
(1988) 08 GAU CK 0002
In the Gauhati High Court
Case No : Civil Rule No. 238 of 1988

Rukma Moran

APPELLANT

Vs

Assam Board of Revenue, Gauhati

RESPONDENT

Date of Decision : 26-08-1988

Acts Referred:

Assam Excise Rules, 1945 — Rule 223(2), 223(2)

Citation : (1989) 1 GLJ 14 : (1989) 1 GLR 379

Hon'ble Judges : A.Raghuvir, C.J. and S.P.Rajkhowa, J

Bench : Division Bench

Advocate : S.N.Bhuyan, P.K.Goswami, N.S.Deka, Advocates appearing for Parties

Judgement

Tenders were invited on December 29, 1986 for twenty Country Spirit Shops in Tinsukia Subdivision. The tenders which were filed were scrutinised and after deliberation with the Advisory Board, the Additional Deputy Commissioner, Tinsukia settled the shops. One among the shops was Kakopathar C. S. Shop No. 6. This shop was settled for three years May 7, 1987 to March 31, 1990 in favour of a Scheduled Caste candidate. Aggrieved by the order of settlement two appeals were filed. The Assam Board of Revenue the appellate authority confirmed the order and rejected the two appeals. One among the two appellants is the instant writ petitioner Rukma Moran. The other appellant Bhaben Chetia did not assail the order of the Board of Revenue in this Court though his appeal was dismissed. He is not impleaded in the instant writ petition. We are therefore not considering his case in this writ petition. Padmeswar Das is the person in whose favour the shop No. 6 is settled. He is a Scheduled Caste candidate. He is impleaded in the case but remained exparte and has not participated in the case.

The case of the writ petitioner ishe is from Moran community as his name indicates. His income he represented is less than Rs. 5.000/ per year. His contention is Shop No. 6 should not have been settled in favour of a Scheduled Caste candidate (a) because the undisputed yearly income of Padmeswar Das was Rs. 15,000/(b) The shop was not reserved for Scheduled Caste candidate,

(c) Because the writ petitioner is a Moran (MOBC) therefore ought to have been accorded to him. Similar contentions were unsuccessfully raised before the appellate authority.

We see shop were settled under Assam Excise Act I of 1910 and Rules made thereunder. The Rules were prescribed under subclause (4) of section 36 of the Act on April 11, 1945 but were amended in many aspects particularly in 1974. Since the issues raised in the case largely turn on the interpretation of Rules we may consider the scope of the Rules. We do no better than to refer a case of this Court in 32 .L. R. Gauhati 1980 page 99 Rajkumar Dilip Narayan Singh vs. The Assam Board of Revenue and others wherein the amendments made in 1974 were noted "prior to the amendment of the Assam Excise Rules in 1974, the main thrust of the State Policy was to extract or squeeze maximum financial benefit out of the sale proceeds of the liquor shops. Auction sale was the main method of settlement. Naturally the right and financial tycoons gobbled up all these shops. The rest of the shops were settled by Tender system with anxious eyes to derive maximum revenue. Here in, as well, the rich and the financial giants monopolised the field. The rule of the day was to select those who could offer the maximum finance to the State." What prompted the State to incorporate the amendments it was stated. "The State realised, as it is evident from the changes brought forward, that a positive approach to achieve equality by equaling up the conditions of those lowly placed, socially and economically, was urgent. In order to avoid inequalities" and monopolies the Rules it is stated were amended.

The amended Rules divide the shops as reserved shops and nonreserved shops. The reserved shops were to be settled among Scheduled Caste candidates. The basis for settlement for other shops is from backward community of backward classes with preferences stated. The candidates preferred or selected not to have income less than Rs. 5.000/ in a year if possible to do so. Who are educated unemployed is defined in the note to the Rule.

How the preference is to be worked out and who are to be preferred are the questions raised in this case. All these issues it is contended arise in Rule 223. We extract Rule 223 in full to facilitate reference. The Rule reads as under

"223. (I) Settlement of country spirit shops shall be made giving adequate representation to the Scheduled Castes and Scheduled Tribes. Of the total number of shops to be settled in a Subdivision, a minimum quota of such shop to be settled with persons belonging to Scheduled Castes and Scheduled

Tribes shall be fixed on the basis of population of those communities in the subdivision. (2) In making settlement to any person preference shall always be given to the educated unemployed youths or to cooperatives and coopt, firms formed by such educated unemployed youth. Preference shall also be given to the persons belonging to the more backward community of the other backward classes (emphasis supplied). (3) While making settlement to such persons due

consideration shall be given to the economic backwardness of the person seeking settlement. No person shall be considered unless the annual income of such person or his parents is less than Rs. 5,000/. The direction issued by the State Government in this respect shall be scrupulously followed. (4) The dependants of the persons who held any country spirit shop for total period of fifteen consecutive years shall not be entitled to settlement of such or any other country spirit shop.

NoteThe term "educated unemployed youth" as mentioned in sub rule (2) of Rule 223 means a person not exceeding 35 years of age who has passed the H. S. L. C. or its equivalent examination and is without any employment.

We cannot but refer to one or two aspects which are not covered in the cases cited in the case. No case considered the difficulties interpreting the four subclauses and the note conjointly. It is obvious the four subclauses and the note cannot be read in isolation from the other clauses. Whether in such a contingency the rule of ejusdem generis has any role to play in interpreting the clauses was not considered in any case. We further make it clear in the instant writ petition the vires of Section 36 or that of Rule 223 is not raised. The provisions of the Constitution were however profusely cited. Articles 15 and 16 Clauses 4 of each of these two Articles were referred in the case. Article 46 in heavily relied on in support of the writ petition.

The learned counsel for the petitioner elaborated the pleas and urged Shop No. 6 is not reserved therefore Scheduled Caste candidate should be out of consideration. The settlement order in favour of a Scheduled Caste candidate per se is illegal for that reason. While the Scheduled Caste candidate is out of consideration it if argued in the field of preference OBC and MOBC (More anon about the two expressions) may be considered.

The writ petitioner is a Moran. Bhaben Chetia was a candidate from OBC, who is no more in the field of consideration as he is reconciled to the order of the Board of Revenue. The petitioner from the words underlined in subclause (2) contended thus the only MOBC candidate has to be preferred. Therefore he should have been accorded the settlement of Shop No. 6. This is how the case of the petitioner was presented and projected in the case.

We have earlier stated the settled candidate chose not to participate in the case. We experienced considerable difficulty in interpreting Rule 223. Therefore we have invited the learned Advocate General of Assam to assist the Court. The learned Advocate General forcefully supported the settlement made in favour of the Scheduled Caste candidate and supported the order of Assam Board of Revenue. In his argument he covered numerous statutes, Constitutional orders, policy statements of Assam State in that Notifications, Instructions, directions issued to the Departments of the State were all read to support the impugned order.

The learned Advocate General at first referred to the Constitution (Scheduled

Tribes) Order of 1950. In Part II of that Order Tribes relevant to Assam are set out. Scheduled Castes are mentioned in Schedule "B". This order was modified by the Ministry of Law, Government of India on April 6, 1956 the State of Assam proclaimed reservation in services and Notification No. SRO. 2477 A on October 29, 1956 was issued. The Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1978 (Assam Act XII of 1979) was enacted. On September 12, 1961 a provisional list of communities Other Backward Classes (OBC) granting additional concessions to them was notified. Later in that (1) Moran and Matak, (2) Tea garden labourers or tribes, (3) Extea garden labourers or tribes and (4) Rajbanshi or Koch (Koch of Goalpara and Garo Hills only) the categories known as More Other Backward Classes (MOBC) was appended to the list notified.

On August 4, 1956 as to settlement of contracts, permits, fisheries, ferries, toll bridges, forest mahals, excise shops, reservations were proclaimed in favour of S. C., O. B. C. and M. O. B. C. candidates. The concessions were specified. "When works are settled on the basis of bids whether in auction or by tender, should be settled with candidates belonging to the Scheduled Castes and the Scheduled Tribes up to the limit of 7% per cent below the highest bid offered if any such case subject to suitability of the person belonging to the category of people entitled to preferential treatment and his ability to perform the task satisfactorily and within such limits as regards the value of work upto which this concession will be available as may be fixed for the purpose.

In any case in which the bid of a candidate belonging to the Scheduled Castes or the Scheduled Tribes is not within the 1% percent limit, but he is otherwise considered suitable for the performance of the work in question, he should, as far as practicable, be given an option to take the contracts, permit or settlement at an amount to be fixed within the 7% per cent limit according to the merit of each case."

A list of classes accepted by the State Government as backwards Communities and backward Classes entitled to preferential treatment was published. Instructions were issued as to how economically weaker sections should be benefited. "Among the people regarded economically weaker (all concerned were directed) the claims of the Scheduled Castes and the Scheduled Tribes should invariably receive the highest priority (emphasis supplied)." In the matter of settlement of fisheries bonafide fishermen among Scheduled Castes were ordered to be accorded first preference." The Scheduled Tribes should also like bonafide fisherman of the Scheduled Castes, got first preference in the settlement of fisheries situated in predominantly tribal areas."

"The Scheduled Castes and Scheduled Tribes, Other Backward Classes and More Other Backward Classes were allowed in view of their comparative economic backwardness to deposit only 50 per cent of the standard amount of security or earnest money fixed for the purpose of any work. In respect of small works where no skill, knowledge or equipment is necessary it was emphasised "the

desirability of granting preference to such people of the locality of the work for whose obvious advantage the work is undertaken should also be considered for the sake of maximum local cooperation." Preference was indicated in Circular No. ABM. 18/56/14 dated August 4, 1956. In notification on September 12, 1961 TAD/BC/6/61/15 and on November 27, 1975 in A AD/ DC/268/75/37 Tribal Areas list of Other Backward Classes including More Other Backward Communities were notified.

In the orders, notifications, instructions and directions we see the State Government assumed backward classes are those who are economically backward. The assumption is not well founded in all perspectives. In this case we are not called upon to circumnavigate the subject in detail. A simple expression like backward classes in the Constitution gained the characteristics of a term of art and eluded definition for four decades by all the Courts including the Supreme Court of India. The tests are yet to be devised. The search has found to be exasperating. The States and the Centre are bewildered at the numerous problems engendered by clause 4 of Article 15 of the Constitution of India. The enormity of the problem if can be gauged from Committee reports. The reports in which attempts are made are : Kalkar Committee Report (March 30, 1955), Nagan Gonda Committee Report (May 16, 1961) Kerala Committee Report (Dec. 31, 1965) Jammu and Kashmir Committee Report to the High Court of J & K (Dec. 15, 1966) Havnur Committee Report (Nov. 19, 1975) Mandal Committee Report (December, 1980) Bakshi Committee Report (December, 1980) Muralidhar Rao Committee Report (September, 1982) Rane Committee Report (?). Each of the reports brought forth numerous controversies in Supreme Court cases leave aside the problems grappled by State High Courts. All the cases have not squared the circle. As on today in Karnataka State a retired Judge of the Supreme Court is appointed to take stock of the situation and spell out tests for identifying backward classes. The question thus for forty years defied ratiocination, leave aside a solution. We do not wish to cover cases in this case as we are called upon to interpret a statutory Rule not any Constitutional provision.

We are unsure whether the issue can be avoided even under a Statute. We however take shelter in this case because vires of section 36 of Act I of 1910 or of Rule 223 is not assailed in the case. As to the solution if we may venture the solution is to be found not in logic. Justice Holmes of America said law is not logic. Assuming experience of four decades is relevant the problem to be solved in pragmatism not in per se logic or intrinsic logic. With that we part with this aspect of the subject.

In 32 ILR Gauhati 1980, page 99 (Rajkumar Dflp Narayan Singha Tg. The Assam Board of Revenue & others) the question before the Special Bench was whether financial soundness of an educated unemployed youth was essential for settlement of an excise shop. In considering the import of column 11 of tender form this Court considered the implication of backwardness. Lahiri, J. as he then

was, observed: "Liquor settlements in the region reveal a sad story. I have noticed with profound regret that on getting settlement, a settlement holder mortgages, sells or hypothecates his land or the land of his relations. He obtains the money and continues to run the shop. But on appeal settlement made in his favour is set aside. He is not only unsettled but sustains shocking damage or loss by transfer of land. When a person really obtains finance by mortgage, sale or hypothec actions or transfer of the right to land the authority below should be cautious and careful enough to consider the predicaments and heavy injustice caused to such persons. The appellate authority should be cautious and careful enough to unsettle settlements made in favour of these persons."

Hansaria, J. considered whether financial soundness is essential and held column 11 was not ultra vires of the Act or Rule. Pathak Acting Chief Justice considered S. 36 of the Assam Excise Act and Rules of 1945, in particular Part IV at para 7 at page 155 and held "After going through the entire scheme of the Act it has been noticed that in the matter of settlement of Country Spirit Shop there are two general tests which are to be taken note of by the settling authority. First, the personal test of the tenderer which is very important matter as envisaged in different rules of the Rules. The second is the question of suitability test in which the financial backing for managing the shop comes for consideration." The special Court sustained the vires of rule in the background of economic backwardness of candidates.

In another case (1983) 2 G. L. R. 390 (Ziaur Rahman vs. Assam Board of Revenue and ors) at page 401 para 3 this Court held the Executive Instructions on August 4, 1956 and September 12, 1961 "cannot" prevail over subrule (2), inasmuch as the latter is a statutory provision and the former are mere Executive Instructions. No doubt, Executive Instructions can fill up the gaps, but they cannot run counter to the statutory rules. The field of preference to the persons belonging to the OBCs being covered by subrule (2). I do not think if aid of the aforesaid executive instructions can be taken. It is worthwhile to point out that the aforesaid executive instructions being prior to the framing of the aforesaid rule in 1974, the question of their filling up the gaps in later provision does not really arise".

In the case (1987) 2 G. L. R. 471 (Shri Joy Kanta Hira vs. The State of Assam and others) in para 7 : "That the Legislation is a typical illustration of the concept of distributive justice". Legislators, Judges and administrators it is stated are now familiar with the concept of distributive justice. The concept distributive justice in the sphere of law making connotes inter alia the removal of economic inequalities and rectifying the injustice resulting from dealings or transactions between unequal in society. Law should be used as an instrument of distributive justice to achieve a fair division of wealth among the members of society based upon the principle, namely, from each according to his capacity, to each according to his need."

We are called upon in this case to answer whether Scheduled Castes are covered

by the expressions Backward Classes or Backward Community. If the answer is in the negative the writ petition per force has to be allowed. The learned Advocate General argued Scheduled Castes are covered by that expression. We agree with the contention of the learned Advocate General without blurring the issue.

We may cite a decision of the Supreme Court wherein Scheduled Castes are backward classes was accepted axiomatic. The case in AIR 1968 SC 1379 (State of Andhra Pradesh vs. P. Sagar) wherein it is held "The criterion for determining the backwardness must not be based solely on religion, race, caste, sex, or place of birth, and the backwardness being social and educational must be similar to the backwardness from which the Scheduled Castes and the Scheduled Tribes suffer" para 6 page 1383. The passage for all pragmatic purposes shows Scheduled Caste persons suffer backwardness therefore form part of backward classes.

We see two in Rule 223. Backward Communities and Backward Classes the two expressions are used. Our answer is recorded not in the background of Article 15, 16, 46 of the Constitution though the above provisions are cited at the debate. The reason for not considering in the background of the Constitution is because vires of S. 36 or rule 223 is not raised in the instant case. As Rule 223 stands we answer even at the cost of repetition the question at issue as under.

We agree with the contention of the learned Advocate General that Scheduled Caste candidates form part of Backward Communities. The contention of the learned counsel for the petitioner that the Scheduled Caste candidate do not form part of Backward Class and Backward Community is not accepted. In that view we hold the conclusions reached by the Additional Deputy Commissioner, Tinsukia in setting the Country Spirit Shop in favour of the Scheduled Caste candidate is not illegal. The impugned order of Assam Board of Revenue does not suffer any vice whatever.

For the aforesaid reasons the writ petition is dismissed. No costs.