CASE NO.:
Appeal (civil) 7306 of 2005

PETITIONER:
Meera Kanwaria

RESPONDENT:
Sunita & Ors.

DATE OF JUDGMENT: 08/12/2005

BENCH:
S.B. Sinha & P.K. Balasubramanyan

JUDGMENT:
J U D G M E N T
[Arising out of Special Leave Petition (Civil) No.2106 of 2005]

S.B. SINHA, J :

Leave granted.

Background fact :

The First Respondent herein was Rajput by caste. She married one Ghanshyam on 09.12.2000, who was a member of Scheduled Caste. The marriage was performed as per Vedic Hindu Rites. She applied for and granted a certificate of being belonging to Scheduled Caste by birth by the Sub Divisional Magistrate (S.D.M.), Rajouri Garden, New Delhi, describing her as a daughter of Ramaye, who in fact was her husband's elder brother's father-in-law.

An inquiry was caused to be made by the Sub Divisional Magistrate upon receiving a complaint that the said certificate contained wrong declaration as she was daughter of one Chinna Singh and not of Ramaye. The said allegations were found to be correct. It was also found that the First Respondent's Jethani's name was also co-incidentally Sunita. On the said premise, the certificate granted in her favour was cancelled by an order dated 10.07.2002 and a criminal case under Sections 406, 420, 469 and 471 of the Indian Penal Code was registered. The said criminal case is still pending.

Election Proceedings :

The First Respondent herein contested an election for the Municipal Councilor from Ward No.20, Subhash Nagar Ward of Municipal Corporation of Delhi, Assembly Constituency No.13, a seat reserved for a Scheduled Caste woman. She was declared elected. The Appellant herein was also a candidate. Whereas the First Respondent got 14,757 votes, the Appellant herein got 13,755 votes.

One Krishan Lal filed an election petition before the District Judge, Delhi in terms of the provisions of the Delhi Municipal Corporation Act, 1957, wherein, inter alia a prayer was made to the effect that the Appellant herein be declared elected. The contention of the election petitioner in the said proceedings was that as the First Respondent herein was born in an upper caste family, she could not have been considered to be belonging to Scheduled Caste by reason of her marriage only. The Appellant indisputably was arrayed as Respondent No.2. In the said proceedings, the learned judge, inter alia, framed the following issues :

"4. Whether the respondent No.1 belongs to a

scheduled caste category ?

5. Whether the respondent No.1 acquired the status of scheduled caste by virtue of her marriage with a Jatav notified as scheduled caste category for the purpose of her eligibility to contest municipal election in Delhi ?

6. Whether the election of respondent No.1 as a municipal councilor from Ward No.20 is liable to be declared void on facts mentioned to the petition ?

7. If issue No.6 is decided in affirmative whether respondent No.2 is entitled to be declared elected from Ward No. 20 as municipal councilor ?"

Issue Nos. 4 and 5 were taken up for consideration together. Relying, inter alia, upon a decision of this Court in Mrs. Valsamma Paul v. Cochin University and Others [AIR 1996 SC 1011], the learned Judge opined :

"25. In view of the above testimony of respondent No.1 in her cross-examination, no manner of doubt is left in my mind except to hold that respondent No.1 has manipulated a scheduled caste certificate by hoodwinking the legal process. By no means she can be said to have acquired the status of scheduled caste merely because of her marriage with scheduled caste person. Hence, both these issues are decided against respondent No.1"

Having regard to the aforementioned findings, the election of the First Respondent herein was held to be void and of no effect and was consequently set aside. Issue No.7 was, however, not pressed.

High Court Proceedings :
A writ petition was filed there-against by the First Respondent before the Delhi High Court. The High Court in its judgment noticed several decisions of this Court and opined that as the First Respondent was accepted by her husband's family and biradari, the judgment of the learned District Judge was unsustainable. The High Court distinguished Valsamma Paul (supra) on the premise that 'principle of reservation contained in Articles 15(4) and 16(4) of the Constitution of India would be different in a case wherein individual claims entitlement to other benefits that may be due to a person belonging to Scheduled Caste'. It was furthermore opined that the learned District Judge committed an error in not accepting the contention of the First Respondent that she had not been accepted by the community of her husband. Subsequent cancellation of the Scheduled Caste Certificate by the S.D.M. was held to be irrelevant.

Maintainability of the Appeal :
Mr. R.K. Jain, the learned Senior Counsel appearing on behalf of the First Respondent, at the outset, would take a preliminary objection as regard the Appellant's locus standi to maintain this appeal drawing our attention to the findings of the learned Trial Judge that the Appellant herein did not file any written statement nor any oral arguments were advanced on her behalf. Strong reliance, in this behalf, has been placed on Thammanna v. K. Veera Reddy and Others [(1980) 4 SCC 62]. We are not persuaded to accept the said contention.

In Thammanna (supra), this Court found that at no stage of the

proceedings, the Appellant before it took any part in the proceedings. Having regard to Section 116-C of the Representation of the People Act, 1951, it was held that the person would be entitled to maintain an appeal if the following conditions are satisfied :

"(1) that the subject-matter of the appeal is a conclusive determination by the High Court of the rights with regard to all or any of the matters in controversy, between the parties in the election petition,

(2) that the person seeking to appeal has been a party in the election petition, and

(3) that he is a "person aggrieved", that is a party who has been adversely affected by the determination."

As of fact it was found that condition nos.1 and 3 had not been satisfied holding :

"\005Before the High Court the appellant did not, at any stage join the contest. He did not file any written statement or affidavit. He did not engage any counsel. He did not cross-examine the witnesses produced by the election-petitioner and the contesting Respondent 1. He did not appear in the witness-box. He did not address any arguments. In short, he did nothing tangible to participate in the proceedings before the High Court."

It was further noticed therein that the Appellant was not a necessary party to the election petition and, thus, it was not obligatory for the election petitioner to join him as a respondent.

The said decision has no application in the instant case, as the Appellant herein took part in the election petition through her counsel,. although she might not have filed a written statement. She was a necessary party. A prayer was made in the election petition that she be declared to have been elected. We have noticed hereinbefore that the election petition succeeded in part. In the appeal preferred there-against by the First Respondent, the Appellant alone was the contesting respondent. Prayer (b) made in the Election Petition, was to her benefit. She filed the present appeal only because she is aggrieved by the decision of the High Court.

Contentions :

On merits Ms. Pinky Anand, the learned counsel appearing on behalf of the Appellant, submitted that the judgment of the High Court is unsustainable as the same runs counter to a three-Judge Bench decision of this Court in Sobha Hymavathi Devi v. Setti Gangadhara Swamy and Others [(2005) 2 SCC 244] wherein one of us (Balasubramanyan, J.) was a member.

It was urged that the certificate obtained by the First Respondent was a fraud on the Constitution. Reliance, in this behalf, has been placed on Lillykutty v. Scrutiny Committee, S.C. & S.T. and Others [JT 2005 (12) SC 569].

Mr. Jain, on the other hand, would submit that in the facts and circumstances of this case, the alleged fraud committed by the First Respondent would not be deterrent for the purpose of holding that she became a member of the Scheduled Caste as her marriage was accepted by the community. Placing strong reliance on the decisions of this Court in C.M. Arumugam v. S. Rajgopal and Others [(1976) 1 SCC 863], The Principal, Guntur Medical College, Guntur and Others v. Y. Mohan Rao [(1976) 3 SCC 411] and Kailash Sonkar v. Smt. Maya Devi [(1984) 2 SCC 91], it was argued that in view of the finding of fact arrived at by the High Court that she had been accepted by the community, the impugned judgment should not be interfered with.

It was submitted that even in the decisions of this Court in Sobha Hymavathi Devi (supra) and Lillykutty (supra), the question which fell for

consideration was as to whether upon marriage by a girl belonging to a forward class with a boy who belongs to Scheduled Caste or Scheduled Tribe, the caste will change as thereby she stands transplanted in her husband's family.

Findings of the District Judge :

Before adverting to the questions of law raised before us, we would notice the findings of fact arrived at by the learned District Judge. The learned District Judge relied upon a circular letter of the Central Government wherein it was stated :

"The guiding principle is that no person who was not a scheduled caste/tribes by birth will be deemed to be member of scheduled caste or scheduled tribe merely because he or she married person belonging to scheduled or scheduled tribes.

N.E. Horo (supra) was also distinguished on the ground that therein the lady who married a person belonging to Munda tribe had proved the custom by which she was admitted in tribunal community after her marriage, which fact is absent in the instant case, stating :

"\005It shall be significant to mention that respondent No.1 in her cross-examination has admitted that her marriage had taken place as per Vaidic Hindu Rites and no special ceremony was held either before or at the time of marriage or after her marriage for conversion of her caste from Rajput to Jatav. She further testified that no panchayat or Jatav Community was held to accept her as a member of Jatav caste. However, the respondent No.1 has testified in para 3 of the affidavit Ex.R-1 filed in her evidence-in-chief that she was fully accepted by the Biradari/Community of Jatavs as its member. In order to prove her said point the respondent No.1 has examined her father-in \026law, husband and three more releatives of her husband who all have testified that they had accepted the marriage of respondent No.1 with a Jatav husband and that they had attended that wedding. Confronted with this situation, the counsel for the petitioner asked respondent No.1 in her cross-examination to explain the word "Biradari" used in her affidavit Ex.P1. Since clarified the meaning of word "Biradari" employed by her in para 3 of her affidavit R1 by saying that by the word "Biradari" she means elders of her husband's family. This position taken by respondent No.1 in her cross-examination does not vindicate her point that she was admitted into Jatav Community by any custom or any other Hindu Tradition."

Caste issue :

It is not disputed that the marriage took place as per Vedic Hindu Rites. The marriage was attended by her father-in-law, husband and three more relatives, who stated that they had accepted the marriage with her Jatav husband and they had attended that wedding. The term "Biradari" has also been explained by the First Respondent stating that the same denotes elders of her husband's family. It is one thing to say that a lady belonging to a forward caste has been accepted by the community to which her husband belongs; but it is another thing to say that her marriage has been accepted only by her husband's family. The question as regard change of caste in view of her marriage although may be relevant in relation to Hindus, but when the question of change of caste is referable to the category belonging to a special class of citizens who require protective discrimination and affirmative action, a different rule will apply. The burden of proof therefor indisputably would be on the person who affirms the same.,

In Punit Rai v. Dinesh Chaudhary [(2003) 8 SCC 204], wherein one of us was a member, this Court opined :

"On behalf of the respondent, the citation of certain decisions has also been furnished but those decisions would be of no help to the respondent. Reliance has been placed upon Jeet Mohinder Singh v. Harminder Singh Jassi7 where it has been held that a party upon whom the burden lies to prove a fact, but fails to discharge his onus, it is not open for him to bank upon the plea of non-examination of witness by the other party. The appellant, it was held, cannot be permitted to derive strength from the weakness of the case of the other party. We feel that this case would not be applicable in the facts and circumstances of the case in hand. On the other hand, the onus to prove facts within the special knowledge of Respondent 1, would lie upon him alone to prove those facts. We have already held that best evidence of the respondent's case that his mother was a Pasi has been withheld. In this connection, we may peruse Section 106 of the Evidence Act also which reads as under:
"106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.""

It was further opined :

"Determination of caste of a person is governed by the customary laws. A person under the customary Hindu law would be inheriting his caste from his father. In this case, it is not denied or disputed that the respondent's father belonged to a "Kurmi" caste. He was, therefore, not a member of the Scheduled Caste. The caste of the father, therefore, will be the determinative factor in absence of any law.

This Court held that the State will have no jurisdiction to reserve a constituency for a person who does not belong to the reserved category for whose benefit it was constituted except by way of a legislation, stating :

"If a customary law is to be given a go-by for any purpose whatsoever and particularly for the purpose of enlarging the scope of a notification issued by the President of India under clause (1) of Article 341 of the Constitution of India, the same must be done in terms of a statute and not otherwise."

Reference, in this connection, may be made to a Constitution Bench decision of this Court in E.V. Chinnaiah etc. v. State of A.P. and Others [(2005) 1 SCC 394], wherein it was held :

"Reservation must be considered from the social objective angle, having regard to the constitutional scheme, and not as a political issue and, thus, adequate representation must be given to the members of the Scheduled Castes as a group and not to two or more groups of persons or members of castes.

The very fact that the members of the Scheduled Castes are most backward amongst the backward classes and the impugned legislation having already proceeded on the basis that they are not adequately represented both in terms of clause (4) of Article 15 and clause (4) of Article 16 of the Constitution, a further classification by way of micro-classification is not permissible. Such

classification of the members of different classes of people based on their respective castes would also be violative of the doctrine of reasonableness. Article 341 provides that exclusion even of a part or a group of castes from the Presidential List can be done only by Parliament. The logical corollary thereof would be that the State Legislatures are forbidden from doing that. A uniform yardstick must be adopted for giving benefits to the members of the Scheduled Castes for the purpose of the Constitution. The impugned legislation being contrary to the above constitutional scheme cannot, therefore, be sustained."

The burden must be fully discharged beyond all reasonable doubts. In N.E. Horo (supra), this Court held :

"Even if a female is not a member of tribe by virtue of birth. She having been married to a tribal after due observance of all formalities and after obtaining the approval of the elders of the tribe would belong to the tribal community to which her husband belongs on the analogy of the wife taking the husband domicile."

Yet again in Valsamma Paul (supra), it was held :

"A candidate who had the advantageous start in life being born in forward caste and had march of advantageous life but is transplanted in backward caste by adoption or marriage or conversion, does not become eligible to the benefit or reservation either under Article 15(4) or 16(4), as the case may be. Acquisition of the status of Scheduled Caste etc. by voluntary mobility into these categories would play fraud on the Constitution, and would frustrate the benign constitutional policy under Articles 15(4) and 16(4) of the Constitution\005"

It is, therefore, beyond any doubt or dispute that a person who is a high caste Hindu and not subjected to any social or educational or backwardness in his life; by reason of marriage alone cannot ipso facto become a member of Scheduled Caste or Scheduled Tribe. In absence of any strict proof he cannot be allowed to defeat the very provisions made by the State for reserving certain seats for disadvantaged people.

The High Court may or may not be right in holding that no special ceremony was required for conversion from upper caste to Jatav, but the finding of fact arrived at by the learned District Judge that her marriage had taken place as per Vedic Hindu Rites and her marriage has been accepted by her Biradari meaning thereby elders of her husband’s family only cannot be held to be the same as that she had been accepted by the community of her husband.

We may notice that in State of Kerala and Another v. Chandra Mohanan [(2004) 3 SCC 429], a three-Judge Bench after noticing the said decisions opined :

"The customary laws of a tribe not only govern his culture, but also succession, inheritance, marriage, worship of Gods etc. The characteristics of different tribes despite the fact that they have been living in the same area for a long time are different. They indisputably follow different Gods. They have different cultures. Their customs are also different."

It was further observed :

"Before a person can be brought within the purview of the Constitution (Scheduled Tribes) Order, 1950, he must belong to a tribe. A person for the purpose of obtaining the benefits of the Presidential Order must

fulfil the condition of being a member of a tribe and continue to be a member of the tribe. If by reason of conversion to a different religion a long time back, he/his ancestors have not been following the customs, rituals and other traits, which are required to be followed by the members of the tribe and even had not been following the customary laws of succession, inheritance, marriage etc. he may not be accepted to be a member of a tribe. In this case, it has been contended that the family of the victim had been converted about 200 years back and in fact the father of the victim married a woman belonging to a Roman Catholic, wherefrom he again became a Roman Catholic. The question, therefore, which may have to be gone into is as to whether the family continued to be a member of a Scheduled Tribe or not. Such a question can be gone into only during trial."

.

In Lillykutty (supra), Thakker, J., speaking for the Division Bench clearly held that once a certificate is cancelled, the election is also liable to be cancelled. It may be true that in terms of the rules framed under the Delhi Municipal Corporation Act, it was not necessary for the First Respondent herein to produce the caste certificate at the time of filing of nomination as a declaration in that behalf subserve the purpose. But such a caste certificate was necessary having regard to the fact that in the event a dispute or doubt arises as regard the question as to whether the conditions precedent for filing the nomination are fulfilled or not. The Returning Officer was required to arrive at a prima facie finding that the candidate belonged to Scheduled Caste. She applied for grant of a Scheduled Caste Certificate on the basis that she was Scheduled Caste by birth. Her claim has been found to be incorrect. Unless it is established as of fact that she had been accepted as a member of Scheduled Caste by the community as contra-distinguished from acceptance of her marriage by her husband's family, in our opinion, she cannot claim the benefit of her reservation.

We, therefore, with respect, express our disapproval to the findings of the High Court.

In Sobha Hymayathi Devi (supra), it was held

"\005First of all, we must point out that the High Court, in our view, has rightly held that there was nothing to show that the marriage of the appellant with Appala Raju took place in the customary mode followed by the Bhagatha community. On the other hand, as noticed by the High Court, the available evidence tends to indicate that the marriage was more in the form followed by Sistu Karnams, the community to which her father belonged. Secondly, as noticed by the High Court, there is nothing to show that the appellant was accepted by the Bhagatha community of Bhimavaram as a member of that community. As discussed by the High Court based on the evidence in the case, the indication available was that the appellant hardly resided in Bhimavaram village to which her maternal grandfather belonged and there was no occasion for that community to treat her as a member of that community. There is also nothing to show that the appellant followed the way of life of that community."

Overruling N.E. Horo v. Smt. Jahan Ara Jaipal Singh [AIR 1972 SC 1840], it was held :

"\005 Even otherwise, we have difficulty in accepting the position that a non-tribal who marries a tribal could claim to contest a seat reserved for tribals. Article 332 of the Constitution speaks of reservation of seats for Scheduled Tribes in Legislative Assemblies. The object is clearly to give representation in the legislature to Scheduled Tribe

candidates, considered to be deserving of such special protection. To permit a non-tribal under cover of a marriage to contest such a seat would tend to defeat the very object of such a reservation. The decision of this Court in Valsamma Paul v. Cochin University supports this view. Neither the fact that a non-backward female married a backward male nor the fact that she was recognised by the community thereafter as a member of the backward community, was held to enable a non-backward to claim reservation in terms of Article 15(4) or 16(4) of the Constitution. Their Lordships after noticing Bhoobum Moyee Debia v. Ram Kishore Acharj Chowdhry and Lulloobhoy Bappoobhoy Cassidass Moolchund v. Cassibai held that a woman on marriage becomes a member of the family of her husband and thereby she becomes a member of the caste to which she has moved. The caste rigidity breaks down and would stand as no impediment to her becoming a member of the family to which the husband belongs and to which she gets herself transplanted. Thereafter, this Court noticed that recognition by the community was also important. Even then, this Court categorically laid down that the recognition of a lady as a member of a backward community in view of her marriage would not be relevant for the purpose of entitlement to reservation under Article 16(4) of the Constitution for the reason that she as a member of the forward caste, had an advantageous start in life and a marriage with a male belonging to a backward class would not entitle her to the facility of reservation given to a backward community. The High Court has applied this decision to a seat reserved in an election in terms of Article 332 of the Constitution. We see no reason why the principle relating to reservation under Articles 15(4) and 16(4) laid down by this Court should not be extended to the constitutional reservation of a seat for a Scheduled Tribe in the House of the People or under Article 332 in the Legislative Assembly. The said reservations are also constitutional reservations intending to benefit the really underprivileged and not those who come to the class by way of marriage. To the extent the decision in Horo6 can be said to run counter to the above view, it cannot be accepted as correct. Even otherwise, in the absence of evidence on the relevant aspects regarding marriage in tribal form and acceptance by the community, the decision in Horo cannot come to the rescue of the appellant\005"

In Sandhya Thakur v. Vimla Devi Kushwah and Ors. [JT 2005 (1) SC 556, this Court held :

"In the light of the decision in Valsamma Paul v. Cochin University and Others (supra) and our decision rendered today in Sobha Hymavathi Devi v. Setti Gangadhara Swamy, which were heard along with this appeal, it must be held that the appellant, who by birth did not belong to a backward class or community, would not be entitled to contest a seat reserved for a backward class or community, merely on the basis of her marriage to a male of that community\005"

The High Court, thus, committed a manifest error in coming to the conclusion that the purposes of reservation under Articles 15(4) and 16(4) of the Constitution, on the one hand, and Articles 330 and 332, on the other, are different.

Sobha Hymavathi Devi (supra), thus, although recognized that in a given case acceptance of such a marriage by the community may be held to

subserve the purpose but in no uncertain terms held that reservation of a seat for a Scheduled Tribe in the House of the People or under Article 332 in the Legislative Assembly are constitutional reservations.

In all the decisions relied upon by Mr. Jain, namely, Arumugam (supra), Mohan Rao (supra) and Kailash Sonkar (supra), this Court was concerned with conversion and re-conversion having taken place while the person concerned was minor. In such a case, the doctrine of revival of the caste was applied. We, however, as at present advised need not dilate further on the said question as nothing turn out therefrom for the purpose of this case.

For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The Appeal is allowed. No costs.