
(2013) 07 BOM CK 0212
In the Bombay High Court
Case No : Writ Petition No. 207 of 2013

Krishna Dhakhu Pilernekar

APPELLANT

Vs

Scrutiny Committee for Verification of Caste Certificate

RESPONDENT

Date of Decision : 04-07-2013

Acts Referred:

Goa State Commissioner for Backward Classes Act, 1993 — Section 9, 9(1), 9(2)

Citation : (2013) 4 ABR 1111 : (2014) 2 ALLMR 356 : (2013) 5 BomCR 550 : (2014) 3 MhLj 49

Hon'ble Judges : U.V. Bakre, J;A.P. Lavande, J

Bench : Division Bench

Advocate : Nitin Sardessai, Deep Shirodkar and L. Raghunandan, for the Appellant; P. Dangui, A.G.A. and G.R. Usgaonkar, for the Respondent

Final Decision : Partly Allowed

Judgement

A.P. Lavande, J.—Rule. Rule is made returnable forthwith. Heard by consent of learned Counsel for the parties.

By this petition, the petitioner seeks the following reliefs:--

(a) Issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction to quash and set aside the Order dated 8.01.2013 passed by the Respondent No. 1;

(b) Issue a direction to quash and set aside the Caste Certificate dated 11.04.2012 and Caste Validity Certificate in favour of the Respondent No. 4 as belonging to OBC;"

(bb) to declare that the Notification dated 1.03.2013 is prospective in nature and consequently validity of the Caste Certificate issued by the Respondent No. 3 in favour of the Respondent No. 4 be valid from the date of the said Notification i.e. 1.03.2013 and not prior to the date of passing of the said above Notification;

2. Briefly, the case of the petitioner is as under:

The petitioner contested the election of Village Panchayat, Mercers from Ward No. 8 against the seat reserved for the candidates belonging to Other Backward Classes ('OBC for short). Respondent No. 4 also contested the election as a candidate belonging to Kharvi Community, based on the provisional Caste Certificate issued by Respondent No. 3 vide Certificate dated 11.04.2012. The petitioner was defeated and Respondent No. 4 was declared elected from the said ward. The certificate issued by Respondent No. 3 is to the effect that Respondent No. 4 belongs to Kharvi Community.

3. The petitioner filed a complaint before Respondent No. 1 to conduct a detailed enquiry and cancel the certificate issued by Respondent No. 3. Respondent No. 1 conducted the enquiry and by judgment 8th January, 2013, ordered that the caste certificate issued by respondent No. 3 in favour of respondent No. 4 was verified and was found to be valid.

4. The petitioner filed the present petition, challenging the judgment passed by Respondent No. 1 on various grounds and initially sought reliefs prayers (a) and (b). The petition was filed on 8th March, 2013.

5. On 1st March, 2013, Respondent No. 2 issued the following addendum to the notification dated 3rd March, 1997 :

Addendum

13/37/2011-SWD/11046

Read : Not. No. 13/1/97-SWD dated 3-3-1997.

At serial No. 3 after the words "Koli/Kharvi (including Christian Kharvi)" of Notification referred above, the following shall be added :

Macchimar/Nustekar/Tisrekar/Kharekar/Byannis (including Christian Peixeira, including Christian Journaleiro/Trabhaladors), Raponkars/Harkar/Magkar/Manshekar/Futanikar/Jalkar/Pagui (including Christian Pascadors) Tari/Tarukar/Hodekar (including Christian Maritino or Marinheiro), Agri (including Christian Saleiro/Saleineiro).

By order and in the name of the Governor of Goa.

V. M. Paranjape, Director & Ex officio Joint Secretary (Social Welfare).

Panaji, 1st March, 2013.

Thereafter, the petitioner sought amendment of the petition and also sought prayer (bb).

6. It is the case of the petitioner that the provisional certificate dated 11th April, 2012 was obtained by Respondent No. 4 by misrepresentation and at the time of issuance of the said certificate, respondent No. 4 did not belong to Kharvi Community and as such he was not OBC and accordingly, could not have contested the election to Ward No. 8 which was reserved for OBC category.

7. Respondent No. 4 has filed an affidavit-in-reply, opposing the petition on various grounds. It is the case of respondent No. 4 that the Notification dated 1st March, 2013 is only clarificatory in nature, and, as such, cannot be held to be prospective, as contended by the petitioner. Respondent No. 4 has also supported the judgment and order passed by Respondent No. 1, on merits. Respondent No. 4 has also relied upon the advice tendered to the Government in exercise of powers u/s 9(1) of the Goa State Commission for Backward Classes Act, 1993 ("the Act" for short), to carry out correction/explanation/rectification to the entry No. 3 of Notification dated 3rd March, 1997, as follows;

a) At entry No. 3 of the word "Koli/Kharvi (including Christian Kharvi). It shall be added namely Macchimar/Nustekar/Tisrekar/Kharekar/Byannis (including Christian Peixeira), (including Christian Journaleiro and Trabhaladors) whose one of the ascendant is among Kharvi), Raponkars/Harkar/Magkar/Manshekar/Futaniar/Jalkar/Pagui (including Christian Pascadors) Tari/Tarukar/Hodekar (including Christian Maritino or Marinheiro), Agri (including Christian Saleiro/Saleineiro).

b) Retrospective effect to give to the said notification as all those members of the caste/community have already included in OBCs State list and have obtained benefits, which have to be protected.

8. Mr. Sardessai appearing on behalf of the petitioner, at the outset, submitted that in view of the Addendum dated 1st March, 2013, published in the Official Gazette on 7th March, 2013, the petitioner is not pressing reliefs (a) and (b), but would press the relief in terms of prayer clause (bb). Learned Counsel submitted that though the Commission had advised the State Government to rectify Entry No. 3 of Notification 3rd March, 1997 and to give retrospective effect, the State Government has not given retrospective effect to the addendum dated 1st March, 2013, and as such, the notification dated 1st March, 2013 is prospective in nature. He submitted that the caste certificate issued by respondent No. 3 in favour of Respondent No. 4 is valid from the date of the Notification and not prior thereto.

Learned Counsel submitted that having regard to the phraseology of the notification dated 1st March, 2013, it is clear that the same is not retrospective, but prospective.

In support of his submissions, Mr. Sardessai relied upon the following judgments :

(1) Vishwanath Pandurang Mahadeshwar, Sai Prasad Gruhanirman Sanstha Vs. Caste Certificate Verification Committee and Others, ;

(2) Sarika Suryakant Khatu Vs. The Secretary/Education Officer, (Primary), Shikshan Sevak Selection Committee, Zilla Parishad, Ratnagiri., Zilla Parishad, Ratnagiri, Tal and Dist: Ratangiri. and State of Maharashtra (Copy to be served upon the Government Pleader's office, High Court, A. S., Mumbai, ; and

(3) Smt. Chaitrali Prakash Borhade Alias Kum. Chitrali Nandu Kedari Vs. Mr.

Rajendra jaywant Dewalekar and others, .

Learned Counsel, therefore, submitted that the petition be allowed in terms of prayer clause (bb).

9. Mr. Dangui, learned Additional Government Advocate appearing for Respondent Nos. 1 to 3 left the matter to the Court.

10. Mr. Usgaonkar, learned Counsel appearing on behalf of Respondent No. 4 submitted that no fault can be found with Respondent No. 1 in passing the impugned judgment inasmuch as although Respondent No. 4 belongs to Agorkar/Mitkar Community, the same is included in Kharvi Community, since Kharvi is generic term used by the general public in Goa, indicating the persons engaged in various specific mode of catching fish, processing and selling activities. According to learned Counsel, the Notification dated 1st March, 2013 is declaratory/clarificatory in nature and, as such, the petitioner is not entitled to the relief in terms of prayer clause (bb). Placing reliance upon the provisions of the Act and more particularly Section 9 of the Act, learned Counsel submitted that the Commission had in the year 2011 already advised the State Government to carry out correction/explanation/rectification to Entry No. 3 of Notification dated 3rd March, 1997 with retrospective effect and, as such, the said advice was binding to the State Government in terms of Section 9(2) of the Act and, as such, no fault can be found with the judgment and order passed by Respondent No. 1 validating the caste certificate issued by Respondent No. 3. According to learned Counsel, the notification dated 1st March, 2013 issued by respondent No. 2 is clarificatory in nature and, as such, it is effective from the date of original notification i.e. 3rd March, 1997 and not from 1st March, 2013, as contended by learned Counsel for the petitioner.

In support of his submissions, Mr. Usgaonkar has placed reliance upon the following judgments :

- (1) S.S. Grewal Vs. State of Punjab and others, ;
- (2) Chandigarh Administration and Another Vs. Surinder Kumar and Others, ;
- (3) Unreported judgment of Delhi High Court dated 23rd April, 2009, in the case of Commissioner of Police & Ors. v. Parmender Kumar and Ors., WP (C) Nos. 1423/1998 & Ors.; and
- (4) Unreported judgment of Madras High Court dated 31st July, 2009, in the case of J. Loganathan v. Union of India and Ors., WP No. 43632/2006.

11. We have carefully considered the rival submissions, perused the record and the judgments relied upon by both sides.

12. There is no serious dispute that the petitioner belongs to Christian Saleiro/Saleineiro Community. In view of the submissions made by Mr. Sardessai that the petitioner is pressing only prayer (bb) and the rival submissions, the issue that would arise for consideration is, whether benefit of Notification dated 1st

March, 2013 can be given to Respondent No. 4? In other words, the issue is whether the Notification dated 1st March, 2013 is prospective or only clarificatory in nature ?

13. We have already quoted the addendum notification dated 1st March, 2013, which adds certain categories as OBC as declared in the Notification dated 3.3.1997 which was published in the Official Gazette dated 25th March, 1997. The said notification reads thus :-

Notification

13-1-97-SWD

Read : 1. Government Order No. 13-3-84-LAWD/OBC dated 12-6-1987 and 9-7-1987.

2. Government of India, Ministry of Welfare Resolution No. 12011/44/96-BCC dated 6-12-1996 published in the Gazette of India No. 210 dated 11-12-1996.

The Government of Goa, after taking into account the Resolution cited above issued by the Government of India, Ministry of Welfare on the recommendations of the National Commission for Backward Classes, have decided to notify inclusion of the below mentioned Communities in the State list of O.B.Cs. with immediate effect.

1. Dhobi, Rajak, Madval (including Christian Dhobies),
2. Nhavi, Nai, Nabhik, Napit, Mahalo.
3. Koli, Kharvi (including Christian Kharvi).
4. Nathjogi.
5. Gosavi.

By order and in the name of the Governor of Goa.

E. Silveira, under Secretary (Social Welfare).

Panaji, 3rd March, 1997.

(Published in the Official Gazette, Series I No. 51 dated 25-3-1997-Extraordinary-2)

14. Before dealing with the rival submissions, we deem it appropriate to refer to the judgments cited by both sides.

In the case of Sarika Khatu (2012 (4) AIR Bom R 327) (supra), the petitioner was belonging to "Vaishya Wani" caste which was not recognised as OBC category. The petitioner relied upon the Government Resolution protecting the service of persons belonging to the said caste who had availed the facility of OBC prior to decision of the High Court pursuant to which the said caste stood excluded from the OBC category. In this factual background, the Division Bench

of this Court held that the fact that in future "Vaishya Wani" caste is likely to be included in the list of OBC pursuant to recommendation to be made by Backward Class Commission, would not be of any avail to the petitioner since that inclusion will obviously be prospective inclusion.

In the case of Chaitrali Borhade (2012 (4) AIR Bom R 353) (supra), the Division Bench was dealing with the case in which the State Government had forwarded the proposal of declaring caste "Vaishya Wani" and "Kulwant Wani" as OBC and Backward Class Commission had instituted survey and was about to prepare report. The Division Bench held that the same could not advance the case of the petitioner inasmuch as inclusion of "Vaishya Wani" and "Kulwant Wani" in the list of OBC category could be done by the State Government, if at all, only with prospective effect and not retrospectively. The Division Bench further held that whether retrospective effect could be given to the recommendation made by the Commission by way of law passed by Legislature, is a matter to be considered by the State Government. The Division Bench further held that the fact that the issue regarding inclusion of "Vaishya Wani" and "Kulwant Wani" castes in the list of OBC was pending with Backward Class Commission, does not take the matter any further.

In the case of Vishwanath Pandurang Mahadeshwar, Sai Prasad Gruhanirman Sanstha Vs. Caste Certificate Verification Committee and Others, , relied upon by Mr. Sardesai, the Division Bench, after referring to the earlier judgments of this Court and the Apex Court, observed that it was well established position that entries in the notified list of OBC must be read as they are. If the State Government intended to add, expand or alter any of the existing entry in the list of OBC in the said category, it ought to follow necessary procedure enunciated by the Apex Court. That, in any case, could not have been done by a clarificatory letter sent by the department. The desired change was possible by issuing Government Resolution by order and in the name of Governor of Maharashtra as was done to include Kathar, Katharwani, Kantharwani as belonging to OBC. The Division Bench, therefore, did not place reliance upon two communications dated 27/04/1989 and 18/10/1989 upon which reliance was placed by the petitioner. The Division Bench further held that the resolution dated 27/04/1989 by which certain castes were included in OBC was issued without following necessary procedure as required to be followed in terms of the judgment of the Apex Court in the case of Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., and subsequent decisions and, therefore, the said resolution was of no avail and did not stand the test of judicial scrutiny. In paragraph 45, the Division Bench held that assuming that this resolution was to prevail, the caste "Vaishya Wani" and "Kulwant Wani" came to be included in the original entry No. 190 for the first time and as such, the benefit of this entry could not be given retrospective effect by the Government Resolution. Moreover, the Caste Certificate issued in favour of the petitioner showing that he belonged to Vaishya Wani was in anterior point of time. The Division Bench further observed that for the reasons already recorded, the resolution could not be sustained since mandatory procedure was not

followed by the State Government.

In the case of J. Loganathan (supra), the Division Bench held that the resolution dated 13/01/2004 including the caste of the applicant i.e. Kannadiyar for the entire State of Tamil Nadu was in the nature of clarification to the earlier resolution dated 10/09/1993 and as such, it had retrospective operation. The Division Bench placed reliance upon the judgment of the Apex Court in the case of S.S. Grewal Vs. State of Punjab and others, , in which it was held that explanatory or clarificatory statute or statutory rules or orders to be read as part of the main statute/rules/orders and as such, would operate retrospectively.

In the case of Parmindar Kumar (supra), learned single Judge of Delhi High Court was considering the question as to whether the resolution/notification of the Government of India dated 06/12/1996 declaring Ahirs and Yadavs and others as belonging to OBC should be with retrospective effect in the sense that the persons belonging to these communities should have the benefit from the date of their appointment or from the date the communities were notified as such by the State Government or from the date of original notification dated 08/09/1993. Learned single Judge held that the said notification was clarificatory in nature.

In the case of W.P.L.I. Limited (supra), the Supreme Court was dealing with the notifications issued under Central Excise Act and the issue was whether the benefit of the notification could be claimed by the industries from the date of issuance of notification and not for the period prior to that date. Having regard to the factual background and the notification issued, the Apex Court held that the notification which granted exemption for the first time in respect of parts of power driven pumps to be used in factory or manufacture of pumps, was not new notification but only a clarificatory notification.

In the case of S.S. Grewal Vs. State of Punjab and others, , the Apex Court was dealing with Punjab Superior Judicial Service Rules, 1963. Having regard to the factual background of the case, the Apex Court held that the letter dated 08/04/1980 was clarificatory in nature and there was no question of its having operation independent of the instructions contained in the letter dated 05/05/1975 and clarification contained in the letter dated 08/04/1980 have to be read as part of the instructions contained in the earlier letter dated 05/05/1975. The facts and the issue in the said case are entirely different and the ratio laid down in the said case is of no help to respondent No. 4.

15. Thus, from a bare perusal of the notification dated 01/03/2013, it is evident that it is not made expressly retrospective by the State Government. The Commission in terms of its advice rendered in the year 2011, had requested the State Government to include different categories in the notification dated 03/03/1997 and also to give retrospective effect. However, the State Government chose to add different categories to the said notification without expressly making it retrospective. In this factual background, the ratio of the judgments cited by Mr. Sardesai in support of his submission that the

notification dated 01/03/2013 is prospective, deserves to be accepted. It was well within the competence of the State Government to issue the said notification by way of clarification making it effective from the date of earlier notification i.e. 03/03/1997, but the State Government chose not to do so. No doubt, in terms of Section 9(2) of the Act, the advice of the Commission is ordinarily binding on the State Government, but this fact by itself would not be sufficient to hold that the notification dated 01/03/2013 is clarificatory in nature.

16. In our view, the ratio of the judgments relied upon by Mr. Sardesai to which we have made exhaustive reference hereinabove, is squarely applicable in the present case. The State Government by the notification dated 01/03/2013 has added certain categories to serial No. 3 of the notification dated 03/03/1997. Admittedly, the petitioner did not belong to Koli/Kharvi community in terms of the original notification dated 03/03/1997, but belongs to Christian Saleiro/Saleineiro. Therefore, in our considered view, the notification dated 01/03/2013 has to be construed as prospective and not retrospective,

17. Insofar as the judgments relied upon by Advocate Mr. Usgaonkar on behalf of respondent No. 4 are concerned, the same do not advance the case of respondent No. 4. Whether the notification is clarificatory or prospective in nature has to be determined having regard to the words used in the notification. Having regard to the plain language of the notification dated 01/03/2013, we have no hesitation to hold that the said notification is prospective and not clarificatory, as contended on behalf of respondent No. 4.

18. In the result therefore, the petition is partly allowed. Rule is made absolute in terms of prayer clause (bb) which reads thus:--

(bb) to declare that the Notification dated 1.03.2013 is prospective in nature and consequently validity of the Caste Certificate issued by the Respondent No. 3 in favour of the Respondent No. 4 be valid from the date of the said Notification i.e. 1.03.2013 and not prior to the date of passing of the said above Notification

Having regard to the facts and circumstances of the case, the parties to bear their own costs.