

(2009) 05 JH CK 0011
In the Jharkhand High Court

Neena Bharti

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 07-05-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 342

Citation : (2009) 05 JH CK 0011

Hon'ble Judges : Ajit Kumar Sinha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Ajit Kumar Sinha, J.—In the instant writ petition the petitioner prays for issuance of an appropriate writ, order or direction particularly a writ in the nature of certiorari for quashing of letter dated 22.11.2007 as contained in memo No. 4468 (ii), by which the caste certificate issued on 08.04.1992 by the District Welfare Officer and 13.04.1998 by the Sub-Divisional Officer, Ranchi Sadar, Ranchi has been cancelled in a most arbitrary manner and that too retrospectively In terms of circular dated 03.01.2007, which also says that this circular will come into existence prospectively without considering the fact that the caste certificate issued to the petitioner was issued In terms of the circular dated 03.03.1979, which came into existence after the Constitution Bench judgment of the Hon''ble Supreme Court as reported in Shri V.V. Giri Vs. Dippala Suri Dora and Others, .

The petitioner further prays for issuance of an appropriate writ, order or direction particularly in the nature of certiorari for quashing of show cause dated 27.11.2007 Issued under signature of the respondent No. 7, by which the petitioner was asked to reply why she should not be removed from the service of the University 6n cancellation of her caste certificate by the District Welfare Officer, Ranchi and only three days time has been given to the petitioner to file reply to the said show cause shows the malafide intention on the part of the respondents towards the petitioner, to whom the caste certificate has been

issued genuinely, legally and within the four corners of law and the said show cause is merely a formality because it is apparent from the said letter that the said decision has been taken for removal from service on the ground of caste certificate when in an earlier opinion sought by them from the learned Advocate General, Jharkhand, her appointment and the caste certificate was said to be legal by the learned Advocate General, Jharkhand and inspite of that they are issuing the show cause for the reasons best known to them.

The petitioner has further prayed that during pendency of the instant writ application, the operation of letters dated 22.11.2007 & 27.11.2007 may kindly be stayed.

2. The facts, in brief, are set out as under:

The petitioner was appointed as Training Associate, Plant Protection and she joined on 03.08.2004 before the Directorate of Extension Education and was posted at Krishi Vigyan Kendra, Bokaro. Vide letter dated 11.10.2007 the appointment of the petitioner was kept in abeyance on the ground of objection of her caste certificate Scheduled Tribe pending enquiry. On 12.10.2007 a show cause was issued as to why the services of petitioner be not terminated. The case of petitioner is that a Government circular was issued on 03.03.1979 which speaks that If a general category person marries with a reserved category, as in the instant case, who happens to be a scheduled tribe, then the children born out of said wedlock would be considered as scheduled tribe and this circular was issued based on a judgment passed by a Constitution Bench of Hon'ble Supreme Court reported in Shri V.V. Giri Vs. Dippala Suri Dora and Others, . On the basis of application preferred by the petitioner the District Welfare Officer upon due enquiry and in view of the prevailing circular dated 03.03.1979 and the Constitution Bench judgment passed by the Hon'ble Supreme Court issued caste certificate on 08.04.1992. The Sub-Divisional Officer based on the aforesaid certificate also issued the caste certificate. In the instant case the mother of the petitioner is schedule tribe Oraon and the father is non-tribal and they got married in the year 1967 and the petitioner was born out of the said wedlock.

3. A show cause notice was issued by the Director, Administration, Birsa Agricultural University to which a reply was filed on 16.10.2007 clarifying that no mischief was done and also clarified the legal position. It appears that the matter was referred to the learned Advocate General to give his opinion on the issue and the learned Advocate General gave his opinion in favour of the petitioner and accordingly the office order dated 19.11.2007 issued under the signature of Director, Administration by which the suspension/appointment was kept in abeyance was revoked and directions were issued to pay the salary for the period of suspension as per rule. A memo No. 4468 (ii) dated 22.11.2007 was issued under the signature of the District Welfare Officer, Ranchi vide which the caste certificate issued to the petitioner on 08.4.1992 and the certificate issued on 13.4.1998 were cancelled relying upon a subsequent judgment of the Hon'ble Supreme Court reported in 2006 (2) JUR 186 (SC). The aforesaid order was

issued based on the interpretation of the Hon''ble Supreme Court judgment and the new circular dated 03.01.2007 by applying the same retrospectively. Thereafter a show cause was called for vide letter dated 27.11.2007 issued under the signature of the Director, Administration as to why the petitioner should not be removed from service on cancellation of the caste certificate issued on 08.04.1992 and 13.04.1998. The present writ petition has been preferred by the petitioner to quash annexure-9 by which the caste certificate granted in favour of the petitioner has been cancelled retrospectively by the State Government as well as for quashing of annexure-10 by which a show cause has been issued by Birsa Agriculture University and also for quashing annexure-12 of the amendment petition vide which the services of the petitioner was terminated with effect from 30.11.2007.

4. Sri Anil Kumar Sinha, learned Senior Counsel appearing for the petitioner has contended that the petitioner was not given any show cause notice before cancellation of the caste certificate and the impugned order was against the well settled cardinal principles of natural justice and thus violative of Article 14 of the Constitution of India. The second contention raised by the learned senior Counsel is as to whether the second circular dated 3.1.2007 which was made effective from the date it was introduced could have been applied retrospectively. The third contention raised by the learned senior Counsel for the petitioner is that the entire enquiry was done behind the back of the petitioner and she was not even afforded any opportunity to justify her case. The learned senior Counsel also submits that a legal, accrued and or vested right cannot be taken away retrospectively more so, when the same was upheld based on the earlier circular of 1979. It is further submitted that the Division Bench order of Hon''ble Supreme Court reported 2006 (2) JLJR 186 (SC) Shri V.V. Giri Vs. Dippala Suri Dora and Others, which is a Constitution Bench judgment and was binding and enforceable and in this regard he also submits that the judgment referred to and relied upon by the respondents (supra) for bringing out the new circular and cancelling the caste certificate followed by termination was per incuriam since it was a judgment by two Hon''ble Judges and the law in this regard is well settled. To support his contention he refers to para 74 of K.H. Siraj Vs. High Court of Kerala and Others, . It has further been contended that the petitioner has made out a specific case as to how even under the customs prevailing and the difficulties faced in the light of the ratio of the judgment she was rightly needed to, be declared as scheduled tribe in the reserved category based on the circular of 1979.

5. Per contra, the learned Senior Counsel for the State submits that no case has been made out as to how the petitioner was prejudiced nor any case is made out to claim it as customary right as held in all the aforesaid judgments. He also refers to Tribal Medical Association Vs. The State of Jharkhand and Others, a Division Bench order of this Court on the issue that in such cases the children born from the wedlock of non-tribal and tribal do not have an automatic right and he further submits that the caste certificate will be based on the caste of the

father and not the mother. He further refers to and relies upon para-15 of the judgment of Hon''ble Supreme Court reported in 2006 (2) JLJR 186 (SC) to support his contention.

6. I have considered the rival submissions and the pleadings and the case law in this regard. In the instant case the circular dated 3.1.2007 which has been annexed as annexure-11 at page 69 is based on the aforesaid judgment (supra) passed in and this circular clearly specifies that in view of the judgment of the Hon''bte Supreme Court such persons who are born from the wedlock of non-tribal and tribal couple will not be entitled to be declared as scheduled caste or scheduled tribe. However, this circular specifically states that it will apply prospectively. This circular does not declare the issuance of caste certificate based on the earlier circular No. 106 dated 3.3.1979 as Illegal nor it has cancelled/recalled the earlier caste certificate Issued as per circular dated 3.3.1979 which was based on the judgment passed by the Constitution Bench of the Hon''ble Supreme Court.

7. The law in this regard is well settled and the Hon''ble Supreme Court has time and again held that a legal right which has accrued and vested in a person based on a statute, rule, circular or policy and has been acted upon cannot be taken away retrospectively. In the instant case the new circular has been issued after 28 years which specifically provides that it will apply prospectively and thus the same cannot be made the basis to take away the legal, accrued and a vested right retrospectively. A Full Bench of this Court in 2000 (4) PLJR 262, Maheshwar Prasad Singh v. State of Bihar (FB) has specifically held that any rule, instruction and or circular which has come into effect subsequently, cannot be applied retrospectively. This issue is no more res integra and the Hon''ble Supreme Court in Secretary, A.P. Public Service Commission Vs. B. Swapna and Others, while considering a similar issue with regard to the eligibility conditions of qualification/experience has conclusively held that every statute or statutory Rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights, the Rule must be held to be prospective.

8. It is further well settled that any action which is punitive in nature and Involves civil consequence has to mandatorily comply with the cardinal principles of natural justice and in absence or non-compliance of the same renders the order illegal and violative of Article 14 of the Constitution of India. In the instant case no notice or show cause was given to explain the position before canceling the caste certificate. The fact remains that the University has no role to play once the authority under the State Government, competent to issue the caste certificate, cancelled the same unilaterally and thus the subsequent show cause was of no consequence.

9. I have also considered the Constitution Bench judgment (supra) which permitted issuance of such caste certificate in case of a person born from the

wedlock of non-tribal with a tribal based on which the earlier circular of 3.3.1979 was issued and It was that circular and the Constitution Bench judgment based upon which the caste certificate was issued and the same could not have been taken away without affording an opportunity to the petitioner. In the case of Shri V.V. Giri Vs. Dippala Suri Dora and Others, , the Constitution Bench of the Supreme Court, while dealing with the question of the acceptance of a couple in a tribal community In the event of the tribal marrying a non-tribal and the recognition thus granted to such couple, observed as under:

The caste status of a person in the context would necessarily have to be determined in the light of the recognition received by him from the members of the caste into which he seeks an entry.

10. Undoubtedly, Article 342 of the Constitution of India relating to the subject of Scheduled Tribes gives the power to the President of India to notify and specify by public Notification the Tribes and tribal community, which for the purposes of the Constitution would be deemed to be Scheduled Tribes. It also gives the Parliament a power to delete or add to such list by making a law to that effect.

Article 342 of the Constitution reads as under:

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 front 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.

11. In exercise of powers conferred upon him under Article 342(1) of the Constitution, the President has issued the Scheduled Tribes Order, 1950 and no addition or deletion from the List of Scheduled Tribes can be made except by the President himself by issuing a Notification in terms of Clause (1) of Article 342 or by Parliament by making a law to that effect in terms of Clause (2) of Article 342. The impugned Circular and the impugned communication issued by the State Government and the Central Government respectively do not amount to either deleting, or adding, or adding or varying or modifying the List of Scheduled Tribes at all. What these Intend to do Is to explain a situation where, in the event of a tribal woman marrying a non-tribal man, the offsprings born out of such matrimonial alliance should be accorded the status of the tribe to which the woman belongs on the condition that the Society of the Tribes to which the woman belongs has recognized such matrimonial alliance and accepts the couple into their fold. This explanation does not amount to addition to, or deleting from

the List of Tribes, their groups or their part in any manner. Actually, these notifications are based on the judgment of the Supreme Court in the case of V.V. Giri v. D.S. Dora (supra). The observations of the Supreme Court in V.V. Giri that the caste status of a person would necessarily have to be determined in the light of the recognition received by him from the members of the caste into which he seeks an entry, appear to have formed the basis and the foundation stone for issuance of the aforesaid Notification by the Central Government which was followed by the State Government subsequently.

12. Thus there is no doubt whatsoever that the impugned Circular or the impugned Notification do not in any way impinge upon the power of the President under Clause (1), or the power of Parliament under Clause (2) of Article 342 of the Constitution, because primarily these do not deal with any matter relating to addition to or deletion from the List of Scheduled Tribes. The Notifications merely can be called as explanatory, or at best clarificatory instruments to cater to an unforeseen fact situation not conceived in normal circumstances and, therefore, it can be safely held that they are outside the scope and ambit of Article 342 of the Constitution of India and on that basis cannot at all be termed as ultra vires the Constitution.

13. The consistent view of the Courts remains that an enquiry has to be held to determine as to whether the person concerned is being treated and accepted by the scheduled tribe community or not. In the supplementary affidavit filed on 5.1.2008 annexure-15 the petitioner has supported the aforesaid requirement by filing certificate Issued by Kendriya Sarna Samiti which has specifically stated that the petitioner has been accepted by scheduled tribe community and is being treated as scheduled tribe and is following all the customary rituals of tribe. The petitioner has also made out a claim by satisfying that she has suffered disability, socially, economically and educationally before such certificates were issued. Further separate affidavits have been filed by many such tribals to support the contention that the father of the petitioner has also been accepted by the scheduled tribe community and is being treated as ST. and is following all the customary rituals of a tribe. There is another factor which even though recommendatory in nature but demands respect and that is the opinion of the Advocate General in favour of the petitioner which was obtained by the petitioner under the Right to Information Act. The petitioner also marked annexure 13, 13/1 and 14 in the supplementary affidavit enclosing the file noting which was obtained under the Right to Information Act on 26.4.2008 wherein the Government has admitted the fault that the circular as contained in annexure 11 to the writ application was to be applied prospectively, i.e. from 3.1.2007 and it cannot be applied in any case retrospectively. It also records that no approval, consent or permission was taken from the Government before cancellation of caste certificate.

14. A Division Bench of this Court in 2001 (3) JCR 169 (Society for Protection and Enforcement of Adivasi Right and Anr. v. The State and Ors.) while

considering the validity of the notification/circular dated 3rd March, 1979 held at paragraph 11 that it cannot be termed as ultra vires to Article 342 of the Constitution of India. Thus it can be safely presumed that even the Division Bench of this Court upheld the circular of 3rd March, 1979 based on which the caste certificate was issued and it can be safely presumed and said that it was binding till the new circular of 2007 came into operation. In this very judgment the learned Division Bench at paragraph 10 considered the judgment of the Constitution Bench in V.V. Giri case (supra) and Article 342(1)(2) of the Constitution and it conclusively held that the circular of 3rd March, 1979 do not amount to either deleting, or adding, or varying, or modifying the list of Scheduled Tribes and reiterated the views expressed by the Constitution Bench. It conclusively held as under:

Actually, these notifications are based on the judgment of the Supreme Court in the case of V.V. Giri v. D.S. Dora (supra).

15. The learned Sr. Counsel for the petitioner has also submitted that the judgment in Anjan Kumar case is per incuriam. He has referred to and relied upon para 74 of 2006 (6) SCC 38. The law in this regard is well settled and the Hon"ble Supreme Court has time and again held that decisions made by High Court and or Supreme Court without reference to the relevant decisions of the Supreme Court are held to be per incuriam decision since the judgment and the law and the ratio laid down by the Hon"ble Supreme Court is a binding precedent under Article 141 of the Constitution of India.

16. The Hon"ble Supreme Court in Government of Andhra Pradesh and Another Vs. B. Satyanarayana Rao (Dead) by Lrs. and Others, at paragraph 8 held as under:

The Rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue.

Again in State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, at paragraph 40 it has been held as under:

40. "Incuria" literally means "carelessness". In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the Rule of stare decisis. The "quotable in law" is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". (Young v. Bristol Aeroplane Co. Ltd.) Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law.

The same view was reiterated while considering a series of judgments on the issue by the Hon"ble Supreme Court in State of Bihar Vs. Kalika Kuer @ Kalika Singh and Others, and ultimately the ratio of the judgments remains that a prior decision of the Hon"ble Supreme Court on Identical facts and law is binding on

the same points of law In a later case more so, when it Is by a larger Bench.

17. Considering the aforesaid facts and circumstances of the case, the Impugned order suffers from Illegality and is on the face of it arbitrary and violative of Article 14 of the Constitution of India and in any case the circular dated 3.1.2007 as recorded in the circular itself, will apply with effect from 3.1.2007 and not retrospectively. In the instant case not even a show cause notice was given before canceling the caste certificate to explain the legal position and the case laws and it goes without saying that the ratio of the judgment passed by the Constitution Bench will prevail over other judgments.

18. Considering the aforesaid facts and circumstances of the case, this writ petition is allowed and the impugned orders dated 22.11.2007, 27.11.2007 and 30.11.2007 as annexed in Annexure-9, 10 and 12 are hereby quashed with no order as to cost.