

(2009) 09 DEL CK 0263
In the Delhi High Court
Case No : Writ Petition (C) 2887 of 2008

Smt. Har Naraini Devi and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 11-09-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 19, 21, 31A
Delhi Land Reforms Act, 1954 — Section 48, 50, 52

Citation : (2009) 162 DLT 663

Hon'ble Judges : Veena Birbal, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Santosh Singh and Rakesh Mudgal, for the Appellant; Gaurav Duggal, for Respondent Nos. 1 and 2 and Anand Yadav, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—Through this writ petition, the petitioners seek that Clause (a) of Section 50 of the Delhi Land Reforms Act, 1954 (hereinafter referred to as the "said Act"), be declared unconstitutional, allegedly being ultravires Articles 14, 15 and 21 of the Constitution of India.

2. The petitioners herein are the widow and daughter of Late Shri Ishwar Singh (died in 1985) s/o Late Shri Mukhtiar Singh (died on 6.6.97). Late Shri Ishwar Singh also had two sons, who are Respondent Nos. 3 and 4.

3. Late Shri Mukhtiar Singh was the bhumidhar in respect of certain lands which were governed by the said Act. As per the provisions of Section 50 of the said Act, on his death, his bhumidhari interest in the said holdings devolved upon his grandsons, Respondent Nos. 3 and 4. Section 50 of the said Act is reproduced hereunder:

50. General order of succession from males. - Subject to the provisions of Section 48 and 52, when a Bhumidhar or Asami being a male dies, his interest in his holding shall devolve in accordance with the order of the succession given

below:

(a) Male lineal descendants in the male line of the descent:

Provided that no member of this class shall inherit if any male descendant between him and the deceased is alive:

Provided further that the son or sons of a predeceased son howsoever low shall inherit the share which would have devolved upon the deceased if he had been then alive:

(b) Widow;

(c) Father;

(d) Mother, being a widow;

(e) Step mother, being a widow;

(f) Father's father;

(g) Father's mother, being a widow;

(h) Widow of a male lineal descendant in the male line of descent;

(i) Brother, being the son of same father as the deceased;

(k) Unmarried sister;

(l) Brother's son, the brother having been a son of the same father as the deceased;

(m) Father's father's son;

(n) Brother's son's son;

(o) Father's father's son's son;

(p) Daughter's son.

4. The main grievance of the petitioners is with respect to the line of succession provided in Section 50. Clause (a) thereof requires that whenever a male bhumidhar or asami dies, the interest shall first devolve upon the male lineal descendants in the male line of descent, howsoever low, thus, excluding the female descendants. Given the fact that the chances of there being no male lineal descendants at all are extremely low, the interest in all likelihood will not devolve upon the female descendants in any case. The widow of the deceased (Petitioner No. 1) is mentioned in Clause (h) and the granddaughter (Petitioner No. 2) is ignored completely. It is on the ground of discrimination on the basis of sex, that the petitioners are challenging the said provision.

5. The respondents, through their learned Counsel, have raised a preliminary objection with regard to the maintainability of the present petition, on the ground that the said Act had been placed in the Ninth Schedule of the Constitution of

India (in Entry 61), by virtue of the Constitution (Seventeenth Amendment) Act, 1964, with effect from 20.06.1964. Article 31B of the Constitution provides that no Act that has been placed in the Ninth Schedule can be the subject matter of challenge. Article 31B reads as under:

Article 31B. Validation of certain Acts and Regulations.- Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts 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 notwithstanding 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 repeal or amend it, continue in force.

6. The learned Counsel for the respondents relied on the Constitution Bench decision of the Supreme Court in *Waman Rao and Others Vs. Union of India (UOI) and Others*, wherein, considering their earlier decision in *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala*, the court held:

2. In *Keshvananda Bharati*, decided on April 24, 1973 it was held by the majority that Parliament has no power to amend the Constitution so as to damage and destroy its basic or essential features or its basic structure. We hold that all amendments to the Constitution which were made before April 24, 1973 and by which the 9th Schedule to the Constitution was amended from time to time by the inclusion of the various Acts and Regulations therein, are valid and constitutional. Amendments to the Constitution made on or after April 24, 1973 by which the 9th Schedule to the Constitution was amended from time to time by the inclusion of various Acts and Regulations therein, are open to challenge on the ground that they, or any one or more of them, are beyond the constituent power of the Parliament since they damage the basic or essential features of the Constitution or its basic structure. We do not pronounce upon the validity of such subsequent constitutional amendments except to say that if any Act or Regulation included in the 9th Schedule by a constitutional amendment made after April 24, 1973 is saved by Article 31C as it stood prior to its amendment by the 42nd Amendment, the challenge to the validity of the relevant Constitutional Amendment by which that Act or Regulation is put in the 9th Schedule, on the ground that the Amendment damages or destroys a basic or essential feature of the Constitution or its basic structure as reflected in Articles 14, 19 or 31, will become otiose.

7. It was accordingly submitted by the learned Counsel for the respondents, that since the said Act was placed in the Ninth Schedule prior to 24.4.1973 (i.e., in 1964), it is covered by the immunity provided in Article 31B, and is, thus, beyond the pale of challenge. Consequently, they submitted, the present petition is not maintainable.

8. The learned Counsel for the petitioners, placed reliance on another recent nine-Judge Bench decision of the Supreme Court in *I.R. Coelho (Dead) By LRs. Vs. State of Tamil Nadu and Others*, wherein the court observed:

136. The role of the judiciary is to protect fundamental rights. A modern democracy is based on the twin principles of majority rule and the need to protect fundamental rights. According to Lord Styan, it is job of the Judiciary to balance the principles ensuring that the Government on the basis of number does not override fundamental rights.

Application of doctrine of basic structure

137. In *Kesavananda Bharati's* case, the discussion was on the amending power conferred by unamended Article 368 which did not use the words "constituent power". We have already noted difference between original power of framing the Constitution known as constituent power and the nature of constituent power vested in Parliament under Article 368. By addition of the words "constituent power" in Article 368, the amending body, namely, Parliament does not become the original Constituent Assembly. It remains a Parliament under a controlled Constitution. Even after the words "constituent power" are inserted in Article 368, the limitations of doctrine of basic structure would continue to apply to the Parliament. It is on this premise that Clauses 4 and 5 inserted in Article 368 by 42nd Amendment were struck down in *Minerva Mills* case.

138. The relevance of *Indira Gandhi's* case, *Minerva Mills* case and *Waman Rao's* case lies in the fact that every improper enhancement of its own power by Parliament, be it Clause 4 of Article 329A or Clause 4 and 5 of Article 368 or Section 4 of 42nd Amendment have been held to be incompatible with the doctrine of basic structure as they introduced new elements which altered the identity of the Constitution or deleted the existing elements from the Constitution by which the very core of the Constitution is discarded. They obliterated important elements like judicial review. They made Directive Principles en bloc a touchstone for obliteration of all the fundamental rights and provided for insertion of laws in the Ninth Schedule which had no nexus with agrarian reforms. It is in this context that we have to examine the power of immunity bearing in mind that after *Kesavananda Bharati's* case, Article 368 is subject to implied limitation of basic structure.

139. The question examined in *Waman Rao's* case was whether the device of Article 31B could be used to immunize Ninth Schedule laws from judicial review by making the entire Part III inapplicable to such laws and whether such a power was incompatible with basic structure doctrine. The answer was in affirmative. It has been said that it is likely to make the controlled Constitution uncontrolled. It would render doctrine of basic structure redundant. It would remove the golden triangle of Article 21 read with Article 14 and Article 19 in its entirety for examining the validity of Ninth Schedule laws as it makes the entire Part III inapplicable at the will of the Parliament. This results in the change of the

identity of the Constitution which brings about incompatibility not only with the doctrine of basic structure but also with the very existence of limited power of amending the Constitution. The extent of judicial review is to be examined having regard to these factors.

140. The object behind Article 31B is to remove difficulties and not to obliterate Part III in its entirety or judicial review. The doctrine of basic structure is propounded to save the basic features. Article 21 is the heart of the Constitution. It confers right to life as well as right to choose. When this triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the "essence of right" test but also the "rights test" has to apply, particularly when Keshavananda Bharti and Indira Gandhi cases have expanded the scope of basic structure to cover even some of the Fundamental Rights.

9. The learned Counsel for the petitioners argued that the Supreme Court, in this case, highlighted the importance of judicial review and pointed out the drawbacks in the decision in the Waman Rao case, which they sought to rectify by watering down the implication of that decision. Accordingly, the court held:

151. In conclusion, we hold that:

(i) A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.

(ii) The majority judgment in Kesavananda Bharati's case read with Indira Gandhi's case requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.

(iii) All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.

(iv) (iv) Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments shall be a matter of Constitutional adjudication by examining the nature and extent of infraction of

a Fundamental Right by a statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and the "essence of the right" test taking the synoptic view of the Articles in Part III as held in Indira Gandhi's case. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law(s) will not get the protection of the Ninth Schedule.

10. The contention of the petitioners was that, the decision of the Supreme Court in Waman Rao's case (supra), had been watered down by the decision in I. R. Coelho's case (supra), in the sense that the conclusion that any Act or Regulation and its provisions thereof, that destroy or damage the basic structure of the Constitution, by taking away or abrogating the fundamental rights of the citizens as per Articles 14, 19 and 21, are open to challenge, would apply to all amendments, whether made prior to or after 24.4.1973. It was submitted that since Section 50(a) is in clear violation of Articles 14, 15 and 21, it accordingly deserves to be struck down.

11. Thus, the fundamental question to be decided by this Court is whether the provisions of Section 50(a) of the said Act can be the subject matter of challenge, once it had been placed in the Ninth Schedule by virtue of the Constitution 17th Amendment Act in 1964?

12. Considering the decision in Waman Rao's case (supra), it is apparent that the enactments that were placed in the Ninth Schedule by virtue of the amendments prior to 1973 cannot be the subject matter of challenge on any grounds whatsoever. In other words, they remain undisturbed. A more detailed reading of the judgment in I. R. Coelho's case also reveals the same. The relevant paragraphs of the decision are reproduced hereunder:

1. In these matters we are confronted with a very important yet not very easy task of determining the nature and character of protection provided by Article 31B of the Constitution of India, 1950 (for short, the "Constitution") to the laws added to the Ninth Schedule by amendments made after 24th April, 1973. The relevance of this date is for the reason that on this date judgment in Kesavananda Bharati v. State of Kerala was pronounced propounding the doctrine of Basic Structure of the Constitution to test the validity of constitutional amendments.

xxxx xxxx xxxx xxxx xxxx xxxx Broad Question

5. The fundamental question is whether on and after 24th April, 1973 when the basic structure doctrine was propounded, it is permissible for the Parliament under Article 31B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and, if so, what is its effect on the power of judicial review of the Court.

Furthermore, a reading of the concluding part of the judgment clarifies the

intention of the Bench. The same, inter alia, reads as under:

151. (iii) All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.

xxxx xxxx xxxx xxxx xxxx (v) If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such a violation/infracton shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying there under.

13. It is clear from the above that both the decisions of the Supreme Court apply to constitutional amendments after 24.04.1973, i.e., after the decision in Keshavananda Bharti's case (supra). The importance of 24.04.1973 has been spelt out in I.R. Coelho (supra) itself to be because on this date the judgment in Kesavananda Bharti (supra) was pronounced which propounded the "basic structure" doctrine. Accordingly, we find that the Section 50(a) of the said Act cannot be challenged because of Article 31B of the Constitution and because it had been placed in the Ninth Schedule to the Constitution in 1964, that is, prior to 24.04.1973.

14. While there may be apparent justification for the petitioners to be aggrieved by the provisions of Section 50 of the said Act inasmuch as it is heavily loaded in favour of male descendants of a bhumidhar and this may appear to unfairly prejudice the rights of women and may be construed as discrimination against them solely on the ground of sex but, in the wake of the Constitutional provisions as interpreted by the Supreme Court, this Court's hands are tied. Perhaps the legislature ought to take note of the incongruous position of female descendants of bhumidhars and asamis and remedy the inequality.

15. For now, we have to agree with the learned Counsel for the respondents, that this writ petition challenging Section 50 of the said Act is not maintainable.

16. The writ petition is therefore dismissed. No order as to costs.