decree or order of any Court or tribunal to the contrary. The effect of Article 31-B however is not to prevent challenge to an enactment on the ground that it is beyond the legislative competence of the legislature which enacted it. It is also plain from the language of the article that the specification of an Act or Regulation would not prevent the competent legislature to repeal or amend it.

The protection and immunity afforded by Article 31-B is, however, restricted to the provisions of the Act or Regulation as they exist on the date the Act or Regulation is included in the Ninth Schedule. The inclusion of the Act and Regulation would protect not only the principal Act or Regulation which is included in the Ninth Schedule but: also the amendments which have been made therein till the date of its inclusion in the Ninth Schedule, even though the constitutional amendment by which the Act or Regulation is included in the ninth Schedule refers only to the principal Act and Regulation, and not to the amendments thereof. The protection or immunity enjoyed by the Act or Regulation, including the amendments thereof till the date of its inclusion in the Ninth Schedule would not however, extend to the amendments-made in the Act or Regulation after the date of its inclusion in the Ninth Schedule. The reason for that is that the inclusion of an Act or Regulation in the Ninth Schedule can be brought about only by means of an amendment of the Constitution. The amendment of the Constitution can be carried out in accordance with Article 368 of the Constitution. Such a power is exercised not by the legislature enacting the impugned law but by the authority which makes the constitutional amendment under Articles 368, viz., the prescribed majority in each House of Parliament. Such a power can be exercised in respect of an existing Act or Regulation of which the provision can be scrutinised before it is inserted in the Ninth Schedule. It is for the prescribed majority in each House to decide whether a particular Act or Regulation should be inserted in the Ninth Schedule, and if so, whether it

should be so inserted in its entirety by Article 31-B is extended to amendments made in an Act or Regulation subsequent to its inclusion in the Ninth Schedule, the result would be that even those provisions would enjoy the protection which were never scrutinised and could not in the very nature of things have been scrutinized by the prescribed majority vested with the power of amending the constitution. It would, indeed, be tantamount to giving a power to the state legislature to amend the constitution in such a way as would enlarge the contents of Ninth Schedule to the Constitution.

In view of what has been said by the Supreme Court, it follow that the Principal Act with all its amendments till the Act got incorporated in the Ninth Schedule by the Fortieth Amendment of the Constitution is protected. Challenge to the President's Act 3 of 1974, in the circumstances, is not available on the ground that the provisions are ultra vires some of the fundamental rights guaranteed under Part III of the Constitution. A seven Judge Bench of the Supreme Court in the case of State of Maharashtra and Others Vs. Man Singh Suraj Singh Padvi and Others, , examined the effect of inclusion of Maharashtra Regulation in the Ninth Schedule. Bhagwati, J. Spoke for the Court thus:

Now it appears that subsequent to the judgment of the High Court and whilst the appeal was pending in this Court, the Ninth Schedule was amended by the Constitution (Fortieth Amendment) Act, 1970 by the inclusion of the West Khandesh Mahwassi Estate (Proprietary Rights Abolition Etc.) Regulation 1961. The effect of the inclusion was that the West Khandesh Mahwassi Estate (proprietary rights Abolition etc.) Regulation 1961 was immunised from challenge on the ground that it was inconsistent with or took away or abridged any of the rights conferred by Part III of the Constitution and hence its constitutional validity could no longer be assailed on the ground that it violated Article 19(i)(f) Article 31-B and the Ninth Schedule cured the defect if any in the West Khandesh Mahwassi Estate (proprietary Rights Abolition etc.) Regulation, 1961 as regards any unconstitutionality alleged on the ground of infringement of fundamental rights and by the express words of Article 31-B. such curing of the defect took place with retrospective operation from the date on which this regulation was enacted by the Governor. This Regulation, even if inoperative or void at the time when it was issued by the Governor on account of infringement of Article 19(i)(f) of the Constitution, assumed full force and vigour from the date of its enactment by reason of its inclusion in the Ninth Schedule, vide. Jagannath Vs. The Authorised Officer, Land Reforms and Ors, and it must accordingly be held to be constitutionally valid....

In the case of Prag Ice and Oil Mills and Another Vs. Union of India (UOI), , the learned Chief Justice delivering the majority opinion observed:

...The Article (31-B) affords protection to Acts and Regulations specified in the Ninth Schedule. Therefore, whenever a challenge to the constitutionality of a provision of law on the ground that it violates any of the fundamental rights conferred by part III is sought to be repealed by the state on the plea that the

law is placed in the Ninth Schedule, the narrow question to which one must address oneself is whether the impugned law is specified in that schedule. If it is, the provisions of Article 31-B would be attracted and the challenge would fail without any further inquiry....

That the Principal Act with the impugned amendment has been included in the Ninth schedule is not in dispute. That being so and the attack being with reference to fundamental rights enshrined in part III of the constitution, there is no merit in the challenge to the vires of the Act and all the contentions advanced by the Petitioners have lost ground with the incorporation of the Act in the Ninth Schedule.

4. The writ applications have no merit and have, therefore, got to be dismissed. It is, however, open to the Petitioners to work out their rights under the law.

We make no order for costs.

P.K. Mohanti, J.

5. I agree.