
(1996) 05 PAT CK 0017
In the Patna High Court
Case No : C.W.J.C. No. 1377 of 1992 (R)

Rakesh Sharma

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 01-05-1996

Acts Referred:

Constitution of India, 1950 — Article 141, 342, 348, 366, 38
Official Languages Act, 1963 — Section 5

Citation : (1997) 1 BLJR 279 : (1996) 2 PLJR 752

Hon'ble Judges : R.N. Sahay, J;P.K. Deb, J;G.S. Sharma, J

Bench : Full Bench

Judgement

R.N. Sahay, J.—A direct conflict between two seats of decisions of this Court on the interpretation of the Presidential Order issued under Article 342 of the Constitution has necessitated this reference to Full Bench. The significant question for consideration is as to whether the members of "Lohar" caste in the State of Bihar, who are admittedly "backward class" have right to claim the privileges available to the members of "scheduled tribe" by virtue of the Presidential Order.

2. Article 366(25) defines "Schedule Tribe"- which means:

"such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purpose of this Constitution." Under Article 342 of the Constitution of India it is provided as follows:

Scheduled Tribes: 1. The President may with respect of 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 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.

3. It is obvious from clause (2) of Article 342 that after the President has specified a "scheduled tribe" it is only the Parliament which is competent to include in or exclude from the list of Scheduled Tribe specified in a notification under clause (1) of Article 342 of Constitution.

4. The President of India in exercise of power under Article 342(1) of the Constitution promulgated Constitution Scheduled Tribe Order, 1950 which was amended by the Parliament from time to time. The Scheduled Castes and Scheduled Tribe Amendment Act, 1976 (Act No. 108 of 1976) was passed by the Parliament on 8th September, 1976. The object of the Act was to provide for inclusion and exclusion from the list of "Scheduled Castes" and "Scheduled Tribes" of certain castes and tribes, for the readjustment of representation of Parliament and assembly constituencies insofar as such readjustment is necessitated by such inclusion or exclusion and for matters connected therewith.

Section 4 of the Act amended Constitution Scheduled Tribes Orders, 1950 and the Constitution (Andaman and Nicobar) Scheduled Tribes Order, 1959 made by the President under Article 342 of the Constitution.

5. The said Scheduled Tribe Orders was amended in the manner specified in Second schedule. Part III of the second schedule contains list of scheduled tribes in the State of Bihar. As many as 30 scheduled tribes are included in the list. Under item No. 22 of the list "Lohara/Lohra" who are members of the scheduled tribe are included. In paragraph 16 which is in respect of West Bengal, "Lohara" and "Lohra" are included under item 24 of the list of West Bengal.

6. The petitioners in these cases are "Lohars" which is recognised as backward caste in the State of Bihar. Now by virtue of the -Amendment Act, 1976, they claim that they are covered by item No. 22 of Part III (Bihar). As a matter of fact, the petitioner in CWJC 1377/92R was granted scheduled caste certificate by the B.D.O., Giridih in the year 1982 (Annexure-1). Later petitioner came to know that "Lohar" caste has been declared scheduled tribe and Supreme Court in SLP No. 5684/90 held that "Lohars" are members of the scheduled tribe.

In CWJC 1377/92R, the petitioner has prayed for direction to the respondents to issue certificate that the petitioner is member of scheduled tribe to enable him to apply for appointment in the quota reserved for the members of scheduled tribe.

In the other writ application i.e. CWJC 3403/93R the petitioner who is also a "Lohar" by caste claims admission in Engineering college against the quote reserved for scheduled tribe. By interim order of this Court, he got the admission.

7. The controversy whether "Lohars" are members of scheduled tribe arose after the decision of the Supreme Court in Shambhu Nath v. Union of India and others

(Civil Appeal No. 4631/90 disposed of on 12th Sept. 1990). The facts in the Supreme Court case were that the appellant got appointment in the postal service of the Union of India on the ground that he was a member of scheduled tribe. But later it transpired that the appellant was not a member of the scheduled tribe and he was dismissed from service. The dismissal order was challenged before the Central Administrative Tribunal which dismissed the case on the ground that petitioner could not claim to be member of the scheduled tribe. The Hon"ble Supreme Court passed the following order:-

We have looked into the records and have heard counsel for the parties. In view of the accepted position that Lohar community is included in the scheduled tribe from the date of amendment of the list in 1976 and the dispute as to whether the community was known as "Lohar" or "Lohra" and if it was the latter, it has been so included from before, we do not think the tribunal was justified in holding the view it has taken.

8. The aforesaid decision of the Supreme Court was given on the assumption that Lohars are included in the list of scheduled tribes under 1976 Act.

9. In *Hari Sharan Thakur v. State of Bihar and others* reported in 1992 (2) PLR 594 a Division Bench of this Court following *Shambhu Nath's* case (*supra*) held that controversy regarding Lohar and Lohra has come to an end from the date of amendment of the list in 1976 as per the President notification contained in Annexure-6. Notification issued by the Deptt. of Personnel and Administrative Reform dated 10.11.1978 in which caste "Lohar" has been placed in the category of other backward classes, was brought to the notice of the Division Bench. The Division Bench held that because "Lohar" is scheduled tribe as per the Presidential notification and, therefore, entitled to all benefits available to the member of the scheduled tribe. The benefit could not be taken away by placing them with other backward classes by another notification.

10 An appeal was taken to the Supreme Court against the judgment of this Court in *Hari Sharan Thakur* (*supra*) in SLP No. 8429/92 *State of Bihar v. Hari Sharan Thakur*, The Supreme Court passed the following order:-

Heard on merits. In view of the decision of this Court in C.A. No. 4631/90 decided on 12th Sept. 1990 *Shambhu Nath v. Union of India* and another which has been followed by the High Court, we find no ground to entertain this special leave petition. It is accordingly dismissed.

11. The same question again came up for consideration before the Division Bench of this Court in *Nityanand Sharma and another Vs. The State of Bihar and others*, . This decision can be said to be the first authoritative pronouncement on the controversy: whether caste "Lohar" is covered under item No. 22 of Bihar list of 1976 Act. The Division Bench considered the decision Bench considered the decision in earlier Division Bench case in *Hari Sharan Thakur* (*supra*) and *Shambhu Nath's* case (*supra*). The contention of the State in that case was as follows:

That "Lohara", "Lohra" which is listed as a scheduled tribe in Bihar appear to have definite tribal origin. H.H. Risley in his book "Tribes and Castes", of 1981 reprint mentions "Lohara" as a sect of Mundas in Chotanagpur and "Lohra" as a synonym for Asura and "Lohar". It may be noted that both Mundas and Asura are notified as Scheduled tribes in Bihar. Apparently only those "Loharas" who owe origin to Asur and Munda seem to have been notified as Scheduled Tribes in Bihar. It is thus evident that Lohar is distinct occupational group and cannot be treated as identical and community to Lohara, Lohra.

That the aforesaid facts are further evident from perusal of English version of order of Bihar and West Bengal and Hindi version of the said order, while in Hindi version of order for West Bengal, Lohara, Lohra is given as equivalent of Lohara, Lohra in Bihar. Lohar is apparently a mistake for Lohara. That thus it is manifest that petitioner being Lohar does not belong to Scheduled tribes and is thus not entitled to any benefit of a scheduled tribe.

12. The Division Bench in Nityanand Sharma's case went deep into the matter. S.B. Sinha, J. speaking for the Bench rightly held in paragraphs 10 and 11 that "in terms of Article 342(1) of the Constitution of India only "tribe or tribal community or groups within the tribes or tribal communities" can be declared as Scheduled tribes in relation to the State of the Union territory, as the case may be. Under Article 342 of the Constitution of India, thus, a person who does not belong to member of a tribe or a tribal community, cannot be specified as Scheduled tribe.

13. Learned Judge held that Lohars are "blacksmith" and "Karmakar" being an occupational group and belong to backward classes. The learned Judge referred to "Tribes and Castes of Bengal" volume II written by H.H. Risley wherein "Lohar" has been described as Blacksmith of Behar, Chota Nagpur and Western Bengal. Risely has stated in his book as follows:

Lohar, a sub-caste of Bihar who only work in Iron. They are, however, distinct from and do not inter marry with the, Lohar caste. The latter are probably Dravidian descent, while former appear to be an occupational group. Lohar is a synonym for Kamar in Behar, a mul of or Section of the Nadmulia or Majraut sub-caste of Goalas in Behar, a Section of Kamis in Darjeeling.

So far as Lohar of Behar are concerned the learned Author says:- "In Behar the caste work as blacksmith and carpenters while many have taken to cultivation. They buy their material in the form of pigs or bars of iron. Iron smelting is confined to the Lohars of Chota Nagpur and is supposed to be a much less respectable form of industry than working up iron which other people have smelted. In the Santhal Parganas Lohars often cultivate themselves while the women of the household labour at the..."

The other sub-caste of Lohra or Loharas have been stated by the learned Author as follows:

Lohara, a sept of Mundas in Chota Nagpur Lohar-Agaria, a sub-tribe of Agarias in Chota Nagpur. Loharatengi, a section of Rajwars in Western Bengal. Loharabans, iron, a totemistic sept of Chiks; a section of Ghasis in Chota Nagpur. Lohar-Kamar, in Midnapur, Loharkoriya a section of Bhats, Lohar Manjhi, a sub-caste of Lohars in Manbhum, Lohra a synonym for Asura and Lohra, Lohra, Asur, a sub-tribe of Asuras in Chota Nagpur." Sinha, J. in paragraph 27 of the report, has referred to "comments of the Register General of India dated 14.1.1992" as contained in Annexure-A to the counter affidavit of that case as follows:

According to available ethnographic information Lohar is a genetic term representing those who work on iron. Being an occupational group one finds Lohar who owe origin to different casts. Even among tribes there are "sects of group who work on iron and are known as Lohar. According to Risley, the Lohars are large and heterogeneous aggregate, comprising members of several different tribes and castes who in different parts of the country took up the profession of working in iron, of the various sub-castes, the Kanaujia claim to be the highest in rank, and they alone have a well marked set of exogamous sections. They regard Vishwani is their legendary ancestors, and worship him as the tuolary deity of their crafts. The Magahiya seems to be the indigenous Lohars of Bihar, or opposed to the Kanuajia and Motiniya who profess to have come in terms of North-West provinces. The Kamia Lohars. found in Champaran have migrated from Nepal and are regarded as ceremonially unclean. The Manbhum Lohars acknowledge three sub-castes-Lohar Manjhi, Danda Manjhi and Badgdi Lohar, names which suggest a connection with the Dagdi castes. Lastly in Lohardagga we have the Sao Lohars, claiming to be immigrant Hindus, the Mahhji Turiyas who may well be a branch of the Turi caste and the Munda Lohars who are certainly Mundas.

The above description about the origin of different sub-groups of Lohar portray them (Lohar) as a heterogeneous group. The different Sections of which own their origins to different castes, tribes of communities. This confirm that Lohar is an occupational term and represents a generic name.

On the other hand Loharas which is listed as Scheduled Tribe in Bihar appear to have definite tribal origin. Risley mentions "Lohara" as a sect of Mundas in Chota Nagpur and Lohar as synonym for Assur and Lohar. " It may be noted that both Munda and Asurs are notified as Scheduled Tribes in Bihar. Apparently, those Lohars who owe origin to Asur and Munda seem to have been notified as Scheduled tribes in Bihar.

From the above description, it is evident that Lohar is a distinct occupational group and cannot be treated as identical. community Lohara, Lohra.

14. Sinha, J., held in paragraph 33 of the report that in Scheduled Castes and Scheduled Tribes Amendment Order, 1976, Lohar has not been mentioned as a member of Scheduled Tribe but "Lohras" or "Loharas" have been so mentioned. Learned Judge further held in paragraph 35 of the judgment as follows:

Thus the entries in the 1976 Act must be given a contextual meaning and thus be given a contextual meaning and thus has to be understood as bringing only such persons who belong to a tribe or tribal community.

"Lohar" who does not belong to any tribe" thus cannot be included in the list of "Scheduled tribe" in terms of entry No. 22 of Scheduled Tribes Order, 1950.

Further as "Lohra" and "Lohara" have been bracketed together, evidently, the Parliament intended to convey that they are members of the same tribe. Had the intention of the Parliament been otherwise, "Lohra" and "Lohara" would have been mentioned as two different items. This has also to be viewed in the context that some authors, as noticed hereinbefore, have bracketed both "Lohara" and "Lohra" together." The learned Judge further held that "thus a mistake has been committed in the Hindi version of the notification. It is now well known that an apparent printing error in the Statute can be ignored.

15. Learned Judge next considered the effect of judgment of this Court in Sri Hari Sharan Thakur Vs. The State of Bihar and Others, and decision of the Supreme Court in Civil Appeal No. 4631/90 (Shambhu Nath v. Union of India). Learned Judge found himself unable to follow the decisions. The decision of the Supreme Court in Shambhu Nath's case (*supra*), stood in the way. However, the problem was overcome by Sinha, J., by holding that the judgment of the Supreme Court had not taken into consideration the relevant provisions of law and the decision was *sub silentio*. Learned Judge referred to a Full Bench decision of this Court in Om Prakash Gupta Vs. The Bihar Public Service Commission and Another wherein it has been held as follows:-

In A.R. Antulay v. R.S. Nayak and another 1988 (1) SCC 602; a Constitution Bench of the Supreme Court held that if a judgment which has been rendered by the Supreme Court ignoring a provision of law, the same must be held to have been rendered *per incuriam* and is not binding upon another Bench.

The learned Judge relied on the following passage in Municipal Corporation of Delhi v. Gurnam Kaur 1988 (1) SCC 101:

Quotability as "law" applies to the principle of a case, its *ratio decidendi*. The only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided. Statements which are not part of the *ratio decidendi* are distinguished as *obiter dicta* and are not authoritative. The task of finding the principle is fraught with difficulty because without an investigation into the facts as in the present case, it could not be assumed whether a similar direction must or ought to be made as a measure of social justice. That being so, the direction made by this Court in Jamna Das case could not be treated to be a precedent. The High Court failed to realise that the direction in Jamna Das case was made not only with the consent of the parties but there was an interplay of various factors and the court was moved by compassion to evolve a situation to mitigate hardship which was acceptable by all the parties concerned. The Court no doubt made incidental observation to the

Directive Principles of State Policy enshrined in Article 38(2) of the Constitution and said:

Article 38(2) of the Constitution mandates the State to strive to minimise amongst others the inequalities in facilities and opportunity amongst individuals. One who tries to survive by one's own labour has to be encouraged because for want of opportunity destitution may disturb the conscience of the society. Here are persons carrying on some paltry trade in an open space in the scorching heat of Delhi, sun freezing cold or torrential rain. They are being denied continuance at that place under the spacious plea that they constitute an obstruction to easy access hospital. A little more space in the access to the hospital may be welcomed but not at the cost of someone being deprived of this very source of livelihood so as to swell the rank of the fast growing unemployed. As far as possible, this should be avoided which we propose to do by this order.

This indeed was a very noble sentiment but incapable of being implemented in a fast growing city like the metropolitan city of Delhi where public streets are overcrowded and the pavement squatterers create a hazard to the vehicular traffic and cause obstruction to the pedestrians on the pavement.

Pronouncements of law which are not part of the ratio decidendi are" classed as obiter dicta and are not authoritative with all respect to the learned Judge who passed the order in Jamna Dass case and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachment from any public place like pavements or public streets and without any citation of authority. Accordingly we do not propose to uphold the decisions of the High Court because it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute. So far as the order shows, no argument was addressed to the court on the question whether or not any direction could properly be made compelling the Municipal Corporation to construct stall at the pitching site of a pavement squatter. Prof. Fitzgerald, editor of the Salmond on Jurisprudence 12th edn. explains the concept of sub-silentio at page 153 in these words:

A decision is passed sub-silentio in the technical sense that has come to be attached to the phrase when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome the decision is not an authority on point B. Point B is said to pass sub-silentio.

16. Sinha, J., holds the view that: "When the earlier decisions of the court or the relevant provisions of law were not brought to the notice of the Court, the judgment rendered therein shall not be binding upon a subsequent Bench. He relied on *M/s. Goodyear India Ltd. v. State of Haryana* 1990 (2) SCC 72. Sinha, J., ultimately came to following conclusion:

For the reasons aforementioned there is no other option but to hold that "Lohar" is not a scheduled tribe within the meaning of Conclusion (Scheduled Tribes) Order, 1950 as amended by Constitution (Scheduled Castes and Scheduled Tribes) Amendment Order, 1976.

The petitioners thus being Lohar by caste which is a backward class and not "Lohra" or "Loharas" who are the members of Scheduled Tribe cannot get any benefit of the seats reserved in Medical College for the Scheduled Tribes. 17. Bharuka, J., concerned with the above finding of Sinha, J., and observed as follows:

So far as the judgment of the Supreme Court in Civil Appeal No. 4631 of 1990 *Shambhu Nath v. Union of India* and another disposed of on 12th September 1990 (Annexure-6) and Bench decision of this Court in CWJC 1034 of 1991 *Sri Hari Sharan Thakur Vs. The State of Bihar and Others*, are concerned, those cases have possibly proceeded not on the footing that the petitioners in those cases were the members of the certain tribes or tribal communities. There is no discussion on this aspect either way in those judgments.

The Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976 by which the schedules to the Order have been substituted, was passed by parliament in English language. Its authoritative Hindi translation made u/s 5 of the Official Languages Act, 1963 has been published by the Central Government in the Gazette of India dated the 29th November, 1979 (Annexure B/A). Section 5 of the Official Languages Act, 1963 is in pari materia with Article 348(3) of the Constitution. In the Hindi translation "Lohara" has been printed as "Lohar" under item No. 41. There is obvious conflict between the original English text and its translation in Hindi. The petitioners have sought to build up their arguments primarily on the basis of Hindi version, which cannot be said to be tenable as said by Brother Sinha, J. I agree with him that in the present case the English version should prevail over the Hindi translation. But I do not agree with the reasoning given by him for the same. It will be wrong to say that English version has always superiority over Hindi version. The superiority of a particular text either in English or in Hindi is to be judged keeping in view as to which of the two texts in the case of *Ram Adhin Singh Vs. The State of Bihar and others*, by placing reliance on a decision in the case of *Rajendra v. Vice- Chancellor, Magadh University* 1984 PLJR 316 wherein L.N. Sharma, J., (as he then was) speaking for the Bench has held that "English translation thorough official cannot override the Hindi text. The English version is the interpretation of the person entrusted with the task of translation. It cannot be equated with the original text.

18. Even after the above authoritative pronouncement by this Court, the controversy was not set at rest. The question again came up for consideration in Bihar Lohar (Scheduled Tribes) Utthan Mahasabha and Another Vs. The State of Bihar and Others, decided by Baskak, C.J., and Chy. S.N. Mishra, J. Basak, C.J., not only refused to follow the ratio in Niyanand Sharma's case (supra), he seriously criticized the approach of Sinha, J. in not following the decision of the Supreme Court in Shambhu Nath's case. After considering the ratio of the decision in Nityanand Sharma's case, Basak, C.J., speaking for the Bench held in para 8 as follows:

In our opinion, having regard to the judgment and order of the Supreme Court it is not necessary for us to go into merits of the case as to whether the "Lohars" are covered by the Presidential Order or not or go into the question as to which of the judgments of the Division Bench is correct. In the case of Delhi Cloth and General Mills Co. Ltd. and Others Vs. The Agricultural Produce Market Committee and Others we have referred to this aspect of the matter wherein we have held as follows:

It is well settled by various decisions of the Supreme Court that in the hierarchical system of courts, each lower tier including the Court of Appeal, is bound by the decisions of the higher tiers. Particular reference may be made in his connection to Shyamaraju Hegde Vs. U. Venkatesha Bhat and Ors, . It is also well settle that a Bench cannot differ from a co-ordinate Bench. A Single Judge is bound by the decision of another Single Judge. Similarly a Division Bench decisions of this Court are not binding of the same High Court. If the subsequent co-ordinate Bench does not hold the same view. It is not open to the subsequent co-ordinate Bench to differ from the judgment of the co-ordinate Bench but it must refer the same to larger Bench. Reference may be made in this connection to the following: Mahadeolal Kanodia Vs. The Administrator-general of West Bengal, ; Jai Knur and others v. Sher Singh and others AIR 1960 SC 119; Addagada Raghavamma and Another Vs. Addagada Chenchamma and Another, ; Bhudan Singh and Another Vs. Nabi Bux and Another, ; Mohar Singh v. Devi Charan and others AIR 1988 SC and Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others, .

Had the matter rested there, that would have been end of the same so far as the main points are concerned. This position is not disputed before us. However, what is sought to be argued before us was that in view of the law laid down by the Supreme Court in its decisions some of which are subsequent to the Division Bench judgments of this Court, the aforesaid division Bench judgment is also binding on another Division Bench on us as they are not good in law.

In that view of the matter we shall discuss some of the judgments of the Supreme Court particularly judgments subsequent to the decisions of the Division Bench of this Court indicated above, to ascertain whether such Division Bench decisions had directly been overruled by the Supreme Court or whether by necessary implications those Division Bench Judgments had become

unsustainable as pointed out in the *Shyamaraju v. U.V. Bhat* (ibid) and other decisions of Supreme Court." 29. Basak, C.J., then observed in paragraph 9 as follows:

In our opinion it is not open to any Bench of any High Court to go into the question as to whether the Supreme Court decision is correct on merits or not or whether the Supreme Court's judgment has considered all aspects of the matter or not. Whether any judgment of the Supreme Court has been passed "sub silentio" or whether it had taken into consideration the relevant law in statutes or not can only be gone into by the Supreme Court if the occasion so arises. But that is not a matter for consideration or speculation so far as the High Courts are concerned. It is open to subsequent bench of the Supreme Court to differ from an earlier decision of the Supreme Court on any ground whatsoever but no Bench of the High Court can under any circumstances, differ with a decision and order of the Supreme Court it has been decided on a point. In this particular case not only the Supreme Court has given such a decision on 12th September 1990 in Civil Appeal No. 4631/90 but when subsequently a Division Bench of this Court in CWJC 1034/91 followed the same, this judgment of this Bench in CWJC 1034/91 was affirmed by the Supreme Court in the appeal preferred against judgment of the High Court and that also following its earlier judgment/ order on 12th September, 1990. It was specifically, mentioned in the judgment and order of the Supreme Court in the second case that it was heard on merit." Learned Chief Justice then observed:

Under these circumstances, it was no longer open for any High Court to contend that the Supreme Court judgment was not based on merit or that relevant law or fact was not considered. Such argument could not only be made before the Supreme Court and not before any High Court. In this connection, we may also refer to two other decisions of the Supreme Court. In the case of *Ballabhadras Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur*, the Supreme Court made it quite clear that a decision of the Supreme Court was binding on the High Court and that the High Court cannot ignore it on the ground that relevant provision was not brought to the notice of the Supreme Court." For the aforesaid reasons, Basak, C.J., held that "Lohars" come within the scope of the Constitution Scheduled Tribe Order, 1950 as amended in 1976 and they shall be entitled to all benefits accordingly. The respondents were directed to act accordingly and take all steps including issue of caste certificates.

30. The State aggrieved by the aforesaid decision filed SLP No. 13390/94 which was permitted to be withdraw.

31. With utmost respect to the Chief Justice, I am of the view that if the Bench was not prepared to follow the decision of the Division Bench in *Nityanand Sharma's* case, the matter should have been referred to a larger Bench. It should have been realised as to how the State could be forced to follow both the decisions at the same time. A Division Bench cannot over-rule the decision of earlier Division Bench even though the view of latter Division Bench is based on

sound legal principal and supported by the decision of the Supreme Court.

32. In my opinion, all this exercise would not have been necessary had the earlier Division Bench noticed the crucial observation in the Shambhunath's case that the decision was not to be taken as a binding precedent. That observation was not brought to the notice of the learned Judges who decided the earlier cases.

33. In Nityanand Sharma's case (supra) S.B. Singhs, j., had to labour a good deal to overcome the decision of the Supreme Court in Shambhunath's case. Basak, CJ., in Bihar Lohar Uthan Mahasabha's case (supra) found himself unable to approve the decision in Nityanand Sharma's case on the ground that it was not open for the High Court not to follow the decision of the Supreme Court.

34. The Supreme Court in Smt. Kausalya Devi Bogra and Others Vs. Land Acquisition Officer, Aurangabad and Another, has pointed out that judicial decorum and discipline require that the direction of the Supreme Court should be taken as a binding precedent by the subordinate courts. Hon"ble Ranganath Mishra (as His Lordship than was) speaking for the Court deprecated the Bombay High Court's attitude in resurrecting its own earlier judgment to life. The Supreme Court rendered the same very decision lifeless and described the decision of the High Court as "unfortunate situation".

In Narinder Singh Vs. Surjit Singh, the Supreme Court has observed that when the decision of the Supreme Court in certain respect was not to the liking of the Judge of the High Court, when his own decision was set aside by the Supreme Court, then said decision becomes law of the land and it is the duty of the High Court to obey the order and not to try to avoid it, but in no case was it open to the High Court to find fault with the same.

35. Dr. A. Lakshmi Nath in his book "PRECEDENT IN THE INDIAN LEGAL SYSTEM" has stated about the attitude which the court to appeal in England feels obliged to adopt towards the decisions of the House of Lords. Learned Author has observed:

Through there is a robust tradition in English Common Law for following the decisions of superior courts without question, after the adoption of the practice statement in 1966 by the House of Lords, loyalty to the doctrine of precedent has shown signs of strain. There have been a few occasions in the recent past when the Court of Appeal by majority felt obliged to deprt from a binding precedent of the House of Lords, in one case by invoking the aid of cessant rationes leges cessant lex ipsa (Miliangos v. Frank Textiles). It is true, faced with such an open confrontation with the Court of Appeal the House of Lords sharply joined issue on the question of binding effect of the House's decisions on the lower courts and ruled firmly in favour of the continued operation of the doctrine of precedent in its relations with the lower courts. But there is no suggestion in any of these decisions that a clear obiter dictim of the House of Lords should be binding on the Court of Appeal. Indeed there are quite a few instances in which the Court of

Appeal has distinguished plausible precedents of the House of Lords either on facts or on the ground of the House's pronouncement being in the nature of an obiter dicta.

36. In *M.S.M. Sharma Vs. Sri Krishna Sinha and Others*, , it was held by the Supreme Court that judgment of the Supreme Court on the basis of concession made by the parties does not amount to a law declared under Article 141 of the Constitution of India.

In *Shivaji Narayan Bachhav Vs. State of Maharashtra*, , the Supreme Court observed that:

No Judge in India except a larger Bench of the Supreme Court on a departure from judicial discipline can whittle down, wish away or to be unbound by the ratio thereof.

In *Sher Singh and Others Vs. State of Punjab*, , the Supreme Court observed that "judgment of the Supreme Court must be followed without reservation till set aside.

37. Sinha, J., as stated earlier did not follow the decision of the Supreme Court in *Shambhu Nath* case, because the decision was per incuriam and was not binding. A decision is rendered per incuriam when a court acts in ignorance of an earlier decision or the provision of a statute which is controlling. Although this infirmity can cripple the authority of an otherwise binding precedent, this rule should be invoked with caution. In *Mamleshwar Prasad and Another Vs. Kanhaiya Lal (Dead) through L. Rs.*, , Krishna Iyer, J., observed a keynote thought on the principle of per incuriam. Learned Judge observed in paragraph 7 of the report:-

Certainly of the law, consistency of rulings and comity of courts, all flowering from the same principle, converge to the conclusion that a decision once rendered must later bind like cases. It is no doubt true that in exceptional instances, where by obvious inadvertence or oversight, a judgment fails to notice a plain statutory provision or obligatory authority, running counter to the reasoning and result reached. It may not have the sway of binding precedents. But it should be a glaring case of an obtrusive omission." But the court did not go into the question whether the judgment per incuriam binds none except the particular parties to the case.

Krishna Iyer, J., cited *Cassell v. Broome* (1972) All 802 to substantiate the thrust of the caution that he sounded. This case is interesting on the point of per incuriam. Lord Denning, M.R. had invoked this doctrine in that case to distinguish a weighty precedent of House of Lords in *Rookes v. Barnard* (1964) AC 1129 which was binding on the Court of Appeal. On appeal from the judgment of Lord Denning, M.R. the House of Lords expressed its strong disagreement from the approach adopted by the Master of Rolls and observed that the "per incuriam exception is for each tier to apply on its own level". It does not entitle a lower court to question the considered decisions in the upper

tier. On this aspect of the matter, Cassel's case was cited with approval by Lord Diplock in *Baker v. Queen*. In that case Lord Diplock observed that to permit the use of per curiam rule would be an invitation to the lower court to ignore the decisions of superior courts on that same ground. It is unlikely the per incuriam doctrine as a ground for distinguishing or not following an otherwise binding decision of the Supreme Court.

38. Learned Author in "Precedent in the Indian Legal System" has observed: "It is not to be forgotten that in the hierarchy of courts we have in our country, the High Courts play an important role in setting disputed questions of law. Whatever creative opportunity exists at this level for interpretation and law ascertainment should not be restricted to passive acquiescence in what the superior courts have said by way of obiter dictum."

39. In the instant case, however, it is obvious that the decision of Supreme Court in *Shambhu Nath's* case was not binding in view of express observation that "this decision may not be taken as a precedent". Despite this clear observation, the Division Bench in *Harishankar Thakur* (supra) took the decision as a binding precedent. The Division Bench in *Lohar Utthan Maharashtra* (supra) also felt that it was bound by the decision of the Supreme Court. This in my opinion was Supreme Court. This is my opinion was decision in *Nityanand Sharma's* case 1992 PLJR 535 lays down the correct law that "Lohar" in Bihar are different from "Lohara or Lohra" and are not covered by entry 22 of Bihar list in the Scheduled Castes Amendment Act, 1976.

40. The confusion was created because of the Hindi version of the Act which is inconsistent with the English version of the Act. Sinha, J., was of the view that in view of clause 3 of Article 348 of the Constitution of India, the authoritative text of the Act in the English language shall prevail over the Hindi version. Mr. Bharuka, J., in his separate concurring judgment held that English version should prevail over its Hindi translation, but the reasoning given by Sinha, J., for taking this view did not appeal to Bharuka, J.

41. The Authoritative Text (Central Laws) 1973 provides for authoritative text of Central laws in any language specified in 8th Schedule of the Constitution. Section 2 of the Act provides as follows:

A translation of any language other than Hindi specified in 8th schedule of the Constitution published under the authority of the President of India official gazette:

a. Of any Central Act or of any Ordinance promulgated by the President; or b. of any order, the regulation or bye-law issued under the Constitution or under any Central Act, shall be deemed to be the "authoritative texts" thereof in such language. 42. In the instant case, the text of the Act is in English and Hindi. In the Hindi version, instead of "Lohra" the word "Lohar" has been included at entry No. 22. The English version mentions "Lohra" and "Lohara". But Sinha, J., has rightly held that English version would prevail over the Hindi version. Under

clause (3) of Article 348, the English version of an Act or rule, regulation or by laws etc. is to be treated as "authoritative text" in case of conflict between English version and Hindi version. See; Sagir Ahmad and Others Vs. The Govt. of the State of Uttar Pradesh and Others, .

43. In Govindram Ramprasad Vs. Assessing Authority (Sales Tax) and Another, , it has been held that "if there be two versions of a statute in two different languages one version can be used to interpret the other does not apply in India, as clause (3) of this article clearly provides that where laws are passed in an Indian language and translation into English, the authoritative version shall be the English one.

In 1990 BBCJ SC 55, it was held that where there is difference in Hindi and English text of Section 16 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, the Hindi version will prevail. In Bihar Hindi has been adopted as the official language without any qualification and there is also nothing to show that the English version was indeed an authenticated translated version of the Hindi text in accordance with the requirements of Art. 348(3).

44. There is n dispute that "Lohars" are not members of tribal community. In any view of the matter, Lohar cannot be declared to be a scheduled tribe under Article 342 of the Constitution which is clear from the decision of Andhra Pradesh High Court referred to earlier.

45.1 may also refer to decision of the Supreme Court in Dadaji alias Dina Vs. Sukhdeobabu and Others, . In that case question for consideration before the Supreme Court was whether "Ksheteriya Bidwaik Mana" was a "tribe" mentioned in the Schedule in the Order. Under Entry No. 18 of part 9 of the Schedule "Mana" community finds mention. Supreme Court held in para 14 as follows:

A reading of the Schedule to the Order also shows that where there are two communities with the same name; one having affect with a tribe and the other not having anything to do with such to be and both are treated as Schedule tribes the community which has affinity with another tribe is shown along with it in the same group against a single entry and the other is shown against a different entry. This is illustrated by the inclusion of the Koya community having affinity with Gonds in entry No. 8 and the Koya community having no such affinity in Entry No. 33 of Part IX of the Schedule to the Order. If the Parliament intended to treat the appellant's community also as a Schedule tribe, it would have shown "Mana" community under a separate entry. No such entry is found in the Schedule.

In my opinion, if Lohar was intended to be included in the Schedule, they would not have bracketed "Lohar" along with "Lohra and Loharas".

46. For the reasons stated above, I come to the following conclusions:

(i) Lohara are not covered by entry 22 part III of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976;

(ii) In the Hindi version of the Act Lohar has been inadvertently mentioned and in view of conflict between English version and Hindi version, the English version, shall prevail;

(iii) The decision in Shambhu Nath's case was not meant to be applied in subsequent cases;

(iv) The decisions in Hari Sharon Thakur, Lohar Utthan Maharashtra which followed Shambhu Nath's case was followed without noticing the observation that the decision was not to be taken as precedent in other cases;

(v) The aforesaid decision holding that "Lohars" are included in Entry 22 of Part III of Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976 and, therefore, entitle to the benefits available to the members of the Schedule tribe, are not correct decisions on the point and are hereby overruled;

(vi) The decision in Nityanand Sharma's case is correct and is approved

47. In the result, both the writ applications are dismissed. There will, however, be no order as to costs.

Gurusharan Sharma, j.

48. I fully agree with the view expressed by Brother Sahay, J., However, I wish to add a few words. The "Lohars" are not Scheduled Tribes; they are Blacksmith and come within Other Backward Class and the Court cannot give any declaration that they were equivalent to "Loharas" or "Lohras" and were entitled to the same statute.

49. Recently, the controversy created by Shambhunath's case (supra) has been resolved in Nityanand Sharma and another v. State of Bihar and others JT 1996 (2) SC 117 wherein the Hon'ble Supreme Court considered its earlier decision (i) in Shambhu Nath v. State of Bihar, Civil Appeal No. 4631 of 1990 disposed of on 12.9.1990 and (ii) in State of Bihar v. Hari Sharan Thakur SLP (Civil) No. 8429 of 1992 disposed of on 21.9.1992 and held that in Shambhunath's case (supra), the Court did not intend to lay down any law that "Lohars" were Scheduled Tribe. Unfortunately, due to concession by the counsel for the Union, without due verification from English version, which was an authoritative text, the Court accepted the translated Hindi version placed before it, wherein silbet "a" of the word "Lohara" was omitted and obviously it was wrongly translated. There was an obvious mistake in accepting the mistaken fact. The court was misled by incorrect record and proceeded on the premise as admitted by the Counsel that "Lohar" was included in the Act as "Lohars" in the second Schedule as Scheduled Tribe, without verification from the Act that "Lohars" were included in the second Schedule, Part III applicable to Bihar State and held that they were included as Scheduled Tribes.

50. In Mrs. Valsamma Paul v. Cochin University & others, JT 1996 (1) SC 57, the Hon'ble Supreme Court surveyed the retrograde attempts successfully made by

different communities in the country to wear the mask of status either of Scheduled Castes or Schedule Tribes to secure constitutional benefits of reservations and other economic empowerments and those attempts in Andhra Pradesh were judicially negated in the said case.

51. In Nityanand Sharama's case (supra) , the Hon"ble Supreme Court found that the case of "Lohar" of Bihar is yet an other instance, where Other Backward Class enrass seek to get the status of Scheduled Tribe. It is a retrograde step to corner the benefits intended for Scheduled Tribes. It observed that there has been consistent attempt by Lohar community to wear the mask of Scheduled Tribe status and to masquerade .as such for getting the constitutional benefits meant for the poor tribes, which the President in consultation with the Governor or Parliament had not granted to them and such status as Scheduled Tribe cannot be granted to other Backwards Classes "Lohars" were held to be Other Backward Class and not Scheduled Tribe. Any contrary view taken by this Court was held to be erroneous.

P.K. Deb, J.

52. I agree

53. Practically after the decision of the Apex Court in Nityanand Sharma's case as is mentioned by Brother Sharma, J. all controversies have been set at rest. The decision in Shambhunath's case which created all controversy has been over-ruled and clearly been held that it did not enunciate good law.