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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 23399 of 2013

Khatua Mallick and others* *Petitioners

-versus-

Union of India and others* *Opposite Parties

Advocates appeared in the cases:

***For Petitioners* : Mr. Prakash Chandra Sethi
Advocate**

***For Opposite Parties* : Mr. Bimbisar Dash
Central Government Counsel
Mr. Ishwar Mohanty
Additional Standing Counsel
Mr. Budhadev Routray
Senior Advocate
Mr. Gautam Misra
Senior Advocate
Mr. Upendra Kumar Samal
Advocate**

**CORAM:
THE CHIEF JUSTICE
JUSTICE CHITTARANJAN DASH**

**JUDGMENT
30.09.2022**

Dr. S. Muralidhar, CJ.

1. The prayer in the present writ petition is for a declaration that Entry 24 in the Constitution (Scheduled Castes) Order 1950 ('the 1950 Order') inserted by virtue of the Constitution (Scheduled

Castes) Orders (Second Amendment) Act, 2002 ('the 2002 Act') published in the Gazette of India on 18th December 2002 is ultra vires Article 341 of the Constitution of India. The further prayer is for a direction to the Opposite Parties, i.e., the Union of India (Opposite Party No.1), Registrar General and Census Commissioner of India (Opposite Party No.2), National Commission for Scheduled Castes (Opposite Party No.3), the State of Orissa (Opposite Party No.4), the Director, Scheduled Castes and Scheduled Tribes Research and Training Institute, Bhubaneswar (Opposite Party No.5) and the Director, Nabakrushna Choudhury Center for Development Studies, Bhubaneswar (Opposite Party No.6), to revoke all the Scheduled Caste (SC) certificates issued in favour of persons belonging to the Keuta, Kaibarta and Dhibara communities in State of Odisha and to remove the persons in service belonging to the said communities who had been employed on the basis of reservations.

2. The three Petitioners belong to the SC and state that all of them are involved in protection of the rights of the SC people. The challenge to the inclusion of the above three castes in the list of SCs by virtue of the 2002 Act inserting Entry 24 in the 1950 Order is that the said castes do not belong to the 'untouchable category' in Orissa, which according to the Petitioners is the basic requirement for a caste to be declared as an SC. It is stated that in exercising the powers conferred by Article 341 (1) of the Constitution of India, the 1950 order included 'Dewar' in the said

list although the said community does not exist in the State of Orissa.

3. It is further stated that on 18th November 1978, the Government of Orissa recommended to the Government of India that the Dewar community be deleted from the list of SCs and reminders were sent repeatedly. The two such reminders dated 4th January, 2002 and 7th February, 2008 are enclosed at Annexure-1 series to the petition.

4. Mr. Prakash Chandra Sethi, learned counsel appearing for the Petitioners states that as a result of a judgment of this Court in *Narayan Behera v. State of Orissa 1979 SCC OnLine (Orissa) 138* (judgment dated 5th November, 1979 in O.J.C. No. 247 of 1978) which was affirmed by the Supreme Court of India by dismissing the Special Leave Petition filed against the said judgment, instructions were issued by the Government of Orissa to treat Keuta, Kaibarta and Dhibara as synonymous with Dewar and treat them as SC. This was done despite clear instructions of the Government of India in the Ministry of Home Affairs that they would be treated as SC only after formal inclusion of the names in the list of SCs by appropriate legislation enacted by the Parliament.

5. It is stated that the Registrar General of India by a letter dated 1st August, 2001 reiterated the views expressed in 1979 and

supported the exclusion of Dewar from the SC list. It is in the above background, that the 2002 Act including Dhibar, Kaibarta and Keuta along with Dewar at Serial No.24 of the 1950 Order was enacted. It is submitted that the said amendment was made without following the due procedure and modalities; and ignoring the recommendations made earlier by the Government of Orissa for deletion of Dewar from the list of SCs.

6. Notice was first issued in the present writ petition on 20th December, 2013. Pursuant thereto replies have been filed by the Opposite Parties, which will be referred to shortly hereafter.

7. Mr. Sethi refers to a series of judgments including *Nityanand Sharma v. State of Bihar* AIR 1996 SC 2306, *Pankaj Kumar Saha v. The Sub-Divisional Officer Islampur* AIR 1996 SC 1728, *S. Swvigaradoss v. Zonal Manager FCI* AIR 1996 SC 1182, *Director of Tribal Welfare, Government of A.P. v. Laveti Giri* AIR 1995 SC 1506, *Srish Kumar Choudhury v. State of Tripura* AIR 1990 SC 991, *State of Maharashtra v. Milind* AIR 2001 SC 393, *A Chinnappa v. V. Venkatamuni* 1996 (3) SCC 585, *Prabhudev Mallikarjunaiah v. Ramachandra Veerappa* AIR 1996 SC 1962 and the decision in *Puducherry Scheduled Caste People Welfare Association v. Chief Secretary to Government, Union Territory of Pondicherry* (2014) 9 SCC 236 to urge that in terms of Article 341 (2), it is Parliament alone which can by law include or exclude from the list of SCs specified

in a Notification issued under Article 341 (1) by the President of India and that even the Courts do not have the power to exclude or include castes in the said list. Mr. Sethi submits that the judgment in *Narayan Behera (supra)*, which purportedly added the Dhibara community as an SC could not have formed the basis for making the 2002 amendment.

8. Mr. Sethi has referred to the reply filed by Opposite Party No.2 i.e. the Deputy Director of Census Operations where it was acknowledged that the ORGI by letter dated 15th January, 1979 had opined as under:

“7..... With the word ‘Dewar’, Dhewar were taking advantage of the name Dewar and were returning themselves as Scheduled Castes and may, in fact, were issued Scheduled Caste certificates. Since Kaibarta and Keuta considered themselves as synonymous to Dhewar, they were also claimants to Scheduled Caste status. In fact, the situation provided scope for ‘Back-door’ entry of communities in the list of Scheduled Castes and a number of persons from the above fishermen and boatmen communities were returning themselves as Scheduled Caste.”

9. In the said affidavit, it was further stated in para 8 as under:

“8..... But this office would like to reiterate here that in view of the ethnic identity of Dewar being different from Dhewar and others, the names Dhewar or Dhiwar, Keuta and Kaibarta, etc. should not be accepted as synonymous of Dewar, as requested in the representation.”

10. It acknowledged further as under:

“10. That in 2012, the nodal Ministry (i.e. the ‘Ministry of Social Justice & Empowerment’) requested the ORGI to examine the State Govt. proposal that whether the main entry ‘Dewar’ can be deleted from the list of Scheduled Castes, leaving its synonymous in the list of Scheduled Castes or the whole entry ought to be deleted. And the ORGI once again examined the proposal. And that the ORGI vide its D.O. letter No.8/1/2011-SS (Odisha) dated 29th June, 2012 once again reiterated its earlier stand for exclusion of the community from the Scheduled Castes list of the State. The ORGI mentioned that “... this office supports not only exclusion of Dewar but also the deletion of Dhibara, Keuta, Kaibarta, as synonyms of Dewar from the Scheduled Castes list of Odisha.”

11. Two affidavits have been filed on behalf of the Opposite Parties 4 and 5. In the affidavit dated 18th December 2018, it was stated that in order to implement the judgment of this Court in *Narayan Behera(supra)*, the State Government had sought the views of the Government of India and on the advice of the Government of India, the State Government has been providing SC benefits to the above three communities i.e. Dhibara, Keuta and Kaibarta since 1981 and the said communities have been enlisted as SCs in the SC List of Odisha. It is further stated in paras 16 and 17 of the said affidavit as under:

“16. That in reply to the averments made in Paragraph-6 of the writ application, it is humbly submitted that the Petitioners Association have made representations dt.30.08.2012 for deletion of Dhibara, Keuta, Kaibarta from the SC list of Odisha along with main entry Dewar. On working on the said representation, State Govt. forwarded the same to the

Director, SCSTRTI, Bhubaneswar vide letter No.35744 dt.15.11.2012 with instruction to conduct fresh broad based study on Keuta, Kaibarta, Dhibara communities as synonymous to Dewar and furnish the report along with views of SCSTRTI. The SCSTRTI have conducted the fresh broad based study on the above communities in Balesore, Bhadrak, Jajpur, Mayurbhanj and Keonjhar Districts and furnished its report to Govt. in ST & SC Dev. Deptt. vide letter No.1723 dt.27.08.2013. From the latest ethnic status report of SCSTRTI, it reveals that the Keuta, Kaibarta and Dhibara communities are not suffering from the social stigma of untouchability and thus are not entitled for SC status. Therefore it was recommended that (a) The State Govt. has already submitted the proposal to Govt. of India for deletion of Dewar from the SC list of Odisha since 1978 with subsequent reminders from time to time, because Dewar community does not exist in Odisha. It is contradiction that this non-existent community has synonyms like Dhibara, Keuta, Kaibarta in the State who are enjoying the SC status as such. (b) Therefore, the proposal may be submitted to delete the whole entry i.e. Dewar, Dhibara, Keuta, Kaibarta at Sl.24 of the SC list of Odisha as they do not at all satisfy the criteria for inclusion in the Scheduled Castes list and close the chapter once for all.

17. That, the above said broad based status study report of SCSTRTI is now under active consideration of Government. After due examination, the matter will be placed before the Scheduled Castes Welfare Advisory Board for its consideration and recommendation. If the Board recommends, the said proposal will be sent to Government of India for further action.”

12. An additional affidavit was filed on 4th February 2019 on behalf of Opposite Parties 4 and 5 in which it is stated in para-5 as under:

“5. That in addition to the averments made in para-17 of the counter affidavit filed on 18.12.2018, it is humbly submitted that the Scheduled Caste Welfare Advisory Board of the State Government meeting was held on 05.06.2015. The SC Welfare Advisory Board decided to send the matter to Government of India, Ministry of Social Justice & Empowerment for continuance of “KEUTA, KAIBARTA & DHIBAR” as synonym of DEWAR in SC list of Odisha at Sl No-24 and recommend the caste like RADHI, NIARY/ NIARI/ GIRGIRIA/ GIRIGIRA/ GINGIRA and GHANI to Govt. of India (Ministry of Social Justice & Empowerment (MOSJ & E) for inclusion in Scheduled Caste (SC) list of Odisha as synonym of KEUTA, KAIBARTA and DHIBAR, Accordingly Govt. of India, MoSJ & E has been requested to include (RADHI, NIARY/NIARI/ GIRGIRIA/ GIRIGIRA/ GINGIRA and GHANI) vide this Deptt. Letter No-20716 dt.16.10.2015. Copy of the letter dtd. 16.10.2015 is annexed herewith and marked as **Annexure-A/4** for kind perusal of the Hon’ble Court. Again Govt. of India has been requested vide Deptt. Letter No-9945/SSD dt.01.06.2016 for continuance of DEWAR, along with KEUTA, KAIBARTA & DHIBAR and inclusion of RADHI, NIARY/NIARI/ GIRGIRIA/ GIRIGIRA/ GINGIRA and GHANI in SC list of Odisha. Copy of the letter No-9945/SSD dt. 01.06.2016 is annexed herewith and marked as **Annexure-B/4** for kind perusal of the Hon’ble Court.”

13. Clearly, between the first affidavit filed on 18th December 2018 and additional affidavit filed on 4th February 2019, there is a change in the stand of the State Government.

14. There have also been interveners on behalf of the three communities sought to be excluded from the list of the SCs. Among the pleas taken by them is that in service matters, a PIL may not be maintainable. It is submitted that there cannot be a judicial review of entries made in the 1950 Order. In support of such proposition, reliance is placed on the decisions in *Shree Surat Valsad Jilla K.M.G Parishad v. Union of India* (2007) 5 SCC 360, *Parsram v. Shivchand* 1969 1 SCC 20, *Pankaj Kumar Saha v. The Sub-Divisional Officer, Islampur* (*supra*) and *State of Maharashtra v. Milind* (*supra*), *Bir Singh v Delhi Jal Board* 2018 10 SCC 312, *Palghat Jilla Thandan Samudhaya Samrakshna Samithi v. State of Kerala* (1994) 1 SCC 359. It is further submitted by Mr. Budhadev Routray, learned Senior Advocate, Mr. Gautam Misra, learned Senior Advocate and Mr. U.K. Samal, learned counsel appearing for the Intervenors that there cannot be an indirect review of the order passed by this Court in *Narayan Behera* (*supra*) against which the SLP was dismissed by the Supreme Court by an order dated 24th September 1980.

15. The above submissions have been considered. The essential prayer in the petition is for striking down Entry 24 in the 1950 order which includes Keuta, Kaibarta and Dhibar in the list of SCs for Odisha and which has been brought about as a result of the 2002 Act. In effect, therefore, what the Petitioners are seeking is

for the Court by judicial order to exclude certain communities from the list of SCs. Even if it is sought to be contended that their inclusion in the list was wrongly made in the first place as a result of judicial intervention by the decision in *Narayan Behera (supra)*, which was impermissible in law and therefore that the wrong should be undone, the Petitioners are in fact inviting the Court to do precisely what it has not been permitted to do in the whole series of judgments cited by the Petitioners themselves.

16. In *State of Maharashtra v. Milind (supra)* reference was made to the Constitution Bench judgments in *B. Basavalingappa v. D. Munichinnappa (1965) 1 SCR 316* and *Bhaiyalal v. Hari Kishan Singh AIR 1965 SC 1557* as well as *Nityanand Sharma v. State of Bihar (supra)* holding that “it is for the Parliament to amend the law and the Schedule to include or exclude from the Schedule a tribe or tribal community or part of or group within a tribe or tribal community in the State, District or Region and its declaration is conclusive. The court has no power to declare synonymous as equal to the tribes specified in the Order or include in or substitute any caste/tribe etc.”

17. In *State of Maharashtra v. Milind (supra)*, reference was also made to the judgment in *Palghat Jilla Thandan Samudhaya Samrakshna Samithi (supra)* which held that “neither the State Government nor the court can enquire into or let in evidence relating to any claim as belonging to Scheduled Castes in any

Entry of the Scheduled Castes Order. Scheduled Castes Order has to be applied as it stands until the same is amended by appropriate legislation.”

18. In ***Puducherry Scheduled Caste People Welfare Association (supra)***, it was reiterated that in terms of Article 341 (2), it is Parliament alone which can by law include or exclude a community from the list of SCs from the notification in terms of Article 341 (1) of the Constitution issued by the President of India.

19. In ***Bir Singh v. Delhi Jal Board (supra)***, the entire case law was elaborately discussed and it was observed as under:

“32. The upshot of the aforesaid discussion would lead us to the conclusion that the Presidential Orders issued under Article 341 in regard to Scheduled Castes and under Article 342 in regard to Scheduled Tribes cannot be varied or altered by any authority including the Court. It is the Parliament alone which has been vested with the power to so act, that too, by laws made. Scheduled Castes and Scheduled Tribes thus specified in relation to a State or a Union Territory does not carry the same status in another State or Union Territory. Any expansion/deletion of the list of Scheduled Castes/Scheduled Tribes by any authority except Parliament would be against the constitutional mandate under Articles 341 and 342 of the Constitution of India.”

21. The consistent legal position reiterated in all of the above decisions is that the Courts should not entertain any plea for either inclusion or exclusion of a community from the list of SCs. In the

present case, the plea is for exclusion of three communities from the list of SCs in Odisha and that is an exercise which in view of the above settled legal position, this Court cannot possibly undertake.

22. Consequently, in view of the settled legal position explained above, the Court declines to grant any of the prayers made in the writ petition and it is dismissed as such. There shall, however, be no order as to costs.

S. Behera/ Jr. Steno.



(S. Muralidhar)
Chief Justice

(Chittaranjan Dash)
Judge