

(2014) 11 GUJ CK 0039

In the Gujarat High Court

Case No : Special Civil Application No. 16395 of 2012

Gujarat Mochi Samaj Sewa Trust

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 07-11-2014

Acts Referred:

Constitution of India, 1950 — Article 122, 13(2), 14, 141, 15

Citation : (2014) 11 GUJ CK 0039

Hon'ble Judges : V.M. Sahai, Acting C.J.; R.P. Dholaria, J

Bench : Division Bench

Advocate : Shalin Mehta, Senior Counsel and Sahil M. Shah, Advocate for the Appellant; P.K. Jani, Additional Advocate General, Vandan Buxi, Assistant Government Pleader and Devang Vyas, Assistant Solicitor General, Advocate for the Respondent

Judgement

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V.M. Sahai, Actg. C.J.

1. This writ petition has been filed by the petitioner-Gujarati Mochi Samaj Sewa Trust challenging the constitutional validity of the Scheduled Castes and Scheduled Tribes Orders (Second Amendment) Act, 2002 (hereinafter referred to as the "impugned Act" for the sake of brevity) to the extent that it derecognizes and de-specifies the Mochis residing in the State of Gujarat except for Dang District and Umargaon Taluka of Valsad District from the notified list of the scheduled castes. The challenge is made on the ground of Articles 14, 15, 16, 19, 21 and 341 of the Constitution of India and it is urged that there is no reasonable nexus with the object sought to be achieved by the Act and the impugned amendment introduced by the Government of India is illegal as it makes unreasonable classification between Mochis residing in Dang District as well as Umargaon Taluka of Valsad District, State of Gujarat and the Mochi residing elsewhere in the State of Gujarat. Therefore, so far as the "impugned Act" is concerned, it treats only Mochi's residing in Dang District as well as in

Umargaon Taluka of Valsad District to be entitled to the benefit of Scheduled Castes category, is illegal and the constitutional validity of the "impugned Act" is liable to be declared ultra vires.

2. We have heard Mr. Shalin Mehta, learned Senior Counsel assisted by Mr. Sahil M. Shah, learned advocate for the petitioner, Mr. Devang Vyas, learned Assistant Solicitor General of India for respondents No. 1 and 3 and Mr. P.K. Jani, learned Additional Advocate General assisted by Mr. Vandan Buxi, learned Assistant Government Pleader for respondent No. 2.

3. It is not disputed by the learned counsel for the petitioner that vires of the "impugned Act" was challenged before a Division Bench of this Court, wherein the validity of the impugned Act was upheld by the Division Bench of this Court on 05.02.2004 in the case of Samasta Gujarat Rajya Mochi Samaj Vs. Union of India (UOI) , wherein the Court in paragraphs No. 28 and 29 has held as under:

"28. We, therefore, conclude:

(i) The List of Scheduled Castes specified in the public notification issued by the President under Article 341(1) of the Constitution whether varied or not by the Parliament under Article 341(2) can not be treated as the provision of the Constitution itself under the definition clause 366(24) and the Amendment Act made under Article 341(2) varying the Constitution (Scheduled Castes) Order, 1950 cannot be treated as an amendment of any constitutional provision.

(ii) The public notification issued by the President under Article 341(1) and the Amendment Act made by the Parliament under Article 341(2) are ordinary law within the meaning of Article 13(2) of the Constitution. The Amendment Act made under Article 341(2) is not made by the Parliament in exercise of constituent power, but is enacted while exercising its legislative power spelt out in Article 341(2).

(iii) Both the public notification issued by the President under Article 341(1) as well as the Amendment Act made by the Parliament under Article 341(2) being "law" within the meaning of Article 13(2) are amenable to judicial review on the ground of violation of fundamental rights conferred by Part III of the Constitution.

(iv) Though the process of making of the Presidential Notification under Article 341(1) and the legislative process of making of the Amendment Act under Article 341(2) cannot be subjected to judicial scrutiny and lacks adjudicatory disposition in view of the constitutional insulations contained in Articles 74(2) and 122, the impact of such "law" can be tested on the ground of constitutional violation.

(v) The Parliament has legislative power to exclude a caste or part of or group within the caste from the list of the Scheduled Castes under Article 341(2) even if by earlier law, it had included that caste or group or part thereof in such list.

(vi) The classification of the Mochi caste of Dangs district and Umargaon Taluka of Valsad district and the Mochi caste of the other areas of Gujarat on the ground

of the former being treated as "untouchables" and the latter not, is a valid classification having reasonable nexus with the object sought to be achieved by the impugned legislation.

(vii) The impugned provisions of the Constitution (Scheduled Castes) Orders (Second Amendment) Act, 2002 and the Constitution (Scheduled Castes) Order, 1950, as varied by it, imposing area restriction for recognition of Mochi community are neither discriminatory nor arbitrary and do not violate any fundamental right of the petitioner and are constitutionally valid provisions.

29. For the foregoing reasons, the challenge of the petitioner against the impugned Amendment Act of 2002 and the imposition of area restriction in respect of the Mochi caste as done in the varied entry 4 of the Order of 1950, as well as against the impugned Government Resolution dated 18-2-2003 fails and the contentions raised on behalf of the petitioner and the supporting respondent No. 10 have no substance. The petition is, therefore, rejected. Rule is discharged. There shall be no order as to costs."

Therefore, the Court has arrived at a conclusion that the Amendment Act is valid and does not suffer from any infirmity and there is no violation of any of the constitutional provisions as there was a valid classification having reasonable nexus with the object sought to be achieved by the impugned legislation.

4. The above judgment of the Division Bench was challenged by filing two Special Leave to Petitions before the Hon'ble Apex Court. One such petition was filed by Gujarat Mochi Samaj Sewa Trust and other petition was filed by Shree Surat Valsad Jilla K.M.G. Parishad. The Apex Court upheld the order passed by the Division Bench of this Court by judgment dated 9th May, 2007 in the case of Shree Surat Valsad Jilla K.M.G. Parishad Vs. Union of India (UOI) and Others, . The Apex Court has held that the Act of Parliament varying the 1950 Order by confining inclusion of caste "Mochi" in list of scheduled castes within a particular area, was not unconstitutional and the Court had no power to render its opinion on correctness thereof. It was also held that the President of India alone in terms of Article 341(1) of the Constitution is authorized to issue an appropriate notification under the Scheduled Castes Order making any amendment thereof and it can only be done by the Parliament as State has no power to alter the Presidential Schedule.

4.1 It appears that after four years of the judgment passed by the Apex Court, a Writ Petition under Article 32 of the Constitution of India was filed by the present petitioner, Gujarat Mochi Samaj Sewa Trust directly before the Apex Court being Writ Petition (Civil) No. 281 of 2011, which was dismissed by the Apex Court on 07.07.2011 on the ground that the petitioner should approach the concerned High Court under Article 226 of the Constitution of India instead of filing Writ Petition under Article 32 of the Constitution of India. Thereafter, the petitioner has filed the instant writ petition.

5. Mr. Shalin Mehta, learned Senior Counsel has vehemently urged that even

though the constitutional validity of the "impugned Act" has been upheld by the Division Bench of this Court as well as by the Apex Court even then the petitioner can again challenge the vires of the "impugned Act" on the ground that the judgment of the High Court as well as of the Apex Court have passed into sub silentio as neither before the High Court nor before the Supreme Court, following points were argued:

"(i) That the Court has not looked into the statement of object and reasons as mentioned in the "impugned Act", as the statement of object did not mention restricting "Mochis" as Scheduled Caste only in two different areas. Therefore, the "impugned Act" has no nexus with the object sought to be achieved.

(ii) As persons belonging to Mochi Caste and residing in Maharashtra or Madhya Pradesh State are coming to Gujarat State, then they should be provided the same status which they enjoyed in their own States, i.e. if a person belonging to Scheduled Caste of Maharashtra or Madhya Pradesh State comes to Gujarat State, then he should be given the same status, as given in the State of Maharashtra or Madhya Pradesh."

The judgment delivered by the High Court as well as Apex Court is silent on above points. Therefore, the said judgments have passed in sub-silentio.

5.1 It is further urged by Mr. Shalin Mehta that the petitioner has sought under the RTI Act, 2005 on 05.01.2003 from the office of Collector, Valsad district to supply following information:

1. List of Mochis of Madhya Pradesh and Maharashtra who have migrated due to construction of Sardar Sarovar Narmada Dam and rehabilitated/staying in Umargaon Taluka of Valsad District.
2. Copy/list of scheduled caste certificates issued to Mochis in Umargaon Taluka of Valsad District.
3. Inspection of complete documentary office records relating to Mochis of Madhya Pradesh and Maharashtra who have migrated due to construction of Sardar Sarovar Narmada Dam and rehabilitated/staying in Umargaon Taluka of Valsad District and scheduled caste certificates issued to Mochis in Umargaon Taluka of Valsad District.

However, the reply given by the respondents on 05.02.2013 was nill, meaning thereby no one has migrated from the Maharashtra or Madhya Pradesh and no such certificate has been issued. It is further submitted that in absence of legislative facts, the amendment is nothing but fraud on the Constitution. Mr. Shalin Mehta, learned Senior Counsel further urged that the principle of res judicata would not apply as the petitioner is challenging the vires on the ground of sub silentio.

5.2 In support of his contention, Mr. Mehta has placed reliance on the decisions of the Apex Court in the case of Municipal Corporation of Delhi Vs. Gurnam

Kaur, . The Apex Court in paras 11 and 12 has held as under:

"11. Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in Jamna Das" case and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavement or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the Court on the question or not whether any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a pavement squatter. Professor P.J. Fitzgerald, editor of the Salmond on Jurisprudence, 12th edn. explains the concept of sub silentio at p. 153 in these words:

"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."

12. In Gerard v. Worth of Paris Ltd. (k)., [1936] 2 All E.R. 905 (C.A.), the only point argued was on the question of priority of the claimant's debt, and, on this argument being heard, the Court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal in Lancaster Motor Co. (London) Ltd. v. Bremith, Ltd., [1941] 1 KB 675, the Court held itself not bound by its previous decision. Sir Wilfrid Greene, M.R., said that he could not help thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided. We went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed. Precedents sub silentio and without argument are of no moment. This rule has ever since been followed. One of the

chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority."

5.3 He has also placed reliance on the decision of the case of Delhi Airtech Services Pvt. Ltd. and Another Vs. State of U.P. and Another, . The Apex Court in paras 42 to 46 has held as under:

"42. It has been held in the decision of this Court in Municipal Corporation of Delhi Vs. Gurnam Kaur, that when a point does not fall for decision of a Court but incidentally arises for its consideration and is not necessary to be decided for the ultimate decision of the case, such a decision does not form a part of the ratio of the case but the same is treated as a decision passed sub silentio.

43. The concept of "sub silentio" has been explained by Salmond on Jurisprudence "12th Edition" as follows:

"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."

44. The aforesaid passage has been quoted with approval by the three Judge Bench in Gurnam Kaur (supra). This Court in Gurnam Kaur (supra), in order to illustrate the aforesaid proposition further relied on the decision of the English Court in Gerard v. Worth of Paris Ltd., reported in 1936 (2) All England Reports 905. In Gerard, the only point argued was on the question of priority of the claimant's debt. The Court found that no consideration was given to the question whether a garnishee order could be passed. Therefore, a point in respect of which no argument was advanced and no citation of authority was made is not binding and would not be followed. This Court held that such decisions, which are treated having been passed sub silentio and without argument, are of no moment. The Court further explained the position by saying that one of the chief reasons behind the doctrine of precedent is that once a matter is fully argued and decided the same should not be reopened and mere casual expression carry no weight.

45. In Gurnam Kaur (supra) this Court conclusively held that:

"12.... not every passing expression of a Judge, however eminent, can be treated

as "ex cathedra statement, having the weight of authority" (see para 12 page 43)

46. Similarly, it has also been held by the majority opinion in Constitution Bench of this Court in the case of H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another, that "it is difficult to regard a word, a clause or a sentence occurring in a judgment of this Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment." (page 578 of the report)"

6. We are not inclined to accept the submission made by Mr. Shalin Mehta, learned Senior counsel for the petitioner in view of the fact that when the vires was challenged before the Division Bench of this Court as well as before the Apex Court, it was always open to the petitioner to lay down all those submissions which were required to be argued if a vires is challenged and upheld on the argument made therein. A subsequent writ petition in our opinion could not be filed challenging the vires again on the ground that a broad point has not been argued.

7. Further the argument of the learned Senior counsel for the petitioner is that so far as the Apex Court has sent this matter to be heard and decided by this Court is concerned, there was no decision of the Apex Court in as much as while dismissing the SLP. The Apex Court merely observed that the petitioner should approach the High Court. It was not laid down by the Apex Court that it should be open to the petitioner to again challenge the validity of the "impugned Act before this Court.

8. Moreover, the Division Bench of this Court, which has earlier upheld this constitution amendment, has given cogent reasons, which is brought to be argued by Mr. Shalin Mehta in this writ petition in a different way. Though these questions have been referred to and decided by the Division Bench's judgment of this Court which is clear from Paragraphs No. 5.2 and 28.

9. Further there cannot be any doubt that it is only the President, who can include Mochi residing within a particular area or in the entire State to be included in the scheduled orders. No mandamus can be issued by this Court or cannot declare the impugned legislation as unconstitutional as held by the Apex Court in paragraph 9 in the case of Shree Surat Valsad Jilla K.M.G. Parishad v. Union of India and others.

10. The Division Bench of this Court in Special Civil Application No. 14908 of 2012, which was decided along with group of matters on 24.04.2014 in the case of Ionik Metallics and others v. Union of India and others, wherein paragraph 15 of the judgment is extracted below:

"15. It is now settled law that once, on consideration of the provisions contained in a statute, the apex Court has arrived at a finding that those are not ultra vires either the Constitution of India or any other statute, it is not open for the High

Court in a subsequent petition to entertain a plea that a particular point relating to the selfsame provision was not considered by the Supreme Court or a specific point was not raised therein. In other words, in a subsequent petition before the High Court, a High Court cannot come to a contrary conclusion merely on the ground that in the previous matter before the Supreme Court, the matter was not properly argued by the learned counsel for the parties or attention of the Supreme Court was not drawn to a particular defect. In this connection, we may profitably refer to the following observations in the three-judge-bench decision of the Supreme Court in the case of Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparao and Another, while elaborating the binding nature of the judgment of the Supreme Court:

"So far as the first question is concerned, Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An "obiter dictum" as distinguished from a ratio decidendi is an observation by Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a bind effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case. So far as constitutional matters are concerned, it is a practice of the Court not to make any pronouncement on points not directly raised for its decision. The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court (See Ballabhadras Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur, . When Supreme Court decides a principle it would be the duty of the High Court or a subordinate Court to follow the decision of the Supreme Court. A judgment of the High Court which refuses to follow the decision and directions of the Supreme Court or seeks to revive a decision of the High Court which had been set aside by the Supreme Court is a nullity. (See Narinder Singh Vs. Surjit Singh,). We have to answer the first question bearing in mind the aforesaid guiding principles."

11. Further it is relevant to point out over here that the Division Bench of this Court in the case of Murtujakhan Joravarkhan Babi (Nawab of Radhanpur Through his power of Attorney Holder Mohmad Umarbhai Desai) v. Municipal Corporation of Ahmedabad reported in 1975 GLR 806, in paragraph 18 has held as under:

"18. Mr. K.S. Nanvati, however, contended that in none of the above mentioned cases the Court was called upon to determine the validity of section 54 on the ground IV(b) as formulated hereinabove and that, therefore, challenge to the said section on the said ground was *res integra*. The submission, in our opinion, is misconceived. Once the validity of the Act as a whole has been upheld after considering the various provisions of the Act and taking into account both the procedural as well as substantive aspects it cannot possible be urged that the validity of a particular section is still open to challenge because it has not been specifically considered. As observed in the majority decision in *Somawanti v. State of Punjab* AIR 1953 SC 151 the binding effect of a decision does not depend upon whether a particular argument was considered therein or not provided that the point with reference to which an argument was subsequently advanced was actually decided. Once it is found that the validity of the Act as a whole has been upheld, merely because the aspect now presented based on the guarantee contained in Article 19(1)(f) was not expressly considered or a decision given thereon, it was not take away the binding effect of the said decision (See *T. Govindaraja Mudaliar Vs. The State of Tamil Nadu and Others*, . These observations were made with reference to a binding precedent of a Court of coordinate or concurrent jurisdiction and they will apply with greater force to the declaration of law made by the Supreme Court which binds us under Article 141."

12. The effect of the above judgment is that once the validity of the Act as a whole has been upheld after considering the various provisions of the Act and taking into account both the procedural as well as substantive aspects it cannot be possible to urged that the validity of a particular section is still open to challenge because it has not been specifically considered or a particular argument was required to be argued in the matter but it could not be argued and therefore, it was not considered while upholding the validity of the Act.

13. The Division Bench of this Court in Special Civil Application No. 14908 of 2012, which was decided along with group of matters on 24.04.2014 in the case of *Ionik Metallics and others v. Union of India and others*, wherein paragraph 15 of the judgment is extracted below:

"15. It is now settled law that once, on consideration of the provisions contained in a statute, the apex Court has arrived at a finding that those are not *ultra vires* either the Constitution of India or any other statute, it is not open for the High Court in a subsequent petition to entertain a plea that a particular point relating to the selfsame provision was not considered by the Supreme Court or a specific point was not raised therein. In other words, in a subsequent petition before the

High Court, a High Court cannot come to a contrary conclusion merely on the ground that in the previous matter before the Supreme Court, the matter was not properly argued by the learned counsel for the parties or attention of the Supreme Court was not drawn to a particular defect. In this connection, we may profitably refer to the following observations in the three-judge-bench decision of the Supreme Court in the case of Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparao and Another, while elaborating the binding nature of the judgment of the Supreme Court:

"So far as the first question is concerned, Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An "obiter dictum" as distinguished from a ratio decidendi is an observation by Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a bind effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case. So far as constitutional matters are concerned, it is a practice of the Court not to make any pronouncement on points not directly raised for its decision. The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court (See Ballabhadras Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur, . When Supreme Court decides a principle it would be the duty of the High Court or a subordinate Court to follow the decision of the Supreme Court. A judgment of the High Court which refuses to follow the decision and directions of the Supreme Court or seeks to revive a decision of the High Court which had been set aside by the Supreme Court is a nullity. (See Narinder Singh Vs. Surjit Singh,). We have to answer the first question bearing in mind the aforesaid guiding principles."

14. In this way of the matter, we do not find any substance in the argument raised by Mr. Shalin Mehta, learned Senior Counsel for the petitioner. The writ petition is devoid of any merits and the same is, accordingly, dismissed. Notice is

discharged. There shall be no order as to costs.