

(2001) 03 BOM CK 0118

In the Bombay High Court

Case No : Writ Petition No. 2368 of 1989

Sudhakar Vithal Kumbhare

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 23-03-2001

Acts Referred:

Constitution of India, 1950 — Article 300, 303, 304, 341, 342
Representation of the People Act, 1950 — Section 20

Citation : (2001) 2 ALLMR 523 : (2001) 4 BomCR 582 : (2001) 2 BOMLR 952 :
(2001) 4 MhLj 475

Hon'ble Judges : R.M. Lodha, J;D.B. Bhosale, J

Bench : Division Bench

Advocate : Mr. R.K. Mendadkar, for the Appellant; Mr. C.R. Sonawane, A.G.P.
and Ms. A.R.S. Baxi, for the Respondent

Judgement

R. M. Lodha, J.—By the order dated 5.5.1989 the respondent No. 2 ordered reversion of the petitioner to the post of Junior Engineer (C) since it was found that the petitioner was wrongfully promoted to the post of Assistant Engineer (C) against the quota reserved for B. C. Communities vide order dated 23.9.1987. This office order dated 5.5.1989 is impugned by the petitioner in the present writ petition.

2. Mr. Mendadkar, learned counsel for the petitioner, urged that the petitioner was born in Maharashtra and the question whether he is migrant from Madhya Pradesh was not open to be decided by the employer, but could only have been determined by the Committee for Scrutiny and Verification of Tribe Claims (For short "the Scrutiny Committee") and unless that claim was determined holding that the petitioner was not Scheduled Tribe (S.T.) the order of reversion could not have been passed. In support of his arguments, the learned counsel for the petitioner relied upon the judgment of Apex Court in Kumari Madhuri Patil and another v. Addl. Commissioner, Tribal Development and Ors., another judgment of the Apex Court in Union of India & Ors. v. Dudh Nath Prasad, and the Order of Division Bench of this Court in Writ Petition No. 1562/2000 Shri Needish Ashwin

v. State of Maharashtra & Ors.,.

3. Per contra Ms. Baxi, learned counsel for respondent No. 2 submitted that the petitioner is migrant to the State of Maharashtra and therefore not entitled to get the benefit of the S.C. and S.T. in the State of Maharashtra vide circular issued by the Government of Maharashtra on 10.5.1990. According to the learned counsel, the said circular dated 10.5.1990 issued by the Government of Maharashtra is based upon the Judgment of the Apex Court in Merri Chandra Shekhar Rao v. Dean, Seth G. S. Medical College & Ors.,. The learned counsel for respondent No. 2 also relied upon the judgment of the Apex Court in Action Committee on issue of Caste Certificate to Scheduled Castes and Schedule Tribes in the State of Maharashtra and Anr. v. Union of India and Anr. and submitted that the order of reversion dated 5.5.1989 is legal and proper.

4. Though the learned Counsel for the petitioner orally submitted that the petitioner was born in Maharashtra, we find that there is no such statement of fact made by the petitioner in the writ petition. Rather, in paragraph 2 of the petition, the petitioner has stated that he was originally resident of village : Sawargaon, post Pandhurna, District: Chhindwara in the State of Madhya Pradesh. Meaning thereby the petitioner was born in the State of Madhya Pradesh and is originally resident of the said State. It is further averred by the petitioner in the petition that he got his primary school education till higher secondary examination in the State of Madhya Pradesh. The petitioner passed his higher secondary examination in the year 1975 from Pandhurna in the State of Madhya Pradesh. The petitioner after having completed his education applied for employment to the respondent No. 2 and by the order dated 26.3.1981 was appointed as Junior Engineer (C) and was posted at Chandrapur. The petitioner claims to have been appointed against the vacant post of Junior Engineer (C) in Work charged establishment. He has averred that he was confirmed in the employment as Junior Engineer (C) on completion of probation period. The petitioner's name was recommended for promotion to the post of Assistant Engineer (Civil) and accordingly vide order dated 23.9.1987 he was promoted on the post of Assistant Engineer and started working as such. As already indicated above, on 5.5.1989 respondent No. 2 issued the order reverting the petitioner from the post of Assistant Engineer (Civil II) to the original post of Junior Engineer (Civil) on the ground that the said post was reserved for backward class communities to which the petitioner did not belong and wrongfully promoted.

5. The nub of the case set up by the petitioner in the Writ Petition is that he belongs to Halba Tribe which is scheduled tribe in the State of Maharashtra as well as in the State of Madhya Pradesh and accordingly belongs to Scheduled Tribe in the State of Maharashtra. The petitioner has produced certificate of caste (Exh. C) issued by Tahsildar, Saunsar certifying that the petitioner is resident of Sawargaon, tahsil Saunsar, District; Chhindwara and belongs to Halba Caste and this caste is included in the scheduled tribes. These facts leave no manner of doubt that the petitioner was born in Madhya Pradesh, got his education in

Madhya Pradesh and also obtained his caste certificate belonging to Halba Tribe from the concerned officer in the State of Madhya Pradesh. The question that falls for our consideration is whether the petitioner being of Halba Tribe and original resident of Madhya Pradesh as migrant to the State of Maharashtra can get the benefit of scheduled tribe Halba in the State of Maharashtra.

6. In Merri Chandra Shekhara Rao (supra), the Apex Court, on construction of Articles 341 and 342 held in paragraphs 10, 12, 20 and 22 of the report thus :

"10. It has, however, to be borne in mind that a man does not cease to belong to his caste by migration to a better or more socially free and liberal atmosphere. But if sufficiently long time is spent in socially advanced area then the inhibitions and handicaps suffered by belonging to a socially disadvantageous community do not continue and the natural talent of a man or a woman or a boy or girl gets full scope to flourish. These, however, are problems of social adjustment i.e. how far protection has to be given to a certain segment of socially disadvantaged community and for how long to become equal with others is a matter of delicate social adjustment. These must be so balanced in the mosaic of the country's integrity that no section or community should cause detriment or discontentment to other community or part of community or section. Scheduled-Castes and Scheduled Tribes belonging to a particular area of the country must be given protection so long as and to the extent they are entitled in order to become equal with others. But equally those who go to other areas should also ensure that they make way for the disadvantaged and disabled of that part of the community who suffer from disabilities in those areas. In other words. Scheduled Castes and Scheduled Tribes of Andhra Pradesh do require necessary protection as balanced between other communities. But equally the Scheduled Castes and Scheduled Tribes say of Maharashtra in the instant case, do require protection in the State of Maharashtra, which will have to be in balance to other communities. This must be the basic approach to the problem. If one bears this basic approach in mind, then the determination of the controversy in the instant case does not become difficult. For the purpose of understanding the problem, it may be worthwhile to refer to the Report of the Joint Committee of the Parliament on the Scheduled Castes and Scheduled Tribes (Amendment) Order Bill, 1967. It may also be worthwhile to refer to the proceedings of the Constituent Assembly on September 17, 1949 dealing with draft Articles 303 and 304, which later on became Articles 341 and 342 respectively. Dr. B. R. Ambedkar moving the Resolution observed as follows :

"That after Article 300, the following articles be inserted :

300-A. (1) The President may, after consultation with the Governor or Ruler of a State, by public notification specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for purposes of this Constitution be deemed to be Scheduled Castes in relation to the State.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes

specified in a notification issued by the President under clause (1) of this article any caste, race or tribe or part of or group within any caste, race or tribe but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

300-B. (1) The President may after consultation with the Governor or Ruler of a State, by public notification specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued by the President under clause (1) of this article 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."

The object of these two articles, as I stated, was to eliminate the necessity of burdening the Constitution with long list of Scheduled Castes and Scheduled Tribes. It is now proposed that the President, in consultation with the Governor or Ruler of a State should have the power to Issue a general notification in the Gazette specifying all the castes and tribes or groups thereof deemed to be Scheduled Castes and Scheduled Tribes for the purposes of the privileges which have been defined for them in the Constitution. The only limitation that has been imposed in this; that once a notification has been issued by the President, which, undoubtedly, he will be issuing in consultation with and on the advice of the Government of each State, thereafter, if any elimination was to be made from the list so notified or any addition was to be made, that must be made by Parliament and not by the President. The object is to eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President.

12. It is, however, necessary to give proper meaning to the expressions for the purposes of this Constitution and in relation to that State appearing in Articles 341 and 342 of the Constitution. The High Court of Gujarat has taken the view in two decisions, namely, *Kum Manju Singh v. Dean, B. J. Medical College and Ghanshyam Kisan Borikar v. L. D. Engineering College* to which our attention was drawn, that the phrase for the purposes of this Constitution cannot be and should not be made subservient to the phrase in relation to that State and therefore, it was held In those two decisions that in consequence the classification made by one State placing a particular caste or tribe in the category of Scheduled Castes or Scheduled Tribes would entitle a member of that caste or tribe to all the benefits, privileges and protections under the Constitution of India. A similar view has been taken by the Karnataka High Court in the case of *P. M. Muni Reddy v. Karnataka Public Service Commission*. On the other hand, the Orissa High Court in the case of *K. Appa Rao v. Director of Posts & Telegraphs, Orissa* and the Full Bench of the Bombay High Court in *M. S. Malathi v. Commissioner, Nagpur Division* have taken the view that in view of the expression in relation to that

State occurring in Articles 341 and 342, the benefit of the status of Scheduled Castes or Scheduled Tribes would be available only in the State in respect of which the caste or tribe is so specified. A similar view has been taken by the Punjab and Haryana High Court in the case of *V. B. Singh v. State of Punjab*.

20. Having regard, however, to the purpose and the scheme of the Constitution which would be just and fair to the Schedule Castes and Scheduled Tribes, not only of one State of origin but other States also where the Scheduled Castes or Tribes migrate in consonance with the rights of other castes or community, rights should be harmoniously balanced. Reservations should and must be adopted to advance the prospects of weaker sections of society, but while doing so care should be taken not to exclude the legitimate expectations of the other segments of the Community.

22. In that view of the matter, we are of the opinion that the petitioner is not entitled to be admitted to the medical college on the basis of Scheduled Tribe certificate in Maharashtra. In the view we have taken, the question of petitioner's right to be admitted as being domicile does not fall for consideration."

7. The view taken in *Merri Chandra Shekhar Rao's* case has been affirmed and followed by the Five Judge Bench of the Apex Court in *Action Committee on Issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra & Anr. (supra)*. The question before the Full Bench of the Apex Court was whether a person belonging to a caste or tribe specified for the purposes of the Constitution to be a scheduled caste or scheduled tribe in relation to State A migrates to State B, whether caste or tribe in the same nomenclature is specified for the purposes of the Constitution to be the scheduled caste or scheduled tribe in relation to that State B, will that person be entitled to claim the privileges and benefits admissible to persons belonging to S.C. and/or S.T. in the State B? The Apex Court on consideration of the relevant provisions held in paragraph 16 of the report thus :-

"16. We may add that considerations for specifying a particular caste or tribe or class for inclusion in the list of Scheduled Castes/Schedule Tribes or backward classes in a given State would depend on the nature and extent of disadvantages and social hardships suffered by that caste, tribe or class in that State which may be totally Honest in another State to which persons belonging thereto may migrate. Coincidentally it may be that a caste or tribe bearing the same nomenclature is specified in two States but the considerations on the basis of which they have been specified may be totally different. So also the degree of disadvantages of various elements which constitute the input for specification may also be totally different. Therefore, merely because a given caste is specified in State A as a Scheduled Caste does not necessarily mean that if there be another caste bearing the same nomenclature in another State the person belonging to the former would be entitled to the rights, privileges and benefits admissible to a member of the Scheduled Caste of the letter State "for the purposes of this Constitution". This is an aspect which has to be kept in mind and

which was very much in the minds of the Constitution-makers as is evident from the choice of language of Articles 341 and 342 of the Constitution. That is why in answer to a question by Mr. Jaipal Singh, Dr. Ambedkar answered as under :

"He asked me another question and it was this. Supposing a member of a Scheduled Tribe living in a tribal area migrates to another part of the territory of India, which is outside both the scheduled area and the tribal area, will he be able to claim from the local Government, within whose jurisdiction he may be residing the same privileges, which he would be entitled to when he is residing within the scheduled area or within the tribal area? It is a difficult question for me to answer. If that matter is agitated in quarters where a decision on a matter like this would lie, we would certainly be able to give some answer to the question in the form of some clause in this Constitution. But so far as the present Constitution stands, a member of a Scheduled Tribe going outside the scheduled area or tribal area would certainly not be entitled to carry with him the privileges that he is entitled to when he is residing in a scheduled area or a tribal area. So far as I can see, it will be practicably impossible to enforce the provisions that apply to tribal areas or scheduled areas, in areas other than those which are covered by them

Relying on this statement of the Constitution Bench ruled that the petitioner was not entitled to admission to the medical college on the basis that he belonged to a Scheduled Tribe in the State of his origin."

8. Thus the legal position appears to be settled that merely because a given caste or tribe is specified in a particular State as a scheduled caste or tribe does not necessarily mean that if there be caste or tribe bearing the same nomenclature in another State, the person belonging to the former would be entitled to the rights, privileges and benefits admissible to a member of scheduled caste or tribe of the later State. The petitioner, accordingly, being of Halba Tribe and belonging to the State of Madhya Pradesh where said Tribe is a scheduled tribe cannot take the advantages: of the Halba Tribe merely because Halba Tribe of the same nomenclature is a scheduled tribe in the State of Maharashtra. The privileges, rights and benefits admissible to the petitioner being a member of scheduled tribe in the State of Madhya Pradesh cannot be necessarily enjoyed by him in the State of Maharashtra simply because the Tribe bearing the same nomenclature is scheduled tribe in the State of Maharashtra.

9. We find that the State of Maharashtra relying upon the judgment of the Apex Court in Merri Chandra Shekhara Rao (supra) issued a circular on 10.5.1990 that migrants from other States are not entitled to get facilities of scheduled caste/scheduled tribe in the State of Maharashtra. We may note here that the petitioner has not challenged the legality of the said circular dated 10.5.1990. We even otherwise find that the said circular is in conformity and accord with the law laid down by the Apex Court as aforesaid and in view thereof, the petitioner being migrant to the State of Maharashtra from the State of Madhya Pradesh is not entitled to get facilities, benefits and privileges of scheduled caste/

scheduled tribe in the State of Maharashtra. There is no dispute before us that the post of Assistant Engineer (Civil) on which the petitioner was promoted was against the quota reserved for B.C. class communities. Apparently since the petitioner cannot claim the benefit of scheduled tribe in the State of Maharashtra being migrant from the State of Madhya Pradesh was not entitled to be promoted to the post of Assistant Engineer (Civil) against the quota reserved for B.C. communities and, therefore, as soon as this error came to the notice of respondent No. 2, the said error is sought to be rectified by reverting the petitioner to the post of Junior Engineer (Civil).

10. Before we part with the case, we may refer to the judgments relied upon by the learned Counsel for the petitioner. Insofar as Kumari Madhuri Patil's case is concerned, we find that the said Judgment does not help the petitioner at all since in that case the Apex Court has issued guidelines to be followed for the purposes of issuance of social status certificate, their scrutiny and their approval as stated in paragraph 13 of the report. In the present case, the question is whether the petitioner as being migrant from the State of Madhya Pradesh to the State of Maharashtra can get benefits to the facilities of scheduled tribe in the State of Maharashtra on the face of Government Circular dated 10.5.1990. The case in hand is squarely covered by the aforesaid two judgments of the Apex Court in Merri Chandra Shekhara Rao and the Action Committee on issue of caste certificate to scheduled castes and scheduled tribes in the State of Maharashtra.

11. Another judgment of the Apex Court in Union of India and Ors. v. Dudh Nath Prasad, upon which reliance has been placed by the learned counsel also does not help. What has been held by the Apex Court in Dudh Nath Prasad's case is with reference to para 5 of the Instructions to the candidates contained in the pamphlet issued for Indian Administrative Service etc. Examination 1966 published under the authority of the Government of India and proforma of the form on which the Schedule Caste Certificate is to be issued as per para 5. The Apex Court in that context held that the concept of domicile and residence are relative concepts and have to be understood in the context in which they are used having regard to the nature and purposes of the Statute in which these words are used. The Apex Court observed that since they were principally concerned with the expression "ordinarily reside." the same meaning should be given as has been given to the expression "ordinarily resident" used in Section 20 of the Representation of People Act. 1950. We find hardly relevance of the Judgment of the Apex Court in Dudh Nath Prasad's case in the case on hand where we are concerned with the question whether the petitioner is entitled to get the benefits, rights and privileges of the scheduled tribe in the State of Maharashtra when he is original resident of Madhya Pradesh and he started residing in Maharashtra only after he got employment in the service of respondent No. 2-Maharashtra State Electricity Board, We are of the considered view that the controversy is concluded rather by the Apex Court judgments in Merri Chandra Shekhar Rao and Action Committee referred to herein above.

12. The reliance placed upon by the learned Counsel for the petitioner on the order of this Court in Writ Petition No. 1562/2000 - Shri Needish Ashwin v. State of Maharashtra & Ors. decided on October 19, 2000 is also misplaced since we find that the Division Bench of this Court was concerned with the question whether the Caste Scrutiny Committee was justified in rejecting the claim of the petitioner therein for grant of caste certificate merely on the ground that he is migrated from Gujarat though the petitioner claimed to belong to caste "Hindu Mahyavanshi" which is a scheduled caste in the State of Gujarat as well as in the State of Maharashtra and the matter remanded to scrutiny Committee.

13. For the reasons already indicated above, we have no hesitation in holding that the office order issued by respondent No. 2 on 5.5.1989 does not suffer from any infirmity.

14. Writ petition accordingly has no merit and is dismissed with no order as to costs.

15. For a period of one month, upon oral prayer made by the learned Counsel for the petitioner, the interim order passed by this Court shall remain operative.