

Succession Act, is the State Act is liable to be struck down on grounds of repugnancy ?

The State Act 29-A became *void* in view of the provisions of Article 254(1) of the Constitution, which provides.

Article 254(1) Inconsistency between laws made by the Parliament and the laws made by the Legislature of States :

“If any provision of law, made by the Legislature of a State is repugnant to any provisions of a law made by the Parliament which Parliament is competent to enact or to any provision of an existing law, with respect to one of the matters enumerated in the Concurrent List, then subject to the provisions of Clause (2) the law made by the Parliament whether passed before or after, the law made by the Legislature of such State, or as the case may be, the existing law, shall prevail and the law made by the Parliament whether such passed before or after the law made by the Legislature of the State, or as the case may be, the existing law shall prevail and the law made by the Legislature of the State shall to the extent of the repugnancy, be *void*.”

The operation of Article 254 is not complex. The real problem that in practice arises is the problem of determining whether a particular State law is repugnant to Central Act. A number of judicial decisions (noted below) give guidance as to when repugnancy arises. The important rulings are :

(i) *Zaverbbai v. State of Bombay*, AIR 1954 SC 752.

(ii) *Tika Ramji v. State of U.P.*, (1956) SCR 393.

(iii) *Municipal Corporation v. Shiv Shankar*, AIR 1971 SC 815.

(iv) *Karunanidhi v. Union of India*, AIR 1979 SC 898.

(v) *Western Coalfields v. Special Area Development*, AIR 1982 SC 697.

(vi) *Reghubir v. State of Haryana*, AIR 1981 SC 2037.

Because of the repugnancy between the Central Act, and the State Act with certain restrictions, the State Act “29-A is *void*. It is therefore obvious in view of the repugnancy between the Central Act Section 6 as amended and the State Act Section 29-A in the Concurrent List are fully inconsistent and are absolutely irreconcilable. The Central Act amending Section 6 will prevail and the State Act Section 29-A is *void* in view of the repugnancy and will not survive and the Central Act only survivor.

In view of the threadbare analysis of the matter keeping in view Article 254(1) of the Constitution that on passing of the Central Act amending Section 6 of Hindu Succession Act 1956 and its extension to the whole of India, the State Act Section 29-A being repugnant to the Central Act, has become inoperative and *void* and is liable to be struck down.

SUITS FOR DECLARATION OF TITLES AND CONSEQUENTIAL INJUNCTION — APPLICABLE ARTICLES OF LIMITATION ACT — A CRITICAL STUDY

By

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What is the relevant Article applicable for suits of declaration of title and for consequential injunction, whether Article 58 or Article 65, or the residuary Article 113 of the Limitation Act ?

Whether the decisions of His Lordship Mr. Justice T. Ch. Suryarao reported in 2006 (1) ALD page 116 in M. Chokkarao v. Sattamma, laying down Article 65 of Limitation applies, contrary to the Division Bench decision reported in AIR 1960 AP 535 and AIR 1961 SC 808, is per incuriam ? Does this decision reflects the correct possession of law ?

There has been a considerable controversy whether Article 58 of the Limitation Act *vis-a-vis* Article 65 of the Limitation Act applies in respect of suits for declaration of title in respect of immovable property and for consequential injunction, a further relief within the meaning of Section 34 of specific relief Act.

His Lordship Mr. Justice T. Ch. Suryarao, laid down after reviewing the entire Single Bench Decisions of the High Court of Andhra Pradesh and other High Courts too “a declaratory relief in respect of immovable property can be sought for at any time within a period of 12 years, after which the right can be extinguished notwithstanding the fact Article 58 prescribe a period of Three Years.

The learned Judge has carefully surveyed the entire law impinged on the subject part wise part III “suits relating to declarations *vis-a-vis* part V suits relating to “immovable property” and relevant paragraphs are extracted hereunder “in order to get a hangover the matter.

Part-11 “one shall not be oblivious of the fact that Para – V of first division specifically deals which category of suits relating to immovable property coming in the domain of Part-V, Articles 64 and 65 specifically deal with the period of limitation to institute a suit for, possession of immovable property based on previous possession and to institute a suit for possession of immovable property or any interest therein based on title. Having regard to the categorization sought to be made in the schedule, although Part III of the first division thereof apparently deals with suits relating to declarations, that part does not deal with suits relating to immovable

inasmuch as Part-V thereof exclusively deals with the suits pertaining to immovable property, *prima facie* it appears, therefore, that notwithstanding the fact that the suit is filed for the relief of declaration but the suit is in respect of an immovable property, Article 58 of the Act has no application, instead Articles 61 to 67 which specifically deal with the suit relating to immovable property, seem to applicable.

Paragraph 12. “A suit for the relief of declaration simplicitor is not maintainable as per the mandate contained in Section 34 of the specific relief Act. If the suit is filed for declaration of title over an immovable property and for the consequential relief of either possession or injunction, if it is said that still Article 58 governs, it does not stand to reason, nay appears to be somewhat odd. A suit for possession or a suit for perpetual injunction obviously is governed by the relevant Article in Part – V of the first division when that suit pertains to immovable property. Article 58, in my considered view, will not fall foul of Article 65 of the Act. In the event of any inconsistency in between the two Articles mentioned in the schedule, the endeavour of the Court shall be to give a harmonious construction having due regard to the scheme and object of the Act. The learned Judge has relied on the following decisions of the Single Judges.

Para 14. The situation seems to be no more *res-integra* in *Pavan Kumar v. K. Igopala Krishna*, 1990 (1) APLJ (HC) 185 at Page 189 = AIR 1990 NOC 123 (AP), *S.S.M. Quadri, J.*, (as His Lordship then was) had taken the view thus:

“Where a suit is filed based on title but claiming declaration of title to the suit

property with consequential relief of possession Article 65 of the Limitation Act would apply; Article 58 would have no application Article 58 applies only to a case there declaration is sought simplicitor, that is without further relief.”

Para 15. A learned Single Judge of this Court in *Surabhi Baburao v. Villgllingala Suryanarayana and others*, 1993 (2) ALT 317, has taken the view that when there is specific chapter viz. part V relating to suits for immovable property, Article 65 which is relevant Article which provides for limitation has to be applied and not Article 58 which provides Limitation for other declarations.

Para 16. Without noticing the said judgments *P. Venkataramana Reddi, J.* (as His Lordship then was) had taken the view that residuary Article 58 applies for the declaratory reliefs in respect of immovable property in *N. Raghotham Rao and another*, 1997 (1) ALD 1. The same view had been reiterated by the learned Judge in *Shaik Omer Bin Ali nmade v. Syed Yousuf Ali*, 1997 (2) ALD 112.

Para 17. However, in *Parepalli Pallalayya v. Kasagai Ramulu*, a learned Single Judge of this Court differed with the view expressed in the latter two judgments.

Para 18. Recently in *Podugu Jaya Lakshmi v. Shahjedi Begum*, 2002 (2) ALD 506, a learned Single Judge of this Court has sought to distinguish Articles 58 and 65 of the Act and held that if the suit is for declaration of title over an immovable property, the period of Limitation would be 12 years. But, inasmuch as the suit was filed for declaration in that case in respect of a sale deed, Article 58 is held to be applicable.

Para 19. Even the High Court of Orissa in *Gouragana v. Bhaga Sabu*, AIR 1976 Ori. 43 at Page 47; the High Court of the Bombay in *Preven v. State of Maharashtra*, AIR 1996 Bom. 280 and in *Indira B. Gokhale v. Union of India*, AIR 1990 Bom. 98 at Page 104, the

High Court of Karnataka in *Sesbu Mull M. Sha v. Syed Abdul Rabsid*, AIR 1991 Kant. 273 page 277, and the High Court of Madras in *Muniammal v. Venkitammal*, 1992 (2) Mad. LJ 425 at Page 429, have taken the same view

The learned Judge observed in the penultimate paragraph of the judgment as follows :

Para 21.

“The preponderance of authority which holds the view that in respect of declaratory suits pertaining to immovable property, the period of limitation is governed by Articles 64 and 65 but not Article 58 of the Act is in conformity with the scheme of the Act, as discussed hereinabove.

An amazing feature is the decision of the Division Bench consisting of *Satyanarayanaraju* and *Munikannayya, JJ.*, reported in AIR 1960 AP 535, and the decision of the Supreme Court AIR 1961 SC 808, *G. Mahammad Yunus Sayyad Unnissa* is not brought to the notice of the learned Judge. The Bench laid down after relying on AIR 1938 Cal. 804, to the following effect.

Suit for declaration of title to immovable property and for consequential injunction the relevant Article is the residuary was Articles 120 = 113 present and further held each fresh attack on title or invasion of right gives rise to new cause of action the observations of the learned Division Bench in the penultimate paragraph are to the following effect.

“The decision of *Midnapur Zamindari case Co. Ltd. v. Secretary of State*, AIR 1938 Cal. 80, supports this view as has been held by the trial Court, the suit filed on 2-1-1953 is within six years from the date of Exs.A.8, A.9, A.10 which are demand notices for contribution.

The suit in our view would therefore be within time as it is not disputed that

Article 120 of the Limitation Act will not apply to such case.”

The study of mine would be incomplete if I would not advert to the other decision of the Supreme Court reported in AIR 1961 SC 808, *G. Mohammad Yunus Syed Unnissa*.

A suit for declaration of right and an injunction restraining the defendants from interfering with the exercise of that right is governed by Article 120. Under the Article there can be no right to sue until there is an accrual of the right asserted in the suit, and its infringement or at least an un-equivocal threat to infringe that right.

It is therefore submitted, in view of the authoritative pronouncement of the A.P. High Court DB, AIR 1960 AP 535 and the Apex Court, AIR 1961 SC 808, the suits for declaration and consequential injunction are governed by the residuary Article (old 120) at present 113. The learned Division Bench and the Apex Court are conscious of the existence of Article 58 and Article 65 of the Limitation Act.

Strengthened and heartened by the decision of the Division Bench of the High Court of A.P. and the Apex Court it is respectfully suggested or asserted the relevant Article is the residuary Article 113 present governing the suits for declaration and consequential injunction which incidentally attracts suits under Section 34 of the Specific Relief Act.

In other words there cannot be any quarrel, or there be any doubt, Article 113 which correspondent to Article 120 (old) the residuary Article an omnibus Article for cases not covered by any other special Article. As the relevant Article applies it is not possible to anticipate or visualize all possible contingencies and *ex abundant cautela* Article 113 has been provided as final and residuary Article.

The learned Judge Justice *T. Ch. Suryarao* has not addressed himself as to the meaning

of the expression any interest therein “occurring in column I of Article 65 of the Limitation Act. Distinction is to be maintained between out and out title and any interest therein. The interest therein means and mean only any interest other than title.

‘Easement Right’

A suit to recover a right to an easement was held to be a suit to recover an interest immovable property and to be governed by the twelve year rule. A right to the exclusive enjoyment of fishery was an interest, in immovable property.

Other instances of interest in immovable property.

The plaintiff’s claim for a grazing right in the defendant’s land is a claim to an interest in immovable property within the meaning of Article 144 now Article 65. Evidently what the plaintiff claim is an interest immovable property and not the property right itself. Please see AIR 1958 Punjab 187, *Kaman Singh v. Konshiram*.

When the right of fishery is claimed without any exclusion of the owner or in common with others, the right may be regarded as an easement or a mere profit a *prendre*. But the exclusive right to fishing falls within the definition of interest in immovable property under Article 144 and adverse possession of such a right for more than twelve years would by, operation of Section 28 of the Limitation Act, extinguishes the right of the lawful owner to that extent (*Krishna Nandbi v. Loknadh Mookbarji*, AIR 1932 Cal. 300 (E)).

The same view was adopted in *Secretary of State v. District Board of Tanjore*, AIR 679 (FB). It was an exclusive right of fishing in the sense that even lawful owner is excluded from its enjoyment is a heritable and transferable interest in immovable property which can be acquired by 12 years adverse/possession as against the lawful owner.

In *Henry Hill & Co. v. Sheoraj Rai*, AIR 1923 Pat (G), a distinction was drawn between a right to fishery which does not exclude the acquisition of similar rights by others or bar the enjoyment of such rights by the lawful owners, and an exclusive right to fishing in a particular locality, as in the case of several fishery. The former was regarded as profit a *prendre*, in the manner of easement, and later, as an interest in immovable property which is both transferable and heritable and can be acquired by twelve years possession.

It is thus sufficient to draw the distinction between interest in immovable property *vis-à-vis*, property right and it is not desirable and profitable to burden the Article with their various pronouncement touching on the distinction between the interest in immovable property and property title.

In view of the threadbare analysis of the study, the relevant Article for the suits of declaration of title and for consequential injunctions is only the residuary Article 113 but not Article 65 of the Limitation Act which contemplates only suits for possession based on title and for any other incidental interest in immovable property such as grazing and fishery rights, Independent of declaration of title.

It is submitted the observations of His Lordship regarding the applicability of Article 65 to the suit of declaration of title and for consequential injunctions cannot be considered in my view as an authoritative pronouncement.

But yet, it leads to an anomaly likely to crop up.

Even a cursory reading of the decision makes it clear 1) the earlier Bench decision of the High Court of A.P. AIR 1960 AP 535, and 2) AIR 1961 SC 808, were not brought to the pointed attention of His Lordship, if otherwise, the decision would have been otherwise and as a corollary the decision may be due to inadvertence as I thought.

Though the observation of the learned Judge, may not be considered as laying down the correct position of law, as it is in conflict with the Bench decision of the High Court of A.P., and is in contrary to the view of the Apex Court, still it may lead to the cropping up several anomalies, and leads to confusion, with respect to the day-to-day matters of general importance, and the Subordinate Judiciary, and the Bar is in a quandary with respect to the legal effect of the observation covered by the Article, which according to me, to be in total disregard to the well settled proposition of law, snapping the line of consistency over a long range of legal history.

Thus the view expressed by His Lordship regarding the applicability of Article 65 to the suits of declaration of title and for consequential injunction under study is incorrect and against settled law and therefore the decision under study is *per incuriam*.

The object of the study is only to suggest for the reconsideration as the observations are likely to open flood gates of controversy and on the conspectus of preponderance or plethora of precedents, the observations, require reconsideration either for confirmation or for reversal as the decision in my view does not lay down the correct.