

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 8176 of 2014

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

Sd/-

and

HONOURABLE MR.JUSTICE R.D.KOTHARI

Sd/-

1.	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2.	To be referred to the Reporter or not ?	Yes
3.	Whether their Lordships wish to see the fair copy of the judgment ?	No
4.	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	No
5.	Whether it is to be circulated to the civil judge ?	No

KESRIBEN HARIBHAI GAMAR....Petitioner(s)

Versus

STATE OF GUJARAT & 4....Respondent(s)

Appearance:

MR NILESH A PANDYA, ADVOCATE for the Petitioner(s) No. 1

MR VISHRUT JANI, ASSTT. GOVERNMENT PLEADER for the Respondent(s) No. 1 - 4

MS ROOPAL R PATEL, ADVOCATE for the Respondent(s) No. 1 - 2

RULE SERVED for the Respondent(s) No. 3 , 5

CORAM: HONOURABLE MR.JUSTICE M.R. SHAH

and

HONOURABLE MR.JUSTICE R.D.KOTHARI

Date : 11/12/2014

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

[1.0] By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed for an appropriate writ, direction, order to quash and set aside the impugned order dated 02.06.2014 passed by the respondent No.2 – Election Officer Deputy Mamlatdar whereby the

objection raised by the petitioner against the nomination / candidature of the respondent No.5 on the reserved post of Schedule Tribe (adivasi) has been rejected. It is also further prayed for an appropriate writ, direction, order to direct respondent No.2 – Election Officer to cancel the candidature of the respondent No.5 for the post of Sarpanch on the reserved category of Adivasi community post in village Aderan (Tarsang), Taluka Danta, District Banaskantha.

A short but interesting question of law which arise in the present petition is that **when a woman born in a Schedule Tribe caste marries to a person belonging to a non-Schedule Tribe, whether she lose her status as Schedule Tribe and right to claim reservation as a Schedule Tribe or not?**

[2.0] The facts leading to the present petition in nut-shell are as under:

[2.1] That the respondent No.5 herein admittedly was born in a family belonging to Adivasi/Schedule Tribe. That subsequently she married with one Dashrathji Sardarji Bandi – Hindu Thakarda – non-Schedule Tribe. That the respondent No.5 filled in the candidature/form for the post of Sarpanch of village on the reserved post of Adivasi/Schedule Tribe as a Schedule Tribe candidate as well as a general candidate (woman). However, basically, the respondent No.5 submitted the candidature as reserved category of Schedule Tribe. That the petitioner herein raised an objection before the Election Officer against her candidature as Schedule Tribe – reserved category of Adivasi community on the ground that after her marriage with a non-Schedule Tribe person, she lose her status as such and right to claim any benefit as a Schedule Tribe / reserved category of Schedule Tribe and therefore, her candidature on the reserved category is required to be rejected. That by impugned order dated 02.06.2014, considering the certificates dated 28.05.2014 issued by the Talati cum Mantri, Gana Pipri and the caste

certificate dated 30.05.2014 issued by the competent authority – Planning officer and Taluka Development Officer, Danta certifying that the respondent No.5 belongs to Schedule Tribe, has rejected the objection raised by the petitioner and has accepted the candidature of the respondent no.5.

Feeling aggrieved and dissatisfied with the impugned order dated 02.06.2014 rejecting the objection raised by the petitioner against candidature of respondent No.5 as Schedule Tribe and as reserved category candidate, the petitioner has preferred the present Special Civil Application under Article 226 of the Constitution of India.

[3.0] Shri Nilesh Pandya, learned advocate appearing on behalf of the petitioner has vehemently submitted that respondent No.2 – Election Officer has materially erred in accepting the candidature of respondent No.5 as Schedule Tribe / reserved category of Schedule Tribe though after the respondent No.5 married with the non-Schedule Tribe person, she lose her status of a reserved category / Schedule Tribe.

[3.1] It is further submitted by Shri Pandya, learned advocate appearing on behalf of the petitioner that the Election Officer has materially erred in rejecting the objection raised by the petitioner against the candidature of respondent No.5 as reserved category / Schedule Tribe. It is submitted that as such even the Talati cum Mantri, Aderan in the certificate dated 30.05.2014 also issued a certificate that the respondent No.5 belongs to Hindu Thakarda. It is submitted that despite the same, the Election Officer has accepted the candidature of respondent No.5 as reserved category candidate of Schedule Tribe.

[3.2] It is further submitted by Shri Pandya, learned advocate appearing on behalf of the petitioner that it is an admitted position that respondent No.5 has married to one Dashrathji Sardarji Bandi, who is of Hindu

Thakarda community, which is falling in general seat – Baxi Panch – OBC. It is submitted that even the conduct on the part of the respondent No.5 that their children are also getting the benefit as a general category, the respondent No.5 subsequently cannot claim the benefit of reservation as Schedule Tribe as on her marriage with the non-Schedule Tribe person, she lose her status as that of reserved category/Schedule Tribe.

[3.3] It is further submitted that even initially the respondent No.5 submitted two forms / candidatures, one as a general category candidate and another as a reserved category candidate – Schedule Tribe candidate. It is submitted that thereafter she withdrew the candidature for general category but maintained the form for reserved caste on the premise that she belongs to Schedule Tribe.

[3.4] Shri Pandya, learned advocate appearing on behalf of the petitioner has heavily relied upon the following decisions of the Hon'ble Supreme Court as well as the Full Bench of this Court in support of his submission that after the respondent No.5 had married with non-Schedule Tribe, she lose her status of a reserved category – Schedule Tribe.

1. Valsamma Paul (Mrs.) vs. Cochin University and Others
(1996)3 SCC 545 [Paras 4, 6]
2. Punit Rai vs. Dinesh Chaudhary
(2003)8 SCC 204
3. State of Kerala and Anr. vs. Chandramohan
AIR 2004 SC 1672
4. Anjan Kumar vs. Union of India & Others
AIR 2006 SC 1177
5. Rameshbhai Dabhai Naika vs. State of Gujarat and Others
(2012)3 SCC 400

6. Full Bench decision of this Court in the case of Goolrokh M. Gupta vs. Burjor Pardiwala President & Ors. 2012(2) GCD 1463 (Gujarat)

Making above submissions and relying upon above decisions, it is requested to allow the present Special Civil Application and hold that on marriage by respondent No.5 with the non-Schedule Tribe person, she lose her status as a reserved category / Schedule Tribe as she has married with the non-Schedule Tribe person – Hindu Thakarda and thereafter she cannot claim any benefit as a reserved category as Schedule Tribe [adivasi].

[4.0] Present Special Civil Application is opposed by Ms. Roopal Patel, learned advocate appearing on behalf of respondent Nos.2 and 3.

Ms. Patel, learned advocate appearing on behalf of respondent Nos.2 and 3 has vehemently submitted that the respondent No.2 considered and relied upon caste certificate issued by the Talati cum Mantri, Gana Pipri dated 28.05.2014 as well as the certificate issued by the competent authority – Planning Officer and Taluka Development Officer, Danta dated 30.05.2014 in which it is specifically stated and mentioned that the respondent No.5 belongs to Dungri Bhil (Adivasi) / Schedule Tribe.

[4.1] It is submitted that therefore as such the respondent No.2 has not committed any error and/or illegality in accepting the candidature of respondent No.5 as a reserved category candidate of Schedule Tribe.

[4.2] It is further submitted by Ms. Patel, learned advocate appearing on behalf of respondent Nos.2 and 3 that as such the controversy raised in the present petition that whether a woman who belongs to Schedule Tribe and/or belongs to a reserved category on her marriage with non-reserved category lose her status as a reserved category is squarely

covered by the decision of the Full Bench of the Bombay High Court in the case of **Rajendra Shrivastava vs. State of Maharashtra** reported in **2010(112) BLR 762**, which has been approved by the Hon'ble Supreme Court vide judgment and order reported in (2012)3 SCC 400. It is submitted by Ms. Patel, learned advocate appearing on behalf of the respondent Nos.2 and 3 that the Hon'ble Supreme Court in the case reported in (2012)3 SCC 400 has as such confirmed the view taken by the Full Bench of the Bombay High Court in the case of Rajendra Srivastav (Supra) that a woman who is born in a Schedule Caste or Schedule Tribe, on marriage with a person belonging to a forward caste, is not automatically transplanted into the caste of husband by virtue of her marriage, and therefore, she cannot be said to be belonging to the caste of her husband and therefore, she does not lose her status as a Schedule Caste or Schedule Tribe as the case may be. It is further submitted by Ms. Patel, learned advocate appearing on behalf of the respondent Nos.2 and 3 that as such and it is an admitted position that the respondent No.5 was born in a Adivasi family belonging to adivasi i.e. Schedule Tribe community and therefore, by birth she acquired the status as a Schedule Tribe / reserved category and therefore, on marriage with a person belonging to a non-Schedule Tribe / forward caste, she does not lose her status as a Schedule Tribe / reserved category. It is submitted that her status as a Schedule Tribe / reserved category is by birth and conferred by the Constitution which cannot be taken away solely on the ground that she had married with a person belonging to a forward caste and/or non-Schedule Tribe in the present case. She has also relied upon the following decisions of the Hon'ble Supreme Court in support of her above submissions.

1. Rameshbhai Dabhai Naika vs. State of Gujarat and Others
(2012)3 SCC 400
2. Rajesh Arjunbhai Patel vs. State of Maharashtra and Others

AIR 1990 Bombay 114(1)

3. Rajendra Shrivastava vs. State of Maharashtra
2010(112) BLR 762

[4.3] Ms. Patel, learned advocate appearing on behalf of the respondent Nos.2 and 3 has submitted that as such none of the decisions upon which the reliance has been placed by learned advocate appearing on behalf of the petitioner, referred to herein above, would be applicable to the facts of the case on hand.

Making above submissions and relying upon above submissions, it is requested to dismiss the present Special Civil Application.

[5.0] Present Special Civil Application is also opposed by Shri Vishrut Jani, learned AGP appearing on behalf of respondent No.1 State of Gujarat. He has adopted the submissions made by Ms. Patel, learned advocate appearing on behalf of respondent Nos.2 and 3 and supported the submissions made by Ms. Patel, learned advocate that when the respondent No.5 was born in the Schedule Tribe family – adivasi community family, she acquired the status of Schedule Tribe by birth and conferred by the Constitution which cannot be taken away solely on the ground that subsequently she has married with a person belonging to a non-reserved category and/or the forward caste. It is submitted that even the State Government has also clarified the aforesaid position by issuing the circulars that on marriage by a woman belonging to Schedule Tribe with a non-Schedule Tribe / non-reserved category person, she does not lose her status as a reserved category / Schedule Caste and/or Schedule Tribe as the case may be.

Making above submissions, it is requested to dismiss the present Special Civil Application.

[6.0] Heard learned advocates appearing on behalf of respective parties

at length.

A short but an interesting question of law which has arisen in the present Special Civil Application is whether a woman belonging to Schedule Tribe / reserved category lose her status as a reserved category on her marriage with a person of a forward caste?

[6.1] While considering the aforesaid issue it is required to be borne in mind that a person acquires caste by birth and not by marriage. The concept of a caste and the manner in which caste is acquired has been considered by the Hon'ble Supreme Court in the case of **Indra Sawhney vs. Union of India** reported in **1992 Suppl. (3) SCC 217** and in para 779 of the said decision, the Hon'ble Supreme Court has observed thus:

“779. The above material makes it amply clear that a caste is nothing but a social class - a socially homogeneous class. It is also an occupational grouping, with this difference that its membership is hereditary. One is born into it. Its membership is involuntary. Even if one ceases to follow that occupation, still he remains and continues a member of that group. To repeat, it is a socially and occupationally homogeneous class. Endogamy is its main characteristic. Its social status and standing depends upon the nature of the occupation followed by it. Lowlier the occupation, lowlier the social standing of the class in the graded hierarchy. In rural India, occupation- caste nexus is true even today. A few members may have gone to cities or even abroad but when they return they do, barring a few exceptions they go into the same fold again. It doesn't matter if he has earned money. He may not follow that particular occupation. Still, the label remains. His identity is not changed. For the purposes of marriage, death and all other social functions, it is his social class the caste that is relevant. It is a matter of common knowledge that an overwhelming majority of doctors, engineers and other highly qualified people who go abroad for higher studies or employment, return to India and marry a girl from their own caste. Even those who are settled abroad come to India in search of brides and bridegrooms for their sons and daughters from among their own caste or community. As observed by Dr Ambedkar, a caste is an enclosed class and it was mainly these classes the Constituent Assembly had in mind though

not exclusively while enacting Article 16(4)."

[6.2] While dealing with the issue as to whether a person who is a member of a Schedule Tribe can cease to be a member of such tribe and can be said to have become a member of another caste, the Hon'ble Supreme Court in the case of **Shri V. V. Giri vs Dippala Suri Dora And Others** reported in **AIR 1959 SC 1318** in para 23 has observed and held as under:

"23. 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 has shown how difficult it is to break or even to relax the rigour of the inflexible and exclusive character of the caste system. 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 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."

[6.3] In *Caste and the Law in India* by Justice S.B. Wad at page 30 under the heading "Sociological Implications", it is stated:

"Traditionally, a person belongs to a caste in which he is born. The caste of the parents determines his caste but in case of reconversion a person has the liberty to renounce his casteless status and voluntarily accept his original caste. His caste status at birth is not immutable. Change of religion does not necessarily mean loss of caste. If the original caste does not positively disapprove, the acceptance of the caste can be presumed. Such acceptance can also be presumed if he is elected by a majority to a reserved seat. Although it appears that some

dent is made in the classical concept of caste, it may be noticed that the principle that caste is created by birth is not dethroned. There is also a judicial recognition of caste autonomy including the right to outcome a person.”

[6.4] In the case of **Kailash Sonkar vs. Maya Devi** reported in (1984)2 SCC 91, it is observed by the Hon’ble Supreme Court considering the historical perspective confronting the framers of the Constitution in drafting the Constitution, that one of the important objectives to be translated into action was to take special care of the backward classes and members of the Dalits and Tribes by bringing them to the fore through pragmatic actions and providing adequate opportunities for their amelioration and development, education, employment and the like. Hindu social structure was erected by impregnable walls of separation with graded inequalities between different sections amongst Hindus. Caste became the result of birth and not of volition. No one wishes to be born in a particular caste or religion. It is the result of biological act of the parents.

[6.5] Identical question came to be considered by the Full Bench of the Bombay High Court in the case of Rajendra Shrivastava (Supra). In the case of Rajendra Shrivastava (Supra), the Full Bench of the Bombay High Court framed the following issue 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?”

The Full Bench of the Bombay High Court in the aforesaid case also considered the decision of the Hon’ble Supreme Court in the case of Valsamma Paul (Supra) in light of the Two Constitutional Bench decisions of the Hon’ble Supreme Court, namely, Indra Sawhney (Supra) and Shri V.V. Giri (Supra) and after considering the law on the issue, the Full Bench of the Bombay High Court has held as follows:

“35. In light of the discussion made above it is clear that the view expressed in para 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.”

The aforesaid view of the Bombay High Court has been endorsed/approved by the Hon’ble Supreme Court in the decision in the case of Rameshbhai Dabhai Naika (Supra). Not only that but in the said decision the Hon’ble Supreme Court has in para 47 observed that the view expressed in para 31 of the judgment in the case of Valsamma Paul (Supra) 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. It is further observed that in any case it is not the ratio of the Valsamma decision and does not make a binding precedent.

[6.6] Thus, considering the aforesaid decisions of the Hon’ble Supreme Court as well as Full Bench of the Bombay High Court, a person acquires the status of a particular caste by birth and certain benefits of reservation are conferred to a particular caste by the Constitution. Thus, if the status of a particular caste is acquired by birth and certain benefits are conferred under the Constitution, the same cannot be taken away solely on the ground that subsequently she has married with a husband belonging to a forward caste. We are in complete agreement with the view taken by the Full Bench of the Bombay High Court in the case of Rajendra Shrivastava (Supra) which as such has been approved by the Hon’ble Supreme Court in the case of Rameshbhai Dabhai Naika (Supra).

[7.0] Now, so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of Valsamma Paul (Supra) by the learned advocate appearing on behalf of the petitioner, as observed hereinabove in the case of Rameshbhai Dabhai Naika (Supra), the Hon'ble Supreme Court has doubted the correctness of the said decision and in para 47 the Hon'ble Supreme Court has observed as stated hereinabove.

[7.1] Now, so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of Anjan Kumar (Supra) by the learned advocate appearing on behalf of the petitioner is concerned, on facts the said decision would not be applicable to the facts of the case on hand. In the case before the Hon'ble Supreme Court, a son born and brought up in forward community claimed the status of Schedule Tribe on the ground that his mother is a tribal woman. The Hon'ble Supreme Court negated the same by observing that the condition precedent for granting tribe certificate being that one must suffer disabilities wherefrom one belongs. The offshoots of a tribal woman married to a non-tribal husband – forward caste cannot claim Schedule Tribe status. Thus, in the aforesaid decision also what was emphasized by the Hon'ble Supreme Court was that a person can claim the status of a particular caste only when he/she suffered disabilities wherefrom one belongs.

[7.2] Similarly, even the decision of the Hon'ble Supreme Court in the case of Chandramohan (Supra), which has been relied upon the learned advocate appearing on behalf of the petitioner shall not be applicable to the facts of the case on hand. In the case before the Hon'ble Supreme Court on facts it was found that the family of the victim was converted about 200 years back into Roman Catholic and in fact the father of the victim married a woman belonging to Roman Catholic wherefrom he again become the Roman Catholic and to that the Hon'ble Supreme Court observed that the family cannot be said to be continued

to be a member of the Schedule Tribe and as such it was left to be decided during the trial.

[7.3] Now, so far as the reliance placed upon the Full Bench decision of this Court in the case of **Goolrokh M. Gupta Maiden Name Goolrokha vs. Burjor Pardiwala President & Ors.** reported in **2012(2) GCD 1463 (Guj.)** by the learned advocate appearing on behalf of the petitioner is concerned, on considering the controversy raised before the Full Bench, we are of the opinion that even the said decision also shall not be applicable to the facts of the case on hand and/or will not be of any assistance to the petitioner. In the case before the Full Bench, the Full Bench was considering the affect of marriage under the Special Marriage Act and right to profess religion claimed by a Parsi lady after she had married with non-Parsi under the Special Marriage Act. It is not appreciable as to how the said decision would be of any assistance/helpful to the petitioner.

[7.4] At this stage it is required to be noted that even the State of Gujarat has also issued the circulars/instructions to the effect that on marriage of a woman who belong to a reserved category shall not lose her status as such on her marrying with a person belonging to non-reserved category.

[8.0] Considering the aforesaid facts and circumstances and the decision of the Hon'ble Apex Court and the decision of the Full Bench of the Bombay High Court, it is held that a woman who by birth belongs to a Schedule Caste or Schedule Tribe marries to a man belonging to a forward caste, she does not cease to belong to the Schedule Caste or Schedule Tribe and by marrying with a person belonging to a forward caste, she does not lose her status as a Schedule Caste or Schedule Tribe as she has acquired the status in a particular caste by Birth and certain

benefits are conferred under the Constitution of India.

[9.0] In view of the above, it cannot be said that respondent No.2 committed any error in accepting the candidature of respondent No.5 as a reserved category – Schedule Tribe. The respondent No.2 has rightly rejected the objection raised by the petitioner and rightly accepted the candidature of respondent No.5 as reserved category candidate – Schedule Tribe candidate. Under the circumstances, the present Special Civil Application fails and the same deserves to be dismissed and is, accordingly, dismissed. Rule is discharged. Ad-interim relief granted earlier stands vacated forthwith.

[9.1] At this stage learned advocate appearing on behalf of the petitioner has requested to continue the ad-interim relief granted earlier so as to enable the petitioner to challenge the present order before the Hon'ble Supreme Court. However, considering the fact that the election has been held in the month of June, 2014, however there is a stay of declaring the result, the prayer is rejected.

At this stage learned advocate appearing on behalf of the petitioner has also prayed for certificate for Leave to Appeal to the Hon'ble Supreme Court submitting that a pure question of law has arisen. However, considering the fact that as such the issue involved is squarely covered by the decision of the Hon'ble Supreme Court referred to hereinabove as well as decision of Full Bench of the Bombay High Court, prayer to issue the certificate for Leave to Appeal to the Hon'ble Supreme Court is refused.

(M.R. SHAH, J.)

(R.D. KOTHARI, J.)

Ajay