

(1997) 07 GAU CK 0012

In the Gauhati High Court

Case No : Writ Appeal Nos. 393, 458 and 471 of 1996

Baghpori Maimal Min Samabai Samiti Ltd.: Sati Radhika
Matshyajibi Samabai Samiti Ltd.: Mangaldoi Pioneer Fishery
Co-Operative Society Ltd. APPELLANT

Vs

State of Assam and Ors. RESPONDENT

Date of Decision : 16-07-1997

Acts Referred:

Assam Land and Revenue Regulation, 1886 — Section 155, 155, 156, 156, 16, 16
Constitution of India, 1950 — Article 341(2), 341(2)
Fisheries Act, 1897 — Section 6, 6, 6(3), 6(3)
Fisheries Rules, 1953 — Rule 12, 12

Citation : (1998) 1 GLJ 223 : (1997) 2 GLT 582

Hon'ble Judges : N.Surjamani Singh, J and V.Dutta Gyani, J

Bench : Division Bench

**Advocate : N.Dutta, S.N.Bhuyan, M.Nath, K.Devi , D.P.Chaliha, B.P.Bora,
B.D.Goswami, A.Roy, A.M.Bujar Barua, Advocates appearing for Parties**

Judgement

V. Dutta Gyani, J.—These writ appeals by the writ petitioners are directed against the judgment and order dated 9.8.96 passed by the learned Single Judge of this Court in Civil Rule Nos.2093, 2161 of 1995 (1996 (2) GLJ 342). All these writ petitions, have been disposed of by a common judgment and order dated 9.8.96. As has been noted above by the learned Single Judge, there has been civil litigation in the past. In the recent past, in respect of the fishery in question in case of every settlement, the unsuccessful society has approached this Court.

2. The writ petitioner appellant is a cooperative society, registered under the Cooperative Societies Act, 1949. It was registered in 1953. It is the writ petitioners' claim that all its members are actual fisherman belonging to "Kaibarta" community, which is included in the listed class.

3. By order dated 20th April, 1994, the "No. 1 Darrang Brahmaputra Fishery" was settled with the appellant society for a period of 5 years, but this settlement was challenged by Baghpuri Maimal Meen Samabai Sammittee Ltd, respondent

No.5 in WA 471 of 1996,458 of 1996. With the result that the order of settlement was set aside and the matter was remanded to the Govt. of Assam for settlement applying the correct principles of law. On 5.4.95 the appellant society again applied for settlement of the fishery. Reports were called for. It is the appellant's claim that the reports were all favourable to the appellant society (M/s Sati Radhika Matshyajibi SS Ltd), but vide Govt.'s order dated 19.5.95, the Deputy " Commissioner, Darrang cancelled the settlement of the fishery made with the petitioner's society. In pursuance to order dated 9.5.95 passed by this Court in Civil Rule No. 1523 of 1994, the fishery in question was settled with the respondent No.5 vide order dated 20th May, 1995. The petitioner society therefore filed a writ petition, Civil Rule No.2093 of 1995. Similarly, M/s Sati Radhika Matshyajibi Samabai Samittee Ltd, filed another writ petition No.2161 of 1995, challenging the settlement of fishery in question with the respondent No.5, who was respondent No.3 in Civil Rule No.2161 of 1995.

4. The main thrust of their contention was that the society did not fulfil the requirement of direct settlement under the proviso to Rule 12 of the Fishery Rules, inasmuch as, the respondent society M/s Baghpori Maimal Min Samabai Samiti Ltd (in Writ Appeal No.45 8 of 1996,471 of 1996) was formed with the members belonging to Maimal community, who are not entitled to direct settlement. This Maitaal community has been recognised and notified for Cachar District only and cannot be equated with the Scheduled Castes community for the purpose of getting settlement of the fishery under the proviso to Rule 12, in other parts of the State of Assam. Learned Single Judge while disposing of both the petitions by common judgment and order, so far as the applicability of the proviso to Rule 12 to the Maimal community is concerned, observed as follows :

"Next submission of learned counsel for the petitioner was that respondent No. 3 (5)M/s Baghpuri Maimal Min Samabay Samity Ltd was not entitled to get settlement of the fishery in question. The said society was situated in Darrang District and was formed with persons belonging to Maimal community. Referring to proviso to Rule 12, learned counsel Mr. Choudhury submitted that benefit of Rule 12 had been given to a fishery cooperative society formed with Maimal community only in the Cachar District and not elsewhere. I have gone through the proviso to Rule 12. On careful reading it appears to me that Maimal community in the Cachar District are backward and therefore, they need protection and economic help. The aim of proviso to the said Rule is to give the benefit of a fishery to a cooperative society formed with 100% actual fisherman of the fishing population belonging to Scheduled Castes or Maimal community. Backwardness and economic deprivation are the main criteria for giving the benefit and not the place of residence. Though the members of respondent No.5 belonging to the Maimal community of Cachar District, now they are permanently residing in Darrang District and in my view they can not be deprived of getting the benefit of proviso to Rule 12."

5. The matter stand remanded to the State Govt. to consider and to give

settlement of the fishery in question, in the light of the following questions :

(1) Whether the claimant fishery cooperative society is formed with 100% actual fisherman of fishing population belonging to the Scheduled Castes community of the State or Maimal community of Cachar District?

(2) Whether the members of the said society live in the "neighbourhood" of the fishery in question ? and

(3) Whether the said society fulfils the other terms and conditions necessary for giving settlement?

6. Learned counsel appearing for the appellant M/s Sati Radhika Matshyajibi SS Ltd in Writ Appeal No.45 8 of 1996 contended that the preference given to or reservation made in favour of Maimal community of Cachar is limited to that community in Cachar District only and the Maimals of other districts of the State of Assam are not entitled to such preference. Referring to a specific averments made in Civil Rule No.2151 of 1995 to the effect that M/s Baghpuri Maimal Min SS Ltd is not a society formed by actual fisherman of the Maimal community of Cachar, a fact not traversed or denied by the M/s Baghpuri Maimal Min SS Ltd, it should be deemed to have been admitted that the members of the said society do not belong to Maimal community from Cachar and, as such, cannot claim any preference under Rule 12 of the Fishery Rules. Learned counsel finding fault with the order of settlement, submitted that the authorities concerned did not consider the claim of M/s Sati Radhika Matshyajibi SS Ltd on the ground that they were not parties to the earlier writ petition before the High Court, learned counsel has, therefore, supported the impugned remand order as passed by the learned Single judge.

7. The real contest therefore is between M/s. Mangaldoi Pioneer Fishery Cooperative Society Ltd (appellant in Writ Appeal No.471 of 1996) and M/s Baghpuri Maimal Min SS Ltd (appellant in Writ Appeal No.393 of 1996). They also arrayed as respondents.

8. Mr. Bhuyan, learned senior counsel assisted by Mr. A. Roy, Mr. BD Goswami and Mr. K. Bhatta appearing for the appellant M/s Mangaldoi Pioneer Fishery Cooperative Society Ltd argued that as per proviso to Rule 12 of the Fishery Rules, the Maimal community of Cachar District was entitled to get settlement of the fishery only within the district of Cachar and not beyond the said district. The preference and privilege granted to Maimal community is confined only to the fishery situated in the district of Cachar. Elaborating his argument he contended that a society with the members of the said community residing outside the Cachar will not be eligible for getting settlement of fishery under the proviso to Rule 12 of the Rules. He has therefore vehemently assailed this part of the impugned judgment and order of the learned Single Judge in attempting to equate the status of the Maimal community with that of the Scheduled Castes community of the State. He also urged that members of the Maimal community of Cachar District permanently settled in Darrang District is purely a question of

fact, which is neither proved nor can be taken as proved. In the circumstances, the learned Single judge should not have concern the privilege on the Maimal community settled in Darrang District, as the privilege and preference is available only within the district of Cachar. In that view of the matter, the impugned part of the judgment allowing members of M/s Baghpuri Maimal Min Samabai Sarniti Ltd to enjoy " the privilege and preference of getting the benefit of proviso to Rule 12 of the Fishery Rules being bad in law is liable to be quashed.

9. Mr. N. Dutta, learned counsel appearing for the Baghpuri Maimal Min Samabai Samity Ltd. in Writ Appeal No,393 of 1996, on the other hand, contended that the learned Single Judge in exercise of his Certiorari jurisdiction, erred in law in setting aside the settlement order without recording any finding that the conditions of eligibility were not fulfilled by the settlement holder i.e. the appellant in Writ Appeal No.393 of 1996. On the basis of the material available on record, it was clear that the writ petitioners did not possess and fulfill the criteria of eligibility regarding being formed of cent percent actual fishermen and that the fishery in question falls within their neighbourhood. He argued that in order to dislodge a settlement holder, there has to be a clear finding as regards non eligibility of the settlement holder which in the instant case is totally missing. The sole ground on which the settlement order has been set aside by the learned Single Judge is that the Govt. had taken into consideration the area of operation of the fishery without deciding the question of neighbourhood. Learned counsel submitted that "neighbourhood" is a relative and correlated term. In the instant case, the materials on record undisputedly go to show that the fishery in question fall within the villages form the area of operation of the appellant (Baghpuri Maimal Mia Samabay Samity Ltd) society and that those villages were situated on the bank of the fishery in question. On the other hand, it clearly appeared that the writ petitioners society were constituted of such villages forming part of their area of operation which were situated at a distance of more than 16 KM away from the fishery. Hence, under the circumstances, the learned Single Judge erred in law in r setting aside the settlement order on the plea that the Govt. order dated 20.5.95 was passed without deciding the question of neighbourhood of the fishery.

10. Coming to the contention as raised by Mr. Bhuyan whether Maimal community of Cachar is a backward Scheduled Castes, the learned Single Judge in paragraph 15 of his judgment has observed as follows :

"15. Next submission of learned counsel for the petitioner was that respondent No.3 (5)M/s Baghpuri Maimal Min Samabay Samity Ltd was not entitled to get settlement of the fishery in question. The said society was situated in Darrang District and was formed with persons belonging to Maimal community. Referring to proviso to Rule 12, learned counsel Mr. Choudhury submitted that benefit of Rule 12 had been given to a fishery cooperative society formed with Maimal community only in the Cachar District and not elsewhere. I have gone through the proviso to Rule 12. On careful reading it appears to me that Maimal

community in the Cachar District are backward and therefore, they need protection and economic help. The aim of proviso to the said Rule is to give the benefit of a fishery to a cooperative society formed with 100% actual fisherman of the fishing population belonging to Scheduled Castes or Maimal community. Backwardness and economic deprivation are the main criteria for giving the benefit and not the place of residence. Though the members of respondent No. 5 belonging to the Maimal community of Caehar District, now they are permanently residing in Darrang District and in my view they can not be deprived of getting the benefit of proviso to Rule 12."

11. Mr. Bhuyan, learned counsel appearing for the appellant in Writ Appeal No.471 of 1996 has assailed the above finding on the ground that the learned Single Judge in admitting equality and status of Maimal community with that of the Scheduled Castes of the State has given a new dimension to the established position of law which has resulted in grave prejudice to the legal and fundamental rights of the Scheduled Castes of the State. It has, therefore, become necessary to examine the Fishery Rules which have been framed in exercise of powers conferred by sections 155 and 156 of the Assam Land and Revenue Regulations, 1886 and. section 6 of the Indian Fisheries Act, 1897. Section 155 and 156 of the Regulations are as follows:

"155. The State Govt. may, in addition to the other matters for which they are empowered to the Regulation to make rules, make rules consistent with this Regulation relating to the following matters

(a) the person by whom, and the time, place, and manner at or in which, anything is to be done for the doing of which provision is made in this Regulations or the Rules made thereunder;

(b) the mode in which notices, proclamations, summons warrants and other process issued under this Regulation shall be issued, published and served, and the fees to be charged for the issue, publication and service of such proceedings;

(c) the costs of all proceedings under this Regulations;

(d) the manner in which representatives shall be appointed to act in meters relating to this Regulation on behalf of anybody or settlement holders or persons entitled to, or with whom it may be desirable to make a settlement;

(e) the granting of licences to prepare or collect or the framing of the right or preparing or collecting, rubber, lac and other forest produce upon land over which no person has the rights of a proprietor, land holder, or settlement holder,

(f) the granting of licences, or the framing of the right, to work mines, stones and lime quarries, salt wells and oil wells to fish in fisheries proclaimed under section 16 and to carry on gold washing operations;

(g) the payment in consideration of which, and the conditions on which, such licences or firms may be granted; and

(h) generally to carry out the provisions of this Regulations.

156. The State Govt. may, in making any rule under this Regulation, provide that a breach of the rule, in addition to any other consequence which would ensue from such breach, be punishable with fine which may extend to two hundred rupees, or when such breach is a continuing breach, to fifty rupees for each day during which such breach continues, or, on conviction before a Magistrate, with imprisonment which may extend to six months or with fine upto one thousand rupees or with both."

Section 6 of the Indian Fisheries Act, 1897, reads as follows :

"6. Protection of fish in selected waters by rules of State Govt. (1) The State Govt. may make rules for the purpose hereinafter in this section mentioned, and may by notification in the Official Gazette apply or any of such rules to such waters, not being private waters, as the State Govt. may specify.

(2) The State Govt. may also, by like notification, apply such rules or any of them to any private water with the consent in writing of the owner thereof and of all persons having for the time being any exclusive right of fishery therein.

(3) such rules may prohibit or regulate all or any of the following matters, that is to say,

(a) the erection and use of fixed engines;

(b) the construction of water; and

(c) the dimension and kind of the nets to be used and the modes of using them.

(4) Such rules may also prohibit all fishing in any specified water for a period not exceeding two years.

" (5) In making any rule under this section the State Govt. may

(a) direct that a breach of it shall be punishable with fine which may extend to one hundred rupees, and, when the breach is a continuing breach, with a further fine which may extend to ten rupees for every day after the date of the first conviction during which the breach is proved to have been persisted in; and

(b) Provide for

(i) The seizure, forfeiture and removal of fixed engines, erected or used or nets used, in contravention of the rule, and

(ii) the forfeiture of any fish taken by means of any such fixed engine or not.

(6) The power to make rules under this section is subject to the condition that they shall be made after previous publication."

A proviso to Rule 12 was added by notification No.VFF.10/76/Pt.IIA/12 dated 5th June 1976, which reads as follows :

"Provided that the State Govt. may settle any registered fishery otherwise than under tender system with Fishery Cooperative Society formed with 100% actual fishermen of the fishing population in the neighbourhood of the fishery concerned and belonging to the Scheduled Castes of the State or Maimal community of the Cachar District at revenue calculated and for a period decided by the State Govt. from time to time."

Reading the proviso as it stands, it cannot be gain said that the Maimal community of Cachar District has been put at par with other Scheduled Caste of the State as notified by the President by public notification under Article 341 of the Constitution. The list of Scheduled Castes as notified by Presidential Order can neither be added not subtracted by any other authority except Parliament in exercise of power conferred by subarticle (2) of Article 341 of the Constitution. This position is very clear from the language of Article 341 of the Constitution.

12. Now adverting to the Rules, Regulation 155 of the Assam Land and Revenue Regulations empowers the State Govt. to make rules and Regulation 156 merely prescribes penalty for breach of rules. Turning to section 6 of the Indian Fisheries Act, 1897, subsection (1) thereof provide that the "Govt. may make Rules for the purpose hereinafter in this section mentioned." the purpose for which the rules can be made is mentioned in subsection (3) of section 6. Subsection (6) of section 6 of the Indian Fisheries Act lays down that the power to make rules under this section is subject to the conditions that they shall be made after previous publication.

13. We are not going into this question, whether these conditions have been fulfilled or not. Restricting ourselves, to the question of purpose for which the Rules can be framed by the State Govt., it is evident that it can only for erection and construction of weir and dimension and kind of the nets to be used and modes of using them and subsection (4) empowers State Govt. to prohibit all fishing in specified water for period not exceeding two years. However, liberally construed, Regulation 155 of the Assam Land and Revenue Regulations, 1886 and section 6 of the Indian Fisheries Act, 1897 along with Regulation 16 of the Regulations 1886 which in fact deals with the rights in fishery, and the power of the Deputy" Commissioner to declare any collection of water running or still, to be a fishery, a reading of the above provisions of law harmoniously together, does not empower the State Govt. to make a rules which confers a preference or privilege in the matter of settlement of fishery on or in favour of a particular community or caste, putting it at par with castes declared to be Scheduled Caste for the State of Assam under the Constitution (Scheduled Castes) Order, 1950, made by the President under Article 341 of the Constitution ? The language of Regulation 155, 156 of the Assam Land and Revenue Regulation, 1886 and section 6 of the Indian Fisheries Act, 1897 to which the source of rule making power is traced, however liberally construed, does not permit such conferment of power on the State, as indeed it can not be nor any such power can be claimed or exercised by the State Govt. in contravention of Article 341 (2) of the

Constitution, there can be no rule making power vesting in the State Govt. contrary to the Constitutional provisions.

14. Under the Constitution Article 341 (2) it is only the Parliament, which may by law include or exclude from the list of Scheduled Castes specified in the Presidential Notification under Article 341 (1) any caste, race or tribe. It is an admitted position that Maimal is not notified as Scheduled Castes. The induction of Maimal community of Cachar District putting them at par with other Scheduled Castes of the State is nothing short of usurping the power of Parliament what cannot be directly done, can not be allowed to be done in an indirect manner.

15. Submission made by the learned counsel Mr. Bhuyan deserves to be accepted. The rule making power of the State, categorising/or classifying the Maimal community of Cachar District and putting them at par with the Scheduled Caste of the State notified as such, cannot be traced to the professed source of rule making power namely Regulations 155 and 156 of the Regulations, 1886 or section 6 of the Fisheries Act, 1897.

16. We are not oblivious with the Full Bench decision of this Court as reported in Arabinda Das vs. State of Assam & others, AIR 1981 Gauhati 18, the point for decision raised in Arabinda Das was not the one as raised by Mr. Bhuyan in the instant case.

17. The main thrust of argument of Mr. Dutta is directed against the order of remand which according to him was wholly uncalled for, but so far as the Maimal community of Cachar District is concerned, he has supported the view taken by the learned Single Judge in paragraph 15 of the impugned judgment as quoted above. The precise question that arises for consideration is whether the Maimal community who settled outside the district of Cachar is entitled to any preferential treatment or protection, in otherwords whether the benefit under proviso to Rule 12 is restricted to geographical limit of the district of Cachar or it can be availed of even out of the district of Cachar. The Supreme Court had occasion to consider this question albeit in a different context relating to reservation and admission to Medical College of candidates belonging to Scheduled Castes and Scheduled Tribes in one State and migrating to another State held that such candidate is not entitled to get the benefit of reservation of seats on his migration to another State. (See (1990) 3 SCC130) and (1994) 5 SCC 244). While there can be no inhibition in migrating a member of Scheduled Caste or Tribe when migrates, he does not and cannot carry any right or privileges attributed to him or granted to him in the original State. On parity of reasonings the Maimal community of the Cachar District, even if treated as backward, as has been observed by the learned Single Judge and therefore, in need of protection and economic help cannot claim and carry the privileges outside the district of Cachar.

18. Mr. Bhuyan, learned counsel appearing for appellant, Mangaldoi Fishery inviting attention to Annexure W4 argued, and to our minds in view of the

foregoing discussions rightly so as per lists appended to the Scheduled Castes and Scheduled Tribes Orders (Amended) Act, 1976 that the Maimal community is not a Scheduled Caste of Assam but has been categorised as one of the other backward classes and as such members of Maimal community are legally barred from claiming the privileges available to the Scheduled Caste under the law nor can they be treated at par with members from Scheduled Castes. Assuming Baghpuri Society to have been formed with members belonging to Maimal community of Cachar District and at present permanently residing in Darrang District is not entitled to be treated equally as any other society consisting of members from the Scheduled Castes such as the appellants, Mangaldoi Pioneer Fishery Cooperative Society Ltd in any case outside the district of Cachar for the purpose of proviso to Rule 12 of Fishery Rules. Learned counsel may be right in his submission that neighbourhood and area of operation are correlative terms and, therefore, learned Single Judge was in error in making the order of remand, as he did.

19. Now, in view of the foregoing discussion it has been found that M/s Baghpuri Maimal Min Samabai Samity Ltd was not eligible, the order of remand as made by the learned Single Judge, cannot be successfully attacked on the sole ground of over lapping meaning and legal connotation of neighbourhood and area of operation. The remand, in view of our finding, as recorded above is necessary.

20. In view of the foregoing discussion, the Writ Appeal Nos. 471 of 1996 (by M/s Mangaldoi Pioneer Fishery Cooperative Society Ltd) and No.458 of 1996 (by M/s Sati Radhika Matshyajibi Samabai Samity Ltd) deserves to be allowed, they are accordingly, allowed. The Writ Appeal No.393 of 1996 (by M/s Baghpuri Maimal Min Samabai Samiti Ltd) is dismissed. There will be no order as to costs. The remand order as passed by the learned Single Judge stands, and shall be carried out by the respondents subject to our findings as regards Maimal community, as recorded above.