IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

WRIT PETITION NO.301 OF 2018

Tanisha Surendra Patel & Ors.
All minors, through: … Petitioner
Shri Mohanbhai Patel

Vs

State of Maharashtra & Ors. … Respondents

Ms.Gayatri Singh, Senior Advocate i/b Kranti L.C. for the Petitioner

Mr.A.A. Kumbhakoni, Advocate General, with Mr.Akshay Shinde, 'B' Panel AGP, Mr.A.P. Vanarase, AGP, for Respondent – State

Mr.S.G. Thakur i/b Ms.Neeta Masurkar for Union of India

CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.

DATED: SEPTEMBER 3, 2019

ORAL ORDER (Per Akil Kureshi, J.):

1. The petitioner has challenged the action of the respondents-authorities in not issuing caste certificate / validity certificate to the petitioner as per the relevant form under the Maharashtra Scheduled Tribes (Regulation of Issuance of Verification of) Certificate Rules, 2003 (hereinafter referred to as 'the Rules of 2003'). The petitioner's consequential prayer is for direction to the

authorities to issue such a certificate by accepting the evidence produced by the petitioner of belonging to a family which was resident of the areas which constituted the erstwhile larger State of Bombay and which after re-organisation of the State, forms part of the State of Gujarat.

2. The petitioner claims to be belonging to Dhodia community hailing from a region which presently forms part of the State of Gujarat but which was a part of the Bombay State prior to re-organisation in the year 1960. The State authorities had earlier refused to grant caste certificate to the petitioner as the person belonging to scheduled tribe community of State of Maharashtra. The petitioner had, therefore, approached this Court by filing Writ Petition No.2556 of 2012. The petition came to be dismissed by order dated 29.4.2013. The order reads thus:

> "1. Heard learned counsel appearing for the petitioners. The challenge in this petition is to the caste certificates issued by the competent authority to the petitioners. The learned counsel appearing for the petitioners submitted that the caste certificates have been issued to the petitioners in the form used for migrants from another State/Union Territory to the State of Maharashtra. He submitted that the petitioner's father and aunt have been granted caste certificates as also caste validity certificates and they have been granted all benefits in the State of Maharashtra on the footing that they belong to 'Dhodia' Scheduled Tribe by birth.

He, therefore, urged that the caste certificates ought not to have been issued to the petitioners in the form used for migrants. He pointed out that in any event, there was no reason for the competent authority entrusted with the jurisdiction to issue caste certificates to proceed on the footing that the petitioners are migrants, inasmuch as whether the petitioners are entitled to benefit of reservation is an issue which could have been left to be decided by the appropriate Caste Scrutiny Committee. He pointed out that the caste validity certificates issued to the petitioners' father and aunt.

2. We have considered the submissions made on behalf of the petitioners. We have perused the caste validity certificate issued to the petitioners' father dated 24th January, 1994. The said certificate records that caste certificate dated 6th September, 1993 issued by the Executive Magistrate to the petitioners' father is valid. The learned A.G.P. has placed on record a compilation of the documents including a copy of caste certificate dated 6th September, 1993. Perusal of the said caste certificate issued to the petitioners' father shows that the same has been issued to the petitioners' father on the basis of caste certificate issued to the petitioners' father on the basis of caste certificate issued to the petitioners' grand-father. The caste certificate and in particular clause (2) thereof records that the petitioners' father belongs to 'HINDU DHODIA' Tribe which is recognized as a Scheduled Tribe in State of Gujarat. Same is the case with the caste certificate issued to the petitioners' aunt which is also dated 6th September, 1993. Thus, the caste certificate which was issued to the petitioners' father is on the footing that the petitioners' father is a migrant from the State of Gujarat and the said certificate, specifically records that the petitioners' father belongs to Hindu Dhodia community which is recognized as a Scheduled Tribe in the State of Gujarat. The validity certificate validates this caste certificate. The petitioners' father has never challenged the caste certificate issued way-back to 6th September, 1993. The caste certificate issued to the petitioners' aunt is also similar which has been validated.

> 3. Present petition is affirmed by the petitioners' father. We find that the caste certificates issued to the petitioners are consistent with the caste certificate issued to the petitioners' father as well as caste certificate issued to the petitioners' aunt. We, therefore, find no illegality in the caste validity certificate. Petition is accordingly dismissed."

3. For several years thereafter, the petitioner took no further steps. The present petition was filed in 2017, with the prayers noted above. In order to sustain these prayers, the petitioner has also challenged the vires of Rule 3(b), 4(1) and 5(1) of the Rules of 2003 contending that the same are ultra vires the Article 342 of the Constitution of India. The learned Counsel for the petitioner contended that in the previous petition, the challenge to the Rules was missing. This was necessary on account of the decision of the Supreme Court in the case of **Puducherry Scheduled Caste People Welfare Association vs. Chief Secretary to Government, Union Territory of Pondicherry and Others**[1] holding that any change in a Presidential Order is impermissible by an Executive Order. In this context, she relied on the decision of the Supreme Court in the case of **Puducherry Scheduled Caste People Welfare Association** (supra), and on the later decision in the case of **Director, Transport Department, Union Territory**

1 (2014) 9 SCC 236

Administration of Dadra and Nagar Haveli, Silvassa and others vs. Abhinav Dipakbhai Patel[2]**.** The Counsel contended that this is not a case of *res judicata* since the fresh petition is based on a fresh cause of action and in such circumstances, principle of *res judicata* or constructive *res judicata* would not apply. In this context, she relied on the decisions in **Jaswant Singh and another vs. Custodian of Evacuee Property, New Delhi**[3] and **Nagabhushanammal (dead) by Legal representatives vs. C. Chandikeshwaralingam**[4]**.**

4. On the other hand, the learned Advocate General in addition to opposing the maintainability of the fresh petition, submitted that the issue is squarely covered by two Full Bench judgments of this Court, namely, **Rajendra vs. State of Maharashtra through its Secretary & ors.**[5] and **Shweta Santalal Lal vs. State of Maharashtra & ors.**[6]**.**

5. At the outset, we are of the opinion that this fresh petition for the same cause of action is not maintainable. We may recall, previously, the petitioner had approached this Court complaining

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2 (2019) 6 SCC 434
3 (1985) 3 SCC 648
4 (2016) 4 SCC 434
5 (2019) SCC Online Bom 1194
6 2010(2) Mh.L.J. 904)

about the Department not issuing caste certificate though according to her, she was eligible for the same. The High Court dismissed the petition by the above noted order dated 29.4.2013. Once again, the same prayer is made, of course under different garb. Essentially, the foundational prayer of the petitioner remains the same, namely, for a declaration that the authorities were not correct in not issuing the caste certificate to the petitioner and that the consequential prayer for directing them to do so. The incidental challenge to the validity of the rules would not give rise to fresh cause of action, nor the arguments that such challenge became available to the petitioner only once the Supreme Court declared the law in **Puducherry Scheduled Caste People Welfare Association (**supra) would permit the petitioner to file a fresh petition.

6. In a famous decision in the case of **Mafatlal Industries Ltd. And Others vs. Union of India & Others[7],** the nine-Judge bench of the Supreme Court considered the effect of Courts declaring a certain law on the right of a party to seek similar treatment at a later point of time. The issues before the Supreme Court arose in the background of the refund claim arising out of excise or

7 (1997) 5 SCC 536

customs laws. In this context, Justice B.P. Jeevan Reddy speaking for the majority, laid down the law as under:

> "108.
> (ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception: Where a person approaches the High Court or the Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be reopened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, C.J. in *Tilokchand Motichand* and we respectfully agree with it.
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> (iv) It is not open to any person to make a refund claim on the basis of a decision of a court or tribunal rendered in the case of another person. He cannot also claim that the decision of the court/tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without reopening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several

well-established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund.

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(viii) The decision of this Court in *STO v. Kanhaiya Lal Mukundlal Saraf* must be held to have been wrongly decided insofar as it lays down or is understood to have laid down propositions contrary to the propositions enunciated in *(i) to (vii)* above. It must equally be held that the subsequent decisions of this Court following and applying the said propositions in *Kanhaiya Lal* have also been wrongly decided to the above extent. This declaration - or the law laid down in Propositions *(i) to (vii)* above - shall not however entitle the State to recover the taxes/duties already refunded *and* in respect whereof no proceedings are pending before any authority/Tribunal or Court as on this date. All pending matters shall, however, be governed by the law declared herein notwithstanding that the tax or duty has been refunded pending those proceedings, whether under the orders of an authority, Tribunal or Court *or* otherwise."

7. The decision of the earlier Supreme Court judgment in the case of **M/s.Tilokchand and Motichand & Others vs. H.B. Munshi & another**[8] was approved and the law laid down in the case of the **Sales Tax Officer, Banaras and others vs. Kanhaiya Lal Makund Lal Saraf**[9] was disapproved.

8 1969 (1) SCC 110
9 AIR 1959 SC 135

8. The petitioner, therefore, cannot approach the High Court again primarily on the ground that after her first attempt to secure reliefs from this Court failed, the Supreme Court had given a decision which may change the complexion of the entire controversy.

9. In the result, this petition is dismissed.

(S.J. KATHAWALLA, J.) **(AKIL KURESHI, J.)**