

(2004) 10 BOM CK 0057
In the Bombay High Court
Case No : Writ Petition No. 2363 of 2003

Arun Ingale

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 21-10-2004

Acts Referred:

Constitution of India, 1950 — Article 342

Citation : (2005) 2 ALLMR 355 : (2005) 1 MhLj 1081

Hon'ble Judges : V.C. Daga, J; S.U. Kamdar, J

Bench : Division Bench

Advocate : N.R. Saboo, for the Appellant; N.W. Sambre, for the Respondent

Judgement

S.U. Kamdar, J.—The learned counsel appearing for the petitioner submitted that in the light of the judgment of this Court in Pandurang Ranganath Chavan v. State of Maharashtra and Ors. 1998 (2) Mh.L.J. 806, Chandrakant Bajirao Shinde Vs. State of Maharashtra, Tribal Development, Mantralaya, The Municipal Corporation of the City of Pune and The Scheduled Tribes Certificate Scrutiny Committee, and unreported judgments of this Court in Writ Petition No. 2745 of 1988, Raviprakash Babulalsing Parmar Vs. State of Maharashtra and Others, and Writ Petition No. 6048 of 2004 and companion writ petitions, Amol Narayan Wakkar and Another Vs. State of Maharashtra and Others, the impugned order of the Caste Scrutiny Committee dated 10th February, 2003 cannot be sustained. The Scrutiny Committee observed in its order as under :

"Hence it is very difficult to determine either candidate belongs to Thakur caste or Thakur tribe only on the basis of documentary evidences. The test of old documentary entry cannot be applied in this case because the caste entries which are synonymous or having same nomenclature with that of tribes, shows the same nomenclature or name in old document found in case of Scheduled Tribes. Therefore it is clear that the Thakur claim should be verified with reference to traits, characteristics and customs, i.e. affinity test.

The candidate attended the hearing on 13-1-2003 and heard fully. He also submitted his explanation on Vigilance Cell Report on the same day of hearing in which he raised following contentions.

1. The candidate contended that he has submitted enough documentary evidences in respect of his forefathers and relatives showing Caste entries as Thakur to prove his caste as Thakur.

The test of old documents entry cannot be applied to the tribe entries which are synonymous with other categories because entries in respect of upper caste also shows the same entries in old documents as shown in case of genuine Scheduled Tribe. In view of the Madhuri Patil's case, it is necessary to scrutinise the Thakur by the affinity tests. Therefore in such cases along with old record socio-cultural traits, affinity, ethnic linkage with that of genuine scheduled tribe are vital. In view of the Madhuri Patil's judgment, it is clear that the caste claim should be decided not only on the basis of old record but also, affinity and ethnic linkage of the community of the candidate, with that of Scheduled Tribe claimed, should also be verified and taken into consideration. The Hon'ble Supreme Court in India while deciding the Civil Appeal No. 5854/1994 in SLP No. 14767 of 1993 in the case of Madhuri Patil and Ors. v. Additional Commissioner have observed that "the ingrained tribal traits peculiar to each tribe and anthropological features all the more become relevant when social status is in acute controversy and needs a decision. The correct projective furnished in proforma and the material would lend credence and give an assurance to properly consider the claims of the social status and the concerned officer or authority would get an opportunity to test the claimed for social status of particular caste or tribe or tribal community. It or he would reach a satisfactory conclusion on the claimed social status. The father of the appellant has failed to satisfy the crucial affinity test which is relevant and germane one."

"Despite cultural advancement, the genetical threads passed on from generation to generation and no one could forget and escape or get them over. The tribal customs are peculiar to each tribe or tribal communities and are still being maintained and presumed. Their cultural advancement to some extent may be modernized and progressed, but they would not be oblivion to or ignorant of their customary and cultural part to establish their affinity to the membership of a particular tribe."

In view of these observations it is must on the part of the candidate to prove his affinity to the group of his people to whom he claim to be belonged. If candidate failed to do this it is natural that the claim of the candidate is rejected.

The Scrutiny Committee has observed that the documents submitted by the candidate though shows the caste entries as Thakur, the candidate and his relatives are not in a position to explain the characteristics and traits, of their caste to the committee and could not prove their affinity towards Thakur Scheduled Tribe. In order to verify the caste claim, the Scrutiny Committee

conducted the home inquiry through its Vigilance Cell Officer. The Vigilance Cell Officer verified the school record to find the Caste entries of the relatives of the candidate, it is found that the Caste in respect of relatives of the candidate were recorded as a Bhat and Profession is shown as Bhikshuki. In one entry though the Caste is recorded as Thakur, the profession is shown Bhikshuki. Genuine scheduled tribe never accepted Bhikshuki as their profession at any point of time. The inquiry report and affinity test clearly shows that the candidate does not belong to Thakur, Scheduled Tribe community.

In view of the modernisation and so far as the impact of the Hindu culture is concerned, the scheduled tribes are inhabitants of intractable terrain, regions of the country. With their traditional moorings and customary beliefs and practices, they are largely governed by their own customary code of conduct regulated from time to time with their own rich cultural heritage, mode of worship and cultural ethics hence it is not acceptable that any tribal has forgotten his original cultural heritage. Hence in view of this discussion the contention raised by the candidate loses its force.

11. The candidate objected upon the Vigilance Cell Report and submitted the references of various Court orders in favour of his claim.

As per the directions of Supreme Court in Madhuri Patil's judgment and as per the direction of the Honourable High Court, the matter of the candidate was referred to the Vigilance Cell associated with the research officer for home enquiry. Vigilance Cell Officer visited the native place of the candidate and also visited the place of relatives of the candidate. During home enquiry and school enquiry Vigilance Cell obtained the information of Caste characteristics of the candidate which do not resemble with genuine Thakur, scheduled tribe. Besides that Vigilance Cell Officer also verified the school record and found that the entries in respect of relatives of the candidate were recorded as Bhat. Thus Vigilance Cell Report clearly shows that the candidate does not belong to Thakur, scheduled tribe."

2. The Scrutiny Committee then went on examining various other aspects including affinity test, ethnic linkage and socio-cultural traits of the petitioner to find out whether the petitioner belongs to "Thakur Scheduled Tribe" and ultimately held that the petitioner does not belong to "Thakur Scheduled Tribe" and held his caste claim as invalid.

3. We may quote with approval the following passage from the judgment of the Division Bench of this Court in Chandrakant (supra) wherein Division Bench had an occasion to consider an identical issue which is posed before us.

"4. The Constitution (Scheduled Tribes) Order, 1950 was issued on 6th September 1950 in exercise of the powers conferred upon the President of India by clause (1) of Article 342 of the Constitution of India. In the schedule appended to the said Order, admittedly Thakar was not notified as a Scheduled Tribe within the then State of Bombay. Thereafter by the Scheduled Castes and

Scheduled Tribes Orders (Amendment) Act, 1956 the Presidential Order, 1950 was amended and in some of the districts of the State of Bombay, Scheduled Tribes "Thakur" or "Thakar" including "Ka Thakur", "Ka Thakar", "Ma Thakur", "Ma Thakar" were included. Thereafter with effect from 18-9-1976, the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 came into force, amongst other amending the Presidential Order i.e. Constitution Scheduled Tribes Orders, 1950. Entry No. 44 of the schedule, Part K-Maharashtra thereof notifies Thakur", "Thakar", "Ka Thakur", "Ka Thakar", "Ma Thakur", "Ma Thakar" without any area restriction being Scheduled Tribe within the entire State of Maharashtra.

8. Constitution Bench of the Supreme Court recently had an occasion to consider inter alia this aspect in *State of Maharashtra v. Milind* and Ors. 2001 (1) Mh.L.J.1 = (2001) 1 SCC 4. In paragraphs 15, 28 and 36 (1) of the report it was ruled thus:

15. Thus, it is clear that States have no power to amend Presidential Orders. Consequently a party in power or the Government of the day in a State is relieved from the pressure or burden of tinkering with the Presidential Orders either to gain popularity or secure votes. Number of persons in order to gain advantage in securing admissions in educational institutions and employment in State Services have been claiming as belonging to either Scheduled Castes or Scheduled Tribes depriving genuine and needy persons belonging to Scheduled Castes and Scheduled Tribes covered by the Presidential Orders, defeating and frustrating to a large extent the very object of protective discrimination given to such people based on their educational and social backwardness. Courts cannot and should not expand jurisdiction to deal with the question as to whether a particular caste, sub-caste; a group or part of tribe or sub-tribe is included in any one of the entries mentioned in the Presidential Orders issued under Articles 341 and 342 particularly so when in clause (2) of the said articles, it is expressly stated that the said order cannot be amended or varied except by law made by Parliament. The power to include or exclude amend or alter Presidential Order is expressly and conclusively conferred on and vested with Parliament and that too by making a law in that regard. The President had the benefit of consulting the States through Governors of States which had the means and machinery to find out and recommend as to whether a particular cases or tribe was to be included in the Presidential Order. If the said orders are to be amended, it is Parliament that is in a better position to know having the means and machinery unlike Courts as to why a particular caste or tribe is to be included or excluded by law to be made by Parliament. Allowing the State Governments or Courts or other authorities or Tribunals to hold inquiry as to whether a particular caste or tribe should be considered as one included in the Schedule of Presidential Order when it is not specifically included may lead to problems, in order to gain advantage of reservations for the purpose of Article 15(4) or 16(4) several persons have been coming forward claiming to be covered by Presidential Orders issued under Articles 341 and 342. This apart when no other authority other than Parliament

that too by law alone can amend the Presidential Orders. Neither the State Government nor the Courts nor Tribunals nor any authority can assume jurisdiction to hold inquiry and take evidence to declare that a caste or tribe is included in Presidential Orders in one entry or the other although they are not expressly and specifically included. A Court cannot alter or amend the said Presidential Orders for the very good reason that it has no power to do so within the meaning, content and scope of Articles 341 and 342. It is not possible to hold that either any inquiry is permissible or any evidence can be let in, in relation to a particular caste or tribe to say whether it is included within Presidential Orders when it is not so expressly included.

28. Being in respectful agreement, we reaffirm the ratio of the two Constitution Bench judgments aforementioned and state in clear terms that no inquiry at all is permissible and no evidence can be let in to find out and decide that if any tribe or tribal community or part of or group within any tribe or tribal community is included within the scope and meaning of the entry concerned in the Presidential Order when it is not so expressly or specifically included. Hence, we answer question 1 in the negative.

36(1) it is not at all permissible to hold any inquiry or let in any evidence to decide or declare that any tribe or tribal community or part of or group within any tribes or tribal community is included in the general name even though it is not specifically mentioned in the entry concerned in the Constitution (Scheduled Tribes) Order, 1950.

In all these four writ petitions, it is not disputed before us that the committee has recorded a finding that the petitioners have established that they belong to "Thakur" but the Committee on erroneous assumption proceeded that Thakur Community is being different than Ka Thakur and Ma Thakur. We are unable to appreciate the approach of the learned members of the committee in analysing the issue posed before it. In view of the judgments of this Court referred to above that the Committee has no competence or authority to go into questions whether the petitioners belongs to Thakur higher caste and or it has done in the present case. We are in respectful agreement with all three judgments of the Court referred to by the learned Counsel for the petitioners. We also approved the view taken by the learned judges of the Division Bench in Ravi Prakash (unreported). Though the learned Judges rendered separate but concurring judgment we endorse the view taken by our learned brother Kochar, J who was the member of the Division Bench who has decided Raviprakash's case (supra). In view of the abovesaid judgments, to which we respectfully agree and adopting the same reasons, the orders challenged in these petitions are required to be set aside. Accordingly, impugned orders passed by the Scrutiny Committee in all these writ petitions is set aside. Rule made absolute. No orders as to costs."

4. In the aforesaid circumstances, Caste Scrutiny Committee has patently erred in rejecting the documents which were produced before it which inter alia show that the caste of the petitioner is Thakur Scheduled Caste. In view of the

aforesaid position of law, the Caste Scrutiny Committee was duty bound to consider the probative value of the said documents and then arrive at the conclusion. The Caste Scrutiny Committee has, however, ignored the said relevant principles and applied the affinity test. In the aforesaid view of the matter, the impugned order is not sustainable in law. We, accordingly, set aside the same and remand the matter back to the Caste Scrutiny Committee for its decision afresh with direction to consider all the documents produced by the petitioner and its probative value and after considering the same take into account the report of the Vigilance Officer and arrive at the decision afresh. We dispose of the present petition in the aforesaid direction. However, there shall be no order as to costs.