

May 10, 2022
Sl. No.20
Court No.1
PA - RB

WPA (P) 186 of 2022

Sk. Jayed Hossain
vs.
The State of West Bengal and Others

Mr. Robiul Islam,
Mr. Samim ul Bari,
Mr. K.M. Hossain, Advocates

... for the petitioner

Sk. Md. Galib,
Mr. Subhabrata Das, Advocates

... for the State

Mr. Amarendra Chakraborty, Advocate

... for the Union of India

Petitioner claiming himself to be a public spirited person has filed this public interest petition. The grievance raised in the petition is that the respondent authorities are not recognizing 'Majhi' community as Scheduled Tribe category and thereby no issuing ST certificate in their favour.

Submission of learned Counsel for the petitioner is that the members of 'Majhi' community belong to 'Santhal' community, therefore, they are entitled for the Scheduled Tribe certificate.

The prayer has been opposed by learned Counsel for the respondents submitting that in view of the Presidential Order, the members of 'Majhi' community are not entitled to the certificate of ST category.

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

The Constitution (Scheduled Tribe) Order, 1950 issued in exercise of power conferred by clause (1) of Article 342 of the Constitution of India clearly mentions in the Schedule, different tribes in various states, which are covered by the Presidential Order. So far as the State of West Bengal is concerned, 'Majhi' is not covered by the Presidential Order but only 'Santhal' is covered.

It is the settled position in law that once the Presidential Order is issued, it can only be amended by the Legislature and Courts cannot assume jurisdiction to enter into enquiry to determine if any particular tribe is covered in any other tribe as indicated in the Presidential Order. It has also been settled that the State Government or any authority or the Court or Tribunal are not vested with any power to modify or vary the Scheduled Tribes order.

In a recent judgment in the matter of **State of Maharashtra and Another vs. Keshao Vishwanath Sonone and Another** reported in **2020 SCC OnLine SC 1040**, Hon'ble Supreme Court has considered the earlier judgments on the point and has held that:

“47. We may notice another Constitution Bench judgment in *Bhaiya Lal v. Harikishan Singh*, AIR 1965 SC 1557, which was delivered few months after judgment of *B.*

Basavalingappa's case, noted the ratio of judgment and reiterated that though the appellant was not a Scheduled Caste as enumerated in the Scheduled Castes Order but he belonged to another caste, which is sub-caste of Scheduled Caste, cannot be looked into. In the above case, Bhaiya Lal was elected from reserved seat. Election was challenged on the ground that Bhaiya Lal belonged to Dohar caste and was not a Chamar. Bhaiya Lal in his nomination has declared that he was member of Chamar Scheduled Caste. Election Tribunal found against the elected candidate and set aside the election. The High Court dismissed the appeal. Bhaiya Lal questioned the judgment of the High Court as well as the Election Tribunal. The case of the appellant was that he was a Dohar Chamar, which is a sub-caste of Chamar Scheduled Caste. This Court held that the claim that Dohar caste is a sub-caste of Chamar caste cannot be entertained. in paragraph 8 following has been laid down:—

“8. Incidentally, we may point out that the plea that the Dohar caste is a sub-caste of the Chamar caste cannot be entertained in the present proceedings in view of the Constitution (Scheduled Castes) Order, 1950. This Order has been issued by the President under Article 341 of the Constitution. Article 341(1) provides that the President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races, or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory, as the case may be. Sub-article (2) lays down that Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) 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. It is thus clear, that in order to determine whether or not a particular caste is a scheduled caste within the meaning of Article 341, one has to look at the public notification issued by the President in that behalf. In the present case, the notification refers to Chamar, Jatav or Mochi, and so, in dealing with the question in dispute between the parties, the enquiry which the Election Tribunal can hold is whether or not the appellant is a Chamar, Jatav or Mochi. The plea that though the appellant is not a

Chamar as such, he can claim the same status by reason of the fact that he belongs to the Dohar caste which is a sub-caste of the Chamar caste, cannot be accepted. It appears to us that an enquiry of this kind would not be permissible having regard to the provisions contained in Article 341. In the case of *B. Basavalingappa v. D. Munichinnappa* this Court had occasion to consider a similar question. The question which arose for decision in that case was whether Respondent 1, though Voddar by caste, belonged to the scheduled caste of Bhovi mentioned in the Order, and while holding that an enquiry into the said question was permissible, the Court has elaborately referred to the special and unusual circumstances which justified the High Court in holding that Voddar caste was the same as the Bhovi caste within the meaning of the Order; otherwise the normal rule would be:

“it may be accepted that it is not open to make any modification in the Order by producing evidence to show, for example, that though caste A alone is mentioned in the Order, caste B is also a part of caste A and, therefore, must be deemed to be included in caste A.”

That is another reason why the plea made by the appellant that the Dohar caste is a sub-caste of the Chamar caste and as such must be deemed to be included in the Order, cannot be accepted.”

48. In *Bhaiya Lal's case*, the Constitution Bench reiterated the ratio of *B. Basavalingappa's case* in following words:—

“it may be accepted that it is not open to make any modification in the Order by producing evidence to show, for example, that though caste A alone is mentioned in the Order, caste B is also a part of caste A and, therefore, must be deemed to be included in caste A.”

49. We may notice few more judgments of this Court where the law on the subject was explained and reiterated. In *Srish Kumar Choudhury v. State of Tripura*, 1990 Supp SCC 220, this Court had occasion to consider Article 342. In the above case, the appellant had filed an application in a representative capacity before the High Court claiming that he belonged to Laskar community, which has always been treated in the erstwhile State of Tripura as a Scheduled Tribe. The writ petition was dismissed by the High Court against which the

appeal was filed. This Court referred to earlier two Constitution Bench judgments in *B. Basavalingappa's case* and *Bhaiya Lal's case*. The observations made by the Constitution Bench in *B. Basavalingappa's case* and *Bhaiya Lal's case* were extracted in paragraphs 8, 9 and 10. In paragraph 9, Three Judge Bench quoted the extract from *Bhaiya Lal's* judgment and in paragraph 11, it was held that the ratio of judgment of *Bhaiya Lal's case* supports the view of earlier judgment of Constitution Bench in *B. Basavalingappa's case*. In paragraphs 10 and 11, following has been laid down:-

“10. A similar dispute again came before a Constitution Bench in *Bhaiyalal v. Harikishan Singh*, AIR 1965 SC 1557 with reference to a scheduled tribe in an election dispute. Gajendragadkar, C.J. speaking for the court said : (SCR pp. 882-83)

“It is obvious that in specifying castes, races or tribes, the President has been expressly authorised to limit the notification to parts of or groups within the castes, races or tribes, and that must mean that after examining the educational and social backwardness of a caste, race or tribe, the President may well come to the conclusion that not the whole caste, race or tribe but parts of or groups within them should be specified. Similarly, the President can specify castes, races or tribes or parts thereof in relation not only to the entire State, but in relation to parts of the State where he is satisfied that the examination of the social and educational backwardness of the race, caste or tribe justifies such specification. In fact, it is well known that before a notification is issued under Article 341(1), an elaborate enquiry is made and it is as a result of this enquiry that social justice is sought to be done to the castes, races or tribes as may appear to be necessary, and in doing justice, it would obviously be expedient not only to specify parts or groups of castes, races or tribes, but to make the said specification by reference to different areas in the State.”

11. What we have extracted above clearly supports the view of the other Constitution Bench, namely, the list is intended to be final.”

50. The Three Judge Bench reiterated that Courts cannot enter into an enquiry to determine whether the three terms indicated in the Presidential Order include Deshi Tripura which covers the Laskar community. In paragraph 20, following was laid down:—

“**20.** The two Constitution Bench judgments indicate that enquiry is contemplated before the Presidential Order is made but any amendment to the Presidential Order can only be by legislation. We do not think we should assume jurisdiction and enter into an enquiry to determine whether the three terms indicated in the Presidential Order include Deshi Tripura which covers the Laskar community;”

51. This Court also reiterated that enquiry is contemplated before the Presidential Order is made.

52. The next judgment to be noticed is *Palghat Jilla Thandan Smudhaya Samrakshna Samithi v. State of Kerala*, (1994) 1 SCC 359. In the above case, a writ petition was filed claiming that the petitioner belonged to Thandan community, therefore, a Scheduled Caste certificate be issued. The writ petition was allowed, however, the petitioner was denied admission in M.B.B.S. course in seat reserved for Scheduled Caste on the ground that she was not a Thandan. A Three Judge Bench of this Court after noticing the ratio of earlier two Constitution Bench judgments has held that the Court could not assume the jurisdiction and order an enquiry to determine whether the terms of the Presidential Order includes a particular community. In paragraphs 17 and 18, following was laid down:—

“**17.** We may usefully draw attention to the judgment of a Bench of three learned Judges of this Court in *Srish Kumar Choudhury v. State of Tripura*, 1990 Supp SCC 220. This judgment considered the Constitution Bench judgments in *B. Basavalingappa v. D. Munichinnappa*, AIR 1965 SC 1269 and *Bhaiyalal v. Harikishan Singh*, AIR 1965 SC 1557 and certain other judgments. It held that the two Constitution Bench judgments indicated that any amendment to the Presidential Orders could only be by legislation. The Court could not assume jurisdiction and order an enquiry to determine whether the terms of the Presidential Order included a particular community. A State Government was entitled to initiate appropriate proposals for modification in cases where it was

satisfied that modifications were necessary and, if after appropriate enquiry, the authorities were satisfied that a modification was required, an amendment could be undertaken as provided by the Constitution.

18. These judgments leave no doubt that the Scheduled Castes Order has to be applied as it stands and no enquiry can be held or evidence let in to determine whether or not some particular community falls within it or outside it. No action to modify the plain effect of the Scheduled Castes Order, except as contemplated by Article 341, is valid.”

53. A Two Judge Bench in *Kumari Madhuri Patil v. Addl. Commissioner, Tribal Development*, (1994) 6 SCC 241 had occasion to consider the Constitution (Scheduled Tribes) Order, 1950 as applicable to State of Maharashtra. In Constitution (Scheduled Tribes) Order, 1950, caste “Mahadeo Koli” was included. The appellants claimed that they were entitled to Scheduled Tribe certificate of Mahadeo Koli whereas caste was shown in admission register as “Hindu Koli”. The Scheduled Caste certificate was refused. A writ petition was filed in the High Court, which was dismissed against which the matter came to this Court. This Court held that Scheduled Caste notified was Mahadeo Koli and the petitioners being Hindu Koli were not entitled for the Scheduled Tribes certificate. In paragraph 9, following has been laid down:—

“9.

.....
.... It is common knowledge that endeavour of States to fulfil constitutional mandate of upliftment of Scheduled Castes and Scheduled Tribes by providing for reservation of seats in educational institutions and for reservation of posts and appointments, are sought to be denied to them by unscrupulous persons who come forward to obtain the benefit of such reservations posing themselves as persons entitled to such status while in fact disentitled to such status. The case in hand is a clear instance of such pseudo-status. Kolis have been declared to be OBC in the State of Maharashtra being fishermen, in that their avocation is fishing and they live mainly in the coastal region of Maharashtra. Mahadeo Kolis are hill tribes and it is not a sub-caste. Even prior to independence, the Maharashtra Government declared Mahadeo Koli to be criminal tribe as early as 29-5-1933 in Serial No. 15 in List II thereof. In 1942 Resolution in Serial No. 15 in

Schedule B of the Bombay resolution Mahadeo Koli tribe was notified as a Scheduled Tribe. It was later amended as Serial No. 13. In the Presidential Scheduled Castes/Scheduled Tribes Order, 1950, it was reiterated. A slight modification was made in that behalf by the Presidential Notification dated 29-10-1956. In the 1976 Amendment Act, there is no substantial change except removing the area restriction. Thus Mahadeo Koli, a Scheduled Tribe continued to be a Scheduled Tribe even after independence. The Presidential Notification, 1950 also does recognise by public notification of their status as Scheduled Tribes. The assumption of the Division Bench of the Bombay High Court in *Subhash Ganpatrao Kabade case*¹, that Mahadeo Koli was recognised for the first time in 1976 under Amendment Act, 1976, as Scheduled Tribe is not relatable to reality and an erroneous assumption made without any attempt to investigate the truth in that behalf. Presidential declaration, subject to amendment by Parliament being conclusive, no addition to it or declaration of castes/tribes or sub-castes/parts of or groups of tribes or tribal communities is permissible.”

54. A Three Judge Bench in *Nityanand Sharma v. State of Bihar*, (1996) 3 SCC 576 had also considered the similar question. The question which was up for consideration has been noted in paragraph 2 of the judgment to the following effect:—

“**2.** Short but an important question of constitutional law of the power of the court to declare a particular tribe to be Scheduled Tribe under Scheduled Castes and Scheduled Tribes Order, 1950 as amended by Scheduled Castes and Scheduled Tribes Orders (Amendment Act), 1976 (for short “the Act”) is the primary question.”

55. The petitioner in the above case belonged to Lohar community. They claimed Scheduled Tribe certificate. The State resisted the claim that Lohar in State of Bihar is recognised as Other Backward Class and not Scheduled Tribe. The entry in the Scheduled Tribe Order mentioned Lohara/Lohra. This Court held that the question which is up for consideration is no longer res integra and is covered by ratio of the Constitution Bench judgment in *Bhaiya Lal* and *B. Basavalingappa case*. In paragraphs 13 and 15, following was laid down:—

“13. The question then is : Whether Lohars could be considered by the Court as synonyms of Loharas or Lohras? This question is no longer res integra. In *Bhaiyalal v. Harikishan Singh*, AIR 1965 SC 1557 a Constitution Bench of this Court had considered in an election petition whether Dadar caste was a Scheduled Caste. It held that the President in specifying a caste, race or tribe has expressly been authorised to limit the notification to parts of or groups within the caste, race or tribes. It must mean that after examining the social and educational backwardness of a caste, race or a tribe, the President may come to the conclusion that not the whole caste, race or tribe, but parts of or groups within them should be specified as Scheduled Caste or Scheduled Tribe. The result of the specification is conclusive. Notification issued under Article 341(1), after an elaborate enquiry in consultation with the Governor and reaching the conclusion specifying particular caste, race or tribe with reference to different areas in the State, is conclusive. The same view was reiterated in *B. Basavalingappa v. D. Munichinnappa*, AIR 1965 SC 1269.

15. It is for Parliament to amend the law and the Schedule and include in and exclude from the Schedule, a tribe or tribal community or part of or group within any tribe or tribal community for the State, District or region and its declaration is conclusive. The Court has no power to declare synonyms as equivalent to the Tribes specified in the Order or include in or substitute any caste/tribe etc. It would thus be clear that for the purpose of the Constitution, “Scheduled Tribes” defined under Article 366(25) as substituted (*sic*) under the Act, and the Second Schedule thereunder are conclusive. Though evidence may be admissible to a limited extent of finding out whether the community which claims the status as Scheduled Caste or Scheduled Tribe, was, in fact, included in the Schedule concerned, the Court is devoid of power to include in or exclude from or substitute or declare synonyms to be of a Scheduled Caste or Scheduled Tribe or parts thereof or group of such caste or tribe.”

56. Rejecting the claim of Lohar as Scheduled Tribe, following was laid down in paragraphs 18 and 20:—

“18. It is seen that in the Second Schedule in Part III of the Act, as extracted hereinbefore, Lohar was not included as a Scheduled Tribe. It is only, as evidenced from the translated version, that the community ‘Lohar’ came to be wrongly translated for the word ‘Lohra’ or ‘Lohara’ and shown to have been included in the Second Schedule, Part III, applicable to Bihar State. Mr. B.B. Singh, therefore, is right in placing before us the original version in English and the translated version.

20. Accordingly, we hold that Lohars are an Other Backward Class. They are not Scheduled Tribes and the Court cannot give any declaration that Lohars are equivalent to Loharas or Lohras or that they are entitled to the same status. Any contrary view taken by any Bench/Benches of Bihar High Court, is erroneous. It would appear that except some stray cases, there is a consistent view of that Court that Lohars are not Scheduled Tribes. They are blacksmiths. We approve the said view laying down the correct law.”

57. Now, we come to a subsequent Constitution Bench judgment of this Court in *State of Maharashtra v. Milind*, (2001) 1 SCC 4. Before the Constitution Bench, two questions arose, which are noted in paragraph 1 of the judgment to the following effect:—

“In this appeal, the following two questions arise for consideration:

(1) Whether at all, it is permissible to hold inquiry and let in evidence to decide or declare that any tribe or tribal community or part of or group within any tribe or tribal community is included in the general name even though it is not specifically mentioned in the entry concerned in the Constitution (Scheduled Tribes) Order, 1950?

(2) Whether “Halba-Koshti” caste is a sub-tribe within the meaning of Entry 19 (Halba/Halbi) of the said Scheduled Tribes Order relating to the State of Maharashtra, even though it is not specifically mentioned as such?”

58. Entry 19 of the Constitution (Scheduled Tribes) Order, 1950 as applicable in the State of Maharashtra was Halba/Halbi. The claim was raised by another caste Halba-

Koshti that they are also entitled for issue of Scheduled Tribe certificate. The caste certificate of the respondent was rejected by the Caste Scrutiny Committee against which an appeal was filed, which was dismissed holding that respondent No. 1 belonged to Koshti and did not belong to Halba/Halbi Scheduled Tribe. Writ petition was filed by respondent No. 1, which was allowed by the High Court holding that it was permissible to enquire whether any sub-division of a tribe was a part and parcel of the tribe mentioned therein and that ‘Halba-Koshti’ is a subdivision of main tribe ‘Halba’/‘Halbi’ as per Entry No. 19 in the Scheduled Tribe Order applicable to Maharashtra. In paragraph 5 of the judgment, following was held by this Court:—

“5. The High Court allowed the writ petition and quashed the impugned orders inter alia holding that it was permissible to inquire whether any subdivision of a tribe was a part and parcel of the tribe mentioned therein and that “Halba-Koshti” is a subdivision of main tribe “Halba/Halbi” as per Entry 19 in the Scheduled Tribes Order applicable to Maharashtra. Hence the State of Maharashtra has come up in appeal by special leave, questioning the validity and correctness of the order of the High Court allowing the writ petition of Respondent 1.”

59. This Court after noticing the constitutional provisions held that it is not possible to say that State Governments or any other authority or courts or tribunals are vested with any power to modify or vary the Scheduled Tribes Orders. This Court also held that no enquiry is permissible and no evidence can be let in for establishing that a particular caste or part or group within tribes or tribe is included in Presidential Order if they are not expressly included. In paragraph 12, following has been laid down:—

“12.It appears that the object of clause (1) of Articles 341 and 342 was to keep away disputes touching whether a caste/tribe is a Scheduled Caste/Scheduled Tribe or not for the purpose of the Constitution. Whether a particular caste or a tribe is Scheduled Caste or Scheduled Tribe as the case may be, within the meaning of the entries contained in the Presidential Orders issued under clause (1) of Articles 341 and 342, is to be determined looking to them as they are. Clause (2) of the said articles does not permit any one to seek modification of the said orders by leading evidence that the caste/Tribe (A) alone is mentioned in the Order but

caste/Tribe (B) is also a part of caste/Tribe (A) and as such caste/Tribe (B) should be deemed to be a Scheduled Caste/Scheduled Tribe as the case may be. It is only Parliament that is competent to amend the Orders issued under Articles 341 and 342. As can be seen from the entries in the schedules pertaining to each State whenever one caste/tribe has another name it is so mentioned in the brackets after it in the schedules. In this view it serves no purpose to look at gazetteers or glossaries for establishing that a particular caste/tribe is a Scheduled Caste/Scheduled Tribe for the purpose of Constitution, even though it is not specifically mentioned as such in the Presidential Orders. Orders once issued under clause (1) of the said articles, cannot be varied by subsequent order or notification even by the President except by law made by Parliament. Hence it is not possible to say that State Governments or any other authority or courts or Tribunals are vested with any power to modify or vary the said Orders. If that be so, no inquiry is permissible and no evidence can be let in for establishing that a particular caste or part or group within tribes or tribe is included in Presidential Order if they are not expressly included in the Orders. Since any exercise or attempt to amend the Presidential Order except as provided in clause (2) of Articles 341 and 342 would be futile, holding any inquiry or letting in any evidence in that regard is neither permissible nor useful.”

The above judgment clearly reveals that as per the settled legal position, no addition or modification in the Presidential Order is permissible. Hence, the prayer made in the petition cannot be granted. The petition is accordingly dismissed.

[Prakash Shrivastava, C.J.]

[Rajarshi Bharadwaj, J.]