

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUROrder reserved on 9-4-2019Order delivered on 30-8-2019WPC No. 2765 of 2016

1. K.N. Singh S/o Rajendra Singh Aged About 40 Years R/o Kedarpur, Abmikapur, Police Station And Post Ambikapur, Civil And Revenue District Surguja, Chhattisgarh

----- Petitioner

Versus

1. State Of Chhattisgarh Through Principal Secretary, Department Of Revenue, Secretariat, Naya Raipur, District Raipur, Chhattisgarh
2. Collector, Surguja Ambikapur, District Surguja, Chhattisgarh
3. Union of India, through Secretary, Ministry of Urban Administration, New Delhi

----- Respondent

For Petitioner

Shri Sunil Otwani, Advocate

For Respondent/State

Shri Kanak Tiwari, Advocate General
with Shri Gagan Tiwari, Dy. Govt.
AdvocateHon'ble Shri Prashant Kumar Mishra, JHon'ble Shri Parth Prateem Sahu, JC A V Judgment

The following judgment of the Court was passed by

Prashant Kumar Mishra, J.

1. Petitioner has called in question the constitutional validity of sub-section (6-a) to (6-f) of Section 165 of the Chhattisgarh Land Revenue Code, 1959 (henceforth 'the CGLRC') on the ground that the said provision inserted in the statute book by notification issued by His Excellency the Governor of the erstwhile State of Madhya Pradesh bearing No.F-16-1-81-II-XXV dated 15-4-1981 as *ultra vires* to clause 5 Part 'B' of Fifth Schedule of the Constitution of India.
2. Article 244 (1) of the Constitution of India provides that the provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the States of Assam Meghalaya, Tripura and Mizoram. The Fifth Schedule of the Constitution is divided into four parts from Part 'A' to Part 'D'. Administration and control of scheduled areas and scheduled tribes is dealt with in Part 'B'.
3. Clause 5 of Part 'B' of the Fifth Schedule makes provision in respect of law applicable to scheduled areas. The said provision is reproduced hereunder :

5. *Law applicable to Scheduled Areas.*—(1) Notwithstanding anything in this Constitution, the Governor may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a

Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.

(2) The Governor may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area.

In particular and without prejudice to the generality of the foregoing power, such regulations may—

(a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area;

(b) regulate the allotment of land to members of the Scheduled Tribes in such area;

(c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.

(3) In making any such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.

(4) All regulations made under this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

(5) No regulation shall be made under this paragraph unless the Governor making the regulation has, in the case where there is a Tribes Advisory Council for the State, consulted such Council.

4. Section 165 of the CGLRC makes provision concerning rights of transfer of a bhumiswami. Sub-section (6) of Section 165 provides for the right of a tribal bhumiswami in respect of transfer. The entire sub-section (6) of Section 165 of the CGLRC is reproduced hereunder :

165. Rights of transfer.--

xxx xxx xxx

(6) Notwithstanding anything contained in sub-section (1) the right of Bhumiswami belonging to a tribe which has been declared to be an aboriginal tribe by the State Government by a notification in that behalf, for the whole or part of the area to which this Code applies shall--

(i) in such areas as are predominately inhabited by aboriginal tribes and from such date as the State Government may, by notification, specify, not be transferred nor it shall be transferable either by way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to such tribe in the area specified in the notification.

(ii) in areas other than those specified in the notification under clause (i), not to be transferred or be transferable either by way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to such tribe without the permission of a Revenue Officer not below the rank of Collector, given for reasons to be recorded in writing.

Provided that the provisions of this sub-section shall not be applicable to the

land acquired under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (No.30 of 2013).

5.
- The above provision authorises the Government to issue a notification specifying the area to which the provisions contained in sub-section (6) of Section 165 of the CGLRC would apply.
6.
- By notification dated 26-1-1977 the State Government has declared the following area shown as schedule, as specified area for the purpose of sub-section (6) of Section 165. The notification itself is reproduced hereunder :

Chhattisgarh Notification :- In supersession of Department Notification No. 5-3-76-384-Seven-N stipulated dated 26-1-1977 the State Government hereby declare the following area shown as schedule, as specified area for the purpose of sub-section (6) of section 165 of Chhattisgarh Land Revenue Code, 1959 (No.20 of 1959).

SCHEDULE

S No.	Area Comprised within the limits of Tahsil	District
(1)	(2)	(3)
1	Whole District Surguja	Surguja
2	Whole District Korla	Korla
3	Whole District Bastar	Bastar
4	Whole District Dantewada	Dantewada
5	Whole District Kanker	Kanker
6	Marwahi, Gorella-1, Gorella-2, Tribal Development Blocks and Kota Revenue Inspector Circle in Bilaspur	Bilaspur

7	Whole District Korba	Korba
8	Whole District Jashpur	Jashpur
9	Dharamjaigarh, Gharghoda, Tamnar, Lailunga and Kharsia Tribal Development Blocks in Raigarh	Raigarh
10	Dondi Tribal Development Block in Durg	Durg
11	Chauki, Manpur and Mohla Tribal Development Blocks in Rajnandgaon	Rajnandgaon
12	Gariaband, Mainpur and Chhua Tribal Development Blocks in Raipur	Raipur
13	Nagri (Sihawa) Tribal Development Block in Dhamtari	Dhamtari
* * *		

7. In exercise of powers under clause 5 of Part 'B' of Fifth Schedule of the Constitution His Excellency the Governor has issued a notification on 15-4-1981 inserting sub-section (6-a) to (6-f) of Section 165 of the CGLRC.
8. The entire provision introduced by notification issued by His Excellency the Governor is reproduced hereunder :

Notification No. P-16-1-81-II-XXV : dated the 15th April 1981.- In exercise of the powers conferred by sub-paragraph (1) of paragraph 5 of the Fifth Schedule to the ***Constitution of India***, the Governor of Madhya Pradesh is pleased to direct that the Act specified in column (1) of the Table below shall apply to Scheduled Areas in the State subject to the exceptions and modifications specified in the corresponding entries column (2) of the said Table, namely :-

SCHEDULE

Name of the Act	Exceptions and Modifications
(1)	(2)

Madhya Pradesh Land Revenue Code, 1959	After sub-section (6) of section 165, the following sub-sections shall be inserted, namely :-
--	---

“(6-a) Notwithstanding anything contained in sub-section (1), the right of a Bhumiswami other than a Bhumiswami belonging to (a tribe which has been declared to be) an aboriginal tribe declared under sub-section (6), shall not be transferred or be transferable either by way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to aboriginal tribe without the permission of the Collector given for reasons to be recorded in writing;

Provided that every such transfer effected prior to the 9th day of June, 1980 which is not in accordance with the provisions herein contained shall, unless such transfer is ratified by the Collector in accordance with the provisions hereinafter contained, be void and shall be of no effect whatsoever, notwithstanding anything contained in this Code or any other law for the time being in force.

(6-b) Notwithstanding anything contained in the Limitation Act, 1963 (No. 36 of 1963), the Collector may on his own motion at any time or on an application made in this behalf within three years of such transaction in such form as may be prescribed, make an enquiry as he may deem fit, and may, after giving a reasonable opportunity of being heard to the persons affected by the transfer, pass an order ratifying the transfer or refusing to ratify the transfer.

(6-c) The Collector shall, in passing an order under sub-section (6-a) granting or refusing to grant permission or under sub-section (6-b) ratifying or refusing to ratify the transaction shall have due regard to the following:-

- (i) whether or not the person to whom land is being transferred is a resident of the Scheduled Area;
- (ii) the purpose to which land shall be or is likely to be used after the transfer;
- (iii) whether the transfer serves or is likely to serve or prejudice the social, cultural and economic interest of the residents of the Scheduled Area;
- (iv) whether the consideration paid is adequate;
- (v) whether the transaction is spurious, fictitious or benami; and
- (vi) such other matters as may be prescribed.

The decision of the Collector granting or refusing to grant the permission under sub-section (6-a) or ratifying or refusing to ratify the transaction of transfer under sub-section (6-b), shall be final, notwithstanding anything to the contrary contained in this Code.

Explanation.-- For the purpose of this sub-section,-

- (a) "Scheduled Area" means any area declared to be a Scheduled Area within the State of Madhya Pradesh under paragraph 6 of the Fifth Schedule to the Constitution of India;
- (b) the burden of proving that the transfer was not spurious, fictitious or benami shall, lie on the person who claims such transfer to be valid.

(6-d) on refusal to grant the permission under sub-section (6-a) or ratification under sub-section (6-b),

the transferee, if in possession of the land shall vacate the possession forthwith and restore the possession thereof to the original Bhumiswami;

(6-e) if the Bhumiswami for any reason whatsoever fails or is unable to take possession of the land of which the right of possession stands restored to him under sub-section (6-d), the Collector shall cause the possession of land to be taken and cause the land to be managed on behalf of the Bhumiswami subject to such terms and conditions as may be prescribed till such time as the original Bhumiswami enters upon his land:

Provided that if any resistance is offered in restoring possession, the Collector shall use or cause to be used such force as may be necessary.

(6-f) the provisions of sub-section (6-a) to (6-e) shall have effect, notwithstanding anything to the contrary contained in this Code or any other law for the time being in force”.

9. Referring to clause 5 of Part 'B' of Fifth Schedule of the Constitution it is argued that in exercise of said power His Excellency the Governor can only notify that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification. Therefore, His Excellency the

Governor has no power to enact a new law for application for the scheduled areas. His Excellency the Governor can only notify that any existing law shall apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification.

10. The argument raised at the bar has been dealt with and negated by the Supreme Court in ***P. Rami Reddy and Others v State of Andhra Pradesh and Others***¹, wherein the following has been held at para 19 :

19.....No unreasonableness therefore is involved in making the prohibition against transfer to 'non-tribals' applicable to both the 'tribal' as also to the non-tribal' owners in the Scheduled Area. As a matter of fact it would have been unreasonable to do otherwise. In the absence of protection, the economically stronger 'non-tribals' would in course of time devour all the available lands and wipe out the very identity of the tribals who cannot survive in the absence of the only source of livelihood they presently have. It is precisely for this reason that the Architects of the Constitution have with far sight and foresight provided in paragraph 5(2) of the Fifth Schedule that the Governor may make regulations inter alia "prohibiting or restricting the transfer of land in the scheduled areas notwithstanding any provision embodied in the Constitution elsewhere". And as has emerged from the foregoing discussion, it is unreasonable to restrict the prohibition against transfer to 'tribals'. It

1

(1988) 3 SCC 433

has to be made comprehensive enough to embrace the 'non-tribals' as well. With the improvement in the economic conditions of the 'tribals', there would not be much difficulty in finding 'tribal' purchasers. Besides, Section 3 (1) (c) thoughtfully provides even for the contingency of not being able to find a 'tribal' willing or prepared to purchase the property. This provision obliges the State Government to acquire the property on payment of compensation as provided therein. One can envisage that some hardship would be occasioned to the owners of lands located in the scheduled areas. But such hardship would operate equally on the 'tribals' as well as the 'non-tribals'. Such hardship notwithstanding keeping in mind the larger perspective of the interest of the community in its entirety in the light of the foregoing discussion, the restrictions cannot be condemned as unreasonable. More so if the factor that the original acquisition by 'non-tribals' from 'tribals' was polluted by the sins of exploitation committed by the non-tribals' is not ignored.

(Emphasis supplied)

11. In the above referred matter of ***P. Rami Reddy*** (supra) the Supreme Court was considering the constitutional validity of the A.P. Scheduled Areas Land Transfer Regulation, 1959 notified by the Government of Andhra Pradesh in exercise of power under clause 5 of Fifth Schedule. Like the subject provision of the CGLRC notified by the Government of Madhya Pradesh (now Chhattisgarh) the legislation before the Supreme Court also prohibited transfer of immovable properties situated in the scheduled areas from a member of scheduled tribe to non-tribals without previous sanction of the State Government.

12. The Constitutional validity of the very same provision assailed in this petition inserted by notification dated 15-4-1981 has been upheld by the Division Bench of the High Court of Madhya Pradesh in ***Sudhakar, S/o Baoorao Kadu v State of M.P. and Others***².
13. Thus, the nature of legislation upheld by the Supreme Court in ***P. Rami Reddy*** (supra) is similar to that with which this Court is faced in the present writ petition, therefore, the matter in issue is squarely covered and we have no hesitation in holding that the notification dated 15-4-1981 issued by His Excellency the Governor in exercise of powers under clause 5 of Fifth Schedule of the Constitution of India inserting sub-section (6-a) to (6-f) of Section 165 of the CGLRC does not suffer from any lack of power nor it has been issued in excess of the power and authority conferred on His Excellency the Governor.
14. As a sequel, the writ petition, *sans* merit, is liable to be and is hereby dismissed, leaving the parties to bear their own costs.

Sd/-
(Prashant Kumar Mishra)
Judge

Sd/-
(Parth Prateem Sahu)
Judge

Gowri

² [2015 (1) MPLJ 372]