

HIGH COURT OF JUDICATURE AT ALLAHABAD

(1) PUBLIC INTEREST LITIGATION (PIL) No. - 2129 of 2017

Dr. B.R. Ambedker Granthalaya Evam Jan Petitioner
Kalyan

v/s

State of U.P. and others Respondents

with

(2) WRIT - C No. - 27122 of 2019

Gorakh Prasad Petitioner

v/s

State of U.P. and others Respondents

Appearance :

For the Petitioners : Mr. Rakesh Kumar Gupta, Advocate

For the Respondents : Mr. Ajay Kumar Misra, Advocate
General with Mr. A.K. Goyal,
Additional Chief Standing Counsel, Mr.
H.N. Singh, Senior Advocate with Mr.
Antriksh Verma, Advocate

**CORAM : HON'BLE RAJESH BINDAL, CHIEF JUSTICE
HON'BLE J.J. MUNIR, JUDGE**

ORDER

1. This order will dispose of two petitions bearing Public Interest Litigation (PIL) No. 2129 of 2017 and Writ - C No. 27122 of 2019.

2. Challenge in this Public Interest Litigation is to the Government Orders dated 21.12.2016 and 22.12.2016, whereby members of certain 'Other Backward Castes' were sought to be declared as Scheduled Castes. This has been done by saying that it is a clarification and is not meant to specify them as Scheduled Castes as done under Article 341 of the Constitution. Additionally, in Writ - C No. 27122 of 2019, challenge is to the subsequent Government Order issued by the State on 24.06.2019 to the same effect.

3. The order dated 21st December, 2016 provides differently. It is mentioned in that order that members of the Scheduled Caste, Majhwar, mentioned at Serial No. 53 of the Constitution (Scheduled Castes) Order, 1950, as amended by the Order of 1976 are not being issued Scheduled Caste Certificate treating them to be a member of 'Other Backward Classes', such as Godia, Mallah etc. It is further recorded that adversely affected persons had approached this Court *vide* Writ Petition No. 4568 of 2007, Ajay Kumar and others v. State of U.P. and others, decided on 30.03.2016, wherein a direction was issued to the Commissioner to look into the matter and pass appropriate orders.

4. The Divisional Appellate Forum, Faizabad on 30.09.2016 had issued directions to provide members of the Majhwar Caste, Scheduled Caste Certificates. There are then instructions carried in the order dated 21st December, 2016, providing that before issue of

Scheduled Caste Certificates in accordance with the Government Order dated 09.07.2015, the ascertainment of the person's caste is to be substantially made and not merely on the basis of the caste title used in the name or the avocation he pursues. There are detailed directions to undertake this inquiry at the local and the family level by officials, including ascertainment of the fact from the educational institutions besides documents, locally available.

5. So far as order dated 21st December, 2016 is concerned, it does not add or introduce any caste as a Scheduled Caste to the Constitution (Scheduled Castes) Order, 1950 issued by the President of India in exercise of powers under Article 341 of the Constitution. All that the order says is that members of the Caste Majhwar, whose Entry Number is 53 in the Scheduled Castes Order should be issued the necessary certificates after verification of their status. Members of this caste should not be confused with Other Backward Classes, such as Godia, Mallah etc. and refused their Scheduled Caste Certificate.

6. We do not find any illegality in the order dated 21st December, 2016.

7. So far as the Government Order dated 22nd December, 2016 is concerned, it clearly recognizes or acknowledges 17 Other Backward Classes as Scheduled Castes in the name of clarification. In whatever manner said, 17 Castes, that are otherwise in the category of O.B.C., have been recognized by the order dated 22nd December, 2016

as Scheduled Castes in the State of Uttar Pradesh. This cannot be done in view of the provisions of Article 341 of the Constitution, which reads as under:

“341. Scheduled Castes.

(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.”

8. The Constitution (Scheduled Castes) Order, 1950 alone can specify which castes, races or tribes or groups within castes, races or tribes, shall be regarded as Scheduled Castes under the Constitution, in relation to a particular State or a Union Territory. The Constitution (Scheduled Castes) Order has to be made by the President of India. Under Article 341(2), any change to the list of Scheduled Castes specified in the President’s order can only be made by Parliament by law. A parliamentary law alone can include in or

exclude from the list of the Constitution (Scheduled Castes) Order, 1950, as amended in 1976, a particular caste. The order to be made by the President, which has been described under Article 341 as a notification is insulated from any kind of variation by a subsequent notification, even by the President. The only variation that can be done is by a parliamentary enactment, not otherwise.

9. Article 341 of the Constitution that applies to Scheduled Castes is *para materia* to Article 342, which provides in identical terms with regard to the Scheduled Tribes. The question fell for consideration of the Supreme Court recently in **State of Maharashtra and another v. Keshao Vishwanath Sonone and another, 2020 SCC OnLine SC 1040**, where it was held:

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

“12.It appears that the object of clause (1) of Articles 341 and 342 was to keep away disputes touching whether a caste/tribe is a Scheduled

Caste/Scheduled Tribe or not for the purpose of the Constitution. Whether a particular caste or a tribe is Scheduled Caste or Scheduled Tribe as the case may be, within the meaning of the entries contained in the Presidential Orders issued under clause (1) of Articles 341 and 342, is to be determined looking to them as they are. Clause (2) of the said articles does not permit any one to seek modification of the said orders by leading evidence that the caste/Tribe (A) alone is mentioned in the Order but caste/Tribe (B) is also a part of caste/Tribe (A) and as such caste/Tribe (B) should be deemed to be a Scheduled Caste/Scheduled Tribe as the case may be. It is only Parliament that is competent to amend the Orders issued under Articles 341 and 342. As can be seen from the entries in the schedules pertaining to each State whenever one caste/tribe has another name it is so mentioned in the brackets after it in the schedules. In this view it serves no purpose to look at gazetteers or glossaries for establishing that a particular caste/tribe is a Scheduled Caste/Scheduled Tribe for the purpose of Constitution, even though it is not specifically mentioned as such in the Presidential Orders. Orders once issued under clause (1) of the said articles, cannot be varied by subsequent order or notification even by the President except by law made by Parliament. Hence it is not possible to say that State Governments or any other authority or courts or Tribunals are vested with any power to

modify or vary the said Orders. If that be so, no inquiry is permissible and no evidence can be let in for establishing that a particular caste or part or group within tribes or tribe is included in Presidential Order if they are not expressly included in the Orders. Since any exercise or attempt to amend the Presidential Order except as provided in clause (2) of Articles 341 and 342 would be futile, holding any inquiry or letting in any evidence in that regard is neither permissible nor useful.”

60. The Constitution Bench reiterated that the power to include or exclude, amend or alter the Presidential Order is expressly and exclusively conferred on and vested with the Parliament and Courts cannot and should not extend jurisdiction to deal with the question as to whether a particular caste or sub-caste or group or part of tribe is included in any one of the entries mentioned in the Presidential Order. Following was laid down in paragraph 15:—

“**15.** Thus it is clear that States have no power to amend Presidential Orders. Consequently, a party in power or the Government of the day in a State is relieved from the pressure or burden of tinkering with the Presidential Orders either to gain popularity or secure votes. Number of persons in order to gain advantage in securing admissions in educational institutions and employment in State services have been claiming as belonging to either Scheduled Castes or Scheduled Tribes depriving

genuine and needy persons belonging to Scheduled Castes and Scheduled Tribes covered by the Presidential Orders, defeating and frustrating to a large extent the very object of protective discrimination given to such people based on their educational and social backwardness. Courts cannot and should not expand jurisdiction to deal with the question as to whether a particular caste, sub-caste; a group or part of tribe or sub-tribe is included in any one of the entries mentioned in the Presidential Orders issued under Articles 341 and 342 particularly so when in clause (2) of the said article, it is expressly stated that the said Orders cannot be amended or varied except by law made by Parliament. The power to include or exclude, amend or alter Presidential Order is expressly and exclusively conferred on and vested with Parliament and that too by making a law in that regard. The President had the benefit of consulting the States through Governors of States which had the means and machinery to find out and recommend as to whether a particular caste or tribe was to be included in the Presidential Order. If the said Orders are to be amended, it is Parliament that is in a better position to know having the means and machinery unlike courts as to why a particular caste or tribe is to be included or excluded by law to be made by Parliament. Allowing the State Governments or courts or other authorities or Tribunals to hold inquiry as to whether a particular caste or tribe should be considered as one included

in the schedule of the Presidential Order, when it is not so specifically included, may lead to problems.....”

61. It is further to be noticed that Constitution Bench in *Milind's case* (supra) has noted the ratio of earlier two Constitution Bench judgments in *B. Basavalingappa's case* and *Bhaiya Lal's case* and in paragraph 28 has reaffirmed the ration of above two Constitution Bench judgments. In paragraph 28, following is laid down:—

“**28.** Being in respectful agreement, we reaffirm the ratio of the two Constitution Bench judgments aforementioned and state in clear terms that no inquiry at all is permissible and no evidence can be let in, to find out and decide that if any tribe or tribal community or part of or group within any tribe or tribal community is included within the scope and meaning of the entry concerned in the Presidential Order when it is not so expressly or specifically included. Hence, we answer Question 1 in the negative.”

62. In view of the ratio of judgments of this Court as noticed above, the conclusion is inescapable that the High Court could not have entertained the claim or looked into the evidences to find out and decide that tribe “Gowari” is part of Scheduled Tribe “Gond Gowari”, which is included in the Constitution (Scheduled Tribes) Order, 1950. It is further clear that there is no conflict in the ratio of Constitution Bench judgments of this Court in *B. Basavalingappa's case* and *State of Maharashtra v. Milind* (supra). The ratio of *B. Basavalingappa's case* as

noted in paragraph 6 of the judgment and extracted above is reiterated by subsequent two Constitution Bench judgments in *Bhaiya Lal's case* and *Milind's case*. There being no conflict in the ratio of the above Three Constitution Bench judgments, we do not find any substance in submission of Shri Rohatgi that for resolving the conflict, the matter need to be referred to a larger Constitution Bench. We, thus, answer question Nos. 1 and 2 in following words:—

(i) The High Court in the writ petition giving rise to these appeals could not have entertained the claim of a caste “Gowari” that it be declared a Scheduled Tribe as “Gond Gowari” included at Entry No. 18 of the Constitution (Scheduled Tribes) Order, 1950 nor High Court could have taken evidence to adjudicate the above claim.

(ii) There is no conflict in the ratio of the judgment of Constitution Bench of this Court in *Basavalingappa's case* and *Milind's case*.

10. In the light of the aforesaid enunciation of law by Hon’ble the Supreme Court of India, the learned Advocate General could not defend the impugned order.

11. Though in **Keshao Vishwanath Sonone’s case** (*supra*), the issue was whether the High Court in a writ petition could examine the claim of a Caste to be included in the Schedule Tribes, which was not included in the Constitution (Scheduled Castes) Order, 1950, their Lordships restated the law laid down by the earlier Constitution Bench

decision in **B. Basavalingappa v. D. Munichinnappa**, AIR 1965 SC 1269, **Bhaiya Lal v. Harikishan Singh**, AIR 1965 SC 1557 and **State of Maharashtra v. Milind and others**, (2001) 1 SCC 4. The provisions of Article 341 of the Constitution do not leave any scope for including any Caste or Group to the list of Scheduled Caste in a State provided by the Constitution (Scheduled Castes) Order, 1950, except by law made by Parliament.

12. In this view of the matter, the orders dated 22.12.2016 and 24.06.2019 are hereby quashed. The writ petition is allowed to the extent mentioned above.

13. All pending impleadment applications are disposed of.

Allahabad
31.08.2022
Anoop

(J.J. Munir)
Judge

(Rajesh Bindal)
Chief Justice

Whether the order is speaking :

Yes✓/No

Whether the order is reportable :

Yes/No