
(1988) 11 BOM CK 0029

In the Bombay High Court

Case No : Writ Petition No. 1317 of 1988 (Bom. Appellate Side)

Kum. Tanuja

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 03-11-1988

Acts Referred:

Constitution of India, 1950 — Article 15, 342

Citation : (1988) 90 BOMLR 541 : (1989) MhLj 99

Hon'ble Judges : V.S. Kotwal, J;S.P. Kurdukar, J;C.S. Dharmadhikari, J

Bench : Full Bench

Judgement

C.S. Dharmadhikari, J.—In this petition the petitioner has challenged the decision of the Caste Scrutiny Committee holding that the petitioner has failed to prove that she belongs to Bawa tribe which is notified as a Nomadic Tribe in the State of Maharashtra. The petitioner has also challenged the order passed by the Additional Commissioner, Konkan Division, Bombay, the appellate authority, confirming the order of the Caste Scrutiny Committee.

2. Initially this writ petition was placed for hearing before the Division Bench. But in view of an apparent conflict in the decisions of this Court and a contention raised that the decision in Vijay Shrichand Daulatnni v. State of Maharashtra requires reconsideration, the matter came to be referred to a larger Bench. This is how this petition came to be placed before this Full Bench.

3. On the basis of the arguments advanced before the Division Bench as well as before us, the following questions arise for our consideration :

(a) Whether "Bawas" from Sindh can claim the benefit of entry Gosavi or its synonyms as included in the list of Nomadic Tribes vide Government Resolution dated 21st November 1961 as amended from time to time?

(b) Whether the Government Resolution dated 1st April 1987 which directs that Sindhi Community is not covered by the said entry, is illegal as by the said resolution Government has sought to set at nought the decision of this Court in

Vijay Daulatani's case?

(c) What should be the nature of evidence to be adduced before the Scrutiny Committee for establishing the fact that a particular person belongs to Nomadic Tribe?

(d) Whether it is necessary to establish mutual affinity amongst the tribal communities specified in the schedule?

4. It was contended by Shri Gursahani, learned Counsel appearing for the petitioner, that the petitioner belongs to Hindu Bawa Nomadic Tribe, which was originally recognised as Other Backward Class in Sindh, West Pakistan. Prior to the partition of India, Sindh was part of the then Bombay Presidency. After partition members of the Sindhi Community migrated to India. They migrated with their traditions and castes and, therefore, it will not be correct to say that Bawas from Sindh have socially or ethnically nothing in common with the community of Gosavi or Bawa notified by the Government of Maharashtra as Nomadic Tribe. In Vijay Daulatani's case the Division Bench of this Court has rightly come to the conclusion that even after migration the caste remained unchanged and, therefore, Bawas from Sindh were entitled to the benefits meant for the Nomadic Tribes.

5. On the other hand it is contended by the learned Advocate General that reservations qua Other Backward Classes or Vimukta Jati and Nomadic Tribes are provided under Article 15(4) of the Constitution of India. When in 1928, the then Government of Bombay appointed a Committee under the Chairmanship of Mr. Starte to enquire into the educational, economic and social conditions of depressed classes, "Sindh" was excluded from the purview of the said Committee. The said Committee had submitted its report to the Government in 1930. Further from the Government resolutions issued from time to time, it is clear that whenever the Government wanted to include any caste or tribe from Sindh, a specific mention has been made in that behalf. The Bawa caste from Sindh is not any way socially or ethnically connected with the Communities known as Bawas, Bairagis or Gosavis from Maharashtra. Therefore, Bawa caste from Sindh was never included in the list of Nomadic Tribes as applicable to the State of Maharashtra. It is also contended by him that the Division Bench of this Court in Vijay Daulatani's case did not consider various aspects of the matter and erred in coming to the conclusion that Bawas from Sindh are also included in the schedule relating to the Nomadic Tribe.

6. In support of their rival contentions learned Counsel have placed strong reliance upon the following decisions :

(1) Vijay Daulatani v. State of Maharashtra (1985) 2 B.C.R. 488

(2) Prakash Ghanshamdas Nathani v. The State of Maharashtra (1982) W.P. No. 2388 of 1981 decided, April 7, 1982 by Deshpande C.J. and Lentin, J. (Unrep.)

(3) Maharashtra Adivasi Thakur Jamat Seva Mandal v. State of Maharashtra

[1986] Mah. L.J. 1021

(4) Devidas Baburao Hajare v. State of Maharashtra [1987] Mah. L.J. 801

(5) Mukesh Thakur v. State of Maharashtra (1983) O.S. Appeal No. 44 of 1983 in W.P. No. 2177 of 1982 decided, October 21, 1983 by Kania & Mehta, JJ. (Unrep.).

(6) Subhash G. Kabade v. State of Maharashtra (1986) W.P. No. 438 of 1983 decided, June 19/20, 1986 by Jamdar & Ratnaparkhi, JJ. (Unrep)

(7) Kum. Sunita Shamrao Pimpelker v. State of Maharashtra (1980) W.P. No. 2282 of 1980 decided, September 5, 1980 by Deshpande C.J. and Bhonsale, J.

(8) Vijayalaxmi K. Ambolkar v. State of Maharashtra (1985) W.P. No. 471 of 1985 with W.P. 537 of 1985 decided, October 15, 1985 by Khatri & V.P. Salve. JJ. (Unrep.)

(9) Miss Ashlesha A. Sankhe v. State of Maharashtra (1986) O.S. Appeal No. 1008 of 1986 in W.P. No. 2704 of 1986 (Bom. Original Side) decided, November 14, 1986 by Kania C.J. and Parekh, J. (Unrep.).

(10) Milind S. Katware and Ors. v. State of Maharashtra [1984] Mah. L.J. 289

(11) Abhay Parate v. State of Maharashtra [1984] Mah. L.J. 289

(12) Sunil N. Umbordekar v. Dr. V.G. Ranade (1980) W.P. N. 2404 decided on September 24, 1980 (Unrep.).

(13) Uttam Bidessingh Rajput v. State of Maharashtra (1983) W.P. N. 1915 decided on July 16, 1983 (Unrep.).

(14) Madhavrao Rajput v. State of Maharashtra (1983) W.P. No. 1914 of 1983 decided on July 16, 1983 (Unrep.).

(15) Bijendra Pratap Patel v. S.L. Dipali (1983) W.P. N. 2749 of 1982 decided on June 23, 1983 (Unrep.).

(16) Baban V. Choudhary v. State of Maharashtra (1986) W.P. N 1197 decided on July 21, 1986 by Qazi & Deshpande, JJ.

(17) State of Maharashtra Vs. Abhay and Others, .

(18) Bhiwaji Eknathrao Kavale v. State of Maharashtra (1982) W.P. N 1572 decided on February 3, 1982 by Kanade and D.B. Deshpande, JJ. (Unrep.).

(19) Miss Anupama d/o Niranjana Chawla v. State of Maharashtra (1984) W.P. N. 2195 decided on July 9, 1984 by S.K. Desai and Kurdukar, JJ. (Unrep.).

(20) Yeshwant Maharaj Pawar v. State of Maharashtra (1988) W.P. N 4681 with W.P. No. 703 of 1988 decided on February 15, 1988 by Sawant and Kolse-Patil, JJ. (Unrep.).

7. With the assistance of the learned Counsel appearing for both sides we have

gone through the entire material placed before us. It is not disputed that initially "Sindh" was part of Bombay Presidency. In the census report of India (for Bombay Presidency) 1911, in column relating to Caste or Tribe "Bairagi" is included, and it is clarified that it is found in Karachi, Hyderabad, Shikarpur. In the column dealing with "principal occupations" it is mentioned that they are devotees and religious beggars. In column synonyms "Gosain" is referred to. In census report of 1921 for Bombay Presidency, Bawa Caste is included in the list of Backward Classes. In Appendix F to the census report of 1931 for Bombay Presidency, it is specifically stated that Bawa, A tit, Bairagi, Gosavi, or Gussain and Sadhu castes cover the whole presidency. Their traditional or habitual occupation was beggars or devotees. It was also clarified in the Remarks Column that the terms enumerated are not really synonymous but are mostly occupational character. It is no doubt true that by a Government Resolution dated May 29, 1933 it was made clear that the orders passed under the said resolution, do not apply to Sindh. This was obvious since Sindh was excluded from the purview of the Starte Committee. By Government of India Act, 1935, Sindh was made a separate province and, therefore, separate notifications were issued for the State of Bombay and State of Sindh. By a resolution dated September 7, 1942 issued by the Government of Sindh "Bawa" was included in the list of Other Backward Classes. In the list of Other Backward Communities "Bawa" was included by the then Government of Bombay, vide resolution dated April 23, 1942. On partition of India, refugees from Sindh migrated and settled in the various parts of the country, including State of Bombay. Vide Government of Bombay resolution dated November 1, 1950 "Bawa" was included in Other Backward Communities. Then by a Government resolution dated November 21, 1961, issued by the Government of Maharashtra, a list of Nomadic Tribes was notified. As per schedule II to this resolution, which deals with the Nomadic Tribes in Maharashtra, the community "Bawa" is included with its synonym "Bairagi". In the accompaniment to the Government circular, Education and Social Welfare Department dated October 1, 1962, also the said entry is continued. The entry thereafter came to be amended from time to time and the entry as corrected vide Government resolution dated December 9, 1977 read with corrigendum dated April 10, 1978, reads as under :

Synonyms

Community. (1) Bawa, (2) Bairagi, (3) Bharati, (4) Girigosavi, (5) Bharati Gosavi, "Gosavi" (6) Saraswati Parbat, (7) Sagar, (8) Ban or Van, (9) Teerth Ashram, (10) Aranya Gharbhari, (11) Sanyasi, (12) Nathpanthi Gosavi.

8. Thus as the entry stands today main community is "Gosavi" and others are synonyms. If all these Government Resolutions are read together with the historical background, it is clear that Sindh being a part of Bombay Presidency. Bawa Caste also came to be included in the resolutions issued by the then Government of Bombay.

9. After the Government of India Act, 1935, separate lists were prepared for Bombay Presidency and for the State of Sindh and in both these lists Bawa Caste is included. It is no doubt true that in the lists prepared vide Government Resolution dated November 1, 1950 relating to Other Backward Communities at item No. 54 Jagiasi, 55 Jajuk, 73 Khati, 83 Kori, 86 Kucchria and 138 Suthria, a specific expression i.e. "from Sindh" is used. This position continued in the modified list of 1956 and 1961 also. It is pertinent to note that Bawa was included in the list of Nomadic tribes for Maharashtra as well as Other Backward Classes qua Old Bombay territory. On the basis of this it was contended by the learned Advocate General that whenever a particular caste from Sindh was sought to be included in the list of backward class, a specific mention in that behalf is made in the entry itself. In the entry relating to Bawa Caste or tribe such a mention is not made, which clearly indicates that Bawas from Sindh are not included in the said entry.

10. We find it difficult to accept this contention. Once it is held that historically Sindh was a part and parcel of the Bombay Presidency and even from the census reports of the years 1911, 1921 and 1931 it is clear that this caste covered the whole of the presidency, then only because qua certain caste a specific mention is made, an inference cannot be drawn that qua others the persons from Sindh are excluded by necessary implication. On the other hand, it appears that whenever it was intended that a particular entry should be restricted to a particular area, a specific reference is made in that behalf. Whenever, it was intended that the entry should cover the whole area, the restrictive expression is not used. Therefore, a person belonging to Bawa Community or tribe from Sindh which was in existence in Bombay presidency will be entitled to the benefits meant for Nomadic Tribes, if he satisfies other conditions, including that of mutual affinity.

11. It appears that after the decision of this Court in Vijay Daulatani's case, on April 1, 1987, the Government of Maharashtra issued a notification stating that except for the entry Nos. 49, 50, 65, 81 and 146 in the list, from other entries of the list (which includes the list relating to Nomadic Tribes) Sindht Community stands excluded. This Government Resolution itself is challenged before us as being ultra vires and illegal. If the Government resolution dated April 1, 1987 is read as a whole then it is obvious that it came to be issued to set at nought or to get over the decision of this Court in Vijay Daulatani's case. It is well settled that the State while purporting to clarify the position cannot enter upon judicial power and set aside the binding judgment of this Court by issuing such an executive fiat. The executive cannot by mere declaration directly or indirectly overrule or reverse a judicial decision. This position is not disputed by the learned Advocate General. However, it was contended by him that this was not a case of directly or indirectly encroaching upon the judicial power of the court or of setting aside the binding judgment of this Court in Vijay Daulatani's case, as Bawas from Sindh were never included in the list. According to him the said resolution is merely explanatory or declaratory. Since we have already held that Bawas from Sindh

were included within the purview of the Government Resolution of November 21, 1961, it will have to be held that the subsequent Government resolution dated April 1, 1987. to the extent it seeks to set at nought or overrule the binding judgment of this Court in Vijay Daulatani's case is obviously illegal and ultra vires, being beyond the scope of Executive power of the State Government. In the view which we have taken the questions (a) and (6) are answered in the affirmative.

12. So far as the question relating to the nature of evidence to be adduced before the Scrutiny Committee, for establishing the fact that a particular person belongs to the Nomadic Tribe, is concerned, from the various decisions referred to above, it is clear that in none of these decisions any general principle or rule has been laid down. All these cases have been decided by the various Division Benches having regard to the facts and circumstances of each case. Variety of circumstances and peculiar features of each case cannot be identical with those in another. There are no legal litmus tests to determine the question. Therefore, the judgment of a court as to why certain claims are accepted or rejected can hardly serve as binding decision. For this reason we are not referring to the various decisions cited at the Bar. It is equally true that so far, no satisfactory criteria has been laid down to determine the question and the courts have been following case to case approach, resulting in no satisfactory solution. However, in our view, it is not possible to lay down any general criteria which will apply to all cases since no singular test could be laid down. As observed by the Supreme Court in K.C. Vasanth Kumar and Another Vs. State of Karnataka, and particularly in para 77 (at p. 1528):--

Poverty, Caste, Occupation and Habitation are the principal factors which contribute to brand a class as socially backward. The customs which they honour and observe, the rituals which they fear and practice, the habits to which they adapt and conform, the festivals which they enjoy and celebrate and even the Gods that they revere and worship are enlightening elements in recognising their social gradation and backwardness.

13. Therefore, it cannot be said that the questionnaire prepared by the Scrutiny Committee is based on irrelevant or extraneous considerations. The questions relating to origin, old traditions, customs, festivals, god and goddesses, language, mother tongue, racial features, traits and characteristics of community, surnames, occupation, names and surnames of near relatives, treatment meted out by the tribal community and others are all relevant for identifying the person and his caste. Similarly duly verified and scrutinised caste certificates of close relatives or validly accepted caste claims of blood relations, entries in public records or the fact that the concessions meant for the tribe were either availed of or not, are relevant though none of them by themselves may be decisive. As rightly contended by the learned Advocate General, occupational traits of family both present and past, treatment meted out by others and the evidence relating to migration etc. are also relevant for determining the question as to whether a

particular person belongs to Nomadic Tribe referred to in the schedule. However, weightage to be attached to any one of these factors must depend upon the facts and circumstances of each case, which can only be evolved by thoughtful penetrating investigation and analysis. It cannot be determined by means of a mathematical formula but must depend upon the totality of the circumstances brought on record. For deciding the said question reports of the various Commissions and the Research Papers of the experts are also relevant. It is true that the younger generation may not be able to answer all these questions; but in that case elders from the family or community, could be examined. In this context a reference could usefully be made to the latest decision of the Supreme Court in *State of Andhra Pradesh and others Vs. Nagam Chandrasekhara Lingam and others*, .

14. Any contrary observations in the earlier Division Bench decisions obviously do not lay down the correct law. Hence ultimately; the concerned authorities will have to decide the matter on the basis of the evidence adduced before them in each case. Therefore Question No. (c) is answered accordingly.

15. So far as the question as to the mutual affinity among tribes included in an entry is concerned, in our view the law laid down by the Supreme Court in *Dadaji alias Dina Vs. Sukhdeobabu and Others*, will apply to the present schedule also. If all the Government Resolutions are read together, it is clear that certain communities have been grouped together and therefore, it is reasonable to hold that the communities named against a specific entry are those which have mutual affinity amongst them. Hence Bow a community included in the entry can only be that which has affinity with Gosavi. Other Castes or Communities which also bear the same name but do not have such affinity cannot be deemed to fall within the scope of the said entry.

16. It is no doubt true that it was contended by Shri Gursahani that since in the schedule the main community and its synonyms are included, which has been done on the basis of the mutual affinity itself, it is not necessary to independently establish such an affinity. We find it difficult to accept this contention. It appears that the Government of Maharashtra has been extending the Welfare scheme to four depressed or backward classes i.e. Scheduled Caste, Scheduled Tribe, Vimukta Jati -- Nomadic Tribes, and Other Backward Classes. It appears to be the case of the State Government that benefits under the resolution are made available to Vimukta Jati and/or Nomadic Tribes which mainly include all castes covered by the Old Criminal Tribes Act, 1924, or Tribes which are in fact Nomadic. It is also experienced by the Government that attempts are being made by persons not belonging to any of these communities to rob the benefits meant for the genuine persons. In *Maharashtra Adivasi Thakur Jamat Seva Mandal's case* (supra) a note was taken by this Court of the fact that there is also a caste known by name "Thakur" which is the amalgamation of certain sub-castes and the people belonging to the said caste were taking advantage of the benefits meant for the tribes known as Thakur etc.

It appears that in one of the cases before us i.e. Miss Ashlesha A. Sankhe's case on the basis of some similarity in the nomenclature of caste Vanjari and Tribe Banjara some debate has been raised. Similar is the case with Rajput, Pardeshi, joshi, Koli and Kunbi etc. Therefore, it is absolutely necessary to find out in each case as to whether a claimant belongs to a tribe notified or a caste carrying similar name. By creating some confusion or raising a cloud nobody should be permitted to rob the benefits meant for the genuine tribals. It is experienced that the benefits are snatched away by vocal classes by creating confusion or by taking advantage of similarity in the name, thereby keeping the weaker among the weak always weak. Therefore, in our view a thorough enquiry as to the mutual affinity amongst the main tribe and the tribes referred to as synonyms or sub-tribes is absolutely necessary. Though the list of Nomadic Tribes is referable to Article 15(4) of the Constitution, from the various Government Resolutions, it is clear that the principle followed for preparing the list is akin to the one followed for preparing the list under Article 342 of the Constitution. It is obvious that these communities have been grouped together and therefore it is reasonable to hold that the communities mentioned in the entry are those which have mutual affinity amongst them. Such a mutual affinity test will have to be satisfied before a person belonging to a particular caste or a tribe can claim the benefit of the Government Resolution. The list is meant for the State of Maharashtra and it will have to be established that the claimant belongs to Bawa tribe existing in Erstwhile Bombay Presidency, which has affinity with Gosavi, the main tribe. Therefore, we answer the question No. (d) in the affirmative.

17. So far as the merits of the case are concerned it is obvious that in view of our aforesaid findings the matter will have to be scrutinised over again by the authorities below. Hence the orders passed by the Scrutiny Committee as well as the Additional Commissioner, are set aside and the matter is remitted back to the Caste Scrutiny Committee for deciding it afresh in accordance with law, obviously after giving a reasonable opportunity of being heard to the petitioner. Hence Rule is made partly absolute with no order as to costs.

18. Before parting with this judgment we would like to draw the attention of the Government towards the judgment of the Supreme Court in *K.C. Vasant Kumar v. State of Maharashtra* (supra). To say the least the ultimate goal is of assimilation of these tribes with the main society and to bring them in the main stream. The social and Constitutional policy is to integrate tribals with larger society and not to preserve them as human specimen. Therefore, it is now high time that a fresh survey or scrutiny in this behalf is undertaken. We hope that the Government will take necessary steps for revision of the lists or schedules, in tune with the observations of the Supreme Court in the aforesaid decision. Government should also take such steps as are necessary to ensure that the persons not belonging to tribes will not be able to rob the benefits, thereby depriving the genuine tribals of their rights.