

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REFERENCE No.1 of 2017

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Uday Prakash Mishra, S/o Late Ram Bilash Mishra, R/o Ward No. 14, P.O. +
P.S. + District- Sheohar.

... .. Petitioner/s

Versus

1. Poonam Mishra. D/o Late Ram Bilash Mishra
 2. Smt. Shailbala Mishra, W/o Late Ram Bilash Mishra
 3. Om Prakash Mishra, S/o Late Ram Bilash Mishra
 4. Jai Prakash Mishra, S/o Late Ram Bilash Mishra.
- All R/o Ward No. -14, Sheohar, P.O. + P.S. + District- Sheohar.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr. J.S. Arora, Sr. Adv.
Mr. Sanjeev Kumar Singh, Adv,
Mr. Ajay Kr. Singh, Adv.

For the Respondents : Mr. Mr. Uma Kant Shukla, Adv.
Mr. Shakhti Suman Kumar, Adv.
Mr. Banwari Sharma, Adv,
Mr. Sheo Kumar, Adv.

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE S. KUMAR
ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 03-03-2020

We notice that the judgment and decree dated



10.07.1973 still remains unexecuted and that too despite the matter having travelled up to the Supreme Court. The instant Reference is with regard to its interpretation.

2. Well, we are not required to express any opinion on the parties' right of exhausting all remedies as available in law, but reference thereto is only to highlight the need of expeditious disposal, putting quietus, of matter, more so a continuous and contentious litigation so as to instill faith and not shake, which a litigant has in the system of administration and dispensation of justice.

3. The instant Reference Petition stands registered on the basis of reference (dated 06.11.2015) made under Section 113 CPC by Civil Judge (Senior Division 2nd), District Sheohar in Miscellaneous Suit No. 65/1993 titled as Uday Prakash Mishra Vs. Poonam Mishra & Others.

4. We deem it prudent not to refer the facts, more so, in view of the admitted position that the reference is totally misconceived in law.

5. Nonetheless we record that in terms of the instant reference, the Civil Judge wants this Court to interpret the judgment rendered in Miscellaneous Suit No. 65 of 1993 as also the order of the Apex Court passed inter se the parties in S.L.P.



NO. (Civil) No. 15016 of 93 tiled as Uday Prakash Mishra Vs. Ram Bilas Mishra & Ors, which in our considered view is wholly impermissible in these proceedings.

6. The said order passed by the Apex Court dated 10.09.93 reads as under:-

“Special Leave petition and application for condonation of delay are dismissed as withdrawn with liberty to the petitioner to move an appropriate forum for such redress as may be open to him under the law.”

7. Prior thereto, Hon’ble the Apex Court had passed the following order dated 12.08.1993 :-

“The petition is adjourned for four weeks to enable counsel to furnish the copy of the impugned judgment.”

8. Section 113 of the CPC reads as under:-

“113. Reference to High Court.- 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 of 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 therefor, and refer the same for the opinion of the High Court.”

9. Learned counsel appearing for both the sides have invited our attention to the decision rendered by a Full Bench of this Court in *Banarsi Yadav Vs. Krishna Chandra Dass and Others*. AIR 1972 Patna 49 (V 59 C 16), wherein the scope of the aforesaid Section has been discussed elaborately and extensively in para 3 which reads as under:-

“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 reads as follows -

“Subject to such conditions and limitation 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 therefor 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, (1913) ILR 36 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 fulfill 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.”

10. More recently, the Apex Court in *State of Jharkhand Vs. The State of Bihar & another*, 2015 (2) SCC 431 in para 16 held as under:-

“16. If the question of constitutionality of a statute (either of Parliament or the State Legislature) were to be raised by a party other than the persons specified under Article 131, both this Court as well as the High Courts are competent to examine. This proposition is too well settled in our jurisprudence for the period of last sixty years. What is more significant is that if Parliament chooses to repeal the proviso to Section 113 of the Code of Civil Procedure, even an ordinary civil



court functioning in accordance with the procedure prescribed under the Code of Civil Procedure would be competent to examine such a question.

“113.Reference to High Court.—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 therefor, and refer the same for the opinion of the High Court.”

It is only the proviso of Section 113 of the Code of Civil Procedure which obliges an ordinary civil court to refer the same for the opinion of the High Court. Therefore, we find it difficult to accept the statement of law enunciated by this Court in *State of M.P. v. Union of India* [*State of M.P. v. Union of India*, (2011) 12 SCC 268 : (2012) 2 SCC (Civ) 478] .

11. Thus, evidently, the reference made is not in line with the proviso to Section 113 CPC, but in excess thereof, and totally misconceived in law.



12. In the instant case, the reference does not pertain to the matters testing the constitutional validity of any Act, Ordinance or Regulation. It pertains to the interpretation of the terms of the decree, as it exists as on date, and the order passed by Hon'ble the Apex Court which is beyond the scope of reference.

13. The reference is misconceived also in the light of Order XLVI Rule 1 of CPC, to which our attention is invited. Outcome of the application filed by the applicant is appellable under law and Order XLVI Rule 1 CPC restricts references with regard to such of those matters which are appellable. The reference has to be only on a question of law and not on fact.

14. As such the present reference being totally misconceived in law is returned to the concerned court.

15. The trial court shall ensure that the Miscellaneous application/proceedings/execution in the suit are positively decided and disposed of within a period of three months.

16. It is made clear that we have not expressed any opinion on the merits of the issues to be agitated in the proceedings below.

17. As such, the instant Civil Reference stands disposed off in the aforesaid terms.



18. Registry to take appropriate steps. Registrar (List)
shall ensure compliance.

(Sanjay Karol, CJ)

(S. Kumar, J)

veena/rajiv

AFR/NAFR	AFR
CAV DATE	
Uploading Date	
Transmission Date	

