REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2202 OF 2012

Adivasis for Social and
Human Rights Action **...Appellant**

versus

Union of India & Ors. **...Respondents**

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. In exercise of powers under sub-clause (2) of Clause 6 of the Fifth Schedule to the Constitution of India, on 31st December 1977, the Hon'ble President of India declared the entire District of Sundargarh in the State of Orissa as a Scheduled Area (for short, 'the Scheduled Area'). The appellant, a society registered under the Societies

Registration Act, 1860, invoked the writ jurisdiction of the High Court under Article 226 of the Constitution of India. The first contention raised in the writ petition was that in the Scheduled Area, except for the members of the Scheduled Tribes, no one has the right to settle down. A contention was raised in the writ petition that every person, who does not belong to Scheduled Tribe and residing in the Scheduled Area, is an unlawful occupant and, therefore, is disentitled to exercise his right to vote in any constituency in the Scheduled Area. Further contention raised was that every constituency in the Scheduled Area should be declared as a reserved constituency under Articles 330 and 332 of the Constitution of India. It was also contended that no candidate, other than the candidates belonging to the Scheduled Tribes, should have the right to contest the elections of the Legislative Assembly or the Lok Sabha in the Scheduled Area.

2. Another contention raised in the petition is that in view of sub-clause (1) of Clause 5 of the Fifth Schedule unless there is a specific notification issued by the Hon'ble Governor of the State applying any particular Central or State law to a Scheduled Area, none of the provisions of the Central or State laws are applicable to that particular

Scheduled Area. Therefore, it was urged that the Representation of the People Act, 1950 (for short, 'the 1950 Act') and the Delimitation Act, 2002 (for short, 'the 2002 Act') are not applicable to the Scheduled Area in the absence of any such notification. A Division Bench of the High Court of Orissa, by the impugned judgment, dismissed the writ petition. Being aggrieved by the decision of the High Court of Orissa, the present appeal has been preferred pursuant to the grant of leave by this Court vide order dated 14th February 2012.

SUBMISSIONS

3. The first contention raised by the learned counsel appearing for the appellant is that none of the laws enacted by the Central or the State Legislature are applicable to a Scheduled Area unless there is a specific notification issued under sub-clause (1) of Clause 5 of the Fifth Schedule by the Hon'ble Governor declaring that any particular law will be applicable to the Scheduled Area. He submitted that Article 244(1) provides that the provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas. Therefore, what is provided in Fifth Schedule shall be considered as a law made by the Constitution of India. His submission is that no law made

by the Central or the State Legislature can be applied to a Scheduled Area in the absence of a specific notification issued by the Hon'ble Governor, and therefore, such law shall be treated as null and void. He submitted that only the laws made under the Constitution of India in exercise of power under the Fifth Schedule will apply to the Scheduled Areas. He submitted that any law made by the State or the Central Legislature in its application to the Scheduled Area will be in derogation of the provisions of Article 244 of the Constitution of India and therefore, such laws are void.

4. He submitted that the Hon'ble Governor of the State must first decide which Acts of the Parliament or the State Legislature should apply to Scheduled Areas of the State. After satisfying himself that a particular enactment needs to be applied to a particular Scheduled Area, he must issue a notification making applicable the law to the Scheduled Area. He submitted that unless a specific notification is issued by the Hon'ble Governor clearly incorporating the title and other particulars of every Act of the Parliament and the State Legislature, which will be applied to the Scheduled Area, no Act of Parliament or State Legislature is applicable to a Scheduled Area.

5. Inviting our attention to the Fundamental Rights guaranteed under sub-clause (e) of Clause (1) of Article 19 of the Constitution of India, he submitted that what prevails in the Scheduled Areas is the law made in accordance with Clause 5 of the Fifth Schedule.

6. The learned counsel relied upon the decisions of the Federal Court in the case of ***Raja Bahadur Kamakshya Narain Singh of Ramgarh v. Commissioner of Income Tax Bihar***[1] and in the case of ***Chatturam v. Commissioner of Income Tax***[2] in support of the interpretation made by him of sub-clause (1) of Clause 5 of the Fifth Schedule. In the statement of case, the appellant has submitted that as the Land Acquisition Act, 1894 is not notified by the Hon'ble Governor, the said law is not applicable to the Scheduled Area. We have also heard the learned counsel appearing for the respondents.

OUR VIEW

7. The first question to be answered by this Court is whether the Central and the State Acts can apply to a Scheduled Area unless a specific notification making the said Acts applicable to the Scheduled Area is issued by the

1 (1947) Federal Court Reports 130
2 AIR 1947 FC 32

Hon'ble Governor. Clause 5 of the Fifth Schedule reads thus:

> **"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."

(emphasis added)

8. On a plain reading of sub-clause (1) of Clause 5 of the Fifth Schedule, the power of the Hon'ble Governor under the said sub-clause (1) extends to:

i. directing by a notification that a particular Central or State legislation will not apply to a Scheduled Area in the State, and;

ii. directing by a notification that a particular State or Central Act will apply to a Scheduled Area subject to certain modifications.

The first part of sub-clause (1) proceeds on the footing that all the State and Central legislations applicable to a State are applicable to the Scheduled Areas within the said State. Otherwise, there was no reason to confer a power on the Hon'ble Governor to declare that particular legislation will not apply to a particular Scheduled Area.

9. For interpreting Clause 5, the learned counsel appearing for the appellant has relied upon the decisions of the Federal Court in the cases of ***Raja Bahadur***[1] and ***Chhaturam***[2]. Both the decisions deal with Section 92 of the Government of India Act, 1935, which reads thus:

> **"Administration of Excluded Areas and Partially Excluded Areas:**
> 92. (1) The executive authority of a Province extends to excluded and partially excluded areas therein, **but, notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature, shall apply to an excluded area or a partially excluded area, unless the Governor by public**

notification so directs, and the Governor in giving such a direction with respect to any Act may direct that the Act shall in its application to the area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit.

(2) The Governor may make regulations for the peace and good Government of any area in a Province which is for the time being an excluded area, or a partially excluded area, and any regulations so made may repeal or amend any Act of the Federal Legislature or of the Provincial Legislature, or any existing Indian law, which is for the time being applicable to the area in question.

Regulations made under this sub-section shall be submitted forthwith to the Governor-General and until assented to by him in his discretion shall have no effect, and the provisions of this Part of this Act with respect to the power of His Majesty to disallow Acts shall apply in relation to any such regulations assented to by the Governor-General as they apply in relation to Acts of a Provincial Legislature assented to by him.

(3) The Governor shall, as respects any area in a Province which is for the time

being, an excluded area, exercise his functions in his discretion."

(emphasis added)

10. By virtue of Article 395, the Government of India Act, 1935 has been repealed. Sub-Section (1) of Section 92 of the Government of India Act, 1935 and sub-clause (1) of Clause 5 of the Fifth Schedule are completely different. Sub-Section (1) of Section 92 provides that no Act of the Federal Legislature or a Provincial Legislature shall apply to an Excluded Area unless the Governor by a public notification so directs. However, sub-Clause (1) of Clause 5 of the Fifth Schedule confers a power on the Hon'ble Governor to issue a notification for directing that a particular enactment, either State or Central, will not apply to a Scheduled Area. He also has the power to direct that a particular enactment will apply to a Scheduled Area with modifications as may be specified by him in the notification. Sub-clause (1) of Clause 5 of the Fifth Schedule proceeds on the basis that all the State and the Central laws which are otherwise applicable to a State apply to Scheduled Areas in the State. Whereas, sub-Section (1) of Section 92 of the Government of India Act, 1935 provides that no law of Federal or Provincial Legislature will apply to an Excluded

Area unless a notification is issued by the Hon'ble Governor issuing a specific direction to that effect. Thus, the reliance placed on sub-Section (1) of Section 92 of the Government of India Act, 1935 is not at all relevant.

11. The contention raised by the appellant that unless there is a specific notification issued by the Hon'ble Governor applying Central or State laws to a Scheduled Area, the said laws will not apply to the said Scheduled Area, to say the least, is preposterous. In fact, the issue is no longer *res integra.* There is a binding decision of the Constitution Bench of this Court in the case of ***Chebrolu Leela Prasad Rao & Ors. v. State of Andhra Pradesh & Ors***[3]**.** In paragraph 2 of the said decision, the Constitution Bench formulated the questions which required consideration. Paragraph 2 of the said decision reads thus:

> **"2.** Several questions have been referred for consideration in the order dated 11-1-2016 [*Chebrolu Leela Prasad Rao* v. *State of A.P.*, (2021) 11 SCC 526]. We have renumbered Questions 1(*a*), (*b*), (*c*) and (*d*) based on interconnection. The questions are as follows: (*Chebrolu Leela Prasad Rao case* [*Chebrolu Leela Prasad Rao* v. *State of*

3 (2021) 11 SCC 401

A.P., (2021) 11 SCC 526], SCC p. 527, para 1)

(*1*) What is the scope of Para 5(1), Schedule V to the Constitution of India?

(*a*) Does the provision empower the Governor to make a new law?

(*b*) Does the power extend to subordinate legislation?

(*c*) Can the exercise of the power conferred therein override fundamental rights guaranteed under Part III?

(*d*) Does the exercise of such power override any parallel exercise of power by the President under Article 371-D?

(*2*) Whether 100% reservation is permissible under the Constitution?

(*3*) Whether the notification merely contemplates a classification under Article 16(1) and not reservation under Article 16(4)?

(*4*) Whether the conditions of eligibility (i.e. origin and cut-off date) to avail the benefit of reservation in the notification are reasonable?**"**

(emphasis added)

In paragraph 39.1, the Constitution Bench held thus:

"39. .. ..

> **39.1.** Para 5(1) of Schedule V does not confer upon Governor power to enact a law but to direct that a particular Act of Parliament or the State Legislature shall not apply to a Scheduled Area or any part thereof or shall apply with exceptions and modifications, as may be specified in the notification. **The Governor is not authorised to enact a new Act under the provisions contained in Para 5(1) of Schedule V to the Constitution. Area reserved for the Governor under the provisions of Para 5(1) is prescribed. He cannot act beyond its purview and has to exercise power within the four corners of the provisions.**
>
> **39.2.** .. .."
>
> (emphasis added)

In paragraph 40, the Constitution Bench proceeded to hold thus:

> **"40. The Act of Parliament or the appropriate legislature applies to the Scheduled Areas. The Governor has the power to exclude their operation by a notification. In the absence thereof, the Acts of the legislature shall extend to such areas.** In *Jatindra* v. *Province of Bihar* [*Jatindra* v. *Province of Bihar*, 1949 SCC OnLine FC 23 : ILR (1949) 28 Pat 703 : 1949 FLJ 225] , it was held that the power of the Governor under Para 5 is a

legislative power and the Governor is empowered to change or modify the provisions of the Act or the section as he deems fit by way of issuing a notification. The power under Para 5(1) is limited to the application of the Governor's decision to apply an Act or making modification or creating exceptions. Though the power is legislative to some extent, that is confined to applicability, modification, or creating exceptions concerning the Act of Parliament or the State. While Para 5(2) confers the power of independent legislation, the Governor has plenary power of framing regulations for the peace and good governance of a Scheduled Area. He is the repository of faith to decide as to the necessity. The Governor is empowered by Para 5(3) to repeal or amend any Act of Parliament or State Legislature, following the procedure prescribed therein, in exercise of making regulations as provided under Para 5(2) of Schedule V. The aspect of power was considered in *Ram Kirpal Bhagat* v. *State of Bihar* [*Ram Kirpal Bhagat* v. *State of Bihar*, (1969) 3 SCC 471 : 1970 SCC (Cri) 154] thus : (SCC pp. 478-80, paras 21-23)

"*21*. The second question which falls for consideration is whether the Bihar Regulation I of 1951 is in excess of the Governor's powers. The contentions were: first, that the Regulation I of 1951 could not at all have been made; secondly, that

Regulations deal with the subject-matter and did not mean power to apply law and thirdly, the power to extend a law passed by another legislature was said to be not a legislative function, but was a conditional legislature. The legislation, in the present case, is in relation to what is described as Scheduled Areas. The Scheduled Areas are dealt with by Article 244 of the Constitution and the Fifth Schedule to the Constitution. Prior to the Constitution, the excluded areas were dealt with by Sections 91 and 92 of the Government of India Act, 1935. The excluded and the partially excluded areas were areas so declared by Order in Council under Section 91 and under Section 92. **No act of the Federal Legislature or of the Provincial Legislature was to apply to an excluded or a partially excluded area unless the Governor by public notification so directed. Sub-section (2) of Section 92 of the Government of India Act, 1935 conferred power on the Governor to make regulations for the peace and good government of any area in a Province which was an excluded or a partially excluded area and any regulations so made might repeal or amend any Act of the Federal Legislature or the Provincial Legislature or any existing Indian law which was for the time being applicable to the area in question.** The extent of the

> legislative power of the Governor under Section 92 of the Government of India Act, 1935 in making regulations for the peace and good government of any area conferred on the Governor in the words of Lord Halsbury "an utmost discretion of enactment for the attainment of the objects pointed to." (See *Riel* v. *R.* [*Riel* v. *R.*, (1885) LR 10 AC 675 (PC)], AC p. 678.) *In that case the words which fell for consideration by the Judicial Committee were "the power of Parliament of Canada to make provisions for the administration, peace, order and good government of any territory not for the time being included in any province*". It was contended that if any legislation differed from the provisions which in England had been made for the administration, peace, order and good government then the same could not be sustained as valid. That contention was not accepted. *These words were held to embrace the widest power to legislate for the peace and good government for the area in question.*"**"**
>
> (emphasis added)

Again, in paragraph 52, the Constitution Bench answered Question (1)(b) as under:

> **"52.** We are of the opinion that the **Governor's power to make new law is not available in view of the clear language of Para 5(1), Fifth Schedule does not recognise or confer such**

> **power, but only power is not to apply the law or to apply it with exceptions or modifications.** Thus, the notification is ultra vires to Para 5(1) of Schedule V to the Constitution."
>
> (emphasis added)

12. In paragraph 80, the Constitution Bench answered Question (1)(c). Paragraph 80 reads thus:

> **"80. The power is conferred on the Governor to deal with the Scheduled Areas. It is not meant to prevail over the Constitution.** The power of the Governor is pari passu with the legislative power of Parliament and the State. The legislative power can be exercised by Parliament or the State subject to the provisions of Part III of the Constitution. **In our considered opinion, the power of the Governor does not supersede the fundamental rights under Part III of the Constitution. It has to be exercised subject to Part III and other provisions of the Constitution.** When Para 5 of the Fifth Schedule confers power on the Governor, it is not meant to be conferral of arbitrary power. The Constitution can never aim to confer any arbitrary power on the constitutional authorities. They are to be exercised in a rational manner

keeping in view the objectives of the Constitution. The powers are not in derogation but the furtherance of the constitutional aims and objectives."

(emphasis added)

13. Therefore, to conclude;

(i) All the Central and the State laws which are applicable to the entire State of Orissa will continue to apply to the Scheduled Area unless, in exercise of powers under sub-clause (1) of Clause 5 of the Fifth Schedule, there is a specific notification issued by the Hon'ble Governor making a particular enactment inapplicable, either fully or partially;

(ii) The power of the Hon'ble Governor under Clause 5 of the Fifth Schedule is restricted to directing that a particular law will not apply to the Scheduled Area or it will apply with such modifications as may be specified in the notification issued under sub-clause (1) of Clause 5 of the Fifth Schedule or while making Regulations in terms of sub-clause (2) of Clause 5 of the Fifth Schedule;

(iii) The power of the Hon'ble Governor under Clause 5 of the Fifth Schedule does not supersede the

Fundamental Rights under Part III of the Constitution of India; and

(iv) Therefore, the Fundamental Rights conferred by sub-clause (e) of Article 19(1) of the Constitution of India on the citizens can also be exercised in relation to the Scheduled Area.

14. Under sub-clause (e) of Clause (1) of Article 19 of the Constitution of India, every citizen has a right to reside and settle in any part of the territory of India. However, by making a law, reasonable restrictions can be put on the said Fundamental Right as provided in Clause (5) of Article 19. Therefore, we reject the argument that non-Tribals have no right to settle down in a Scheduled Area.

15. The argument that the Fifth Schedule is a law made by the Parliament is misconceived. Even assuming that Fifth Schedule is a law, it does not put any constraints on the exercise of the Fundamental Rights under Article 19(1) of the Constitution of India.

16. Now, we come to the second question whether a non-Tribal has the right to vote in a Scheduled Area. As far as the right to vote is concerned, the 1950 Act is applicable to

the Scheduled Area and therefore, the appellant cannot contend that only a person belonging to Scheduled Tribe can cast a vote in elections of the constituencies in the Scheduled Area. The right to vote will be governed by Part III of the 1950 Act. Every eligible voter is entitled to be registered in the electoral roll of a constituency, in which he is ordinarily residing. Therefore, any person eligible to vote who is ordinarily residing in the Scheduled Area has a right to vote, even if he is a non-Tribal.

17. As regards providing reservation for all the Lok Sabha and the State Legislative constituencies in a Scheduled Area, the appellant cannot contend that all the constituencies in a Scheduled area should be reserved for the Scheduled Tribes. Reservation is required to be made in terms of Articles 330 and 332 of the Constitution of India. These provisions do not provide that all the constituencies in the Scheduled Areas shall be reserved for Scheduled Tribes. Moreover, the 2002 Act is applicable to the Scheduled Area. Therefore, even the said prayer to issue a writ of *mandamus*, as regards the reservation for the Scheduled Tribes, deserves to be rejected.

18. The Land Acquisition Act, 1894 was made applicable to the whole of India except the State of Jammu and Kashmir. In the absence of the exercise of power by the Hon'ble Governor under sub-clause (1) of Clause 5 of the Fifth Schedule, the said law was applicable to the Scheduled Area.

19. We are, therefore, of the view that there is absolutely no merit in the appeal, and the High Court was right when it dismissed the writ petition filed by the appellant. Only in view of the claim that the appellant is working for the welfare of the tribals that we refrain from saddling the appellant with costs.

20. Hence, the appeal is dismissed with no order as to costs.

.....J.
(Abhay S. Oka)

.....J.
(Rajesh Bindal)

New Delhi;
May 10, 2023.