

<p>Serial No. 13 Regular List</p>

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP(C) No. 182 of 2017

Date of Decision: 10.10.2019

Smti Sumarlin Wankhar

Vs.

Secretary, KHADC & Ors.

Coram:**Hon'ble Mr. Justice H. S. Thangkhiew, Judge****Appearance:**

For the Petitioner(s) : Mr. V.K. Jindal, Sr. Adv. with
Ms. C. Nongkhlaw, Adv.

For the Respondent(s) : Mr. V.G.K. Kynta, Sr. Adv. with
Ms. V. Mawlieh, Adv. (For R 1-3)
Mr. A.N. Diengdoh, Adv. (For R 4&5)

i)	Whether approved for reporting in Law journals etc.	Yes/No
ii)	Whether approved for publication in press:	Yes/No

1. By this petition under Article 226 of the Constitution of India the petitioner has assailed the impugned order dated 15.05.2017 passed by the Registration Authority of the Khasi Hills Autonomous District Council, Shillong under Section 12 of the Khasi Hills Autonomous District (Khasi Social Customs of Lineage) Act, 1997(hereinafter referred to as the 'Act') by which the Wankhar title/surname of the petitioner has been withdrawn and cancelled allegedly without issuing any notice, at the back of the petitioner.

2. The case of the petitioner is that apart from the violation of the principles of natural justice, the impugned order is also without jurisdiction, inasmuch as, Section 12 of the Act only prescribes for change of surname or 'Kur' or 'Jait' and does not empower the Registration Authority to withdraw or cancel the surname of any Khasi Scheduled Tribe. Being highly aggrieved with the order passed by the Registration Authority the writ petitioner is before this

Court by means of the instant writ petition seeking quashment of the impugned order dated 15.05.2017.

3. Heard Mr. V.K. Jindal, learned senior counsel assisted by Ms. C. Nongkhlaw, learned counsel on behalf of the writ petitioner. Learned counsel submits that the petitioner (Sumarlin Wankhar) was born on 17.07.1980, and her natural parents are Smti Serian Suting and (L) Louis Suting. He submits that the petitioner was introduced when only a few months old, to (L) Lucrecia Wankhar and (L) Bido Bell Wankhar who adopted the petitioner and since the time of adoption, the petitioner has been using the surname Wankhar along with her name which was given by the adoptive mother and grandmother. He submits that the surname Wankhar was added in all her School certificates, College certificates and other documents. He further submits that affidavits were then sworn by the mother in 18.09.1996 and by the adoptive mother in 03.01.2001 making the declaration that the petitioner be known as Sumarlin Wankhar. As such, he submits on being adopted, and also with her surname being declared as Wankhar, the writ petitioner for all purposes was considered legally as Sumarlin Wankhar.

4. The learned counsel submits that (L) Bido Bell Wankhar the adoptive grandmother of the petitioner executed a will dated 26.02.2010 bequeathing all her movable and immovable properties in favour of the petitioner and made her the sole executor of the will. On the death of (L) Bido Bell Wankhar on 26.07.2016, learned counsel submits that the petitioner then filed application under Section 276 of the Indian Succession Act, 1925 for a grant of probate of the aforesaid will in the Court of the Judge, District Council Court, KHADC. This however he submits, was never concluded in view of the fact that the respondents No. 4 & 5 filed an application in the Probate Court bringing on record the order dated 15.05.2017 passed by the respondent No. 3 whereby the surname 'Wankhar' had been withdrawn from the name of the petitioner. He submits that the respondents No. 4 & 5 had before the Probate Court prayed that in view of the order dated 15.05.2017, the probate matter be declared infructuous. He submits that the learned Probate Court took cognizance of the application and order dated 15.05.2017 and asked the petitioner to show cause to the same.

5. The learned senior counsel then submits that the petitioner was shocked with the turn of events, inasmuch as, she had no knowledge about the proceedings before the respondent No. 3 (Registration authority) nor was she aware that the respondent No. 4 & 5 had filed a complaint under Section 12 of the Khasi Hills Autonomous District (Khasi Social Customs of Lineage) Act, 1997, which had culminated in the impugned order dated 15.05.2017. He submits that the entire proceedings before the respondent No. 3, was done behind the petitioner's back and though the impugned order revealed that notices were issued, there is no mention that the same were ever served upon the petitioner. He further submits that the Act, came into force only on 25.02.2005 and it cannot be said to have retrospective effect and as such it will have no application to the case of the petitioner who had been using the surname 'Wankhar' since her school days much before the Act came into force.

6. The learned senior counsel submits that the object of the Act is to prevent the claims of Khasi status by unscrupulous persons for the benefits conferred on the Khasi community as a Scheduled Tribe and not in matters such as the instant case, wherein it is not disputed that the petitioner is a Khasi and a member of a Scheduled Tribe. Drawing the attention of the Court to the provision of Section 12 of the Act, the learned senior counsel submits that it does not empower or confer any jurisdiction on the respondent No. 3 to withdraw or cancel a surname of any Khasi. He contends that the action of the respondent No. 3 in passing the impugned order is not only arbitrary and without jurisdiction but capricious and mala fide. He further submits that Section 12 only prescribes the procedure for change of surname, kur, jait or clan and the only power vested upon the respondent No. 3 is to effect such change and not to withdraw or cancel the surname of any Khasi which he or she has used for decades together, prior to coming into force of the Act. He therefore submits that the impugned order being contrary to the provisions of the Act, 1997, and without jurisdiction the same is liable to be set aside and quashed.

7. The learned senior counsel while closing his arguments, submits that though the Act provides for an appeal under Section 13 against the orders of the Registration Authority, the same has not been resorted to as the said alternate remedy will not be efficacious in the facts and circumstances of the

case where the petitioner has suffered grave injustice. To buttress his case, the learned senior counsel has placed reliance on the following decisions rendered by the Hon'ble Supreme Court:

- i) *State of U.P vs. Mohammad Nooh (1958) SCR 595 or AIR 1958 SC 86, Para 10*
- ii) *Ram and Shyam Company vs State of Harayana and Others (1985) 3 SCC 267, Para 9*
- iii) *Harbanslal Sahnia and another vs Indian Oil Corpn. Ltd. (2003) 2 SCC 107, Para 7*
- iv) *L.K. Verma vs. HMT Ltd and another (2006) 2 SCC 269, Para 13, 20 and 21*
- v) *Dhampur Sugar Mills Ltd vs. State of UP (2007) 8 SCC 338, Para 10 & 23.*

8. Mr. V.G.K. Kynta, learned senior counsel assisted by Ms. V. Mawlieh, learned counsel on behalf of the respondents No. 1 to 3 at the outset, raised objections as to the maintainability of the writ petition, firstly on the ground of the availability of alternate remedy, as provided under Section 13 of the Act and secondly, on the question of as to whether a writ court can go into disputed facts. Learned senior counsel admits that the impugned order has been passed exparte, but however contends that the petitioner on statutory appeal, could have raised all grounds as may be deemed necessary instead of approaching this Court directly. He further submits that Section 16 of the Act has cloaked the Registration Authority with all the powers of a Civil Court while trying a suit as provided under the Code of Civil Procedure, 1908, and as such, being vested with such powers the Registration Authority had accordingly exercised its powers in determining the issue under Section 12 of the Act.

9. He next submits that several notices were issued to the petitioner and in fact as per office record the notice was served on 21.11.2016 and thereafter ample opportunities were given to the petitioner to contest the case but however the petitioner chose not to make any appearance. In this context learned counsel refers to Annexure-1 of the affidavit in opposition which he submits is a receipt indicating the factum of service. He further submits that in view of the non-appearance of the petitioner, the respondent No. 3 was duty

bound to dispose of the matter exparte based on the submissions and documentary evidence submitted by the respondents No. 4 & 5. He then reiterates his submissions that the writ petition as it stands is not maintainable due to the availability of alternate remedy by way of appeal before the Executive Committee of KHADC, and lastly prays that the writ petition be dismissed.

10. Mr. A.N. Diengdoh, learned counsel for the respondents No. 4 & 5 apart from supporting the submissions made by the learned counsel for the respondents No. 1, 2 & 3 has submitted that the petitioner cannot change her surname on her whims and fancies. He submits that there is no documentation such as an adoption certificate to substantiate the stand of the petitioner that she had been adopted and had taken the Wankhar surname, and it was only after the death of (L) Bido Bell Wankhar that the petitioner started using the Wankhar surname. He submits that the writ petition being not maintainable and involving disputed questions of fact should be dismissed with cost.

11. I have heard learned counsel for the parties, considered the submissions and examined the materials and the records of the proceedings before the Registration Authority which have been produced before this Court.

12. The issues that arise for determination in the instant matter is, firstly whether the Registration Authority under the Act was vested with the jurisdiction to entertain the complaint, secondly, whether the impugned order so passed was in violation of principles of natural justice and thirdly, whether in the set facts and circumstances of the case, the writ petition is maintainable in view of the existence of statutory appeal provision in the Act.

13. For the purposes of this discussion it would be necessary to quote Section 12 of the Act which provides as follows:-

“12. Change of Surname, Kur, Jait or Clan :- (1) No person shall change his/her surname, Kur, Jait, or clan and take or assume any other Khasi surname, Kur, Jait or clan except as hereinafter provided in this Act.

(2) a petition for effecting change of surname, Kur, Jait, of clan shall be submitted to the registration authority, on payment of such fees as may be prescribed in this behalf, for its orders giving reasons and grounds necessitating such change together with such papers or documents if any, in support thereof and the names and other

particulars of the persons the petitioner wish the registration authority to examine on such matters mentioned in the petition.

Provided that no such petition shall be accepted by the registration authority unless it is satisfied that a public notice as prescribed under this Act had been published in two consecutive issue of any two local newspapers one in English and the other in Khasi, inviting objection, if any, to the proposed change, from any person, body, authority or association within such time as mentioned in the notice which shall not, however, exceed forty days from the date of the last publication of the second notice in the newspapers.

(3) It shall be the duty and responsibility of the petitioner or the party making the objection to furnish, at their own expenses, copies of such papers or documents the parties respectively relied upon and to bear all costs and expenses for their respective witnesses as well as for the discovery and examination or production of any paper or documents as and when so directed by the registration authority.

Provided that the registration authority may, if satisfied, on prayer made in that behalf giving reasons thereof and after all expenses involved had been deposited as directed with the Registration Authority, summon or enforce the attendance of any person and examining the person on oath and/or requiring the discovery, production and examination of any paper or document.

(4) Notwithstanding anything contained in sub-section (3) of this Section the registration authority may, on its own motion or otherwise direct the personal appearance of any person if the registration authority has reasons to believe that such person has knowledge or information on any matter connected with the case and for the discovery, production and examination of any paper or document and all expenses and costs involved in that behalf shall be borne by the petitioner in full.

(5) The provisions of sub-section (4), (5) and (8) of Section 9 of this Act shall mutatis mutandis apply to the petition under this Section as are applicable to the application in the aforesaid section 9.

(6) Every petition under this Section shall be disposed of as soon as may be by the Registration authority and not later than six months from the date of receipt of the petition.

(7) Where the change as proposed in the petition contravenes the prevailing Khasi Social Customs of Lineage as provided in Section 3 and 4 of this Act, the registration authority shall refuse consent and shall dismiss the petition.

(8) Every order made by the Registration authority, refusing to give consent and dismissing the petition or giving its consent and allowing the petition, as the case may be, shall be in writing and shall contain reasons thereof and it shall be published in such form as may be prescribed in the Gazette and in any local newspaper, in English and Khasi by the registration authority which shall also be communicated to the petitioner and expenses thereof shall be borne by the petitioner out of the fees paid under Sub-section (2) of this section.

(9) Where the registration authority gives it consent and allows the petition, registration, if any already made under this Act, shall be modified accordingly and fresh certificate granted cancelling the one already granted earlier.

(10) Where in the course of the proceeding under this section it is found that the petitioner is not or is no longer a Khasi under the provisions of this Act, but identified and claimed himself/herself to be a Khasi, the person shall be liable to action under all or any of section 10, 11 and 17 of this Act according to the circumstances of the case and registration and certificate, if any, already made and granted under this Act shall be cancelled forthwith.”

14. A bare perusal of the above quoted Section, will reflect that this provision deals with the change of a surname, kur, jait or clan and that the same is to be effected in terms of the stipulations contained therein. Section 12 (2) provides only for petitions to be filed for effecting change of surname but nowhere does the provision lay down, that a complaint filed against a person for withdrawal or striking of the title or surname can be entertained, as has been occasioned in the present case. From the records as produced, the prayer in the complaint dated 22.08.2016 by the respondents No. 4 & 5, is for striking of the surname Wankhar, from the name of the petitioner. On scrutiny of the said provision, the complaint cannot be said to come within the ambit of Section 12 for the Registration Authority to adjudicate upon. Though Section 16 of the Act, provides that the Registration Authority while making enquiries under this Act, shall have all the power for trying a suit as per the Code of Civil Procedure, 1908, the fact remains that the limits of jurisdiction and power to be exercised by the Authority has to be within the confines of Section 12 itself and cannot be extended to include the proceedings as initiated by respondents No. 4 & 5. The jurisdiction of the Registration Authority being statutory, it is not entitled

to go outside the provisions as laid down. As such, it can conclusively be held that the proceedings and adjudication on the complaint so filed, is beyond the scope of the Registration Authority to take upon itself the power to entertain the complaint and to pass orders thereon.

15. The next issue which though uncontroverted, is as to whether the order was passed exparte. In this regard, counsel for the respondent No. 1, 2 & 3 had however contended that the order came to be passed ex parte as the writ petitioner though served, chose not to attend the proceedings or make any appearance. I have examined the records of the proceedings and though the process server was not examined by the Registration Authority, the process server's report dated 08.03.2017, which is available in the record reflects that the summons/notice had to be returned to the office as the name as shown in the summons/notice was not correct and as such the notice was not accepted.

16. The third aspect which assumes great significance in a backdrop of the facts so far discussed is whether the writ petition can be held to be maintainable due to the availability of alternate relief by way of appeal as provided in Section 13 of the Act. Section 13 is quoted herein below and reads as follows:-

“13. Appeal :- (1) An appeal shall lie to the Executive Committee against the order of the registration authority under Section 6, 7, 8, 9, 10 or 12 of this Act if filed within 90 days from the date of the order:

Provided that the Executive Committee may entertain an appeal after the expiry of such period of ninety days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) In computing the period of 90 days under sub-section (1), the time required to obtain the certified copy of the order appealed against shall be excluded.

(3) An appeal under this section may be filed by the person aggrieved by the order or by any other person, Chief, Headman or any Authority, body or association on ground of injury to such Khasi Social Customs as may be shown in the appeal petition.

(4) an appeal under this section shall be made in such form and manner and on payment of such fee as may be prescribed.

(5) The order or decision of the Executive Committee in appeal under this section shall be final and binding.”

17. Section 13 of the Act as quoted above clearly speaks of an appeal being available against orders passed under Sections 6, 7, 8, 9, 10 & 12. No doubt, the order impugned herein has been passed ostensibly under Section 12 of the Act. However, the fact that is apparent is that the said sections as discussed earlier does not envisage or provide for the adjudication of a complaint filed for striking of or withdrawing of a surname. The order as it appears has also been passed without hearing the petitioner, notwithstanding the irregularity or any definite conclusion as to whether service was effected. In any other circumstance it would have been appropriate for the ends of justice, to remand the matter back for reconsideration after hearing both the parties, which will also necessarily entail the setting aside of the impugned order. However, by remanding the matter, this Court cannot vest the Registration Authority with the jurisdiction to adjudicate such dispute when the statute itself does not provide for the same.

18. The existence of alternate remedy otherwise also is not an absolute bar to entertain a petition under Article 226 of the Constitution of India. As per the law laid down by the Hon'ble Supreme Court in the case of *Hanbanslal Sahnia & Ors. Vs Indian Oil Corporation & Ors.* it has been held that the rule of exclusion of writ jurisdiction by availability of an alternative remedy, is a rule of discretion and not one of compulsion. The judgment at Para-7 which speaks of the contingencies where in spite of availability of alternate remedy writ jurisdiction can be exercised by a High Court is quoted herein under: -

“7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged (See Whirlpool Corporation v. Registrar of Trade Marks, (1998) 8 SCC 1. The present case attracts applicability of first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter

came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.”

19. The facts of the instant case come well within the scope of the contingencies as enunciated by the judgment, inasmuch as, there has been a violation of the principles of natural justice and the impugned order and the proceedings are without jurisdiction and beyond the ambit of Section 12 of the Act. As such, though there is an appellate provision contained in the Act, the facts of the case, and the efficacy thereof of pursuing the same is overridden by the circumstances by which the impugned proceedings were conducted and the impugned order passed.

20. A pertinent issue which also merits mention is with regard to the applicability of the Act as to whether it can operate retrospectively. As contended by the writ petitioner, she has been using the title for decades together, prior to coming into force of the Act in 1997, and all the writ petitioner's testimonials, documents and certificates are in the name of Sumarlin Wankhar. The Act does not speak of any retrospectivity, but only indicates that it received the assent of the Governor on 23.02.2005 and was published in the Gazette of Meghalaya on 25.02.2005 meaning thereby the Act came into force only in the year 2005. However, the question as to whether a certificate from the Registration Authority is now necessary under the Act, for the writ petitioner to completely effect the change in surname, is left open in view of the facts and pleadings as they pertain in the matter.

21. As such in view of the discussions hereinabove, and the foregoing facts and circumstances of the case, the writ petition is allowed and the impugned order dated 15.05.2017 passed by the Registration Authority, KHADC, is hereby quashed and set aside. The records as produced to be returned.

22. No order as to costs.

JUDGE

Meghalaya
10.10.2019
“V. Lyndem PS”