REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 654 OF 2012
(Arising out of S.L.P (CIVIL) NO.4282 of 2010)

Rameshbhai Dabhai Naika … Appellant

versus

State of Gujarat & Others … Respondents

J U D G M E N T

Aftab Alam,J.

1. Leave granted.

2. The question that once again arises before this Court is what would be the status of a person, one of whose parents belongs to the scheduled castes/scheduled tribes and the other comes from the upper castes, or more precisely does not come from scheduled castes/scheduled tribes and what would be the

entitlement of a person from such parents to the benefits of affirmative action sanctioned by the Constitution. The Gujarat High Court has proceeded on the basis that the issue is settled by the decisions of this Court in *Valsamma Paul* v. *Cochin University and others,* (1996) 3 SCC 545 followed by *Punit Rai* v. *Dinesh Chaudhary*, (2003) 8 SCC 204 and *Anjan Kumar* v. *Union of India and others*, (2006) 3 SCC 257. On the strength of those three decisions the High Court upheld the order passed by the Scrutiny Committee cancelling the tribal certificate earlier obtained by the appellant on the sole ground that his father was a non-tribal, belonging to the Hindu caste Kshatriya. The High Court did not advert to the fact that the mother of the appellant was undeniably a Nayak, one of the scheduled tribes and the appellant himself and his other siblings were also married to Nayaks. The High Court also did not refer to the evidences adduced by the appellant on the question of his upbringing as a member of the Nayak community and his acceptance in that community (or for that matter the contra evidence produced by the respondent

questioning his claim to be a member of the scheduled tribe). In view of the fact that his father was a non-tribal, the High Court deemed everything else as of no relevance and declined to record any finding on whether the appellant was, in fact, brought up as a tribal and, consequently, shared all the indignities and handicaps and deprivations normally suffered by the tribal communities.

3. The appellant, thus, lost his tribal certificate and the Fair Price shop that was allotted to him on that basis. He has now brought the matter to this Court making the grievance that the High Court order does not impact him alone but as a result of the order of the High Court his children too, though undisputedly born to a tribal mother, are bound to lose their tribal identity.

4. The High Court seems to have read the decisions in *Valsamma Paul*, *Punit Rai* and *Anjan Kumar* as laying down the rule that in all cases and regardless of other considerations the offspring of an inter-caste marriage or a marriage between a tribal and a non-tribal would take his/her caste from the father.

In the three decisions there are indeed observations (though by no means forming the ratio of the decisions) that may lend credence to such a view but the question is whether it can be said to flow from those decisions, as an inflexible rule of general application, that in every case of inter-caste marriage or marriage between a tribal and a non-tribal, the offspring must take his/her caste from the father. The clear answer, to our mind, is in the negative. A careful examination of the three cases together with some other decisions of this Court would clearly show that what was said in *Valsamma* in a certain context has been rather mechanically and inappropriately extended and applied to different other fact situations as the law laid down in *Valsamma*.

5. *Valsamma* was a Syrian Catholic woman (forward caste) who married a Latin Catholic man (backward class) and the question arose whether by virtue of her marriage she was entitled to appointment to a post of lecturer that was reserved for Latin Catholics (Backward Class Fishermen). The full bench of the Kerala High Court held that though *Valsamma* was

married according to the Canon law, being a Syrian Christian by birth, she could not by marriage with a Latin Catholic become a member of that class nor could she claim the status of backward class by marriage. Dealing with the consequences of a woman marrying outside her caste the Court relied upon two old Privy Council decisions of the nineteenth century and came to hold that when a woman marries outside her caste, she becomes a member of the caste of the husband's family. In paragraph 31 of the judgment in *Valsamma* the Court said:

> "It is well-settled law from *Bhoobum Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (1865) 10 MIA 279: 3 WR 15 that judiciary recognized a century and a half ago that a husband and wife are one under Hindu law, and so long as the wife survives, she is half of the husband. She is 'Sapinda' of her husband as held in *Lulloobhoy Bappoobhoy Cassidass Moolchund* v. *Cassibai* (1879-80) 7IA 212 . It would, therefore, be clear that be it either under the Canon law or the Hindu law, on marriage the wife becomes an integral part of husband's marital home entitled to equal status of husband as a member of the family. **Therefore, the lady, on marriage, becomes a member of the family and thereby she becomes a member of the caste to which she moved. The caste rigidity breaks down and would stand no impediment to her becoming a member of the family to which the husband belongs and she gets herself transplanted."**
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> (emphasis added)

6. Having said that in an inter-caste marriage the woman takes on the caste of her husband, the Court proceeded to consider the next question which was, "whether a lady marrying a Scheduled Caste, Scheduled Tribe or OBC citizen, or one transplanted by adoption or any other voluntary act, *ipso facto*, becomes entitled to claim reservation under Article 15(4) or 16(4) as the case may be?" This question the Court firmly answered in the negative and in paragraph 34 of the judgment observed and held as follows:-

> "In *Murlidhar Dayandeo Kesekar* v. *Vishwanath Pandu Barde* 1995 supp. (2) SCC 549 and *R. Chandevarappa* v. *State of Karnataka* (1995) 6 SCC 309: JT (1995) 7 SC 93, this Court had held that economic empowerment is a fundamental right to the poor and the State is enjoined under Articles 15(3), 46 and 39 to provide them opportunities. Thus, education, employment and economic empowerment are some of the programmes the State has evolved and also provided reservation in admission into educational institutions, or in case of other economic benefits under Articles 15(4) and 46, or in appointment to an office or a post under the State under Article 16(4). **Therefore, when a member is transplanted into the Dalits, Tribes and OBCs, he/she must of necessity also have had undergone the same handicaps, and must have been subjected to the same disabilities, disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation. 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 of 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. "

(emphasis added)

7. Proceeding further, in paragraph 35 of the judgment, the Court expressly held that acceptance by the community, a test that was earlier applied by the Court in cases of conversion and reconversion, would have no application to judge *Valsamma's* claim to the post reserved for Latin Catholics by virtue of her marriage in that caste.

8. The court, thus, gave two reasons for disallowing *Valsamma,* the benefit of reservation under Articles 15 & 16 of the Constitution; first, being born in a forward caste she had an advantageous start in life and she had not gone through the same disabilities, disadvantages, indignities or sufferings as other members of the backward class and secondly claiming the benefits of reservation by getting transplanted into a backward class by means of marriage, that is to say, through voluntary mobility would amount to a fraud on the Constitution.

9. On a careful reading of the judgment it becomes clear that the ratio of the *Valsamma* decision lies in paragraph 34 of the judgment as quoted above. What was said earlier in paragraph 31 of the judgment was in the facts of that case and it would be an error to take it as the ratio of the decision. More importantly, it would be very wrong to take paragraph 31 of the *Valsamma* judgment as a premise for drawing the corollary or the deduction that the child born from an inter-caste marriage or a marriage between a tribal and a non-tribal would invariably take his caste from the father. But before examining *Valsamma* in any greater detail it would be useful to see how it was used, applied and "improved upon" in later decisions of the Court.

10. *Valsamma* was a case of reservation under Articles 15 & 16 of the Constitution. A case of reservation of seats in the Legislative Assembly under Article 332 of the Constitution came to be considered by a three judge bench of the Court in *Sobha Hymavathi Devi* v. *Setti Gangadhara Swamy & Others* (2005) 2 SCC 244. The case of *Sobha Hymavathi Devi,* in certain aspects on facts, is very similar to *Valsamma*. The election of

Sobha to the Andhra Pradesh Legislative Assembly from a constituency reserved for Scheduled Tribes was challenged on the ground that she belonged to a forward community, Patnaik Sistu Karnam, and was, therefore, not qualified to contest the election from the constituency reserved for Scheduled Tribes. Denying the allegations of the election petitioner *Sobha* raised three pleas; first, both her parents belonged to Scheduled Tribes; secondly, in case her father was held to come from a forward caste she was actually brought up by her mother, who undeniably belonged to a scheduled tribe, as a member of the tribal community and thirdly she married a Scheduled Tribe person and, therefore, became a member of the Scheduled Tribe. She had, therefore, the status of a Scheduled Tribe and was qualified to contest the election from the constituency reserved for the Scheduled Tribes. The Court examined Sobha's first and second pleas fully in light of the factual evidence and came to reject the two pleas on the basis of the findings of fact. Dealing with the second plea, in paragraph 8 of the judgment, the Court held and observed as follows:-

> "Elaborating her argument, learned counsel for the appellant contended that even though the appellant was born to Murahari Rao, a Sistu Karnam, she was still being treated as a member of the Bhagatha community to which her mother belonged and that she had married a person belonging to the Bhagatha community; that the Bhagatha community had always accepted her as belonging to that community and in such a situation, she must be considered to belong to the Bhagatha community, a Scheduled Tribe and hence eligible to contest from a constituency reserved for the Scheduled Tribes. That the appellant had married Appala Raju, her maternal uncle belonging to the Bhagatha community, is not in dispute. **But the claim of the appellant that she was being brought up and was being recognised as a member belonging to the Bhagatha community, cannot be accepted in the face of the evidence discussed by the High Court including the documentary evidence relied on by it. The document Ext. 10 and the entry therein marked as Ext. X-11 relating to the appellant, show her caste as Sistu Karnam and not as Bhagatha. This entry was at an undisputed point of time. Moreover, the evidence also shows that she was always being educated at Vishakhapatnam and she was never living as a tribal in Bhimavaram village to which her mother's family belongs. There is no reason for us to differ from the conclusion of the High Court on this aspect."**
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> (emphasis added)

11. It was only then that the Court considered the third plea of *Sobha* that having married a person belonging to a Scheduled Tribe she had acquired membership of that community and consequently she must be treated as a member of the Scheduled Tribe. Dealing with this plea the Court referred to the decision in *Valsamma* and applied it to the case of reservation of a seat in the Legislative Assembly under Article 332 of the

Constitution. In Paragraph 10 of the judgment the Court held and observed as follows:-

> "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**. …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."**
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> (emphasis added)

12. What is of importance in *Sobha Hymavathi Devi* is that the Court did not take the fact that *Sobha's* father was a man of forward caste as conclusive of her caste status. The Court did not shut out the plea raised by *Sobha* that she must be considered as belonging to the scheduled tribe because her mother who was herself a tribal brought her up as a member of her community and raised her as a tribal even though her father might have come from a forward caste. On the contrary the Court examined the plea raised by *Sobha* in light of evidences adduced by the parties and negated it on the basis of a pure finding of fact. Though the Court referred to and approved *Valsamma* for rejecting Sobha's plea that she had acquired the status of a tribal by virtue of her marriage to a tribal man, it did not take *Valsamma* as an authority that in a marriage between a tribal and a non-tribal, the caste of the father would be determinative of the caste of the child.

13. The third plea raised by *Sobha* in support of her being a tribal and the claim of *Valsamma* were both based on their voluntary action in marrying a tribal man. In both cases the

Court held that getting transplanted into the tribal community through voluntary mobility cannot be the basis for the Forward caste/non-tribal woman to avail of the benefits of reservation under Article 15 & 16 (in Valsamma) or under Article 332 of the Constitution (in Sobha Hymavathi Devi). But in neither of the two cases the question of a child born of an inter-caste marriage or a marriage between a tribal and a non-tribal was directly in issue.

14. This question came up directly for consideration in *Punit Rai* v. *Dinesh Chaudhary* (2003) 8 SCC 204. The election of Dinesh Chaudhary (the respondent in the appeal before this Court) *to Bihar Legislative Assembly* from a constituency reserved for scheduled castes was challenged on the ground that he was born to Kurmi parents and he did not belong to any scheduled castes. The respondent did not deny that his father Bhagwan Singh was a Kurmi and he was married to a Kurmi woman. He, however, set up the case that Bhagwan Singh had taken a second wife Deo Kumari Devi who was a Pasi (scheduled caste) and he was born to Deo Kumari Devi from

Bhagwan Singh and he was, thus, fully eligible to contest from the reserved constituency. He also relied upon a circular issued by the State of Bihar according to which a child born to a non-scheduled caste father and a scheduled caste mother would be counted in the category of scheduled caste. A three-judge bench of the Court before which the case came up for hearing handed down two separate, though concurring, judgments, one by Brijesh Kumar, J., speaking for himself and for V.N. Khare, CJ, and the other by Sinha, J. It is significant to note that the judgment by Brijesh Kumar,J. is based on the finding that the respondent failed to establish that Bhagwan Singh had taken a Pasi woman as the second wife and he was born to her from Bhagwan Singh. The Court held that the fact that Bhagwan Singh was a Kurmi and he was married to a Kurmi woman being admitted, the election petitioner had discharged the onus and the burden now lay upon the respondent to establish that Bhagwan Singh had married second time and his second wife was a Pasi who had given birth to the respondent and the respondent had completely failed to establish that. In paragraphs 14 and 15 of the judgment by the two judges it was

observed and held as follows:

> "14. The case of the parties is clear from their pleadings and the evidence adduced by them as indicated above. The petitioner challenged the status of respondent Dinesh Chaudhary as a Scheduled Caste person belonging to the SC community. Precisely what was indicated in support of that case is that the father of Dinesh Chaudhary and Naresh Chaudhary is Bhagwan Singh who is Kurmi by caste married to Jago Devi, also a Kurmi lady. The High Court has also observed that a person born in a Kurmi family normally would be presumed that he is Kurmi by caste. **In this background the initial burden of the petitioner would stand discharged and it would shift upon the respondent to prove his case which, in normal course of things, would be and is within his special knowledge.** A case which has been set up by the respondent through his witnesses as well, that his father had taken a fancy to Deo Kumari Devi, a resident of Village Adai, who is Pasi by caste and married her, who gave birth to two children including the respondent, would normally be not in the knowledge of the people in general, particularly when according to the case of the respondent himself Jago Devi lived in another village and she was never brought from there by Bhagwan Singh. More so, when Bhagwan Singh, a Kurmi by caste, is living with his wife Jago Devi, also a Kurmi, in their village Jehanabad. The best evidence, as also according to the High Court to prove the case of the respondent, was to produce Bhagwan Singh and Deo Kumari Devi but they have been withheld after being cited as witnesses for the respondent. These facts clearly make out a case for drawing an adverse inference that in case they had been produced they would not have supported the case of the respondent. *Kundan Lal Rallaram* v. *Custodian, Evacuee Property* AIR 1961 SC 1316, *T.S. Murugesam Pillai* v. M.D. Gnana Sambandha Pandara Sannadhi AIR 1917 PC 6 and *Thiru John* v. *Returning Officer* (1977) 3 SCC 540, may also be referred on the point.
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> 15. ……Apart from the above, the appellant had also discharged his burden by proving the fact that the father of Respondent 1 is Bhagwan Singh, a Kurmi by caste married to Jago Devi, also a Kurmi by caste. The natural inference in

such circumstances would be that the respondent would, in normal course of events, be a Kurmi by caste. If there is anything contrary to the normal course of events, as pleaded in this case, of another marriage of Bhagwan Singh in some other village, namely, Adai with Deo Kumari Devi who never came to live with Bhagwan Singh in his village nor Bhagwan Singh ever lived there. Such facts in the special knowledge of the respondent have to be proved by him alone. The respondent was under duty to prove his case both ways, namely, in view of the special knowledge of facts pleaded and again in view of the fact that the appellant had discharged his initial burden of showing that the respondent was Kurmi by caste being the son of Bhagwan Singh, a Kurmi married to Jago Devi, also a Kurmi. The other decision which has been referred to on behalf of the respondent is reported in *Dolgobinda Paricha v. Nimai Charan Misra* AIR 1959 SC 914. It in connection with the fact that the evidence of the brother of Deo Kumari Devi that Bhagwan Singh had married her, was relevant for the purposes of relationship of one person to another since the brother of Deo Kumari Devi, is a person who is a member of the family or otherwise has special means of knowledge of the particular relationship. The decision is in reference to Section 50 of the Evidence Act. It may be observed that the evidence of persons who belong to Village Adai including the brother of Deo Kumari Devi have been examined by the respondent to establish the allegation of marriage between Bhagwan Singh and Deo Kumari Devi. Undoubtedly, the evidence of the brother of Deo Kumari Devi would be relevant for the relationship between Bhagwan Singh and Deo Kumari Devi but his evidence would not be of any help, in view of the adverse inference drawn under Section 114(g) of the Evidence Act due to withholding of the best evidence available on the point. When the persons concerned are not coming forward to the Court to depose about the alleged relationship and an adverse inference has been drawn that if they had come to the Court to depose, their evidence would have gone against the respondent, in such circumstances, there is no occasion to act upon the statement of DW 5, the brother of Deo Kumari Devi or other witnesses."

(emphasis added)

15. Once again it is to be seen that the judgment by the two judges went into the facts of the case in detail and considered the effect of the evidences led (or rather not led!) by the respondent in support of his case. And again it was on a finding of fact that the Court held that the respondent failed to establish his scheduled caste status. The judgment by two judges, like the decision in *Sobha Hymavathi Devi*, did not proceed on the basis that the respondent would get his caste from his father and his father being admittedly Kurmi the respondent could not have a caste status other than Kurmi. The Court did not disallow the respondent from taking the plea that he was the child of a Pasi mother and, thus, belonged to a scheduled caste. But in that endeavour the respondent failed on a finding of fact.

16. It is equally important to note that the judgment by the two judges does not rule out the possibility of the child from an inter-caste marriage taking his/her caste status from the mother, if such a provision was made in a circular issued by the

Government and, in paragraph 7 of the judgment, made the following observations:-

> "A person born in a Kurmi family, which details have been provided, would normally be taken to be a Kurmi by caste. But it is only in special circumstances, as may have been provided under a circular of the Government of Bihar, that the caste of the mother would be taken as the caste of the children, if she happens to be a Scheduled Caste, married to a non-Scheduled Caste."

17. Sinha,J., the third member on the Bench wrote a separate, though concurring judgment. He applied the test of acceptance by the community for rejecting the respondent's claim that he qualified as a 'Pasi' (scheduled caste). In paragraphs 33 and 34 of the judgment Sinha,J. observed as follows-

> "33. In the instant case there is nothing on record to show that the respondent has ever been treated to be a member of the Scheduled Caste. In fact evidence suggests that he has not been so treated. He as well as his brothers and other members of his family are married to persons belonging to his own caste i.e. "Kurmi".
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> 34.There was no attempt on the part of the respondent herein to bring on record any material to the effect that he was treated as a member of the "Pasi" community. Furthermore, no evidence has been brought on record to show that the family of the respondent had adopted and had been practicing the customary traits and tenets of the "Pasi" community."

Sinha, J., however, proceeded to make certain other observations and in paragraph 27 of the judgment he said as follows:-

> "27. The caste system in India is ingrained in the Indian mind. **A person, in the absence of any statutory law, would inherit his caste from his father and not his mother even in a case of inter-caste marriage."**
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> (emphasis added)

And in paragraphs 41 and 42 of the judgment as under:-

> "41. 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."**

Here there is no reference to Valsamma but the connection is obvious. It is only the next logical step to what was said in paragraph 31 of Valsamma. If as a result of inter-caste marriage the woman gets transplanted into the family of the husband and takes her husband's caste it would logically follow

that the child born from the marriage can take his/her caste only from the father. We shall presently consider the highly illogical consequences of this logical derivation but before that it needs to be noticed that Sinha, J. rejected the government circular also that provided that the caste of the mother might be taken as the caste of the child. In the same paragraph (41) Sinha,J. observed:

> " Reliance, however, has been placed upon a circular dated 3-3-1978 said to have been issued by the State of Bihar which is in the following terms:
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> "Subject: Determination of the caste of a child born from a non-Scheduled Caste Hindu father and a Scheduled Caste mother.
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> Sir,
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> In the aforesaid subject as per instruction I have to state for the determination of a child born from a non-Scheduled Caste father and a Scheduled Caste mother, upon deliberation it has been decided that the child born from such parents will be counted in the category of Scheduled Caste.
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> 2. In such cases before the issue of caste certificate there will be a legible enquiry by the Block Development Officer, Circle Officer/Block Welfare Officer."
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> 42. The said circular letter has not been issued by the State in exercise of its power under Article 162 of the Constitution of India. It is not stated therein that the decision has been taken by the Cabinet or any authority authorized in this behalf in terms of Article 166(3) of the Constitution of India. It is trite that a circular letter being an administrative instruction is not a law within the meaning of Article 13 of the

Constitution of India. (See *Dwarka Nath Tewari* v. *State of Bihar* AIR 1959 SC 249)."

(emphasis added)

18. He, thus, rejected the circular issued by the State of Bihar as invalid and of no consequence. However, the judgment by the two judges, as seen above expressly acknowledged that in special circumstances, as may be provided in the Government Circular, the caste of the mother may be taken as the caste of the children. Therefore, the view taken by Sinha J. on the circular is clearly at variance with the judgment of the two Judges on that issue. On the question of the child inheriting the caste of the mother the judgment by the two judges is silent as the question did not arise for consideration in view of the finding of fact that the respondent's father, a kurmi, had not married the pasi woman. It is, therefore, difficult to clothe the observation by Sinha J. on this point with precedent value, especially in view of the fact that the question did not arise at all after the decision of the majority of two judges. Seervai in his Constitutional Law of India, Fourth Edition, pages 2669-2673

esp. Para 25.102 explains that a 'decision' refers to the determination of each question of law which arose and was decided in that case. In *Punit Rai's* case, the question did not arise at all, and moreover, there was no majority concurrence on the question that a child inherits his caste from the father. Thus, the concurring judgment of Sinha J. must be interpreted by reference to Paragraphs 33, 34 and 47 of the judgment, where the learned Judge concurs with the majority on the question of fact. The other observations in the concurring judgment cannot be said to constitute binding precedent.

19. The question of the status of a child born to a scheduled tribe mother from a forward caste father again came up before the Court in *Anjan Kumar* v. *Union of India and others*, (2006) 3 SCC 257. *Anjan Kumar*, was the son of a scheduled tribe mother and a Kayastha (forward caste) father. The question was whether he could be considered to belong to the scheduled tribe. On the facts of the case, the Court found that though the mother of the child indeed belonged to a scheduled tribe, the child was brought up in the environment of forward

caste community and he did not suffer any social disabilities or backwardness. In paragraph 6 and 7 of the judgment the Court observed as follows:-

> "6.Undisputedly, the marriage of the appellant's mother (tribal woman) to one Lakshmi Kant Sahay (Kayastha) was a court marriage performed outside the village. Ordinarily, the court marriage is performed when either of the parents of bride or bridegroom or the community of the village objects to such marriage. In such a situation, the bride or the bridegroom suffers the wrath of the community of the village and runs the risk of being ostracised or excommunicated from the village community. Therefore, there is no question of such marriage being accepted by the village community. The situation will, however, stand on different footing in a case where a tribal man marries a non-tribal woman (forward class) then the offshoots of such wedlock would obviously attain the tribal status. However, the woman (if she belongs to a Forward Class) cannot automatically attain the status of tribal unless she has been accepted by the community as one of them, observed all rituals, customs and traditions which have been practiced by the tribals from time immemorial and accepted by the community of the village as a member of tribal society for the purpose of social relations with the village community. Such acceptance must be by the village community by a resolution and such resolution must be entered in the Village Register kept for the purpose. Often than not, such acceptance is preceded by feast/rituals performed by the parties where the elders of the village community participated. However, acceptance of the marriage by the community itself would not entitle the woman (forward class) to claim the appointment to the post reserved for the reserved category. It would be incongruous to suggest that the tribal woman, who suffered disabilities, would be able to compete with the woman (forward class) who does not suffer disabilities wherefrom she belongs but by reason of marriage to tribal husband and such marriage is accepted by the community would entitle her for appointment to the post reserved for the Scheduled Castes and Scheduled Tribes. It would be a negation of constitutional goal.

> 7. It is not disputed that the couple performed court marriage outside the village; settled down in Gaya and their son, the appellant also born and brought up in the environment of forward community did not suffer any disability from the society to which he belonged. Mr. Krishnamani, learned Senior Counsel contended that the appellant used to visit the village during recess/holidays and there was cordial relationship between the appellant and the village community, which would amount to the acceptance of the appellant by the village community. By no stretch of imagination, a casual visit to the relative in other village would provide the status of permanent resident of the village or acceptance by the village community as a member of the tribal community."

20. The Court in paragraph 6 of the judgment, as quoted above, applied the test of acceptance in the community in which the woman gets married. But more importantly in paragraph 7 of the judgment went into the specifics of the case on the question of upbringing of the appellant *Anjan Kumar* and recorded a finding of fact that he was "brought up in the environment of forward community (and) did not suffer from any disability from the society to which he belonged". Having arrived at the aforesaid finding of fact the Court proceeded to refer to several decisions, including *Valsamma* and the judgment of Sinha, J. in *Punit Rai* (in particular paragraph 27 of the

judgment) and in paragraph 14 came to observe and hold as follows:-

> "14. In view of the catena of decisions of this Court, the questions raised before us are no more *res integra*. The condition precedent for granting tribe certificate being that one must suffer disabilities wherefrom one belongs. **The offshoots of the wedlock of a tribal woman married to a non-tribal husband – Forward Class (Kayastha in the present case) cannot claim Scheduled Tribe status. The reason being such offshoot was brought up in the atmosphere of Forward Class and he is not subjected to any disability.** A person not belonging to the Scheduled Castes or Scheduled Tribes claiming himself to be a member of such caste by procuring a bogus caste certificate is a fraud under the Constitution of India. The impact of procuring fake/bogus caste certificate and obtaining appointment/admission from the reserved quota will have far-reaching grave consequences. A meritorious reserved candidate may be deprived of reserved category for whom the post is reserved. The reserved post will go into the hands of non-deserving candidate and in such cases it would be violative of the mandate of Articles 14 and 21 of the Constitution."
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> (emphasis added)

21. Here the Court said that, "the offshoot of the wedlock of a tribal woman married to a non-tribal husband – Forward Class (Kayestha in the present case) cannot claim Scheduled Tribe status". But it was not on the reasoning of *Valsamma* that in an inter-caste marriage or in a marriage between a tribal and a

non-tribal the woman gets transplanted into the community of the husband and gets her caste from the husband (paragraph 31 of the judgment) or the reasoning in Sinha J's judgment that in the absence of any statutory law a person would inherit his caste from his father and not his mother even in a case of inter-caste marriage". Here the reasoning is that, "..such offshoot was brought up in the atmosphere of Forward Class and he is not subjected to any disability. That is exactly the reasoning of *Valsamma* in paragraph 34 of the judgment and that as noted above is the true ratio of the decision in *Valsamma*.

22. It is, thus, clear that it is wrong and incorrect to read *Valsamma*, *Punit Rai* and *Anjan Kumar* as laying down the rule that in an inter-caste marriage or a marriage between a tribal and a non-tribal, the child must always be deemed to take his/her caste from the father regardless of the attending facts and circumstances of each case. Now, we propose to consider why the observation in *Valsamma* to the effect that an inter-caste marriage or a marriage between a tribal and a non-tribal the woman becomes a member of the family of her husband

and takes her husband's caste (Paragraph 31 of the judgment) is not the ratio of that decision and more importantly what inequitable and anomalous results would follow if that proposition is taken to its next step to hold that the offspring of such a marriage would in all cases take the caste from the father.

23. For the proposition that on marriage the woman takes the caste of her husband *Valsamma* relied on two nineteenth century Privy Council decisions, one in *Bhoobum Moyee Debia v. Ram Kishore Acharj Chowdhry*, (1865) 10 MIA 279 and the other in *Lulloobhoy Bappoobhoy Cassidass Moolchund v. Cassibai*, (1879-80) 7IA 212. In *Bhoobum Moyee Debia* the respondent Chandrabullee Debia after the death of her son, who left behind an issueless widow (the appellant, Bhoobum Moyee Debia), in order to devest the widowed daughter-in-law, made an adoption on the strength of a deed of permission of adoption that was executed in her favour by her deceased husband (Gaur Kishore Acharj Chaudhary). The adopted son filed a suit claiming the entire estate of Gaur Kishore Acharj

Chaudhary, trying to defeat the claim of the appellant and devest her of the estate. He succeeded before the Sudder Dewanny Adawlut of Calcutta. But in appeal the Privy Council held that under the Hindu Law an adopted son takes by inheritance and not by device and as by that law in the case of inheritance, the person to succeed must be the heir of the full owner. In the facts of the case, the deceased son of Gaur Kishore Acharj Chaudhary and Chandrabullee Debia who was the husband of the appellant was the last full owner and at his death his wife, the appellant, succeeded as his heir to her widow's estate. Consequently, the adoption by Chandrabullee Debia was void as the power was incapable of execution. After reaching this conclusion the Privy Council further noted that an additional difficulty in holding the estate of the widow to be devested "may perhaps be found in the doctrine of Hindoo Law, that the husband and wife are one and that as long as the wife survives, one half of the husband survives; but it is not necessary to press this objection".

24. The second decision of the Privy Council in Lulloobhoy Bappoobhoy Cassidass Moolchund, raised the question whether the widow of a paternal first cousin of the deceased became – by her marriage – a Gotraja–sapinda of the deceased, and whether she was, therefore, entitled to succeed to the estate in preference to male gotraja-sapindas who were more distant heirs. The Privy Council, based on an interpretation of the Mitakshara law as it prevailed in Bombay at that time, affirmed the widow's right of inheritance. The Privy Council observed, "It is not disputed that on her marriage the wife enters the gotra of her husband, and it can scarcely be doubted that in some sense she becomes a sapinda of his family. It is not necessary to cite authorities on this point….. Whether the right to inherit follows as a consequence of this sapinda relationship is the question to be considered?" The Privy Council cited a passage from the Achara Kanda of the Mitakshara which suggested that sapinda relationship depended on having the particles of the body of some ancestor in common. However, "the wife and the husband are sapinda relations to each other, because they together beget one body

(the son)". It was further observed; "If then, as already pointed out, the wife upon her marriage enters the gotra of her husband and, thus, becomes constructively in consanguinity or relationship with him, and through him, with his family, there would appear to be nothing incongruous in her being allowed to inherit as a member of that family under a scheme of inheritance which did not adopt the principle of the general incapacity of women to inherit. But, though it may be consisted with this theory of sapinda relationship to admit the widow so to inherit, the existence of the right has still to be established."

25. In the first of the two Privy Council decisions, the issue of sapinda relationship did not really arise and the case was decided on an altogether different basis. In the second decision, it is only observed that the wife enters the gotra of the husband. There may be many gotras within a certain caste, and it is unclear if this doctrine of Hindu Customary law can be applied in the post-Constitution era to determine the caste of a child from an inter-caste marriage or a marriage between a tribal and non-tribal.

26. Without any disrespect, it seems a matter of grim irony that two nineteenth century decisions of the Privy Council that were rendered in their time to advance and safeguard the interests of Hindu widows should be relied upon and used for complete effacement of the caste and the past life of a woman as a result of her marrying into a different caste. The Privy Council decisions were rendered about a century and a quarter ago in cases of inheritance, in a completely different social and historical milieu, when cases of inter-caste marriage would be coming to the court quite rarely. We are not quite sure of the propriety or desirability of using those decisions in a totally different context in the post-Constitutional, independent India where there is such great consciousness and so much effort is being made for the empowerment of women and when instances of inter-caste marriage are ever on the increase. It also needs to be considered how far it would be proper to invoke the customary Hindu law to alter the caste status of a woman in an inter-caste marriage or a marriage between a tribal and non-tribal and to assign to the woman the caste of

her husband when such a marriage may itself be in complete breach of the Hindu customary law.

27. We may also recall that *Valsamma Paul* was a case where a Syrian Catholic woman (forward caste) had married a Latin Catholic man (backward class). The parties were Christians but the Court applied the Hindu Customary law observing, "It would, therefore, be clear that be it either under the Canon law or the Hindu law, on marriage the wife becomes an integral part of husband's marital home entitled to equal status of husband as a member of the family. The Court, thus, put the Canon law at par with the Hindu Customary law. Now, surely the same reasoning cannot apply if a Muslim of a forward caste marries a Muslim tribal e.g. a Lakshdweep Gaddi or a Bakriwal from Jammu and Kashmir. One wonders whether in those cases too the woman can be said to take the caste of her husband applying the reasoning of *Valsamma*.

28. Further, whether and to what extent the Hindu Customary law would govern members of scheduled tribes (as opposed to scheduled castes) would depend on the extent to which the

given tribe was hinduised prior to the adoption of the Constitution of India.

29. The view expressed in *Valsamma* that in inter-caste marriage or in a marriage between a tribal and a non-tribal the woman gets transplanted into the family of her husband and takes her husband's caste is clearly not in accord with the view expressed by the Constitution Bench of the Court in *V.V. Giri v. Dippala Suri Dora and others*, (1960) 1 SCR 426 that it is well nigh impossible to break or even to relax the inflexible and exclusive character of the caste system. In *V.V. Giri* the election of the returned candidate was challenged on the ground that he had ceased to be a member of the Scheduled Tribe and had become a Kashtriya. In support of the allegation evidences were led that from 1928 onwards he had described himself and the members of his family as belonging to the Kashtriya caste. Oral evidence was led to show that he had for some years past adopted the customs and rituals of the Kashtriya caste and marriages in his family were celebrated as they would be among the Kashtriya and homa was performed on such

occasions. It was also shown that his family was connected by marriage ties with some Kashtriya families, that a Brahmin priest officiated at the religious ceremonies performed by him and he wore the sacred thread.

30. Rejecting the contention of the election petitioner Gajendragadkar J. (as his Lordship then was) speaking for himself and three other Honourable Judges on the Bench observed in Paragraph 25 of the judgment as follows:

> "In dealing with this contention it would be essential to bear in mind the broad and recognized features of the hierarchical social structure prevailing amongst the Hindus. It is not necessary for our present purpose to trace the origin and growth of the caste system amongst the Hindus. It would be enough to state that whatever may have been the origin of Hindu castes and tribes in ancient times, **gradually castes came to be based on birth alone. It is well known that a person who belongs by birth to a depressed caste or tribe would find it very difficult, if not impossible, to attain the status of a higher caste amongst the Hindus by virtue of his volition, education, culture and status. The history of social reform for the last century and more <u>has shown how difficult it is to break or even to relax the rigour of the inflexible and exclusive character of the caste system</u>[1].** It is to be hoped that this position will change, and in course of time the cherished ideal of casteless society truly based on social equality will be attained under the powerful impact of the doctrine of social justice and equality proclaimed by the Constitution and sought to be implemented by the relevant statutes and as a result of the spread of secular education and the growth of a rational outlook and of proper sense of social

[1] In Valsamma (para 31) a bench of two judges, using similar words said just the opposite: "The caste rigidity breaks down and would stand no impediment to her becoming a member of the family to which the husband belongs".

> values; but at present it would be unrealistic and utopian to ignore the difficulties which a member of the depressed tribe or caste has to face in claiming a higher status amongst his co-religionists."

31. The observation made by Gajendragadkar J. half a century ago was tellingly shown to be true in *Rajendra Shrivastava vs. State of Maharashtra*, (2010) 112 BomLR 762, a case that came before the Full Bench of the Bombay High Court. In *Rajendra Shrivastava* a Scheduled Caste woman, who had married a man from an upper caste, accused her husband and his family members of subjecting her to cruelty and abusing her in the name of her caste. A case was accordingly instituted against the accused, including the husband, under Sections 498A, 406, 494, 34 of the Indian Penal Code read with the provisions of Section 3(1)(ii) and Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. In the anticipatory bail application filed on behalf of the husband it was contended that on getting married with him the complainant had assumed his caste and lost her identity as a Scheduled Caste person. She could, therefore, make no

complaint under the provisions of the SC/ST (Prevention of Atrocities) Act. It goes without saying that in support of the contention raised on behalf of the husband strong reliance was placed upon the observations made in *Valsamma* in Paragraph 31 of the judgment.

32. The full bench before which the matter came up for consideration on reference framed the following issue as arising for consideration:

> "If a woman who by birth belongs to a scheduled caste or a scheduled tribe marries to a man belonging to a forward caste, whether on marriage she ceases to belong to the scheduled caste or the scheduled tribe?"

33. The full bench of the Bombay High Court examined *Valsamma* in light of two Constitutional Bench decisions of this Court, namely, *Indra Sawhney v. Union of India*, 1992 supp (3) SCC 217 and *V.V. Giri v. D. Suri Dora*, (supra). The full bench also considered the law of precedent and referred to the decision of this Court in *State of A.P.* v. M. *Radha Krishna Murthy,* (2009) 5 SCC 117. It finally came to hold that the observations made in Paragraph 31 of the decision in

Valsamma cannot be read as the ratio laying down that on marriage, a wife is automatically transplanted into the caste of her husband. In Paragraph 12 of the judgment it held as follows:-

> "When a woman born in a scheduled caste or a scheduled tribe marries to a person belonging to a forward caste, her caste by birth does not change by virtue of the marriage. A person born as a member of a scheduled caste or a scheduled tribe has to suffer from disadvantages, disabilities and indignities only by virtue of belonging to the particular caste which he or she acquires involuntarily on birth. The suffering of such a person by virtue of caste is not wiped out by a marriage with the person belonging to a forward caste. The label attached to a person born into a scheduled caste or a scheduled tribe continues notwithstanding the marriage. No material has been placed before us by the applicant so as to point out that the caste of a person can be changed either by custom, usage, religious sanction or provision of law."

34. We fully endorse the view taken by the Bombay High Court and we feel that in the facts of the case that was the only correct view.

35. In light of the discussion made above it is clear that the view expressed in Paragraph 31 of the *Valsamma* judgment that in an inter-caste marriage or a marriage between a tribal and a non-tribal the woman must in all cases take her caste from the husband, as a rule of Constitutional Law is a proposition, the correctness of which is not free from doubt. And

in any case it is not the ratio of the *Valsamma* decision and does not make a binding precedent.

36. It is also clear to us that taking it to the next logical step and to hold that the off-spring of such a marriage would in all cases get his/her caste from the father is bound to give rise to serious problems. Take for instance the case of a tribal woman getting married to a forward caste man and who is widowed or is abandoned by the husband shortly after marriage. She goes back to her people and the community carrying with her an infant or may be a child still in the womb. The child is born in the community from where her mother came and to which she went back and is brought up as the member of that community suffering all the deprivations, humiliations, disabilities and handicaps as a member of the community. Can it still be said that the child would have the caste of his father and, therefore, not entitled to any benefits, privileges or protections sanctioned by the Constitution.

37. Let us now examine how the issue has been dealt with by some of the High Courts.

38. A full bench decision of the Kerala High Court in *Indira v. State of Kerala,* AIR 2006 Ker. 1, is a case in point.

39. The Government of Kerala had issued G.O. (Ms) No. 298 dated 23/6/1961 stating that children born of inter-caste marriages would be allowed all educational concessions if **either** of the parents belonged to scheduled caste/scheduled tribe. Later, on a query made by the Kerala Public Service Commission, the Government clarified *vide* a G.O. (Ms) dated 25/1/1977 that the Government Order dated 23/6/1961 could be adopted for determining the caste of the children born of such inter-caste marriage for all purposes. Resultantly, such children were treated as belonging to scheduled caste or scheduled tribe if either of their parents belonged to SC/ST. After the decision of this Court in *Punit Rai* (supra) and in light of the separate though concurring judgment of Sinha J. the State of Kerala cancelled the earlier G.O. (Ms) dated 23/6/1961 and its clarification dated 25/1/1977 and replaced it by another order G.O. (Ms) No. 11/2005/SCSTDD dated 20/6/2005 directing that the competent authorities would issue Scheduled

Caste/Scheduled Tribe community certificates to the children born from inter-caste marriage only as per the caste/community of his/her father subject to the conditions of acceptance, customary traits and tenets as stipulated in the judgments of the Supreme Court. The validity of the Government Order dated 20/6/2005 came up for consideration before the full bench of the Kerala High Court. The High Court considered the decisions of this Court in a number of cases including *Valsamma*, *Sobha Hymavathi Devi* and *Punit Rai* and in Paragraph 21 of the judgment came to hold as follows:

> "The Government, vide order G.O. (Ms) No. 25/2005/SCSTDD dated 20/6/2005 directed the competent authority to issue SC/ST community certificates to the children born out of intercaste married couples as per the caste/community of the father subject to the conditions of acceptance, customary traits and tenets stipulated in Punit Rai's case and Sobha Hymavathi Devi's case. **The above government order would also be applicable to the children born out of intercaste married couple if the mother belongs to SC/ST community**. Subject to the above direction, rest of the directions contained in G.O. (Ms) No. 11/05/ and G.O. (Ms) No. 25/2005 would stand."

40. We are in agreement with the view taken by the Kerala High Court.

41. A division bench of the Delhi High Court in *Kendriya Vidyalaya Sangathan v. Shanti Acharya Sisingi,* 176(2011) DLT 341, after considering a number of decisions of this Court summed up the legal position as to the offspring of an inter-caste marriage or a marriage between a tribal and a non-tribal in clauses 3 and 4 under Paragraph 30 of the judgment as follows:

> "III The offshoot of wedlock between Scheduled Caste/Scheduled Tribe **male** and a female belonging to forward community can claim Scheduled Caste/Scheduled Tribe status for Indian society is patriarchal society where the child **acquires the caste of** his father.
>
> IV The offshoot of wedlock between Scheduled Caste/Scheduled Tribe female and a male belonging to forward community cannot claim Scheduled Caste/Scheduled Tribe status unless he demonstrates that she has suffered the disabilities suffered by the members of the community of his mother."

42. In *Arabinda Kumar Saha v. State of Assam*, 2001 (3) GLT 45 a division bench of the Gauhati High Court had a case before it in which a person whose father belonged to the upper caste and mother to a scheduled caste claimed scheduled caste status. The court found and held that though the father of the writ petitioner was admittedly a forward caste man he was

brought up as a member of the scheduled caste. This was evident from the fact that the writ petitioner had not only been the office holder of Anushchit Jati Karamchari Parishad but the scheduled caste community treated the appellant as belonging to scheduled caste and even the non-scheduled caste people treated him as scheduled caste, in as much as in his college career and in his service career he was treated as a person belonging to a scheduled caste.

43. In view of the analysis of the earlier decisions and the discussion made above, the legal position that seems to emerge is that in an inter-caste marriage or a marriage between a tribal and a non-tribal the determination of the caste of the offspring is essentially a question of fact to be decided on the basis of the facts adduced in each case. The determination of caste of a person born of an inter-caste marriage or a marriage between a tribal and a non-tribal cannot be determined in complete disregard of attending facts of the case. In an inter-caste marriage or a marriage between a tribal and a non-tribal there may be a **presumption** that the child has the caste of the

father. This presumption may be stronger in the case where in the inter-caste marriage or a marriage between a tribal and a non-tribal the husband belongs to a forward caste. But by no means the presumption is conclusive or irrebuttable and it is open to the child of such marriage to lead evidence to show that he/she was brought up by the mother who belonged to the scheduled caste/scheduled tribe. By virtue of being the son of a forward caste father he did not have any advantageous start in life but on the contrary suffered the deprivations, indignities, humilities and handicaps like any other member of the community to which his/her mother belonged. Additionally, that he was always treated a member of the community to which her mother belonged not only by that community but by people outside the community as well.

44. In the case in hand the tribal certificate has been taken away from the appellant without adverting to any evidences and on the sole ground that he was the son of a Kshatriya father. The orders passed by the High Court and the Scrutiny Committee, therefore, cannot be sustained. The orders passed

by the High Court and the Scrutiny Committee are, accordingly, set aside and the case is remitted to the Scrutiny Committee to take a fresh decision on the basis of the evidences that might be led by the two sides. It is made absolutely clear that this Court is not expressing any opinion on the merits of the case of the appellant or the private contesting respondent.

45. Before parting with the records of the case, we would like to put on record our appreciation for the assistance that we got from Mr. Sanjay R. Hegde counsel appearing for the appellant and Mr. Sanjeev Kumar counsel appearing for respondent No. 6. The assistance we received from the *amicus curiae*, Mr. Aman Ahluwalia was especially invaluable.

46. In the result, the appeal is allowed but in the facts of the case there will be no order as to costs.

.....J

(Aftab Alam)

.....J
(Ranjana Prakash Desai)

New Delhi;
January 18, 2012