VOLUME 2 | ISSUE 1 | ISSN 2456-9704

KAMESHWAR SINGH vs STATE OF BIHAR (AIR 1951 Pat 91)

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Facts of the case:

The object of the British Parliament is enacting Sub-section(2) of Section 299, **Government of India Act, 1935**, and of His Majesty the King in inserting in the Instruments of Instructions, which were issued under the Royal Sign Manual to the Governor-General and to the Governors of Provinces, a direction not to assent to any bill regarding which they felt doubt, whether it did or did not offend against that section, was to secure owners of property in the enjoyment of their rights and to ensure that, in the event of the State, in exercise of the right known to American jurists as the tight of eminent domain, depriving them of their property, they should receive compensation, meaning thereby the value in money of the property to the owner at the time at which he is called upon to relinquish it. On **6-1-1949**, the Governor-General gave his assent to an Act entitled **the Bihar Abolition of Zamindaris Act, 1943(Bihar Act XVIII [18] of 1918).** That Act empowered the Provincial Government to deprive proprietors and tenure-holders of their estates and tenures it provided, or purported to provide, for the payment of compensation to them, but the compensation was not, and perhaps, in the circumstances of the case, could not be, compensation within the meaning of the term as used in the statutes as the Consolidation of Lands Clauses Act in England or the Land Acquisition Act in India. The plaintiff who is the owner of the largest and one of the oldest zamindars in Bihar, thereupon instituted a suit in which he asked for a declaration that the **Bihar Abolition of Zamindaris Act, 1948**, was an unconstitutional law and for an injunction restraining the Government of Bihar from putting it into operation. The suit was instituted in the **Court of the Subordinate Judge at Darbhanga**, and on **25-11-1949**, was removed to this Court to be tried by it in exercise of its extra-ordinary original civil jurisdiction on **9-12-1949**, a bill, entitled **the Bihar Land Reforms Bill, 1949**, was published, and was later introduced in the Bihar Legislative Assembly. Many of the provisions contained in this bill are provisions which were contained in the **Abolition of the Zamindaris Act, 1948**. **Clause 44** of the bill contained the following: **"The Bihar Abolition of Zimindaris Act, 1918, is hereby repealed."** Subsequently, however, this clause in the bill was deleted and a separate act, entitled the **"Bihar Abolition of Zamindaris Repealing Act, 1950(Bihar Act IX [9] of 1950)"**, was passed by the Bihar Legislature. This act was assented to by the Governor of Bihar on **18-01-1950**, that is, on the day before that on which this suit was set down for hearing. A preliminary issue has therefore been framed as to whether, in consequence of this enactment, any cause of action, which the plaintiff had or may have had, has not been taken away and whether or not the suit can or ought to proceed.

Issues Raised:

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VOLUME 2 | ISSUE 1 | ISSN 2456-9704

whether or not the suit can or ought to proceed.

While the assent to the **Bihar Abolition of Zamindaris Act, 1948**, was given by the Governor-General, assent to the Act which repeals, or purports to repeal it was given by the Governor. The main argument which had been addressed to the judges by **Mr. P.R. Das** for the plaintiff, on the preliminary issue is based on this circumstance and is, in short that the legislative body or authority which has purported to repeal the Act is not the legislative body or authority which enacted it. The legislative body or authority, it is said, consisted, in the former case of the Governor and the two Chambers of the legislature, and, in the latter case, of the Governor-General and the two Chambers of the legislature. It is, **Mr. P.R. Das** said, axiomatic that the legislative body or authority which if competent to repeal an act must be the same legislative body of authority as enacted it, or legislative body or authority having powers co-extensive with the powers of the legislative body or authority which enacted it. It necessarily follows, it is suggested that the repealing Act is null and void, that, in consequence, the impugned Act still remains on the statute book and that the plaintiff is entitled to show and, if he succeeds in showing, to obtain, a declaration, that the impugned Act is an unconstitutional Law.

In view of the importance of the questions raised, **Shearer, J.** stated briefly and in his own words, the conclusions he had reached with regard to the preliminary issue,--- an issue raised by way of a bar to the suit being proceeded with, on the decision which, he thought, the fate of this suit depends on. **Mr. Setalvad** appearing for the defendant has rightly pointed out that the preliminary issue consisted of three parts. As a matter of logical sequence, the questions involved may be stated in the following order :-

- **Is the Bihar Abolition of Zamindaris Repealing Act, 1950(Bihar Act IX [9] of 1950) hereinafter to be referred to as the Repealing Act, validly enacted?;**
- **If so, does it take away the plaintiff's cause of action based on the Bihar Abolition of the Zamindaris Act, 194 (Bihar Act XVIII [18] of 1949), hereinafter referred to as the Abolition Act?;**
- **Should the suit proceed to trial on the other issues?**

Contentions and Judgments:

This case was decided by a **division bench**. A division bench is a term in judicial system in India in which a case is heard and judged by at least two judges. The two judges in this case were **Justice Das** and **Justice Shearer**. Both judges gave their opinions after the arguments and the arguments and the opinions are mentioned below.

JUSTICE DAS

Das, J. gave a short answer to the to the contention put forward by the learned counsel for the plaintiff is that the legislature which has repealed the Act is the same legislature as enacted it, namely, the legislature consisting of his Majesty and of the Bihar Legislative Assembly and the

VOLUME 2 | ISSUE 1 | ISSN 2456-9704

Bihar Legislative Council. **Section 60(1), Government of India Act, 1935, states:**

"There shall for every Province be a Provincial Legislature which shall consist of His Majesty, represented by the Governor, and in the Province of Bihar, two Chambers."

Section 75 of the Act states:

"A Bill which has been passed…. by both Chambers of the Provincial Legislature, shall be presented to the Governor, and the Governor shall declare either that he assents in His Majesty's name to the Bill, or that he withholds his assent there from, or that he reserves the Bill for the consideration of the Governor-General."

Section 76(1) states:

"When a Bill is reserved by a Governor for the consideration of the Governor-General, the Governor-General shall declare, either that he assents in His Majesty's name to the Bill, or that he withholds his assent there from."

Nevertheless, although the Governor-General directly, and the Governors of Provinces indirectly, are no longer required by any Instrument of Instructions to reserve bills for the signification of His Majesty's pleasure, Governors are still required or authorized to reserve certain bills for consideration of the Governor-General under **Sub-section(2) of a 107, Government of India Act, Section 90, British North America Act, 1867,** similarly empowers the Lieutenant Governors of Canadian Provinces to reserve bills for the consideration of the Governor General of Canada. A device invented by British state men a century ago for the protection of imperial interests and the prevention of international incidents has been made to sub-serve another and very different purpose, namely to ensure that a Provincial Legislature does not enact a law which is illegal and unconstitutional in whole or part, or a law clashing with the legislation of the Federal Legislature. The necessity for a provision of this kind in the Indian Constitution Act is the greater, as in a large number is of matters the Federal and Provincial Legislatures have concurrent powers. **Mr. P.R. Das**, is, of course, correct to this extent that an Act of the Provincial Legislatures may be unconstitutional if it has received the assent of the Governor and yet would have been constitutional if it had received the assent of the Governor-General. It does not, however, at all follow that the criterion to be adopted in deciding whether a law is or is not unconstitutional, is to see whether it has been assented to in the name of His Majesty by the one representative of His Majesty or the other representative. The criterion must, in each case, be whether the Provincial law deals with a matter enumerated in the Concurrent Legislative List and, if so, whether it contains any provision repugnant to the provisions of an earlier Dominion law or an existing law with respect to that matter. It may well be that the **Bihar Abolition of Zamindaris Act, 1918,** dealt with matters enumerated in the Concurrent Legislative List and contained provisions repugnant to the provisions of an existing law, or existing laws, of the Federal Legislature with respect to these matters. Presumably, it did, in fact, contain such provisions, or was believed to contain such provisions, as the object of reserving the bill for the assent of the Governor General was to ensure that the bill should be subjected to scrutiny by the legal advisers of the

VOLUME 2 | ISSUE 1 | ISSN 2456-9704

Government of India in order that the Government of India might decide whether, if the effect of it was to make the law in certain matters in Bihar different from the law in these matters prevailing in other provinces, there was, on grounds of policy, any objection to this. It is important to notice that the checks on, or safeguards against, a clash between the laws passed by the Federal and the Provincial Legislatures which were devised by the British Parliament and embodied in **Section 107(2)** and other connected sections of the **Government of India Act** were twofold. In the first place when a proposed law of a Provincial Legislature as the effect of altering or repealing an Act of the Federal Legislature, it has to be reserved for the consideration of the Governor-General. Secondly, when the Governor General has given his assent to such a proposed law and, in consequence, the law which obtains in that Province is different from the law, which prevails in other Provinces, no proposed law which has the effect of again altering the law, can be introduced in the Federal Legislature without the previous sanction of the Governor General. While, however, the Federal Legislature cannot repeal the provincial law unless the repealing bill has received the previous sanction; of the Governor General before it is introduced in the Federal Legislature there is clearly nothing to prevent the Provincial Legislature itself repealing it. The effect of the repeal is merely to restore the status quo ante and to bring the law in that province once more into conformity with the law prevailing in the rest of India. There is, on principle, no reason why, before such a course is taken by a Provincial Government, the Government of India should be consulted. In fact, as the original object of His Majesty in the delegating to the Governors of Provinces authority to assent in His name to proposed legislation was to avoid unnecessary delay in His assent being obtained, there is every reason why an Act which merely repeals an existing Act, and does not purport to do anything more, should not be reserved.

Mr. N.C. Chatterji, who followed **Mr. P.R. Das**, for the plaintiff, put forward an argument which, one must confess, he had some difficulty in comprehending. The question or one of the questions, raised is the preliminary issue is as to whether the **Bihar Abolition of Zamindars Repealing Act, 1950,** is intra vires of the Provincial Legislature. If, **Mr. Chatterji** said, the **Bihar Abolition of the Zamindaris Act, 1948,** is itself void and of no effect the **Bihar Abolition of Zamindaris Repealing Act, 1960,** is similarly and necessarily void and of no effect. In other words if **Justice Das** understood the argument correctly, **Mr. Chatterji** contended that it was impossible to distinguish between the two Acts and that in consequence, we must consider and could not avoid deciding, whether the **Bihar Abolition of Zamindaris Act, 1948,** was or was not an unconstitutional law. There is, in his opinion, no substance in this argument. It is, of course, true that an unconstitutional law has no validity whatever, and that rights which it may purport to take away from individuals continue to exist to the same extent as they would have existed if the law had never been enacted. On the other hand, a law is not an unconstitutional law unless and until it has been so decided by the judicial tribunal competent to pronounce on its validity. Moreover, unless and until a

question as to its validity is directly raised and a court of law has no option but to decide it, the courts must proceed on the presumption that the law is valid law. In that situation, it appears to him that, if the validity of the repealing act can be questioned at all, it can be questioned only on the ground raised by **Mr. P.R. Das**, namely, "that in enacting it the proper procedure was not followed, and, for the reasons just given, that ground must fail." There is another and more cogent reason for our declining to go into the question which **Mr. Chatterji** asks them to, namely, that as the impugned act has been repealed, the Government of Bihar is debarred from taking any action under it. If, however, no action can be taken under the impugned act, the question as to whether that act was or was not an unconstitutional law becomes a question of purely academic interest. **Sir Alladi Krishnaswamy Ayyar**, for the defendant cited a number of authorities to show that the courts will not decide such questions. One of these decisions namely, **Attorney-General for Alberta vs Attorney-General of Canada, 1939 A.C. 117: (AIR (26) 1933 P.C. 53)** is very much in point. That was an appeal against an opinion expressed by the Supreme Court of Canada that two wills which had been introduced in the Legislature of the Province of Alberta were ultra vires of that legislature. If the proposed laws had been enacted, no action could have been taken under them except under and in accordance with certain provisions contained in another Act, known as the Alberta Social Credit Act. During the pendency of the appeal this Act was, however, repealed. **Lord Maugham,** after observing that the bills could no longer be brought into operation, said:

"Since nothing can be done there under, the appeal from the order of the Supreme Court is one of no practical interest. It is contrary to the long established practice of this Board to entertain appeals which have no relation to the existing rights created or purported to be created; and there Lordships have, therefore, found it necessary to decline to hear arguments on this appeal in so far as it relates to the bills."

The other decisions cited were **Sun Life Insurance Co. of Canada vs Jervis, 1944 A.C. 111 : (113 L.J.K. 174), and the Lawrence P. Mills vs W. Briggs Green, 159 U.S. S.C.R 651.**

Paragraph 10 of the plaint is as follows :

"The plaintiff is further advised and submits that his title to the said properties will subsist notwithstanding any notification that may be issued by the defendant declaring that the estates or tenures of the plaintiff have passed to and become vested in the Crown. He further submits that the promulgation of the said Act by the defendant constitutes an infringement, or a threatened infringement, upon his title to the properties collectively known as **"Raj Reyasat Darbhanga**" and that as a cloud has been thrown upon his title, he is entitled to as declaration that the said Act is wholly void and inoperative."

As Justice Das already said, while the **Bihar Abolition of Zamindaris Act, 1948,** has been repealed, a bill which contains precisely the same provisions has been introduced in the Provincial Legislature. **Mr. P.R. Das**, for the plaintiff, made a great deal of this and said, more than once, that the cloud which had been cast on

his client's title and which constituted his cause of action had not been dissipated. The defendant, however, does not deny the title of the plaintiff and the suit cannot be said to be a suit falling under **III.(g), Section 42, Specific Relief Act,** the intention of the Crown, as manifested in the bill now pending in the Legislative Assembly, is to deprive the plaintiff of his property in exercise of its sovereign powers. That the right or power of the State to deprive a citizen of his property is one of the incidents of sovereignty, there can be no question. In most democratic countries, the Constitution imposes on the exercise of this power a twofold limitation. In the first place, it is to be used only for the enjoyment and exercise of the powers conferred on the executive and, secondly, when it is used, it is to be used **"on just terms"**, to borrow the expression used in the **Australian Constitution Act (vide Clause XXXI of Section 51, Commonwealth of Australian Constitution Act).** The people of India have adopted a Constitution and that Constitution is to come into operation in the course of this week. What limitations the Constitution imposes on the exercise of the right of eminent domain is the matter to be dirty mind hereafter. For the present, it is enough to say that the **Bihar Abolition of Zamindaris Repealing Act, 1950**, is intra vires of the Provincial Legislature and that the effect of that Act is to deprive the plaintiff of the cause of action on which he sued. **Mr. P.R. Das** suggested that, as we were not a final Court of Appeal, we ought to decide the other issues. We have, however, discretion in the matter and, in his opinion, we would be exercising it wrongly if we went into the other issues. In the events which have happened, the suit cannot and ought not, in his judgment to proceed, **Justice Das** dismissed it but would make no order for costs against the plaintiff. In order to avoid any misapprehension, he wishes to say that, as at present advised, he is not prepared to say that when a law is enacted and before it is put into operation or any action is taken under, it, a person who may be prejudicially affected by it, is entitled to ask the court for a declaration that is an unconstitutional law.

JUSTICE SHEARER

As to first issue**, Mr. P.R. Das** appearing for the plaintiff has contended that the repealing act is not validly enacted. His main thesis is that the **Abolition Act** was passed by a different authority, and on the principle that the repealing authority must be same as the enacting authority, the repealing act is bad for want of assent of the Governor General, which assent was given to the **Abolition Act on 6-7-1949**. **Mr. Das** has developed his argument in the following way. He states that from **Sections 99-107**, and in particular **Section 107(2), Government of India Act, 1935,** as adapted by India (Provisional Constitution) Order, 1947, follows the conclusion that the Governor General is an integral part of the machinery for legislation when the Provincial law relates to one of the matters enumerated in the Concurrent Legislative List, particularly to a field already occupied by an earlier dominion law or existing law**. The Abolition Act**, according to him, contained provisions repugnant to or in conflict with, provisions of **(a) The Civil Procedure Code, (b) The Transfer of Property Act, (c) The Contract Act, (d) The Trusts Act etc.** : therefore, under the provisions of **Sub-section(2) of Section**

VOLUME 2 | ISSUE 1 | ISSN 2456-9704

107, the Abolition Act required the assent of the Governor General for its validity. If with regard to **the Abolition Act** the assent of the Governor General was necessary, such assent is also necessary for **the Repealing Act**. This, in substance, is the contention of **Mr. Das**.

Justice Shearer said the contention has no sound foundation in law. **Section 107, Government of India Act, 1935**, does not act up any enacting authority, nor does it deal with competency or power to legislate in the strict sense of the term. It merely states what will happen in the case of in consistency between Dominion law and Provincial law, and in **Sub-section(2)** lays down how to get over a repugnancy of a particular character. It does not deal with the question of ultra vires, which is far more fundamental than more repugnancy. The position becomes, **Justice Shearer** thinks, quite clear, if one examines the provisions in **Chap. III Part III, and Chap. I. Part V, Government of India Act, 1935**. The former deals with the Provincial Legislature and the latter with the Distribution of Powers. Under **Section 60**, the Provincial Legislature of Bihar consists of two Chambers and His Majesty represented by the Governor. That is the legislative body, or the enacting authority. **Section 73**, etc. deal with legislative procedure. **Section 75**, states that a bill which has been passed by both the Chambers shall be presented to the Governor, and the latter shall declare either he assents in His Majesty's name to the bill or that he withholds assent there from or that he has reserved the Bill for the consideration of the Governor-General. **Section 76** says that when a Bill is reserved for the consideration of the Governor General, the latter shall declare either that he assents in His Majesty's name to the Bill or he withholds his assent there from. It is to be observed that the Governor or the Governor General, as the case may be, acts in the name of His Majesty. Then comes **Sections 99 to 107**. **Section 99** lays down the extent---territorial extent---of different legislatures. **Section 100** delimits the field or subject matter of legislation, with reference to three lists, respectively called **the Federal Legislative List(List I), Concurrent List(List III), and Provincial Legislative List(List II).** Under **Sub-sections (2) and (3) of Section 100**, the Provincial Legislature has power to make laws with respect to any of the matters enumerated in **List III and List II**. Then there is **Section 107**, which, as **Justice Shearer** has already said, deals with the inconsistency or repugnancy of a particular character. It would be wrong to assume from the provisions of **Section 107** that the Governor General as representing His Majesty is part of the legislative machinery of a Province. The legislative machinery is indicated in the **Section 60**, and not by **Section 107**. A Provincial law even with regard to a matter enumerated in the Concurrent List does not become bad, merely because the assent of the Governor General has not been taken. The only effect of **Section 107** is that, in the absence of such assent, the Provincial law will be void to the extent of the repugnancy may be in part or entirety. But surely **Section 107** can have no application, when there is no repugnancy. The short answer to the argument of **Mr. Das**, based on **Section 107**, is that the **Repealing Act** does not create any repugnancy; on the contrary, it removes the repugnancy, if any, created by the **Abolition Act**, the latter Act itself not

VOLUME 2 | ISSUE 1 | ISSN 2456-9704

being either a Dominion law of an existing law as defined in **Section 311**. The absence of the assent of the Governor General does not, therefore, invalidate the **Repealing Act**, which has been enacted by the proper legislative authority of the Province, viz., the two Chambers and His Majesty represented by the Governor. The decision **Mr. Das** relied on are **Rev. Robert Dobie vs The Temporalities Board, (1881) 7 A.C. 136 : (51 L.J.P.C. 26).** In this case the question raised was whether the legislature of the Province of Quebec had power, in the year **1875**, to modify or repeal the enactments of a statute passed by the Parliament of the province of Canada in the year **1858**. It was held that the powers conferred by the **British North America Act, 1867, Section 129**, upon the legislature of Quebec to repeal and alter the statutes of the old Parliament of Canada were co-extensive with the powers of direct legislation with which the said legislatures was invested by the other clauses of the Act of **1867**. The question was considered with reference to **Sections 91 and 92** of the **British North America Act**, which enumerate and the Parliament of Canada, as well as those in relation to which are within the exclusive right of making law. If it cannot be disputed in this case that the Provincial Legislature has power to make laws with regard to compulsory acquisition of land **(item 9 of List II)** or land and land tenure, including rights in and overland, (**item 21 of List II**) or even with regard to matters enumerated in List III, then on principle of the decision in **Rev. Robert Dobie vs The Temporalities Board,(1881) 7 A.C. 136 : (51 L.J.P.C. 26)** that Legislature will have power to repeal, modify or alter such laws. The question of the assent of the Governor General will come in, not with regard to the competency or power to legislate but in case there is repugnancy of the kind mentioned in **Section 107**.

It remains now to consider another argument urged by **Mr. Das** but developed more fully by **Mr. Chatterji** who followed **Mr. Das** on behalf of the plaintiff. The constituent parts may be stated thus (1) let it be assumed that the **Abolition Act** was ultra vires, being in contravention of the provisions of **Section 299**. **Government of India Act, 1935**; (2) on that assumption, the **Repealing Act** is also a nullity, because that which is ultra vires does not exist in law and cannot be repealed; (3) therefore, it is necessary in this suit to decide whether the **Abolition Act** was ultra vires. In fairness to **Mr. Chatterji, Justice Shearer** made it clear that he did not state the constituent parts in the way in which he has stated them for the purpose of understanding the implications of the argument. So stated, the argument has the obvious fallacy that it assumes the very question to be decided. **The Abolition Act** was Provincial law till it was repealed, and the effect of the repeal is as if it never existed except as to transactions past and closed. Even assuming that **the Abolition Act** was bad, it is no longer in the statute book and no judicial intervention is called for with regard to something which does not exists there being no past transaction under the Act which was never brought into force.

A reference was made to a large number of decisions, some of which **Justice Das** had noticed, on the point that the Court will not decide a constitutional question

which is merely academic and has no live relation to the rights of the parties it would be a vague thing to re-examine those decisions, except on which **Mr. Das** relied. The point is summarized at **PP. 338-339 of Cooley's Constitutional Limitations (Edn.8) as follows :**

"Neither will a Court, as a general rule, pass upon constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. While Courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very lis mota."

In the present suit the plaintiff asks for two reliefs--- (1) a declaration that **the Abolition Act** is ultra vires and void; and (2) an order of injunction restraining the defendant and its officers from issuing any notification under **Section 3, Abolition Act**, having been validly repealed, does not exist, and it is unnecessary to pronounce on its validity or otherwise, because the plaintiff has now no cause of action.

There has been some argument before the judges as to the continued threat to the right of the plaintiff in the almost identical clauses of the Land Reforms Bill now pending before the legislature. **Mr. Das** has suggested that the intention of the defendant is to take advantage of **Section 31(4), Constitution Act**, when it comes into force on **26-1-1980**, so as to make the acquisition of the plaintiff's property, without payment of adequate compensation, not liable to question in any Court. The judges are not concerned with questions of motive, expediency or policy, or with the legislative ethics. It may even be doubted if the introduction of a Bill by itself constitutes any threat the Bill may or may not be passed, or may be passed with different Clauses. These are all speculative matters, and, it is quite outside the province of judicial enquiry on the present occasion. Obviously, what the position of the plaintiff may be when some new law is made cannot be determined now.

Order:

The order given by both the bench is a **just order**. Both the judges came to the conclusion that all the **three questions** involved in the preliminary issue **must be answered against the plaintiff** and the suit must **fail** on that ground. So the suit **cannot proceed further**. Both the judges have **not given any order for the costs.**

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