
(1982) 09 OHC CK 0013

In the Orissa High Court

Case No : Original Jurisdiction Case No. 950 of 1977

K. Adikanda Patra and Others

APPELLANT

Vs

Gandua and Others

RESPONDENT

Date of Decision : 25-09-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 341, 342

Citation : AIR 1983 Ori 89 : (1982) 54 CLT 475

Hon'ble Judges : J.K. Mohanty, J;B.K. Behera, J

Bench : Division Bench

Advocate : B.B. Ratho, for the Appellant; Addl. Standing Counsel and D.P. Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

J.K. Mohanty, J.—This is an application for a writ of certiorari to quash the proceeding initiated against the petitioners under Orissa Regulation No. 2 of 1956 directing restoration of possession of the properties to opposite parties Nos. 1 to 3 by ejecting the petitioners therefrom.

2. The disputed land known as "Jholla Billa" measuring about 10 acres is situated in village Tadakasahi within Ramagiri police station of Parlakhemundi Sub-division in the district of Ganjam. Boisomo Pradhano, father of opposite parties Nos. 1 to 3, had borrowed money from late K. Kasi Patra, father of petitioners Nos. 1 to 6. Money Suit No. 16 of 1958 was filed in the court of the Munsif, Berhampur for realisation of the debt. The suit was decreed in favour of late K. Kasi Patra and Execution Case (E. P. No. 205 of 1959) was filed for executing the decree. During the pendency of the execution proceeding K. Kasi Patra died and the proceeding was carried on by his legal representatives. The disputed land was put to court auction on 27-3-1961. The petitioners being the highest bidders were declared as auction purchasers. The sale was confirmed on 13-5-1961 and, the certificate of sale was issued on 16-7-1961 and the petitioners took delivery

of possession of the disputed land. In the year 1971 opposite parties Nos. 1 to 3 and their late father Boisomo Pradhano started creating trouble in the disputed land and a proceeding u/s 145 Cr. P. C. was started in which the petitioners were found to be in possession of the same by order dated 28-12-1971, Thereafter opposite parties Nos. 1 to 3 filed Title Suit No. 6 of 1972 before the Munsif, Parlakhemundi (which was subsequently renumbered as Title Suit No. 31 of 1973 and was taken to the file of the Subordinate Judge, Parlakhemundi) against the petitioners and their father Boisomo Pradhano for a declaration of right, title and interest over the suit land. In the said suit it was alleged, inter alia, that the plaintiffs (opp. parties 1 to 3) are members of Scheduled Tribe and that the sale of the suit land in court auction without previous permission of the competent authority is absolutely null and void in view of the provisions of Orissa Regulation No. 2 of 1956 (hereinafter referred to as the "Regulation"). The learned Subordinate Judge held that the suit land is situated in the scheduled area, but it is doubtful if the plaintiffs (opp. parties 1 to 3) are members of the Scheduled Tribe. It was further held that the suit is barred by constructive res judicata. So the suit was dismissed with costs. Thereafter Title Appeal No. 40 of 1974 was preferred against the judgment and decree passed by the Subordinate Judge before the District Judge, Ganjam-Boudh which is sub judice. During the pendency of the Title Appeal Boisomo Pradhano, father of opp. parties Nos. 1 to 3, died. During the pendency of the Title Suit, on 29-9-72 opposite parties Nos. 1 to 3 filed an application against the petitioners and their father Boisomo Pradhano under Sections 3(2), 6 and 7 of the Regulation before the Officer on Special Duty (opposite party No. 5) praying for restoration of the suit land alleging that they belong to Scheduled Tribe and were in possession of the suit land till the same were put under attachment in the proceeding u/s 145 Cr. P. C. and that the sale of the disputed land in court auction to the auction purchasers who are not members of Scheduled Tribe without the previous consent in writing of the competent authority is in contravention of the provisions of the Regulation. The Officer on Special Duty (Opp. Party No. 5) by his order fin R. M. C. No. 109/72) observed that the petitioners therein (Opp. Parties 1 to 3) are members of Scheduled Tribe. He held that as no prior permission from the competent authority was obtained as contemplated u/s 3 (1) of the Regulation, the sale in execution of the money decree was directly hit u/s 6 of the Regulation. He however held that though several opportunities were available to raise such a question either in the Money Suit or in the execution proceeding the petitioners (Opp. Parties 1 to 3) having not availed of the opportunities are debarred from raising such a plea at this stage under the principles of constructive res judicata and accordingly dismissed the application by his order dated 30-4-74 (Annexure-3). Against the aforesaid, order in Annexure-3 opp. parties Nos. 1 to 3 preferred Regulation Appeal No. 3 of 1974 u/s 3(3) of the Regulation before the District Magistrate (Opp. Party No. 4), who allowed the same by his order dated 21-9-77.

3. Mr. Ratho, learned counsel for the petitioners, submitted that admittedly opp.

parties Nos. 1 to 3 claimed to be "Jarasavar" and in the Presidential Order of 1950 (hereinafter referred to as the "Order") so far as Orissa is concerned there is no classification as "Jarasavar" and it was not for the opposite parties Nos. 4 and 5 to construe the entry "Savar" (in Entry No. 59) and say that "Savar" would be the same class as "Jarasavar". In support of his above contention he cited some decisions reported in B. Basavalingappa Vs. D. Munichinnappa, , and the decision in O. J. C. No. 263 of 1974 of this Court decided on 21-1-1976. On the other hand, Mr. Mohapatra, learned counsel appearing for opp. parties Nos. 1 and 2, relies on the decisions reported in Bhaiya Ram Munda Vs. Anirudh Patar and Others, (referred to by Mr. Ratho) Raghunath Pradhani Vs. Damodra Mahapatra and Others, .

4. The next contention of Mr. Rotho was that the opp, parties Nos. 1 to 3 derived title over the suit land through their father late Boisomo Pradhano and admittedly late Boisomo Pradhano was a party to the Money Suit No. 16 of 1958 and also contested E. P. No. 205 of 1959 in pursuance of which the suit land was sold to the petitioners in court auction. In the above proceeding the question which is now being raised could have been raised and decided. So the learned Officer on Special Duty (Opp. Party No. 5) rightly held R. M. C. No. 109/72 to be barred by the principles of constructive res judicata.

5. Article 342 of the Constitution provides :--

"Scheduled Tribes.--(1) The President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union Territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under Clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid, a notification issued under the said clause shall not be varied by any subsequent notification."

In exercise of the powers conferred by Article 342, the President issued an Order called the Constitution (Scheduled Tribes) Order, 1950 (hereinafter referred to as the "Order") which by the Second Clause provided:--

"The tribes or tribal communities, or parts of, or groups within, tribes or tribal communities specified in Parts I to XVI of the Schedule to this Order shall, in relation to the States to which those Parts respectively relate, be deemed to be Scheduled Tribes, so far as regards members thereof resident in the localities specified in relation to them respectively in those parts of that Schedule."

In the Schedule the names of certain tribes are set out and in Part IX (as it stood, then and now Part XII) under the heading State of Orissa are designated

certain tribes. The tribes designated in Part IX are deemed to be Scheduled Tribes throughout the State of Orissa. In Part IX (Entry No. 59) of the Order "Saora, Saver, Saura, and Sahara" have been described as Scheduled Tribes in Orissa. But "Jarasavar" does not occur in Part IX. So Mr. Ratho, learned counsel for the petitioners, contended that "Jarasavars" are not members of the Scheduled Tribes. On the other hand Mr. Mohapatra, learned counsel appearing for opposite parties Nos. 1 to 3, contended that both the courts have concurrently held that "Jarasavars" are "Savars" and are members of Scheduled Tribes. According to Mr. Mohapatra, the name included in the Order is a general name and applicable to sub-tribe "Jarasavar" which is part of or group within the tribe, or tribal community of. "Savar". He placed reliance on the definition of Scheduled Tribe given in Clause 25 of Article 366 of the Constitution of India and Second Clause of the Order,

6. In order to appreciate the rival contentions it is necessary to find out the position of law on examination of the decisions cited by the learned counsel bearing on the question. In the case of B. Basavalingappa Vs. D. Munichinnappa, the question arose whether respondent No. 1 though "Voddar" by caste belongs to the sub-caste of "Bhovi" mentioned in the Constitution (Scheduled Caste) Order, 1950. In that case it was observed (at p. 1271):--

"It may be accepted that it is not open to make any modification in the Order by producing evidence to show (for example) that though caste A alone is mentioned in the Order, caste B is also a part of caste A and, therefore, must be deemed to be included in caste A. It may also be accepted that wherever one caste has another name it has been mentioned in brackets after it in the Order: Therefore, generally speaking it would not be open to any person to lead evidence to establish that caste B (in the example quoted above) is part of caste A notified in the Order. Ordinarily, therefore, it would not have been open in the present case to give evidence that the Voddar caste was the same as Bhovi caste specified in the Order for Voddar caste is not mentioned in brackets after the Bhovi caste in the Order.

But that in our opinion, does not conclude the matter in the peculiar circumstances of the present case. The difficulty in the present case arises from the fact (which was not disputed before the High Court) that in the Mysore State as it was before the reorganisation of 1956 there was no caste known as Bhovi at all. The order refers to a Scheduled Caste known as Bhovi in the Mysore State as it was before 1956 and, therefore, it must be accepted that there was some caste which the President intended to include after consultation with the Rajpramukh in the Order, when the Order mentions the caste Bhovi as a Scheduled Caste. It cannot be accepted that the President included the caste Bhovi in the Order though there was no such caste at all in the Mysore State as it existed before 1956. But when it is not disputed that there was no caste specifically known as Bhovi in the Mysore State before 1956, the only course open to courts to find out which caste was meant by Bhovi is to take evidence in

that behalf.

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We may again repeat that we have referred to the evidence in this case only because there was undoubtedly no caste known as Bhovi in the Mysore State as it was before 1956 and we had to find out, therefore, which caste was meant by the word "Bhovi" as used in the Order. But for this fact it would not have been open to any party to give evidence to the effect that (for example) caste A mentioned in the Order includes or was the same as caste B where caste A does exist in the area to which the Order applies."

In the case of Bhaiyalal Vs. Harikishan Singh and Others, the question arose out of an election petition as to whether "Dohars" are "Chamars" who are members of Scheduled Caste in the State of Madhya Pradesh in the district of Sehore. It was observed (at pp. 1558-59):

"Thus, the question which arose between the parties for decision in the present proceedings is a question of fact and on this question both the Tribunal and the High Court have made concurrent findings against the appellant. It is true that in reaching their conclusion on this point, the Tribunal as well as the High Court had to consider oral as well as documentary evidence; but in cases of this kind where the Tribunal and the High Court make concurrent findings on questions of fact, this Court does not usually interfere; and after hearing Mr. Chatterjee we see no reason to depart from our usual practice in this matter.

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It is thus clear, that in Order to determine whether or not a particular caste is a scheduled caste within the meaning of Article 341, one has to look at the public notification issued by the President in that behalf. In the present case, the notification refers to Chamar Jatav or Mochi, and so in dealing with the question in dispute between the parties, the enquiry which the Election Tribunal can hold is whether or not the appellant is a Chamar, Jatav or Mochi. The plea that though the appellant is not a Chamar as such, he can claim the same status by reason of the fact that he belongs to the Dohar caste which is a sub-caste of the Chamar caste, cannot be accepted. It appears to us that an enquiry of this kind would not be permissible having regard to the provisions contained in Article 341."

In the case of Parsram and Another Vs. Shivchand and Others, which arose out of an election petition the question was whether "Chamar" covered by Item No. 9 in Part X (Punjab) of the Order falls within the caste of "Mochi". In this case reliance was placed on the decisions reported, in B. Basavalingappa Vs. D. Munichinnappa, and 1557, It was observed (at p. 600):--

"Quite a lot of evidence was adduced orally and also by documents before the learned trial Judge to show that Krishan Lal was a Chamar and not a Mochi. The learned Judge examined the evidence thoroughly and we do not propose to do the same again. In his view Krishan Lal was a mochi and not a chamar and we

do not see any reason why we should come to any different conclusion.

Once we hold that it is not open to this Court to scrutinise whether a person who is properly described as a mochi also falls within the caste of cha-mars and can describe himself as such, the question of the impropriety of the rejection of his nomination paper based on such distinction disappears. In this case, Krishan Lal was found to be mochi and not a chamar and therefore his nomination paper was rightly rejected. He tried to prove by evidence that he was a chamar but he did not succeed therein,"

In the case of Bhaiya Ram Munda Vs. Anirudh Patar and Others, which arose out of an election petition the question for determination was whether "Patars" are "Mundas" specified in Part III of the Constitution (Scheduled Tribes) Order 1950 applicable to Bihar. It was held, (at p. 2535):--

"Whether a particular person is a member of a Scheduled Tribes so declared, by the President under Article 342 of the Constitution is essentially a question of law. Though an admission made by him expressly or by implication that he is not a member of a Scheduled Tribe is evidence against him in an election petition, the evidence is not conclusive."

Referring to the decision reported in B. Basavalingappa Vs. D. Munichinnappa, it was observed (at p. 2539):--

"This Court held that the evidence clearly showed that in 1950 when the Order was passed there was no caste in the then Mysore State which was known as Bhovi and the Order could not have intended to recognise a caste which did not exist. It was therefore necessary to find out which caste was meant by the use of the name Bhovi and for that purpose evidence was rightly recorded by the Tribunal and acted upon by the High Court. This Court accordingly confirmed the view of the High Court. The decision in this case lends no support to the contention that evidence is inadmissible for the purpose of showing what an entry in the Presidential Order was intended to mean."

Referring to a decision of the Supreme Court in the case of Dina v. Narayan Singh (C. A. No. 1622 of 1967 D/- 21-5-1968) the Court held:--

"The decision clearly decides that the name by which tribe or subtribe is known is not decisive. Even if the tribe of a person is different from the name included in the Order issued by the President, it may be shown that the name included in the Order is a general name applicable to sub-tribes."

The decision in Bhaiyalal Vs. Harikishan Singh and Others, was also referred to in this case.

In the case of Raghunath Pradhani Vs. Damodra Mahapatra and Others, which was a case under the Regulation the question for consideration was whether "Bhotras" which is not expressly mentioned as one of the Scheduled Tribes in the Schedule to the Order are members of Scheduled Tribe. The Supreme Court held

(at p. 1823):

"The contention that respondent No. 3 did not belong to a Scheduled Tribe was founded solely on the consideration that he belonged to the Bhotra tribe which is not expressly mentioned as one of the Scheduled Tribes in the Schedule to the Constitution (Scheduled Tribes) Order, 1950. It may be assumed that respondent No. 3 is a Bhotra. But paragraph 2 of the Scheduled Tribes Order, 1950 provides to the extent, material that the Tribes, or parts of or groups within the tribes specified in the Schedule to the Order shall also be deemed to be Scheduled Tribes."

In the case of Dadaji v. Sukhdeobabu reported in AIR 1980 SC 150 which arose out of an election petition the question for determination was whether "Kshetriya Bidwaik Mana" community is included in "Mana" community as mentioned in Entry No. 18 of Part IX (Maharashtra) of the Order as it stood at the time of election in question. By subsequent amendment "Mana" community was included in the group of communities headed by "Gond" community (Entry No, 18)." So it was argued that a "Kshetriya Bidwaik Mana" is a member of the Scheduled Tribe as he belongs to "Mana" community. The Court held (at p. 156):--

"We are, therefore, of the view that the "Mana" community included in Entry No. 18 can only be that which has affinity with "Gonds" and any other community which also bears the name, "Mana" but does not have any such affinity cannot be deemed to fall within the scope of "Mana" in Entry No. 18,"

In the decision of our High Court reported in 1973 (2) CWR 990 (Bimala Peria v. Thabir Dandia) which was a case under the Orissa Regulation 2 of 1956 the question for consideration was whether "Jara Savars" are "Savars" as mentioned in the order, In this case reference was made to the decisions reported in Bhaiyalal Vs. Harikishan Singh and Others, . It was argued that there is no classification as "Jara Saver" and it was not for the competent authority to construe the entry "Savar" to be of the same class as "Jara Savar". The Court ultimately remanded the case to the appellate authority with an observation:--

"We, therefore, allow the petition, set aside the order of the appellate authority and remit the matter to him for a fresh determination. He will consider the contention of the petitioner that the opposite party No. 1 is not a member of the Scheduled Tribe because Jara Savar to which admittedly the opposite party No. 1 belongs is not a Scheduled Tribe and again in view of the description in the several documents, the opposite parity No. 1 is also not a Jara Savar as alleged by him."

In the case of Debadas Majhi v. Additional District Magistrate (Executive) Koraput, reported in 1974 (2) CWR 962 the appellate authority under the Regulation 2 of 1956 held "Dharuas" as Scheduled Tribe in the State of Orissa and not "Dhuruas". A write petition was filed challenging the aforesaid decision of the appellate authority and, this Court held :--

"The admission of the opposite party No. 2 to the effect that the petitioner is a member of the Scheduled Tribes has been completely overlooked by the appellate authority and the appellate authority has proceeded on the basis of the Record-of-Rights. Though we do not have the advantage of seeing the Record-of-Rights, we are prepared to accept the contention of the petitioner's counsel that the record must have been in Oriya language and the description of the caste must have also been stated in Oriya. That being so, no importance could be given to the view of the appellate authority that the spelling being different, it was not open to the petitioner to contend that he was a member of the Scheduled Tribes,"

The case was, therefore, remitted to the appellate court for disposal according to law. In this case reference was made to the decisions reported in *Bhaiyalal Vs. Harikishan Singh and Others*, .

In O. J. C. No. 263 of 1974 D/- 21-1-1976 (*Madan Kamaraju v. Special Officer*) which was a case under the Regulation the question for determination was whether "Kapu Sauras" are "Sauras" within the meaning of Entry 59 of the Schedule to the Order. In the above case reliance was placed on the decisions reported in *B. Basavalingappa Vs. D. Munichinnappa*, . The Court ultimately held that Kapu Saura is not a Scheduled Tribe within the State of Orissa,

In the case of *Sailabala Baxi Vs. Johanas Bissoi and Others*, which arose out of a civil suit the question for determination was whether "Bhotradas are same as "Bhotras" and belong to Scheduled Tribe as indicated in the order. Reliance was placed on the decisions reported in *B. Basavalingappa Vs. D. Munichinnappa*, . In that case it was observed (at p. 218):--

"Plaintiff and defendants 2 to 6 have taken the stand that defendants 2 to 6 are Bhotras belonging to the Scheduled Tribes. The dispute in the present case does not relate to any sub-caste of the named caste, Bhotras as pleaded in the case and Bhotradas as indicated in the Presidential Order refer to the same community and the courts below appear to have come to the correct conclusion. I do not think, on the basis of the decisions of the Supreme Court referred to above, defendant No. 1 can succeed in her contention that defendants Nos. 2 to 6 are not members of the Scheduled Tribes. The first contention must accordingly fail."

In the case of *Prasana Mishal v. Jain Jamana* reported in 1977 (2) CWR 681 which was a case under Orissa Regular lion 2 of 1956 the question for determination was whether "Kampa Sauras" are included in the categories of "Sauras" mentioned in the Order, Reference was made to the decisions reported in *Bhaiya Ram Munda Vs. Anirudh Patar and Others*, and O. J. C. No 263 of 1974 decided on 21-1-1976 (*supra*). It was held that Kampa Soura is not a Scheduled Tribe within the State of Orissa.

In the case of *Narayan Behera v. State of Orissa* reported in 49 Cut LT 47 : 1979 Lab IC 1438 the petitioner was duly selected for appointment as Homoeopathic

Medical Officer on the basis of a certificate that he belonged to Scheduled Caste as he is a member of Dewar community. But he was not given the appointment on the ground that he was not a member of the Scheduled Caste. The petitioner filed the writ petition for a direction to the opposite party to proceed on the footing that the petitioner belongs to the Scheduled Caste and should be given appointment for which he had been duly selected. In the counter it was contended that the petitioner is a ""Kaibarta" and, therefore, not covered by the Scheduled Castes Order, Reference was made to the cases reported in B. Basavalingappa Vs. D. Munichinnappa, . Relying on the decision reported in B. Basavalingappa Vs. D. Munichinnappa, it was held:--

"We have just indicated that according to Clause 2 of the Scheduled Castes Order the castes, races or tribes or parts thereof as specified in the Schedule are to be taken as Scheduled, Castes. Dhibara is a caste and, traditionally it refers to the community engaged in the trade of fishing and rowing of boats, Etymologically derived from the root "Dhi" the word Dhibara refers to the persons engaged in catching of fish. In the "Purnachandra Oriya Bashakosh" which is an accepted authority, the meaning of the word "Dhibara" has been given as "those whose occupation is catching fish". As we have already indicated "Dhibara" is not a community as such and essentially refers to that Section of people in the Society which take to the profession of catching fish,

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Adopting the substance of the ratio, it should follow that when there is no community known as "Dhibara" as such and Dhibara essentially refers to a profession, Kaibartas and Keutas who are traditionally accepted to belong to Dhibara profession should be taken as included in the term Dhibara,

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We are inclined to accept the petitioner's stand that he belongs to the Dhibara community and the Collector of Puri had rightly given him the certificate under Annexure-10, Now that we have found the petitioner to be of the Scheduled Castes, it must follow that the opposite parties should issue the appointment for the post to which the petitioner has been selected."

7. On a conspectus of the decisions referred to above the position that emerges is that :

(1) Generally speaking it would not be open to any person to lead evidence, to establish that a particular caste/tribe is a part of caste/tribe notified in the Constitution (Scheduled Caste/Scheduled Tribes) Order.

(2) It is clear from Article 341/342 that in order to determine whether or not a particular caste/tribe is a Scheduled Caste/Scheduled Tribe within the meaning of Article 341/342 one has to look at the public notification issued by the President in that behalf.

(3) The name by which" a tribe or sub-tribe/caste or sub-caste is known is not decisive. Even if the tribe/caste of a person is different from the name included in the order issued by the President, it may be shown that the name included in the order is a general name applicable to sub-tribe/sub-castes,

(4) Para 2 of the Order provides to the extent material that the tribes, of parts of, or groups within the tribes specified in the Schedule to the Order shall also be deemed to be Scheduled Tribes.

(5) An admission made by a party expressly or by implication that he is not a member of the Scheduled Tribes/Scheduled Castes is evidence against him, but the evidence is not conclusive.

8. Mr. Ratho, learned counsel for the petitioners, submitted that in the decision reported in 1973 (2) CWR 990 (supra) this Court accepted, in principle the decision reported in Bhaiyalal Vs. Harikishan Singh and Others, and has held that "Jarasavars" are not "Savars" as mentioned in the Order. But this contention of Mr. Ratho is not correct. This Court also referred to the decision reported in Bhaiya Ram Munda Vs. Anirudh Patar and Others, and ultimately remanded the case to the appellate authority for fresh determination whether "Jarasavars" are members of the Scheduled Tribe.

Mr. Ratho next argued, that this Court In O. J. C. No. 263 of 1974 decided on 21-1-1976 has categorically held that "Kapu Sauras" are not "Sauras" within the meaning of Entry 59 of the Order. Also in the decision reported in 1977 (2) CWR 681 the view taken was that "Kampa Sauras" are not included in the categories of "Sauras" mentioned in the Order. Mr. Mohapatra, learned counsel for the opposite parties, however submitted that in O. J. C. No. 263 of 1974 the fact that "Kapu Saura" does not come within the corresponding entry for the State of Orissa was not disputed, before this Court. Therefore, it was held that "Kapu Sauras" are not "Sauras" and are not members of Scheduled, Tribes. He further argued that in the case reported in 1977 (2) CWR 681 the lower courts mainly relied on a letter of the Tribal and Rural Welfare Department of the Government of Orissa and held that "Kampa Saura" is included in the tribe of "Saura". This letter was not accepted by this Court, so this decision has no application to the facts and circumstances of the present case. He however placed much reliance on the decision reported in 49 CLT 47 : 1979 Lab IC 1438 (supra) where the Court after considering the evidence on record came to the conclusion that "Kautas" who are traditionally accepted to belong to Dhibara profession should be included in the term "Dhibara".

Mr. Ratho referred to the evidence adduced on behalf of the opposite parties (who were petitioners before the Officer on Special Duty) and submitted, that all the witnesses examined on behalf of the petitioners therein (opposite parties 1 to 3) have stated that they belong to "Jarasavar" caste. According to Mr. Ratho, therefore, none of the witnesses have stated that the opposite parties are Scheduled Tribes or that "Jara Savar" belongs to tribes or tribal communities, or

parts of, or groups within, as specified in Part IX, Entry 59 of the Order. No doubt, they have stated that they are Jarasavars by caste. But the word "caste", it appears, has been loosely used to indicate a group or sub-tribe. P. W. 4 examined on behalf of the petitioners (before the Officer on Special Duty) who is the maternal uncle of O. P. No. 1, has categorically stated:--

"I am Jarasavar by caste. The petitioners are all (of) my caste."

In cross-examination he has stated:--

"I am Jarasavar by caste and, a member of the Scheduled Tribe."

On the other hand, it has not been denied by the witnesses of the petitioners (including one of the petitioners who examined himself) before the Officer on Special Duty (O. P. No. 5) that opp. parties Nos. 1 to 3 do not belong to Scheduled Tribes. Rather O. P. No. 1 has clearly admitted that the petitioners are "Savar" by caste. Mr. Mohapatra learned counsel pointed out that the Officer on Special Duty on a consideration of the evidence on record both oral and documentary has categorically found that the petitioners are members of Scheduled Tribes and this finding has been accepted by the petitioners and has not also been disputed before the appellate court, i.e. the Collector and District Magistrate (O. P. No. 4). So in the premises aforesaid it is clear that the concurrent finding of both the courts below on a question of fact that the opp. parties 1 to 3 are members of Scheduled Tribe is sustainable and in our view this Court should not interfere with the finding arrived at by both the courts below. On a careful consideration of the facts and circumstances of this case and in view of the discussions above, we agree with the finding of the courts below that the petitioners are "Jarasavars", a sub-tribe/group within the tribe or tribal community of "Savar" and are members of Scheduled Tribe.

9. The next question raised by Mr. Ratho is that assuming for the sake of argument but not conceding that the petitioners are members of Scheduled Tribe as held by the Officer on Special Duty (O. P. No. 5) in Revenue Misc. Case No. 109/72, they are debarred from objecting to the sale of the properties in E. P. No. 205/59 on the principle of constructive res judicata. Mr. Ratho submitted that the father of opp. parties Nos. 1 to 3 was a party in the execution proceeding and he had an opportunity to raise an objection that the disputed properties cannot be attached and sold in view of the specific bar in Section 6 of the Regulation and he having not raised such an objection either at the stage of attachment or sale, the same cannot be raised now by the opp. parties Nos. 1 to 3 who are his sons. The learned Officer 013 Special Duty (O. P. No. 5), therefore, rightly decided that the proceeding was barred by the principles of constructive res judicata. But the appellate court, the District Magistrate (O. P. No. 4) has acted illegally in holding that the proceeding is not barred by the principle of constructive res judicata.

10. Mr. Mohapatra, learned counsel for opp. parties Nos. 1 to 3, submitted that in view of the express bar under the provisions of the Regulation specially those in

Clauses 3 and 6 the principle of constructive res judicata has no application to the facts and circumstances of the present case. Opp. Parties Nos. 1 to 3 were not parties in the execution proceeding and they have every right under the provisions of the Regulation to raise the plea that the disputed, properties cannot be transferred, attached or sold without permission of the competent authority. In this case admittedly the permission of the competent authority had not been obtained before the attachment or sale. The decision referred to by O. P. No. 5, Officer on Special Duty, as reported in (1969) 35 CLT 139 (Damodar Mohapatra v. Raghunath Pradhani) in order to hold that the proceeding in Revenue Misc. Case No. 109/72 is barred, by principles of constructive res judicata has been reversed by the Hon'ble Supreme Court in the decision reported in Raghunath Pradhani Vs. Damodra Mahapatra and Others, .

11. Mr. Ratho in support of his contention that the proceeding in Revenue Misc. Case No. 109/72 is barred by the principles of constructive res judicata cited decisions reported in AIR 1958 AP 1 (FB) (Venkateseshayya v. Viryya) Baijnath Prasad Sah Vs. Ramphal Sahni and Another, Bijali Bala Das Vs. Charu Bala Ash, State of U.P. Vs. Nawab Hussain, Petambar Pujari Vs. Bhikari Meher and Another, Ananta Jena Vs. Deity Shri Gopinath Jew, Ramrup Rai Vs. Mst. Gheodhari Kuer and Others, and Sat Pal and Another Vs. Sudershan Lal and Others, . On the other hand, Mr. Mohapatra relied on the decisions reported in 1972 (2) CWR 1951 (Mohant Shri Radhacharan v. Bhima Patra) 1973 (1) CWR 368 (Gopinath Deba v. Biswanath) and specifically Raghunath Pradhani Vs. Damodra Mahapatra and Others, .

12. Clause 3 (1) of the Regulation lays down that notwithstanding anything contained in any law for the time being in force any transfer of immovable property situated within a Scheduled Area, by a member of a Scheduled Tribe shall be absolutely null and void and of no force or effect whatever unless made in favour of another member of a Scheduled Tribe or with the previous consent in writing of the competent authority. Clause 6 of the Regulation provides that in execution of a money decree against a member of a Scheduled Tribe, no right, title or interest held by him in any immovable property within any Scheduled Area shall be liable to be attached, and sold except as and if prescribed. Rule 4 (1) of the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Rules, 1959 says that there shall be no attachment or sale of immovable property in execution of money decrees against a member of a Scheduled Tribe within any Scheduled Area without the written permission of the competent authority. The property at such sale shall be sold only to members of Scheduled Tribes unless otherwise specifically, directed in writing by the competent; authority. Thus from the above provisions it is absolutely clear that transfer of immovable property situated within the Scheduled Area by a member of Scheduled Tribe shall be absolutely null and void if made in favour of a person who is not a member of Scheduled Tribe without prior permission of the competent authority. Also in execution of a money decree against a member of a Scheduled Tribe, no right, title or interest held by him in any immovable property

within any Scheduled Area shall be liable to be attached, and sold except as prescribed.

13. Admittedly in this case no prior permission was taken before the land was attached and sold in execution of the money decree. No doubt, the decisions cited by Mr. Ratho support him to a great extent, but in view of the direct decision on the point, by the Supreme Court reported in *Raghunath Pradhani Vs. Damodra Mahapatra and Others*, and in view of the express provision contained, in Clauses 3 and 6 of the Regulation and Rule 4 (1) of the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Rules, 1959 the decisions cited by Mr. Ratho are of no consequence. In the decision reported in AIR 1973 SC 1820 their Lordships have held (at p. 1823):

"Prior to that sale the property was undoubtedly attached in execution proceedings on July 13, 1963 but the order of attachment was void, being contrary to the express inhibition contained in Clause 6 of Regulation No. 2 of 1956 read with Rule 4 made thereunder. Both Clause 6 and Rule 4 provide that no immovable property belonging to a member of the Scheduled Tribe is liable to be attached or sold except in accordance with the permission granted by the competent authority."

Ultimately their Lordships held that no question of *res judicata* can arise because the basic issue in the case is as regards the validity of the auction sale in favour of respondent No. 2 (who is the son of the decree-holder). This decision reversed the decision reported in (1969) 35 CLT 339 (*supra*) on which the Officer on Special Duty (O. P. No. 5) placed reliance. Mr. Ratho tried to distinguish the case reported in AIR 1978 SC 1820 (*supra*) on facts. He submitted that in that case the decree-holder himself apprised the Executing Court of the position and the parties were conscious of the situation that the property could, not be sold without the sanction of the R. D. O., Nowrangpur. But in the present case the Executing Court had no knowledge about the fact that the judgment-debtor is a member of the Scheduled Tribe and the properties cannot be attached or sold without the previous permission of the competent authority. In the above decision the Hon'ble Supreme Court has held that in view of the express inhibition contained in Clause 6 of the Regulation read with Rule 4 made thereunder, no immovable property belonging to a member of the Scheduled Tribe is liable to be attached or sold except in accordance with the permission granted by the competent authority. Applying the principles laid down in the above decision reported in *Raghunath Pradhani Vs. Damodra Mahapatra and Others*, , we are of the view that the contention of Mr. Ratho is of no consequence

14. In the result, therefore, the writ petition is dismissed. The competent authority is to take appropriate action to restore possession of the disputed property to opposite parties Nos. 1 to 3, if it is found that they have already been dispossessed.

15. There will be no order as to costs.

Behera, J.

16. I agree.