
(1993) 05 J&K CK 0006
In the Jammu And Kashmir High Court
Case No : Writ Petition No. 401 of 1989

Sunita Devi

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 20-05-1993

Acts Referred:

Constitution of India, 1950 — Article 15, 16(4), 336(24), 341

Citation : (1994) 1 DMC 30

Hon'ble Judges : R.P. Sethi, J;M.L. Koul, J

Bench : Division Bench

Advocate : S.D. Sharma, for the Appellant; S.K. Anand and V.K. Wazir, for the Respondent

Final Decision : Dismissed

Judgement

R.P. Sethi, J.—How does the marriage of a Hindu female outside her caste affects her rights of benefits arising out of the Jammu and

Kashmir Scheduled Castes and Backward Classes Rules, 1970 (hereinafter referred to as the 1970 Rules)? is the important question of law

referred to this Bench vide order passed by the learned Single Judge on 16.11.1990. It is submitted that as after her marriage the female acquires

the status and Gotra of her husband, her rights in terms of the 1970 Rules should be determined by reference to the caste of her husband

notwithstanding his own caste in which she was born.

2. Some of the facts giving rise to the filing of the present petition are : that the petitioner herein who is a member of a scheduled caste claims

promotion under the rules by quashing order No. DSW/286 of 1989 dated 20-10-1989 with a prayer of restraining the respondents from

reverting her to the post from which she was promoted. It is submitted that as

respondent No. 3 who was originally a member of the scheduled caste, had married to a Rajput she has become disentitled to claim the benefit under the 1970 Rules. Respondent No. 3 is alleged to have made a representation against the promotion of the petitioner as Asstt. Child Development and Project Officer (ACDPO. for Short) on the ground that she was senior than the petitioner and could not be ignored while making promotion vide order No. DSW/229 of 1989 dated 2-9-1989. Said representation was accepted vide the order impugned herein wherein was held :
Whereas Smt. Suman Bala Supervisor represented against this order on the ground that she is senior to Sunita Devi and figures at Sr. No. 13 of seniority list circulated vide this office endorsement No. DSW/Estt.-Sup/3839-396/86 dated 5-9-1986 and belongs to a Sch. Caste community. .

Whereas the representation of Smt. Suman Bala has been examined and her claims of being senior to that of Sunita Devi accepted.

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Now, therefore, it is hereby ordered that Smt. Sunita Devi appearing at Sr. No. (6) of Part II Jammu Dev. in order No. DSW-229 of 1989 dated 2-9-1989 shall revert to her original place of posting as Supervisor and Smt. Suman Bala shall be deemed to have been promoted for a period of

six months and placed in the grade of 1550-2350 against the original grade of Rs. 1550-2250 as Asstt. C.D.P.O. and posted in ICDS Project

Bishnah.

3. In the counter affidavit filed on behalf of respondents 1 & 2 it is submitted that the petitioner came to be appointed as Supervisor in the ICDS

Project on probation for a period of two years vide Government order No. DSW 6718-52 dated 10.11.1983 alongwith respondent No. 3. The

name of the petitioner figured at S. No. 24 whereas name of respondent No. 3 figured at No. 11 of the said order. A tentative seniority list of

supervisors in the ICDS Project was circulated by the Directorate of Social Welfare on 5.9.1986 wherein respondent No. 3 was shown to be at

S. No. 13 and the petitioner at S. No. 25 vide order No. DSW-229 of 1989 dated 2.8.1989 six supervisors of Kashmir as well as Jammu

divisions were promoted as ACDPO for a period of six months pending clearance by the Deptt. Promotion Committee and according to that

order the petitioner who figured at S. No. 6 of the Jammu division was promoted and adjusted as ACDPO in ICDS project Bishnah against the

vacant post. Respondent No. 3 made a representation which was thoroughly examined and considered. It was found that the grievance projected

by her were genuine as a result whereof respondent No. 3 was ordered to have been promoted vide the order impugned in the writ petition. The

petitioner was reverted back to her post on the ground that she had been erroneously shown in the promotion order whereas she being quite junior

to respondent No. 3 had been wrongly promoted. The petitioner was relieved by the Child Development Officer on 23.10.1989 afternoon and

respondent No. 3 was allowed to join as ACDPO, Bishnah on the same day by submitting joining report (Annexure R7). ICDS Project is a

centrally sponsored scheme based on 20 point economic programme given to the nation by late Smt. Indira Gandhi, the then Prime Minister of

India and only administrative control was vested in the administrative department of the social welfare of the Government of Jammu and Kashmir

whose service rules have not been framed so far. The applicability of then 1970 Rules is not denied but it is submitted that seniority is the only

criteria for making, promotions in so far as the Supervisors are concerned. The plea of the petitioner in so far as it pertains to the averment that

respondent No. 3 after marrying a non scheduled caste has lost the status of being a scheduled caste member, has vehemently been denied. It is

submitted that the contention is contrary to the brochure on Reservation for Scheduled Castes and Scheduled Tribes in services, as issued by the

General Department in the year 1986 wherein it has been categorically mentioned that a person belonging to a scheduled caste will continue to be

so irrespective of the fact that he or she has married to a non-scheduled caste person.

4. In the counter affidavit filed on behalf of respondent No. 3 it is submitted that despite her marriage with a Rajput she continues to be a member

of the scheduled caste for the purposes of the rules. It is submitted that in brochure issued by the General Department it has been specifically

mentioned in Chapter I that a person belonging to scheduled caste will continue to be and deemed to be a member of the scheduled caste

irrespective of the fact that he or she has married to a non-scheduled caste member, she has further submitted that her representation has been

accepted on the admitted fact of her being senior than the petitioner.

5. We have heard learned Counsel for the parties and perused the record.

In order to appreciate the rival contentions of the parties it is necessary to ascertain the circumstances under which the rules were framed. It is to

be noticed that the State Government had issued the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules in the year

1956 containing a provision enabling the State Government to make reservation in Government services in favour of a backward class which in the

opinion of the Government was not adequately represented in service. The rule was only general in nature without specifying any class of people

belonging to backward class. It was amended vide Government Order No. 62-C of 1957. On 6 11.1967, Gajendragadakar Commission was

appointed to make assessment of the development programmes apportioned to various regions of the State and to recommend measures

necessary to give assurances that the resources available to the State Government were being shared equitably and to examine the recruitment

policy of the Government by making recommendations of giving an equitable share in the Government employment to various Regions and

communities, having special regard to the claim of scheduled castes and others economically, educationally and socially backward communities

classes and groups among the citizens of the State. In the month of December, 1968. the Gajendragadaka rCommission provided the following

criteria for determining the classes as backwards.

(i) Economic backwardness of the classes (based on suitable adhoc figure of annual income);

(ii) The occupation or occupations pursued by that class of citizens ;

(iii) Their place of habitation ;

(iv) The average students population per thousand in that class ;

(v) Caste in relation to Hindus"".

6. It was further recommended that a high power committee should be appointed to make recommendations for determination of the backward

classes on the lines and under the criteria laid down by the Gajendragadakar Commission. A backward Classes Committee was thereafter

appointed under the Chairmanship of Late Shri J.N. Wazir, retired Chief Justice of

the Jammu and Kashmir High Court in February, 1969 which submitted its report in November, 1969 recommending several classes of citizens to be classified as backward classes. Acting upon recommendations of the said committee the State Government framed rules which made provisions with respect to reservation of appointment and posts in favour of certain classes permanent residents of the State, who, in the opinion of the said committee were backward and were not adequately represented in service. Further rules were framed on 8.8.1970 known as the Jammu and Kashmir Scheduled and Backward Classes (Reservation) of Appointment by Promotion Rules 1970, which, inter alia, provided that the provisions of the Rules would apply mutatis mutandis in the matters of appointment by promotion also upto a certain grade and vacancies in any service, class, category or grade carrying the maximum pay-scale prescribed therein. The appointing authority or the selection authorities were required to maintain rosters in respect of each service, class, category or grade in which vacancy for appointment by direct recruitment and promotions were to be filled. These rules came up for scrutiny before the Supreme Court in case Janki Nath Parimoo v. State and Ors. AIR 1973 SC 93 and Triloki Nath and Ors. v. State of J & K AIR 1969 SC 1. In pursuance to the aforesaid judgments of the Supreme Court the State Government vide Government Order No. 174-GD of 1973 dated 17.1.1973 kept in abeyance the provisions of the aforementioned rules so far as they related to the backward classes and sought the position to be examined afresh and defects pointed out by the Supreme Court removed for which a committee headed by Justice (Dr.) A.S. Anand of this Court (as His lordship then was) was appointed for removal of various anomalies in the rules. This committee submitted its report in September, 1977.

7. Reservation in favour of scheduled castes and backward classes have their source in Part III of the Constitution of particularly as embodied in Sub Article (4) of Article 15 and Sub-article (4) of Article 16 Article 46 declaring the directive principles provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular of the scheduled castes and scheduled tribes, and shall protect them from social injustice and all forms of exploitations. Weaker sections of the society includes the backward

class of citizens as contemplated by Articles 16(4) of the Constitution. Part XVI of the Constitution embodies "special provision relating to certain

classes." The classes for which special provisions are made or scheduled castes scheduled tribes and Anglo Indian community. Article 340

empowers the President to appoint commission to investigate the conditions of backward classes. Various commissions were appointed by the

Central Government for the aforesaid purposes the most important of which is the Mandal Commission' whose report has been thoroughly

considered by the Supreme Court in case Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., . In order to appreciate the spirit behind

Article 16(4) of the Constitution a reference may be made to the speech of Dr. Ambedkar on the subject in the Constituent Assembly, who had

stated then "we have quite a massive opinion which insists that although theoretically it is good to have the principle that there shall be equality of

opportunity there must at the same time be a provision made for the entry certain communities which have so far been outside the administration".

It, therefore, follows that the reservation made in favour of scheduled castes and backward classes have their inception, basis and of foundation in

the Constitution which has promised for the establishment of a democratic specialist and secular republic in this country. The reservation has.

therefore, no theological origin or impact. The reservations were intended to benefit socially and educationally oppressed people mostly on the

basis of their birth in a particular caste or community. The word 'class' used in Article 16(4) of the Constitution has been held to have been used in

the sense of social class as distinguishable from the classes envisaged under the Marxist philosophy.

8. In K.C. Vasanth Kumar and Another Vs. State of Karnataka, , D.A. Desai, J. defined and described the caste in the following terms :

What then is a caste? Though caste has been discussed by scholars and jurists, no precise definition of the expression has emerged. A caste is a

horizontal segmental division of Society spread over a district or a region or the whole State and also sometimes outside it. Homo Hierachicus is

expected to be the central and substantive element of the caste/system which differentiate it from other social systems. The concept of purity and

impurity conceptualises the caste system..... There are four essential features of the caste system which maintained its homo hierachicus

character (1) hierarchy; (2) commendality; (3) restrictions on marriage; and (4) hereditary occupation. Most of the caste are endogamous groups.

Inter-marriage between two groups is impermissible. But 'Pratilom marriages are not wholly known.

9. It was again observed by the Supreme Court that a caste is an association of families which practice the custom of endogamy i.e., which permits

marriage amongst the members belonging to such families only. In *Indira Sawhney's* case (supra) the Supreme Court held that a caste was an

occupational grouping with the difference that its membership was hereditary. It observed "one is born into it. Its membership is involuntary. Even if

one ceases to follow that occupation, still he remains and continues a member of that group. To repeat, it is a socially and occupation ally

homogeneous class, Endogamy is its main characteristic. Its social status and standing depend upon the nature of the occupation followed by it.

Lower the occupation, lower the social standing of the class in general hierarchyHe may not follow that particular occupation. Still, the

label remains. His identity is not changed.....

10. The Supreme Court in *C.M. Arumugam Vs. S. Rajgopal and Others*, noted that in the Indian society originally there were only four main

castes but gradually castes, and subcastes have multiplied as the social fabric expanded with the absorption of different groups of people belonging

to various cults and professing different religious faith. Caste system in early stages was quite elastic but in course of time had gradually hardened

into rigid frame work based upon heredity. The Constitution framers were noticed to have accorded favourable treatment to the lower castes who

were at the bottom of the scale of social values and who were afflicted by social and economic disabilities. It was further observed that conversion

from Hinduism would operate as an expulsion from the caste and the converttee shall cease to have any caste because caste was predominantly a

feature of Hindu society and ordinarily a person who ceases to be a Hindu would not be regarded by other members of the caste as belonging to

their fold. In that case the appellant and the respondent had contested for election to the Mysore Legislative Assembly. The constituency was

declared as a seat reserved for scheduled caste with the result that only member of the scheduled castes could stand as a candidate from the said

constituency. The expression 'scheduled caste' was held to be having a technical meaning giving in Clause (24) of Article 336 of the Constitution

which meant, "such caste, race or tribe or parts of or groups within such castes or tribes as are deemed under Article 341 to be scheduled castes

for the purposes of the Constitution. The appellant in that case was proved to be belonging to the Adi Dravida professing Hindu religion and was

qualified to stand as a candidate for the reserved seat from that constituency. The first respondent also claimed to be an Adi Dravida. After the

elections were over the first respondent defeated the appellant and was declared elected, an election petition was filed in the Mysore High Court

challenging the election of the first respondent on the ground that he was not an Adi Dravida therefore, not qualified to stand as a candidate from

the said reserved constituency. The Mysore High Court held that the first respondent was converted to Christianity in 1949 and on such

conversion he ceased to be an Adi Dravida and therefore, at the material date cannot be said to be a member of the Scheduled caste. His election

was set aside and being aggrieved by the judgment, he approached the Supreme Court. Their Lordships observed that it must be held that when

the first respondent embraced Christianity in 1949 he ceased to belong to Adi Dravida caste but found that he subsequently reconverted to

Hinduism. The decision of the High Court was upheld vide the judgment reported in S. Rajagopal Vs. C.M. Armugam and Others, . Again in the

year 1976 the Supreme Court dealt with the effect of re-conversion and after reference to the facts of the case held, "It is clear from these

circumstances, which have been discussed and accepted by us, that after his re-conversion to Hinduism the 1st respondent was recognised and

accepted as a member of Adi Dravida caste by the other members of the community", which entitled him to contest the election as a scheduled

caste candidate.

11. In The Principal, Guntur Medical College, Guntur and Others Vs. Y. Mohan Rao, the Supreme Court dealt with the case of reservation of

seats for scheduled castes and held that a person whose parents belong to a scheduled caste before their conversion to Christianity can on

conversion of re-conversion to Hinduism, be regarded as a member of the scheduled caste only if they are accepted as members of their caste by

other members of the caste. On such acceptance they would be eligible for the benefit of reservation of seats for scheduled castes in the matter of

admission to a medical college. A candidate recognised as a member of the scheduled tribe in his original state on his migration to another state

was held by the Supreme Court to be not entitled to get benefit of reservation of seats in Marri Chandra Shekhar Rao Vs. Dean, Seth G.S.

Medical College and Others, . It was further observed that a person shall not be deemed to cease to belong to his caste by migration to a better

more social and free liberal atmosphere but if sufficient long time is spent in socially advanced area then the inhabitants and handicaps suffered by

belonging to a socially disadvantageous community do not continue and the natural talent of a man, woman or a boy or girl gets full scope of

flourish. It was found that some scheduled castes and scheduled tribes in different areas of the country required further protection and those who

go to better areas should ensure that they make way for disadvantaged and disabled of that part of the community who suffer from disabilities in

the areas.

12. Enclosure to Ministry of Home Affairs Circular No. 3511 y 72-RU (SCT.V) dated 2 5.1975 specifically provides amongst other things.

Claims through marriage :

The guiding principle is that no person who was not a Scheduled Caste or a Scheduled Tribe by birth will be deemed to be a member of a

Scheduled Caste or a Scheduled Tribe merely because he or she had married a person belonging to a Scheduled Caste or a Scheduled Tribe.

Similarly a person who is a member of a Scheduled Caste or a Scheduled Tribe would continue to be a member of that Schedule Caste or

Scheduled Tribe as the case may be, even after his or her marriage with a person who does not belong to Scheduled Caste or Scheduled Tribe.

Similarly in the brochure on Reservation for Scheduled Castes in Services, issued by the General Department of the State of Jammu and Kashmir

in the year 1976, it is specifically provided.

A person belonging to a Scheduled Caste will, however continue to be deemed a Scheduled Caste irrespective of her/his being married to a non-

Scheduled Caste"".

13. The origin of caste and class, their acknowledged backwardness the

constitutional guarantees provided, the scheme and object of reservation and the social purpose which is sought to be achieved unmistakably leads us to believe that the reservation provisions were intended for the purposes of such scheduled castes, scheduled tribes and backward classes, who had been deprived of the social benefits on account of their poverty and other circumstances and were intended to continue in order to do away with the stigma attached to such persons on account of their birth into a particular family of Scheduled Caste, Scheduled Tribe and backward class. The provision was secular in nature which had nothing to do with the religious aspect. It may religiously be true that after the marriage a woman may acquire the Gotra of the family to which she is married and be in a position to perform such religious activities which are intended to achieve solace for the soul of her husband and his family and to perform such religious ceremonies which are deemed to be necessary in the day to day affairs of the family connected with spiritual aspect as distinguishable from the secular outlook. If a person is allowed to acquire or be liable to the change of a status in the caste on account of his or her marriage, the consequences may be disastrous mainly resulting in defeating the object for which the constitutional provisions were made. It may also be against the public policy in as much as contract marriages be encouraged to be solemnised for a specific purpose of getting employment or promotions, as the case may be, and such marriages to be dissolved after the conferment of the benefits accruing on account of such matrimonial ties. If encouraged this may further lead to social chaos in the society resulting in the destruction of the basic fabric upon which its structure rests. In *Urmila Ginda Vs. Union of India and Others*, it was noticed that Article 15 did not enable the state to make any reservation in respect of backward classes or of scheduled castes or scheduled tribes except to the extent permitted for helping social and educational advancement of members of such class, caste or tribe. Dealing with the question regarding the effect of marriage of a lady with a scheduled caste husband, the High Court observed :

Article 15 having placed a total ban on the state discriminating against any citizen on the ground only of caste etc. the state would not be able to make any reservation at all in respect of backward classes or Scheduled Castes

or Scheduled Tribes except to the extent permitted i.e.; for helping social and educational advancement of members of such classes, castes or tribes. In other words, the Constitution does not enable the State to make any special provision de hors Article 15; it cannot make any except to the extent necessary for making special provision for the advancement of socially and educationally backward classes. The petitioner cannot obviously seek to take advantage of any special provision made by the State for the advancement of such classes of persons because she is not one of them she is a high caste Hindu who was not subject to any such backwardness either socially or educationally.

14. It seems to me that to permit a lady like the petitioner belonging to a higher caste to compete for a seat reserved for such socially and educationally backward class of people, merely by reason of her marrying a person belonging to such a caste, might even defeat the provision made by the State in favour of such socially and educationally backward classes by reserving certain posts for them. The special provision reserving a seat for Scheduled Castes would be nullified if a person not subject to educational or other backwardness is allowed to compete with those who are so handicapped. Even if it is not possible at the moment for the post reserved for backward communities and Scheduled Castes and Tribes to be filled up owing to non-availability of the candidates, the same has to be carried forward for at least two years, according to the Home Ministry's Official Memorandum (No. 27/25/68-Estt-SCT dated 25.3.1970). Shri D.K. Kapur, however, drew my attention to yet another Memorandum of the Ministry of Home Affairs dated 2.9.1964 [No. I/4/64-SCT(1)] stating that if there is only one vacancy it shall be treated as unreserved vacancy. I do not see how it helps the petitioner in any way because this particular post, according to the case of both sides, has been treated as a reserved vacancy and the petitioner also is claiming that it is a reserved one.

15. We, therefore, find no force in the argument of Counsel for the petitioner that after her marriage with a high caste Rajput, respondent No. 3 had ceased to be a member of the scheduled caste and, therefore, disentitled to the grant of benefits on account of reservation. Despite her marriage respondent No. 3 continues to remain as a member of the scheduled

caste and was rightly promoted to the post of ACDPO on the basis of her seniority.

16. No other point was urged before us.

There is no merit in this petition which is accordingly dismissed.