

(2011) 12 SC CK 0042

In the Supreme Court Of India

Case No : Civil Appeal No. 10465 of 2011 (Arising out of SLP (C) No. 34229 of 2010)

Bharati Balkrishna Dhongade

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 05-12-2011

Acts Referred:

Constitution of India, 1950 — Article 15(4), 16(4), 341, 342, 366(24)
Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis),
Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of

Citation : (2011) 12 SC CK 0042

Hon'ble Judges : P. Sathasivam, J; J. Chelameswar, J

Bench : Division Bench

Advocate : L.N. Rao, A.V. Savant, R.N. Govilkar, Nitin S. Tambwekar, B.S. Rai, Santosh Krishnan, K. Rajeev, Sunil Upadhyay, Sudhanshu S. Choudhari, Asha Gopalan Nair, S. Sukumaran, Anand Sukumar, Bhupesh Kumar Pathak and Meera Mathur, for the Appellant;

Final Decision : Dismissed

Judgement

P. Sathasivam, J.—Leave granted.

2. The principal question which arose for consideration in this appeal is whether "Namdeo Shimpi" caste is a sub-caste within the meaning of Entry 153 (Shimpi) in the Government Notification notifying list of Other Backward Classes (OBC) relating to the State of Maharashtra, even though it is not specifically mentioned as such'

3. This appeal is filed against the final judgment and order dated 21.10.2010 passed by the High Court of Judicature at Bombay in Writ Petition No. 5772 of 2009 whereby the Division Bench of the High Court dismissed the writ petition filed by the Appellant herein.

4. Brief Facts:

(a) On 18.01.1997, the Additional District Deputy Collector, Mumbai Suburban District, Mumbai issued a Caste Certificate to the Appellant herein certifying that she belongs to Hindu Shimpi Caste which is recognized as Other Backward Class (Sr. No. 153) under Government Resolution No. CBC 1467/M dated 13.10.1967, Education and Social Welfare Department and as amended from time to time. In the year 2007, the Appellant herein along with Mrs Safia Parveen Abdul Munaf-Respondent No. 6 contested the elections of Municipal Corporation of Greater Mumbai from Ward No. 62 reserved for women candidate belonging to the other backward classes and the Appellant won the election. As per the policy of the State Election Commission, the Caste Certificate of the Appellant herein was sent to the Scrutiny Committee to scrutinize the caste claimed and issue of validity certificate.

(b) After the elections, Respondent No. 6 forwarded a complaint to the Caste Scrutiny Committee (in short 'the Committee') alleging that the Appellant's claim of belonging to caste "Hindu Shimpi" was not proper. The Appellant herein also submitted the documents in support of her claim. By order dated 20.04.2007, the Committee certified that the Caste Certificate issued to the Appellant was valid and accepted that she belongs to 'Shimpi' of Other Backward Class (OBC).

(c) Challenging the said order, Respondent No. 6 filed Writ Petition No. 5112 of 2007 before the High Court of Bombay. By order dated 15.09.2008, the High Court set aside the order dated 20.04.2007 passed by the Committee and remanded the matter back to it for de novo consideration and decision in accordance with law. By order dated 19.06.2009, the Committee declared the claim of the Appellant herein as invalid and cancelled the Caste Certificate issued to her.

(d) Aggrieved by the order dated 19.06.2009, the Appellant herein filed Writ Petition No. 5772 of 2009 before the High Court of Bombay. By order dated 21.10.2010, the Division Bench of the High Court dismissed the writ petition.

(e) Aggrieved by the said decision, the Appellant herein has preferred this appeal by way of SLP before this Court.

5. Heard Mr. L. Nageswara Rao, learned senior counsel for the Appellant and Ms. Asha Gopalan Nair, Learned Counsel for Respondent Nos. 1 to 3, Mr. S. Sukumaran, Learned Counsel for Respondent No. 5 and Mr. A.V. Sawant, learned senior counsel for the contesting Respondent No. 6.

6. Mr. Rao, learned senior counsel for the Appellant by drawing our attention to the Government Resolution dated 03.06.1996 issued by Social Welfare, Cultural Affairs and Sports Department, Government of Maharashtra, submitted that in view of illustration given in Clause 25, the Committee and the High Court ought to have accepted the claim of the Appellant and declared that she belongs to 'Namdeo Shimpi', which is one of the castes included in Other Backward Classes (OBCs). In the above-mentioned Government Resolution, Clauses 25 and 31 have been pressed into service. They are as follows:

Clause 25

If in the list of O.B.C.'s if there is a clear reference of the main caste, the competent authorities should issue caste certificate to the sub-caste or the similar caste of the main caste i.e., in the list of list of O.B. Cs' caste Kunbi is included. If in the documents of any person the word used are Tillori Kunbi or Khaire Kunbi then since the caste Kunbi is in the list of the O.B.C's and since the said caste is a main caste, such person be granted certificate of the caste Kunbi. If only the word/names Tillori, Khaire are mentioned, the caste certificate cannot be issued to such person as on the bases of the name Tillori, Khaie the main caste does not get clarified.

Clause 31

In the list of O.B.C's, eligible for the benefits in the state of Maharashtra, main castes are included and the sub-castes of such caste are also held eligible for issuance of the caste certificate. Persons belonging to such sub-castes be issued caste certificate in the name of the main caste.

It is not in dispute that the reference mentioned in Clause 25, namely, caste 'Kunbi' is only an illustration. It is, no doubt, true that in terms of Clause 31 in the list of OBCs eligible for the benefits in the State of Maharashtra, if main castes are included, in that event, the sub-castes are also eligible for issuance of the caste certificate. According to the learned senior counsel for the Appellant, based on Clause 31, persons belonging to such sub-castes can be issued caste certificate in the name of the main caste. Per contra, Mr. A.V. Sawant, learned senior counsel for the contesting Respondent No. 6 submitted that first of all, the reference made by the Appellant is not a full extract and admittedly it is only a portion thereof and in the absence of full details about the Government Resolution, it is not safe to rely upon and, more particularly, in the light of Constitutional judgments of this Court clarifying the position regarding issuance of caste certificate.

7. On a complaint being made by Respondent No. 6, regarding the validity of the caste certificate produced by the Appellant, the matter was referred to the Regional Caste Certificate Verification Committee (RCCVC). The Verification Committee, consisting of the President, Member and Research Officer, on receipt of the complaint issued notice to both the parties, afforded opportunity to them and after relying on various materials including the Government Notifications, Regulations etc., by order dated 19.06.2009, declared the claim of the Appellant invalid and cancelled the Caste Certificate issued by the Additional District Deputy Collector, Mumbai Suburban District dated 18.01.1997.

8. The said order of the Verification Committee was challenged before the Division Bench of the High Court and by order dated 21.10.2010, it concluded that the Appellant belongs to 'Namdeo Shimpi' caste which does not fall under Entry 153 of the relevant Government Resolution dated 01.03.2006 issued by the Government of Maharashtra. It is relevant to point out that though some other

sub-castes of caste 'Shimpi' in (OBC) have been mentioned in Entry 153, admittedly, 'Namdeo Shimpi' has not been included under the original caste 'Shimpi'. The relevant portion of the Entry 153 is as under:

S.No.

Original caste and Serial no. In the category of Other Backward Class

Synonym caste/sub-caste and Serial Number of its original caste included afresh

6.

Shimpi - 153

Jain Shimpi, Shravak Shimpi, Shetaval, Shetawal, Saitaval, Saitawal - 153

In view of the fact that there is no reference to 'Namdeo Shimpi' in Entry 153, the Appellant who belongs to the same caste cannot claim the benefit meant for 'Other Back-ward Classes' of 'Shimpi' caste.

9. The issue relating to caste certificate, scrutiny by the Committee, inclusion or deletion etc. have been considered by the Constitution Bench of this Court in *State of Maharashtra v. Milind and Ors.* (2001) 1 SCC 4. Relying upon two earlier Constitution Bench decisions in (i) *B. Basavalingappa Vs. D. Munichinnappa*, and (ii) *Bhaiyalal Vs. Harikishan Singh and Others*, the Constitution Bench in *Milind's case* (supra) has clearly held that an enquiry as to whether any other caste or sub-caste can be included in the caste or tribe specifically mentioned in the Presidential Order was wholly impermissible.

10. The factual position in the *Milind's case* (supra) is as follows:

The Respondent, on the basis of the School Leaving Certificate and other records of himself and his close relative obtained a caste certificate from the Executive Magistrate, Nagpur on 20.08.1981 as belonging to "Halba", Scheduled Tribe. On the basis of that certificate, he was selected in the Government Medical College for MBBS degree course for the year 1985-86 in the reserved category meant for Scheduled Tribes. The certificate was sent for verification to the Scrutiny Committee constituted under the Directorate of Social Welfare. After necessary inquiry, the Scrutiny Committee recorded a finding to the contrary and rejected the certificate. The Appellate Authority, after detailed examination of evidence dismissed the Respondent's appeal and held that the Respondent belonged to "Koshti" caste and not to "Halba/Halbi", Scheduled Tribe. However, the High Court allowed the Respondent's writ petition and quashed the impugned orders inter alia holding that it was permissible to inquire whether any subdivision of a tribe was a part and parcel of the tribe mentioned therein and that "Halba-Koshti" was a subdivision of main tribe "Halba/Halbi" as per Entry 19 in the Constitution (Scheduled Tribes) Order, 1950 (for short "Scheduled Tribes Order") applicable to Maharashtra. Before the Constitution Bench, learned senior counsel for the Appellant-State of Maharashtra contended that:

(a) it was not permissible to hold an inquiry whether a particular group was a part of the Scheduled Tribe as specified in the Scheduled Tribes Order;

(b) the decision in *Bhaiya Ram Munda Vs. Anirudh Patar and Others*, , did not lay down the correct principle of law as to the scope of inquiry and the power to amend the Scheduled Castes/Scheduled Tribes Order; (this contention involved the specific question as to whether "Halba- Koshti" caste was a sub-tribe within the meaning of Entry 19 (Halba/Halbi) of the Scheduled Tribes Order relating to the State of Maharashtra, even though not specifically mentioned as such).

(c) the High Court misinterpreted the report of the Joint Committee of Parliament placed before it when representations for inclusion of "Halba-Koshti" in the Scheduled Tribes Order were rejected;

(d) the High Court also committed an error in invoking and applying the principle of *stare decisis* to the facts of the present case;

(e) & (f) the High Court erred in setting aside the orders of the Scrutiny Committee and the Appellate Authority which were made on proper and full consideration of evidence and authorities;

(g) the High Court gave undue importance to the resolutions/circulars issued by the State Government which were contrary to law;

(h) the High Court erred in treating the issue involved in the present case to have been closed in *Abhay* caste. On the other hand learned senior counsel for the Respondent contended that the old records relating to the period when there was no controversy, clearly supported the case of the Respondent and the School Leaving Certificate issued to the Respondent was valid. He also submitted that it was open to show that a particular caste was part of the Scheduled Tribes coming within the meaning and scope of tribal community even though it was not described as such in the Presidential Order.

11. Allowing the appeal but moulding the relief, the Constitution Bench held thus:

11. By virtue of powers vested under Articles 341 and 342 of the Constitution of India, the President is empowered to issue public notification for the first time specifying the castes, races or tribes or part of or groups within castes, races, or tribes which shall, for the purposes of the Constitution be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or Union Territory, as the case may be. The language and terms of Articles 341 and 342 are identical. What is said in relation to Article 341 *mutatis mutandis* applies to Article 342. The laudable object of the said articles is to provide additional protection to the members of the Scheduled Castes and Scheduled Tribes having regard to social and educational backwardness from which they have been suffering since a considerable length of time. The words "castes" or "tribes" in the expression "Scheduled Castes" and "Scheduled Tribes" are not used in the ordinary sense of the terms but are used in the sense of the definitions contained in Articles 366(24) and 366(25). In this view, a caste is a Scheduled Caste or a tribe is a

Scheduled Tribe only if they are included in the President's Orders issued under Articles 341 and 342 for the purpose of the Constitution. Exercising the powers vested in him, the President has issued the Constitution (Scheduled Castes) Order, 1950 and the Constitution (Scheduled Tribes) Order, 1950. Subsequently, some orders were issued under the said articles in relation to Union Territories and other States and there have been certain amendments in relation to Orders issued, by amendment Acts passed by Parliament.

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 article, it is expressly stated that the said Orders 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 exclusively 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 caste 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 the Presidential Order, when it is not so 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 Governments nor the courts nor Tribunals nor any authority can assume jurisdiction to hold inquiry and take evidence to declare that a caste or a tribe or part of or a group within 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.

36. Finally, the Constitution Bench has concluded that:

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 tribe 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.

2. The Scheduled Tribes Order must be read as it is. It is not even permissible to say that a tribe, sub-tribe, part of or group of any tribe or tribal community is synonymous to the one mentioned in the Scheduled Tribes Order if they are not so specifically mentioned in it.

3. A notification issued under clause (1) of Article 342, specifying Scheduled Tribes, can be amended only by law to be made by Parliament. In other words, any tribe or tribal community or part of or group within any tribe can be included or excluded from the list of Scheduled Tribes issued under Clause (1) of Article 342 only by Parliament by law and by no other authority.

4. It is not open to State Governments or courts or tribunals or any other authority to modify, amend or alter the list of Scheduled Tribes specified in the notification issued under Clause (1) of Article 342.

5. Decisions of the Division Benches of this Court in *Bhaiya Ram Munda v. Anirudh Patar and Dina v. Narain Singh* did not lay down law correctly in stating that the inquiry was permissible and the evidence was admissible within the limitations indicated for the purpose of showing what an entry in the Presidential Order was intended to be. As stated in Position (1) above no inquiry at all is permissible and no evidence can be let in, in the matter.

12. In *Kumari Madhuri Patila and another Vs. Addl. Commissioner, Tribal Development and others*, , this Court has given elaborate directions for deciding the claim of persons who belong to the Scheduled Castes, Scheduled Tribes or Other Backward Classes. These directions have been reiterated in a recent decision by a larger Bench of three Judges of this Court in *Dayaram Vs. Sudhir Batham and Others*, .

13. Mr. Rao, learned senior counsel, by relying on the position prevailing in the State of Karnataka, namely, that caste 'Namdeo Shimpi' has been included in OBC submitted that the same analogy may be applied to the State of Maharashtra. We have already noted the elaborate discussion and the ultimate order of the Committee as well as the Division Bench of the High Court. We are satisfied that before arriving at such conclusion they considered the entire material on record including the distinction between the list of OBCs in the State

of Karnataka as against the list of OBCs in State of Maharashtra and recorded a finding that the Appellant who belongs to 'Namdeo Shimpi' caste does not belong to OBC of 'Shimpi' caste in Maharashtra. In view of the same, we reject the contention of the learned senior counsel for the Appellant.

14. Ms. Asha Gopalan Nair, Learned Counsel appearing for the State took us through various averments in the counter affidavit filed by the State of Maharashtra. The counter affidavit filed by the Secretary to the Government of Maharashtra in this Court shows that pursuant to the recommendations made by the Maharashtra State Backward Class Commission, the list of castes falling under OBC 'Shimpi' has been amended from time to time. However, even the Government Resolution dated 01.03.2006 does not include 'Namdeo Shimpi' under the heading 'Shimpi' as OBC.

15. It is brought to our notice that the Maharashtra State Backward Class Commission has been constituted in terms of the judgment of this Court in *Indra Sawhney v. Union of India*, (1992) 6 SCR 321, which is headed by a retired Judge of the Bombay High Court and assisted by experts in the field. Further, the said Commission undertakes extensive studies and make recommendations from time to time or suggest additions and alterations in the list of OBCs and it is after such elaborate exercise the final list has emerged as per the Government Resolution dated 01.03.2006. The details furnished in the counter affidavit filed by the Secretary to the Government of Maharashtra show that the above referred Government Resolution is being updated from 1961 on several occasions. We have already explained that the extract of the Government Resolution dated 03.06.1996 relied on by Mr. Rao, learned senior counsel for the Appellant dealing with caste 'Kunbi' (OBC), has no relevance to the facts of the present case. We are also satisfied that the said Committee has considered the distinction between the list of OBCs in the State of Karnataka and in State of Maharashtra and has taken note of the fact that though the Karnataka State has thought it fit to include 'Namdeo Shimpi' under the category of 'Shimpi' (OBC), the Government of Maharashtra has not done so. This has also been rightly highlighted in the impugned order by the Division Bench of the High Court.

16. When it is not so expressly or specifically included in the Government Resolution/order along with the main caste, in such case, even if it is synonymous to the one mentioned in the order, it is not permissible to avail such benefit of reservation. It is well known that a caste may fall under the category of OBCs in one State, but the said caste may not be classified as OBC in other State. At any rate, we are of the view that no specific evidence was led by the Appellant to discharge the burden of proof on her u/s 8 of the Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2001. Inasmuch as the burden of proof u/s 8 of the said Act being on the person who claims to belong to that caste, tribe, or class, in view of the factual conclusion by the Committee

based on relevant acceptable material and the decision of the Division Bench, we are unable to accept the claim of the Appellant. On the other hand, we are satisfied that the Committee and the Division Bench of the High Court have considered the entire material in the light of the decisions of this Court and came to a finding of fact that the Appellant does not belong to caste 'Shimpi' (OBC) and belongs to 'Namdeo Shimpi' caste which is not OBC in the State of Maharashtra.

17. Under these circumstances, we do not find any valid ground for interference with the impugned order of the High Court. Consequently, the appeal fails and the same is dismissed with no order as to costs.