
(2007) 07 OHC CK 0052
In the Orissa High Court

Bikrama Keshari Jena and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 11-07-2007

Acts Referred:

Constitution of India, 1950 — Article 15, 16, 226, 227, 330

Citation : (2007) 104 CLT 627 : (2007) 2 OLR 472 Supp

Hon'ble Judges : B.P. Das, J;A.K. Samantaray, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.P. Das, J.—The Petitioners, who are the elected Councillors of different wards of Banpur Notified Area Council (N.A.C.) in Khurda district, have filed this Writ Petition praying inter alia for a declaration that the election of O.P.5-Rajashree, Das " Rajashree Nayak to the office of the Chairperson of Banpur N.A.C, whiGh was reserved for" Backward class of citizen", is illegal on the grounds namely, (i) the office of Chairman of Banpur N.A.C. having been reserved for backward class of citizen and O.P. 5 being a citizen of non-backward class, as by birth she belongs to Karan caste which was not a backward class community, cannot hold such office and (ii) O.P.5 having been elected as a Ward Councillor from a general seat, i.e., ward NQ.12, cannot hold the office of Chairperson of Banpur N.A.C. The election in question was held in the year 2003 and the same was challenged before this Court in the year 2006 and during these three years O.P. 5 was continuing in the office.

2. The brief facts as delineated in this Writ Petition tend to reveal that O.P.5 by birth belongs to "Karan" caste which is a general one. She got married to a person belonging to "Khandayat" which was declared by the State as a backward caste and included in the State List of Socially and Educationally Backward Class (in short, "S.E.B.C."). In 2003, O.P.5 got elected as a Councillor of Banpur N.A.C. from an unreserved ward, i.e., Ward No. 12 (Badahantuada). Thereafter, she was elected to the office of Chairperson of the N.A.C., which was reserved for

"Backward Class of citizen" as per the notification dated 26.3.2003 issued by the Government of Orissa. This election of O.P. 5 as Chairperson of Banpur N.A.C. is under challenge in the Writ Petition on the grounds mentioned hereinbefore.

3. A counter affidavit as well as an additional affidavit has been filed on behalf of O.P. 5, wherein it is stated that O.P. 5 by birth was "Karan" by caste, which is a general caste. She got married to one Krushna Chandra Nayak, who is Khandayat caste, in the year 1980 and at that point of time Khandayat by caste was treated to be a general caste. After thirteen years of their marriage, in the year 1993, Khandayat caste was declared to be a backward class and included in the State List of S.E.B.C. The election in question was held in the year 2003. O.P. 5 has filed her caste certificate granted by the Tahasildar, Banpur, in which she has been stated to be belonging to Khandayat community, which is recognized as an S.E.B.C. as per the Resolution dated 10.9.93 issued by the State Government in Tribal Welfare Department and nobody challenged the said certificate when she produced the same at the time of her election as Chairperson of the N.A.C. After getting elected, she is continuing as such till date. Now her election is challenged after she continued in the said office for three years.

4. Mr. B. Mohapatra, Learned Counsel appearing for O.P.5, contends that in view of Section 57 in Chapter-V of the Orissa Municipal Act, the election of O.P.5 can only be challenged by filing an application before the Civil Court and this Court in a proceeding under Articles 226 & 227 of the Constitution of India cannot resolve an election dispute.

5. However, Mr. J. Katikia, Learned Counsel for the Petitioners, strenuously argues that O.P. 5 having been born in a non-backward class family and after getting the benefits of an advanced caste by virtue of her marriage in a backward class family she cannot claim herself to be belonging to a backward class, i.e., S.E.B.C. and cannot take the benefits meant for the S.E.B.C. In this regard, Mr. Katikia draws our attention to a decision rendered by the Apex Court in the case of Mrs. Valsamma Paul Vs. Cochin University and others, and, referring to paragraph-34 of the said decision, he submits that a candidate, who had the advantageous start in life being born in forward caste and had march of advantageous life but is transplanted in backward caste by adoption or marriage or conversion, does not become eligible to the benefit of reservation either under Article 15(4) or 16(4), as the case may be. Acquisition of the status of Scheduled Caste etc. by voluntary mobility into these categories would play fraud on the Constitution, and would frustrate the benign constitutional policy under Articles 15(4) and 16(4) of the Constitution. Mr. Katikia further takes us through a decision of the Apex Court in the case of Meera Kanwaria v. Sunita and Ors.2006 (1) OLR 186, wherein the Apex Court referred with approval to Sobha Hymavathi Devi Vs. Setti Gangadhara Swamy and Others, , in which it was held that whether it be a reservation under Article 15(4) or 16(4) or 330 and 332, the said reservation would benefit only those who belong to a S.C. or S.T. and not those who claim to acquire the status by marriage.

6. Now, let us see the Judgment rendered by the Constitution Bench of the Apex Court in *Sobha Hymavathi Devi (supra)*. In paragraph-10 of that Judgment it was held that the caste rigidity breaks down and would stand as no impediment to a woman becoming a member of the family to which the husband belongs and to which she gets herself transplanted. Thereafter, the Court noticed that recognition by the community was also important. Even then, the Court categorically laid down that the recognition of a lady as a member of a backward community in view of her marriage would not be relevant for the purpose of entitlement to reservation under Article 16(4) of the Constitution for the reason that she as a member of the forward caste, had an advantageous start in life and marriage with a male belonging to a backward class would not entitle her to the facility of reservation given to a backward community.

7. But fact remains that the cases relied upon by Mr. Katikia, Learned Counsel for the Petitioners, are ones where the persons seeking election or elected from the reserved category seats were transplanted to the family of Scheduled Castes or reserved category castes. The case at hand totally stands on a different footing. O.P. 5 belonged to Karan caste by birth, which is a general caste. The husband of O.P. 5 "belongs to Khandayat caste, which was also treated to be a general caste. Both the castes till issuance of the Resolution (Annexure-A/5J) in 1993 were treated to be forward castes in the State. O.P. 5 married in the year 1980 and after thirteen years of her marriage, the caste of her husband was declared to be S.E.B.C. So in these premises, can it be said that O.P.5 has married in a family of backward class/reserved category? In our considered opinion, the answer would be "no", as O.P. 5 married thirteen years before the reservation came and she had already mingled with the said family and accepted by the said community. That too, the castes of O.P.5 and that of her husband were treated to be forward class till 1993. The decision in *Sobha Hymavathi (supra)* rather helps the Petitioners to some extent.

8. The fact that O.P. 5 contested the election to the office of the Chairperson by producing caste certificate showing her to be belonging to S.E.B.C. and that such certificate remains in force are undisputed. So long as the said certificate remains valid, there is no reason as to why this Court will interfere in the election of O.P. 5, which was held in a democratic manner and O.P. 5 was elected as Chairperson by majority and she has been continuing as such since 2003. That apart, the aforesaid caste certificate cannot even be scrutinized by this Court in a proceeding under Articles 226 & 227 of the Constitution of India.

In view of the above, this Writ Petition is dismissed being devoid of merit but without any order as to cost.

A.K. Samantaray, J.

9. I agree.