

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2363 OF 2013

WITH

CIVIL APPLICATION NO. 196 OF 2019

IN

WRIT PETITION NO. 2363 OF 2013

Prakesh s/o Shrawan Deore
Age : 38 years, Occ. : Service
R/o. N-32, P-53, Ganesh Chowk, New
CIDCO, Nashik

...Petitioner

Versus

- 1 Scheduled Tribe Certificate Scrutiny
Committee, Nashik, Gadkari Chowk,
CBS Road, Nashik, Dist. Nashik,
Through its Member Secretary
- 2 The Chief Engineer (Gen. O & M),
Nashik Thermal Power Station, P.O.
Eklhare, Nashik Road, Nashik

...Respondents

Mr. Mahesh Deshmukh, for the Petitioner.
Mr. Y. S. Khochare, AGP for Respondent no.1/Committee.
Ms. A. R. S. Baxi, for Respondent no.2.

**CORAM: B. R. GAVAI &
N. J. JAMADAR, JJ**

DATED: 22nd February, 2019

Oral Judgment:- (Per B. R. Gavai, J.)

1. The Petitioner has approached this Court being aggrieved by the order passed by Respondent no.1 – Scrutiny Committee, dated 9th January, 2013, thereby invalidating the claim of the Petitioner as belonging to the caste of Thakur – Scheduled Tribe (ST).

2. The Petitioner has been employed as a semi-skilled worker on the establishment of Respondent no.2 against a seat reserved for ST. As such, the claim of the Petitioner came to be referred by Respondent no.2 to Respondent no.1 for consideration of validity thereof. After due enquiry, including the inquiry by the vigilance cell, by the impugned order the claim came to be rejected.

3. We have heard Mr. Deshmukh, the learned Counsel for the Petitioner, Mr. Khochare, the learned AGP for the Respondent no.1/Scrutiny Committee and Ms. Baxi, the learned Counsel for Respondent no.2.

4. Mr. Deshmukh submits that the claim of the real brother of the Petitioner's father, namely Pitambar, has been held to be valid by the judgment and order of the Division Bench of this Court in the case of ***Pitambar Dhondu Deore vs. The State of Maharashtra & ors in Writ Petition No.4813 of 1998 dated 11th September, 1998.*** He further submits that relying on the validity which is granted in favour of Pitamber, Pitambar's son, namely Rajesh, has also been granted validity by the committee on 5th October, 1999. He, therefore, submits that in view of the law laid down in the case of ***Apoorva d/o. Vinay Nichale vs. Divisional Caste***

Certificate Scrutiny Committee and ors.¹, the claim of the Petitioner ought to have been accepted by Respondent no.1 - committee. He further submits that there are pre-constitutional documents in favour of the Petitioner's grandfather, namely Dhondu Thakur and, Petitioner's father Shrawan Deore. In view of the law laid down in the case of ***Anand vs. Committee for Scrutiny and Verification of Tribe Claims & ors.***², the committee could not have rejected the claim of the Petitioner only on the ground that the information submitted by the Petitioner on the trait, trades and characteristic of the tribal appears to have been gathered. The learned Counsel, therefore, submits that the petition deserves to be allowed.

5. Mr. Khochare, the learned AGP, on the contrary, vehemently submits that in view of the judgment of the Full Bench of this Court in the case of ***Shilpa Vishnu Thakur vs. State of Maharashtra and ors.***³, the enquiry with regard to the affinity test is the relevant consideration while considering the claim of the Petitioner. The learned AGP further relies on the judgment of the Division Bench of this

12010(6) Mh.L.J. 401.

2(2012) 1 SCC 113.

32009 (5) AIR Bom R 478.

Court at Aurangabad Bench in the case of ***Smt. Monika d/o Satish Thakur vs. The State of Maharashtra & ors. in Writ Petition No. 10123 of 2010 dated 4th May, 2018***, wherein, the Court, after taking survey of various judgments, has come to the conclusion that the failure to pass the affinity test would entitle the committee to reject the claim of the candidate.

6. We have perused the material placed on record. The record would reveal that the Petitioner has tendered the school leaving certificate of his grandfather, namely Dhondu Govinda Thakur. In the said certificate, the date of birth is shown as 26th February, 1907, the date of admission in school is shown as 9th April, 1912 and the date of leaving the school is shown as 21st January, 1919. The said document shows Petitioner's grandfather's caste as 'Thakur'. The Petitioner has also placed on record the extract of the school leaving certificate of his father Shrawan Dhondu Deore. In the said certificate, the date of birth is shown as 10th August, 1946, the date of admission in the school is shown as 5th June, 1954 and the date of leaving the school is shown as 4th May, 1963. The said document shows Petitioner's father's caste as 'Hindu Thakur'. The Petitioner has also placed on

record the school leaving certificate of his father's real brother Pitambar Dhondu Deore. In the said certificate, his caste is also shown as 'Hindu Thakur'.

7. It will be relevant to note that the Petitioner's father's real brother Pitambar was denied the validity by the Scrutiny Committee at Nashik and, therefore, he was required to approach this Court by way of Writ Petition No.4813 of 1998.

8. The Division Bench of this Court in the judgment and order passed in the said petition referred to the documents which were discussed hereinabove and found that, though in some documents 'Hindu' was mentioned, the same entry related to the religion of the Petitioner's forefathers and the caste was 'Thakur'. After considering the entire material and the judgment of the Hon'ble Apex Court in the case of ***Palghat Jilla Thandan Samudhaya Samrakshna Samithi vs. State of Kerala***⁴, the Division Bench observed in paragraphs 5, 6 and 7 thus:

“5. In the Presidential Order, Thakur tribe has been categorised as Scheduled Tribe at Serial No.44. It would, thus, not be open to either the State Government or to the Court to hold that Thakur does not belong to Scheduled Tribe. In the instant case, petitioner has been found to belong to Thakur Community but has been held to belong to a non-tribal group. This is specifically prohibited under the aforesaid judgment of the Supreme Court.

41994 SCC (1) 359.

6. In the instance case, the documentary evidence produced by the petitioner shows that the petitioner belongs to Thakur. Thakur in the aforesaid entry at Serial No.44 in the Presidential Order is shown to belong to Scheduled Tribe. It will, therefore, be not open either to the State Government or to any Court to hold that the said Thakur does not belong to Scheduled Tribe but to a high caste.

7. In the circumstances, the impugned order, which is annexed at Exhibit 'B' to the petition, is quashed and it is declared that the Petitioner belongs to Thakur Scheduled Tribe."

Not only this but also the scrutiny committee at Nashik vide order dated 5th October, 1999, after considering the judgment and order of the Division Bench of this Court in the case of ***Pitambar Deore*** (supra) held the claim of the Pitambar's son, namely Rajesh, to be valid.

9. Admittedly, all these documents were placed before the committee and the committee also does not dispute the genuineness of the said document. However, the committee goes on to observe thus while rejecting the claim of the Petitioner:

"Moreover, the information furnished by the applicant in his explanation regarding his ordinary place of residence, surnames, dialect, mother tongue, god-goddesses etc., is not consistent with Thakur, Scheduled Tribe community appeared at Sr. No.44 and some information about rituals, custom etc., is based on gathered knowledge. On the contrary, the basic fact is that the applicant is not the ordinary resident of the area scheduled for the Thakur, Scheduled Tribe community appeared at Sr. No.44 and the applicant wants to take the benefit of similarity of nomenclature of his caste as Thakur."

10. The aforesaid observations are not only contrary to the law laid down by the Hon'ble Apex Court in the case of ***Palghat*** (supra) but also totally in ignorance of the observation made by the Division Bench of this Court in the case of the Petitioner's father's real brother, namely Pitambar. The committee could not have ignored the said observations. As a matter of fact, in view of the judgment of this Court in the case of ***Apoorva Nichale*** (supra) in view of the validity in favour of the Petitioner's close blood relatives, the committee ought to have granted validity in favour of the Petitioner. Undisputedly, the decision of the committee is dated 9th January, 2013 i.e. after the judgment of the Division Bench in the case of ***Apoorva Nichale*** (supra).

11. We may also gainfully refer to the observations of the Hon'ble Supreme Court in the case of ***Jaywant Pawar vs. State of Maharashtra in Special Leave to Appeal No.2627 of 2010, dated 4th March, 2011.*** After remand, the case of ***Jaywant Pawar*** came for consideration in Writ Petition No.2152 of 2007 before the Division Bench consisting of B. R. Gavai and M. S. Karnik, JJ. The Division Bench allowing the said petition observed thus:

“9. We have considered the submissions made by the learned Counsel for the parties. In the present case, there is no dispute that certificate of validity dated 16/04/2004 is already issued in favour of real brother of the petitioner. The Division Bench of this Court in case of **Apoorva d/o Vinay Nichale** (supra) held that if the caste claim of the candidate has been held to be belonging to Scheduled Tribe then other close blood relatives cannot be denied the validity certificate. It is not the contention of the respondents that the caste validity certificate of the petitioner's real brother has been obtained by fraud or misrepresentation nor any finding to that effect is recorded. In the light of the law laid down by this Court in the case of **Apoorva d/o. Vinay Nichale** (supra), as the petitioner's real brother is already granted caste validity certificate as belonging to Thakur – Scheduled Tribe, in that view of the matter, the Petition is allowed.”

It will be relevant to refer to the observations of the Apex Court in the case of **Anand** (supra), which read thus:

“21. It is manifest from the aforeextracted paragraph that the genuineness of a caste claim has to be considered not only on a thorough examination of the documents submitted in support of the claim but also on the affinity test, which would include the anthropological and ethnological traits etc., of the applicant. However, it is neither feasible nor desirable to lay down an absolute rule, which could be applied mechanically to examine a caste claim. Nevertheless, we feel that the following broad parameters could be kept in view while dealing with a caste claim:

(i) While dealing with documentary evidence, greater reliance may be placed on pre-Independence documents because they furnish a higher degree of probative value to the declaration of status of a caste, as compared to post-Independence documents. In case the applicant is the first generation ever to attend school, the availability of any documentary evidence becomes difficult, but that ipso facto does not call for the rejection of his claim. In fact, the mere fact that he is the first generation ever to attend school, some benefit of doubt in favour of the applicant may be given. Needless to add that in the event of a doubt on the credibility of a document, its veracity has to be tested on the basis of oral evidence, for which an opportunity has to be afforded to the applicant;

(ii) While applying the affinity test, which focuses on the ethnological connections with the scheduled tribe, a cautious approach has to be adopted. A few decades ago, when the tribes were somewhat immune to the cultural development happening around them, the affinity test could serve as a determinative factor. However, with the migrations, modernisation and contact with other communities, these communities tend to develop and adopt new traits which may not essentially match with the traditional characteristics of the tribe. Hence, affinity test may not be regarded as a litmus test for establishing the link of the applicant with a Scheduled Tribe. Nevertheless, the claim by an applicant that he is a part of a scheduled tribe and is entitled to the benefit extended to that tribe, cannot per se be disregarded on the ground that his present traits do not match his tribes' peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc. Thus, the affinity test may be used to corroborate the documentary evidence and should not be the sole criteria to reject a claim."

It could, thus, be clearly seen that the Hon'ble Apex Court has in unequivocal words held that, with the migrations, modernisation and contact with other communities, the tribal tend to develop and adopt new traits which may not essentially match with the traditional characteristics of the tribe. It has been observed that the affinity test may not be regarded as a litmus test for establishing the link of the applicant with a Scheduled Tribe. It has been held that the claim of belonging to Scheduled Tribe cannot be disregarded on the ground that his present traits do not match his tribe's peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, method death ceremonies, method of burial of dead bodies, etc. It has been

held in clear terms that the pre-independence documents showing the applicant's forefathers belonging to the particular Scheduled Tribe have more probative value regarding his claim. It would further reveal that when there is doubt regarding the credibility of the document, its veracity has to be tested on the basis of the oral evidence, for which an opportunity has to be afforded to the applicant. It has been held that the affinity test cannot be a sole criteria to reject a claim.

12. No doubt that the learned AGP relied on the judgment of the Full Bench of this Court in the case of ***Shilpa Thakur*** (supra) that the claim cannot be decided only on the basis of the documentary evidence but the affinity test also plays an important role. However, it is to be noted that the judgment of the Full Bench in the case of ***Shilpa Thakur*** is dated 7th May, 2009, whereas the judgement of ***Anand Kathole*** is delivered by the Hon'ble Apex Court on 8th November, 2011. In the case of ***Rashmi Metaliks Limited and anr. vs. Kolkata Metropolitan Development Authority and ors.***⁵, the Hon'ble Apex Court has frowned upon the practice of lawyers citing multiple judgments in support of a proposition

5(2013) 10 SCC 95.

of law. Any sincere student of law, leave aside a practising lawyer, who has put a number of years at the bar, is expected to know that the judgment of High Court, including the judgments delivered by the Full Bench, which has taken a view, which is contrary to the view taken by the Hon'ble Apex Court, subsequently, the earlier judgment stands impliedly over-ruled. We do not understand the propriety in citing the judgment which is impliedly over-ruled.

13. Insofar as the judgement of the Division Bench in the case of **Monika** (supra) of Aurangabad Bench of this High Court is concerned, with due respect, we record that we have no other option but to state that the said judgment is *per incurium* in law. When the Division Bench of this Court in the case of **Apoorva Nichale** (supra) had taken a view that once the blood relatives of a candidate are declared to be ST, then the other blood relatives cannot be denied the said claim, the Division Bench has totally erred in rejecting the claim of the Petitioner therein in the backdrop of the fact that one brother and three sisters of the Petitioner therein were already granted validity. We have perused the entire judgment. It appears that the judgment of the Division Bench in the case of **Apoorva Nichale** (supra) was not brought to the notice of

the learned Judges of the Division Bench at Aurangabad. In that view of the matter, the view taken in the said judgment will have to be held to be *per incuriam*, the earlier judgment of the same strength of the Judges in the case of **Apoorva Nichale** (supra). It is necessary for us as a student of law to state that, earlier view of the Court of the same strength of Judges binds the subsequent Benches of the same strength of Judges and, if they propose to disagree with the same, the only option available to them is to make a request to the Hon'ble Chief Justice for making reference to a larger Bench.

14. We have extensively reproduced the observations of the Hon'ble Apex Court in the case of **Anand**. In the light of those observations, some of which have already been reproduced by the learned Judges at Aurangabad Bench in the case of **Monika**, we fail to understand as to how in spite of pre-constitutional documentary evidence the claim of the Petitioner could have been rejected.

15. However, from the perusal of the said judgment it appears to us that on the basis of the facts which were placed on record before the learned Judges of the Division Bench, the learned Judges found that no case was made out for setting aside the order of the scrutiny committee. We do not

wish to comment anything about the correctness of the view taken in the case of ***Monika Thakur***. Rather the principles of judicial propriety demand us not to do that.

16. In that view of the matter, we have no hesitation to hold that the view taken by the committee is not sustainable in law, in the light of the judgment of the Division Bench of this Court in the case of ***Apoorva Nichale***, so also subsequent judgment of the Hon'ble Apex Court in the case of ***Anand***. The view taken by the committee is patently contrary to the view taken by the Hon'ble judges of the Division Bench of this Court and the Hon'ble Apex Court.

17. A judicial note can be taken of the fact that the scrutiny committees have a tendency of rejecting the claims in spite of various genuine documents being placed on record and in spite of the legal position explicitly clarified by the earlier judgments of the Hon'ble Apex Court as well as the Division Benches of this Court.

18. In that view of the matter, the impugned order is not sustainable in law. The impugned order dated 9th January, 2013, is quashed and set aside. It is held and declared that the Petitioner is belonging to Thakur community – Scheduled Tribe. The Respondent – Scrutiny Committee is directed to

issue validity certificate to the Petitioner within the period of one week from today.

19. The petition is, therefore, allowed with costs.

20. The cost is quantified at one month's salary of the members of the committee, who have decided the present matter. The Chief Secretary of State of Maharashtra is directed not to pay the salary to the members of the Committee for the month of March-2019 and deposit the amount equivalent to one month's salary of each of the members with the TATA Memorial Hospital, Parel, Mumbai. The said costs be deposited by the Chief Secretary within ten days from uploading of the said order and the receipt thereof be placed on the record of the present proceedings.

21. The learned AGP is requested to communicate this order to the Chief Secretary, State of Maharashtra.

22. In view of disposal of the Petition, the Civil Application does not survive and is disposed of accordingly.

[N. J. JAMADAR, J.]

[B. R. GAVAI, J.]