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**(1989) 07 BOM CK 0016**

**In the Bombay High Court**

**Case No : Writ Petition No. 4018 of 1987**

Rajesh Arjunbhai Patel

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

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**Date of Decision :** 31-07-1989

**Acts Referred:**

Constitution of India, 1950 — Article 14, 15, 16, 19, 226

**Citation :** AIR 1990 Bom 114 : (1990) 1 BomCR 68 : (1990) 1 MhLj 55

**Hon'ble Judges :** S.P. Daud, J

**Bench :** Single Bench

**Advocate :** Kumar Desai, instructed by M/s. Eastley Lam and Co, for the Appellant; N.T. Saraf and D. M. Trivedi, for the Respondent

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## **Judgement**

1. This petition under Art. 226 of the Constitution of India impugns parts of G.R: No. CBC-1083. 103591 R-11 dated March 13, 1985 (Ex.9) and certificate dated 25-6-1987 (Ex. R) based on the said Government Resolution.

2. Petitioner's father Arjunbhai and mother Meenabehn hail from Village Virpore, Taluka Nanded, District Broach, Gujarat State. Arjunbhai is from the Bhil tribe which tribe is to be found in a number of States of India including Gujarat and Maharashtra. The founding fathers being aware of the disabilities from which certain sections of the people suffered, took care to incorporate in the Constitution provisions designed to provide compensatory discrimination in favour of these sections. The disabled include Scheduled tribes, Groups to be recognised as such tribes have to figure in a notification which the President issued in consultation with the Governor where the specification is in relation to a State. Parliament can by law amend this notification whether by inclusion or exclusion of any group. Barring this method, the Presidential notification could not be otherwise varied -- not even by such a subsequent notification. Groups recognised as Scheduled tribes (vide Article 342), get; concessions in the matter of public employment and social and economic advancement. This is constitutionally protected vide Art-cles 15 and 16.

3. The President in exercise of his powers under Article 342(1) has issued the Constitution (Scheduled Tribes) Order, 1950 hereinafter referred to as the "Order". This being a pre-reorganisation of States enactment, the State figuring there was Bombay. The Bhil tribe is listed in the "Order" as a Scheduled tribe. The territories in and around the State of Bombay went through two reorganisations, First came what is popularly known as the bilingual State of Bombay and later came the carving out of separate States of Gujarat and Maharashtra. There was no change in the position of Bhils Vis-a-vis the State of bilingual Bombay though Parliament did enact Scheduled Castes and Scheduled Tribes Orders (Amendment) Act; 1956 (1956 Act). The State was dismembered in 1960 and succeeded by Gujarat and Maharashtra. In 1961 and 1971 there took place the ten-yearly censuses, A bill of 1967 dealing with proposed amendments to the Order had been referred to a Joint Committee. Having regard to the census returns and the recommendation of the Joint Committee, the Parliament amended the Order vide Scheduled Castes and Scheduled Tribes Orders (Amendment) Act." 1976 (1976 Act). The Bhil tribe found place as a Scheduled Tribe in the lists of Gujarat and Maharashtra both.

4. Arjunbhai migrated to Bombay city in April 1961. This he did after appearing for the March 1961 S.S.C. examination through the Rajpipla High School of Gujarat, He lived at Bombay with his brother Ishwarbhai in Dahisar till March 1982, During this period Arjunbhai qualified as a Bachelor of Commerce of the Bombay University having kept terms in a Bombay College. In 1969-70 Arjunbhai worked in the Income Tax Department, the Reserve Bank of India and then back again with the former which attachment continues to this day. Petitioner Rajesh was born in 1960 at his maternal grand parents home at Rajpipla, Gujarat. This is in keeping with the traditional practice in the country whereby girls are taken to their parental home for child birth. Rajesh has been living and staying with his parents at Bombay. After passing the March 1987 S.S.C. examination. Rajesh sought and was granted an offer for admission for a course of diploma in Engineering. This he got to one of the seats reserved for Scheduled Tribes pursuant to a certificate of entitlement produced by him.

5. In February 1987. Arjunbhai applied to the Sub-Divisional Magistrate. Bombay (respondent 2) for a certificate showing Rajesh to be the member of a Scheduled Tribe. The application was accompanied by various documents including a certificate issued by an Additional Chief Presidency Magistrate. Bombay reciting that Arjunbhai and his family ordinarily resided in Bombay. Maharashtra and that he was a Bhil. Respondent 3 wrote to the Tahsildar. Nanded Taluka and on the basis of the reply from that Officer issued Ex.R. This certificate speaks of Rajesh being a son of Arjunbhai who belongs to the Bhil Tribe recognised as a Scheduled Tribe in Gujarat. The certificate ends with the recital that the holder of the certificate is not entitled to any concessional facilities extended to Scheduled Tribes by the Government, of Maharashtra.

6. Aggrieved by the disabling recitals of F.x.R Rajesh moved this petition on

11-12-1987. Briefly the petition lodged questioned the disentitlement recitals on various grounds. Rajesh had been residing at Bombay after his birth. He and his parents had their domicile in Maharashtra. This State recognised Bhils as a Scheduled tribe. The disentitlement amounted to denial of Rajesh's right under various Articles of the Constitution.

7. The petition was admitted and a direction given to expedite it on 11-2-1988. Then took place the usual adjournments without respondents 1 and 2 filing a return. Came 13-6-1989 and the petition was heard partial-ly. On that date petitioner obtained an adjournment to challenge the vires of Ex.8. The hearing was adjourned to 15-6-1989. On 15-6-1989 the petition was permitted to be amended to enable a challenge to Ex.S. it was made clear that respondents 1 and 2 were restricted to meeting the challenge to Ex.8. This was so despite the non-appearance of their Counsel when the case was called out. Respondents 1 and 2 were to file the permitted return on or before 22-6-1989. Notwithstanding the above, the Advocate then representing respondents 1 and 2 Mr. S. M. Shah seems to have un-authorisedly thrust a return purporting to be of 15-6-1989 reciting that it was "in reply to the petition". This return has been excluded from consideration as it is no more than a surreptitious attempt to over reach the order passed on 15-6-1989. Significantly there is no endorsement showing the date of its lodging or tender on the record of the case. On 26-6-1989 a short return suggesting the joinder of the Maharashtra Government's Tribal Development Department and the Government of India was filed. The plea having been negatived respondents 1 and 2 on 27-6-1989 filed a return limited to the challenge to Ex.R on the basis of Ex.8.

8. Rajesh contends that Ex.8 violates Article 342 as also Article 14 of the Constitution. The latter Article is breached as the Government Resolution differentiates between Scheduled Tribe born prior to and after 6-9-1950 and for no reason. He wants to pursue the Bachelor's course in Medicine and Surgery and is entitled to a seat in the colleges imparting instruction therein as a Scheduled Tribe candidate. Ex.S and R be declared illegal and a direction to give him a seat in the M.B.B.S. be issued. Respondents 1 and 2 question the maintainability of the petition in the absence of the Union of India. The impugned Government Resolution is based on Notification dated 22-3-1977, 18-11-1982 and 22-2-1985 issued by the Union. The nonjoinder of the Union is fatal. The notifications are in conformity with Article 342 as they seek to restrict the Scheduled Tribe benefits to residents of the specified areas. The reliance placed upon Article 14 is misconceived. Migrants like Rajesh cannot be placed on par with permanent residents of this State. Differentiation between these classes is reasonable and permissible. Ex.R being based on Ex.S is valid and could not be voided.

9. The background set out in the foregoing paragraphs gives rise to points which are discussed below. First is the plea with regard to the non-joinder of the Union of India and the consequence thereof. The so-called notifications of the Union of

India on which Ex.S is based, are in fact letters addressed to the Chief Secretaries to State Governments and Union Territories by different officials of the Home Ministry at the Centre. These have no legislative force and the directions or suggestions contained there -in do not fail in either clause of Art. 342 nor the Acts of 1956 and 1976. In fact to describe these" letters as notifications is to take an impermissible liberty with the terminology of law, These letters do not require consideration and if they do bear the interpretation placed upon them, so much the worse for respondents in following a view at variance with the law. This suffices to negative the plea about the Union of India being a necessary party to the petition.

10. Before we proceed to consider the language and vires of Ex.S it will be relevant to restate the material facts. Arjunbhai was a Resident of Rajpipla or Virpore in Gujarat till April, 1961. When he came to Bombay in April 1961 he was a migrant from Gujarat to Maharashtra. He completed his college education in Bombay and having got a job here has never looked back. Indeed though married and the father of a child Rajesh Arjunbhai continued to reside with his brother Ishwarbhai in Dahisar. Bombay till 1982. Having a job in Bombay since 1969-70, Arjunbhai strengthened his roots hereby acquiring a flat in 1982 in the joint names of himself and his wife Meenabehn. In 1971 he obtained a domicile-cum-tribe certificate from an Additional Chief Metropolitan Magistrate. Rajesh has been brought up and educated in Bombay. In fact he secured an offer for admission to the Diploma in Engineering course as a Scheduled Tribe of Maharashtra. More than this is not necessary to establish that neither Arjunbhai nor Rajesh can be considered as transients or migratory birds vis-a-vis Maharashtra.

11. What comes in the way of Rajesh is the following from Ex, S:--

"Instruction No. 17:

(a) Where a person migrates from one State to another he can claim to belong to Scheduled Tribes only in relation to the State from which he has migrated.

(b) The persons covered under the following two categories should be treated as "Migrants" for the purpose of issuing caste certificates as belonging to Scheduled Tribes:--

(i) a person whose tribe is Scheduled as Scheduled Tribe in any other State Union Territory of India, but not in Maharashtra State.

(ii) a person whose tribe is Scheduled as Scheduled Tribe in Maharashtra State as well as in other State: but the ordinary residence of this person on the date of the Notification of the Presidential Order scheduling his tribe (i.e. 6th September 1950) has been in, the State Union Territory other than Maharashtra.

(c) In the case of persons born after the date of the said Notification (i.e. 6th September 1950) the place of Ordinary residence for the purpose of acquiring Scheduled Tribes status. will be the place of permanent abode of their parents at

the time of the Notifications."

Is there any substance in the contention that letters of 22-3-1977, 18-11-1982 and 22-2-1985 led respondent No. 1 to promulgate Ex.S and in particular the offending portion recited above? Far from that being the case, the three letters expressly qualify the word migrant as meaning someone who has come to one State from another for the purpose of seeking education, employment and like reasons. Ex-cerpts from two of them are :--

"Thus the residence of a particular person in a particular locality assumes a special significance. This residence has not to be understood in the literal or ordinary sense of the word. On the other hand it connotes the permanent residence of a person on the date of the notification of the Presidential Order scheduling his caste/tribe in relation to that locality. Thus a person who is temporarily away from this permanent place of abode at the time of notification of the Presidential Order applicable in his case, say, for example, to earn a living or seek education, etc.. can also be regarded as a Scheduled Caste or a Scheduled Tribe as the case may be, if his caste; tribe has been specified in that order in relation to his State/Union Territories. But he cannot be treated as such in relation to the place of his temporary residence notwithstanding the fact that the name of his caste tribe has been Scheduled in respect of that area in any Presidential Order."

"It is also clarified that a Scheduled Caste; Tribe person who has migrated from the State of origin to some other State for the purpose of seeking education, employment etc. will be deemed to be a Scheduled Caste/Tribe of the State of his origin and will be entitled to derive, benefits from the State of origin and not from the State to which he has migrated."

Arjunbhai's ties with Gujarat indeterminate since April 1961 were finally ruptured when he secured a job at Bombay in 1969-70. Desirous of appearing for the I.A.S. Exam. Arjunbhai applied for and obtained a Maharashtra domicile-cum-tribe certificate. The birth of Rajesh in Ajapila was obeisance to the time-honoured custom of girls delivering children or at least the first-born at the homes of their parents. Justifiably has it been held that it is difficult to define domicile though easy enough to illustrate it. It is a compound of a fact physically interlinked to a state of mind. In other words residence of a certain kind coupled with intention of a particular kind furnish the key to the question as to a person's domicile. Here, at least since 1969-70 there is no mistaking that Arjunbhai's and his family's domicile is in Bombay which is part of the State of Maharashtra.

12. The offending portion of Ex. S is assailed as violative of Arts. 342 and 14 of the Constitution. Counsel for parties rely on various decisions in support of their contention vis-a-vis the vires of Ex. S with reference to Art. 342 and 14. Mr. Saraf for respondents 1 and 2 submits that the territorial nexus to a claim for reserved status is of the essence of Art. 342 and that there is nothing wrong with

making this explicit in a *Milind Nikhare Vs. The Malviya Regional Engineering College Society and Another*, is relied upon in support of the plea that a Scheduled Tribe of one State cannot claim reservation in another State. This reliance assumes that petitioner admits that his father is entitled to Scheduled Tribe privilege only in Gujarat and is for that reason claiming a similar privilege in Maharashtra. Far from that being the case, Arjunbhai asserts that though Bhils have reservations in both States, he claims that status for himself and his family by virtue of his Maharashtra domicile in relation to the State of Maharashtra. In *Milind Nikhare's* case (supra) a Halba recognised as a Scheduled Tribe in Maharashtra wanted that recognition to secure him a Scheduled Tribe seat in Rajasthan -- without Halbas being recognised as a Scheduled Tribe in Rajasthan. Rajesh's claim is that Arjunbhai a Bhil of Gujarat acquired Maharashtra domicile which State also recognises Bhils as a Scheduled Tribe and has transmitted the benefit to him. He on his part has done nothing to lose that benefit. To these facts *Milind Nikhare's* case has no application. Mr. Saraf then seeks to draw sustenance from *M.S. Malathi Vs. The Commissioner, Nagpur Division and Others* and *Manjusha Govind Waghmare Intervenor*, . This decision reiterates the well-known position of reservation being a combination of class of territory and that obtaining of such a status in one State is not a passport to a similar advantage in other States.

13. Mr. Desai is on firmer ground when citing the decisions in W.P. Nos. 2499 of 1983 and 1572 of 1980 the latter being from the Aurangabad Bench. In the first case a person born in 1965 of parents who came to Bombay that very year and who was at Bombay applied for admission to the M.B.B.S. course as Scheduled Tribe. The Committee scrutinising such claims held that the claimant was entitled to reservation in his State i.e. Gujarat but not Maharashtra. *Pendse J.* overruling this denial observed:

"The mere fact that the father of the petitioner hails from a village in the State of Gujarat is no ground even to suggest that the petitioner is a permanent resident of Gujarat."

Assailed in appeal vide Appeal No. 790 of 1987, the decision remained unshaken. The similarity to the facts of the present case is remarkable -- though this time it is not merely a Committee fiat which is put forth as a justification. The defence does not get sanctified because of instructions contained in Government Resolution Ex. S. The next decision is that of a reversion of a promotee on the basis of a quota for Scheduled Castes pursuant to a finding that he came from Karnataka, though the caste he came from was recognised as backward in Karnataka as also Maharashtra, *Kanade J.* speaking for the Bench opined:--

"But if that person is treated as belonging to Scheduled Caste or Scheduled Tribe in both the States i.e. where he normally resided and migrated for employment to then in view of the public notification issued by the President of India, he cannot be discriminated on the ground of place of birth between the persons so migrating for employment and the permanent residents of such State,"

14. Significantly the State in both the above cases relied upon instructions or circulars suspiciously close in spirit to Ex. S. it is time the State Government recognised the embargo placed upon it by Cl. (2) of Art. 342. The power to include or exclude from the enumeration of Scheduled Tribes under the Order of 1950 vests only in Parliament. This power cannot be encroached upon by the State Government in the guise of administrative instructions. The mischief of Instruction No. 17 in Ex. S lies in a usurpation of power contrary to Art. 342(2). The power to enumerate Scheduled Tribes vested in the President and the notification containing such enumeration can be amended only by Parliament. The State Government cannot in the guise of Government Resolutions cloaking interpretational codes give their own construction to the list of Scheduled Tribes entitled to reservations.

15. Petitioner is on equally good ground in assailing Ex. S as violative of his rights under Arts. 14 and 19. The Government Resolution creates an artificial distinction between migrants prior to 6th Sept. 1950 and those subsequent to that date. Why the cut-off date should be 6-9-1950 for the progeny of migrants pre and post this date is incomprehensible. According to Mr. Saraf this is to preserve the rights of the really needy instead of the well-placed migrants. That this argument, constitutes a refutation of the right to move freely, reside and settle anywhere and practise any profession etc. in the Territory of India guaranteed under Art. 19, appears to have been forgotten. And yet that is precisely what respondents 1 and 2 have to say to Rajesh. His father came to xxxx what is now part of Maharashtra after 6-9-1950, He therefore has to go to Gujarat to get the benefits which a Bhil is entitled to in that State. The acquisition of a domicile in Maharashtra has all been in vain for Ex. S has evolved a cut-off date vide the parents of the benefit-seekers. Nothing more pernicious of the equality promise in Art. 14 and freedoms incorporated in Art. 19 can be conceived of. Articles 15 and 16 permit compensatory discrimination for classes like Scheduled Tribes. But they do not warrant denial of facilities to those entitled to reservations on the entirely fortuitous timing of their parents entry into Maharashtra irrespective of the factors that go into the fashioning of domicile.

16. To sum up petitioner is of Maharashtra domicile. This is so whether reckoned by his up-bringing or that of his father's history. Ex. S's Instruction No. 17(a), (b)(ii) and (c) being violative of Arts, 342, 14 to 16 and 19 hereby declared unconstitutional and void. Respondents 1 to 5 shall process petitioner's application for admission to the M.B.B.S. course as that of a person belonging to a Scheduled Tribe entitled to such concession and privileges as a member of such Tribes is entitled to in this State. If eligible on this basis he shall be granted admission to the 1989-90 course on payment of the prescribed charges. Rule in these terms made absolute with parties left to bear their own costs.

17. Order accordingly.