Laxman Siddappa Naik

Vs

Kattimani Chaniappa Jamappanna & Ors

Civil Appeal No. 1303 of 1967

(M. Hidayatullah, K. S. Hegde, S. M. Sikri JJ)

19.01.1968

JUDGMENT

HIDAYATULLAH, J. –

This is an appeal under s. 116-A of the Representation of the People Act, 1951 against the judgment and order, July 24, 1967, of the High Court of Mysore in Election Petition No. 10 of 1967. The High Court has set aside the election of Laxman Siddappa Naik, who is the appellant before us. The appellant had stood from Gokak constituency of the Mysore Legislative Assembly for a seat reserved for a member of the Scheduled Tribes specified in Part VIII para 2 of the Constitution (Scheduled Tribes) Order, 1950. Five others had filed nomination papers. The nomination paper of one Kaushalya Devi was rejected by the Returning Officer and one Bhimgouda Mallagouda Patil withdrew from the contest within the time permitted by the Act. There were thus four contesting candidates. The result of the poll was as follows :-

> #1. Shri Laxman Siddappa Naik 175222. Shri Parasappa Hanmantha Karaing 70443. Shri Patel Shivangowd Malgowd 59964. Shri Kattimani Chandappa Jampanna 620##

The election petition was filed by the last candidate who had received only 620 votes. The main contention and on which his election petition in the High Court succeeded was that the appellant and the other two were not members of the Scheduled Tribes and were not thus entitled to stand for the reserved seat. This objection was also taken before the Returning Officer but was rejected by him.

The case of the election petitioner was that the appellant did not belong to the tribe shown as Nayaka including Cholivala Nayaka, Kapadia Nayaka, Mota Nayaka and Nana Nayaka, mentioned at No. 13 in Part VIII (2) of the Order. He was, on the other hand, a "Bedar" which tribe is not mentioned in the Order. The election petitioner also urged that the other two candidates also did not belong to any Scheduled Tribes but to the "Bedar" caste. He, therefore, asked that he himself should be declared elected treating the votes cast in favour of his opponents as "thrown away" since the voters knew this fact and voted with this knowledge. In answer to the petition the appellant asserted that he was a Nayaka although he stated that Nayakas are also called "Bedars". The High Court on an appraisal of the evidence and after looking into census reports and certain writers on the subject of Castes and Tribes has come to the conclusion that there is no Nayaka in this area and that the appellant is a Bedar. The appellant now appeals against the order of the High Court.

Under Art. 332 of the Constitution seats are reserved for Scheduled Tribes in the Legislative Assemblies of the States and under Art. 342 of the Constitution the President has, with respect to the States, after consultation with the Governors, by public notification specified the tribal communities

which are deemed to be the Scheduled Tribes in relation to a particular State. Parliament has power by law to include in or exclude from the list of Scheduled Tribes specified in the President's order any tribe or tribal community or part of or group within any tribe or tribal community. The Presidential Order was modified in 1956 and 1960. The District in which Gokak is situated was formerly part of the Bombay State. 24 tribes were named in the original Presidential Order. In 1956 this part was incorporated in the State of Mysore. In 1960 the Bombay State was bifurcated into two. As a result the Presidential order was suitably amended. Para 2 of Part VIII now refers to the area formerly in Bombay State which now is a part of the Mysore State. This part now shows 19 tribes instead of 24. An identical list of tribes is also shown in certain districts of Maharashtra and Rajasthan. Formerly the entry read only "Naikda or Nayaka" but now it reads "Naikda or Nayaka, including Cholivala Nayaka, Kapadia Nayaka, Mota Nayaka and Nana Nayaka". The "Nayaka" also means a chieftain and the word "Naikda" means a petty Nayaka, but that obviously is not intended to be its meaning. These words definitely refer to tribal communities which the President's Order shows are autochthonous in the respective areas. The appellant claimed to be a Nayaka. In his evidence he denied that he was a Naikda. He did not know the other tribal communities included in the expression "Naikda or Nayaka" by the entry. In Abhoy Pada Saha v. Sudhir Kumar Mondal [[1966] Supp. S.C.R. 387] the question had arisen what was meant by the entry "Sunri excluding Saha". The plea of the election petitioner in that case was that the candidate was a Saha. He failed to prove it and it was held that he belonged to the Sunri caste. It was pointed out that where the entry excluded a certain sub-caste the candidate must be taken to belong to the original caste if his exclusion as a member of that sub-caste was not proved. In other words, the matter was treated as a question of fact. Similarly, in B. Basavalingappa v. D. Munichinnappa and others [A.I.R. 1965 S.C. 1269] the Voddar caste of Mysore State, before the State Reorganization in 1956 was held, on evidence, to be the same as the Bhovi caste mentioned in the Constitution (Scheduled Castes) Order, 1950. Again the matter was treated as a question of fact. This Court has finally decided in Bhaiya Lal v. Harikishan Singh and others [A.I.R. 1965 S.C. 1557] that what caste a candidate belongs to is a question of fact.

Starting from this conclusion that the matter in controversy between the election petitioner and the appellant is a question of fact we have to address ourselves to the right questions in this case. These questions are : to what tribal community, if any, does the appellant belong and who is to prove the necessary facts ? These questions obviously have to be resolved on certain principles. The ordinary rule is that a person, who as a plaintiff, asserts a fact, has to prove it. The election petitioner here asserts two facts (a) that the appellant is not a Nayaka as mentioned in the Order, and (b) that he is a "Bedar". The first is a negative fact and the second a positive one. It is said that the proof of the negative was not only difficult but impossible. We do not agree. The election petitioner could have proved by positive evidence that the petitioner was a "Bedar". That would have proved that he was not a Nayaka. To establish the fact evidence was required to show the characteristics, such as customs of marriages, births, deaths, worship, dress, occupation and the like which distinguish a Bedar from a Nayaka. Evidence was also possible to show that the petitioner was received in the Bedar community. This was capable of being proved by showing intermarriage, inter-dining, community of worship, residence in a particular place and the like. Such facts would have led to the drawing of an inference one way or the other. A bare assertion that the appellant is a Bedar does not suffice to displace the acceptance of the nomination paper or the claim of the appellant that he is a Nayaka.

We shall now see what the election petitioner did to establish that the appellant was Bedar which would have proved conclusively that he was not a Nayaka. The election petitioner examined five witnesses including himself and filed two documents. The first document (Ex. P-1) was a certified

extract of Births and Deaths Register of Arbhani village issued by the Tehsildar Gokaka regarding the birth of a child Anasuya by name. It was alleged that Anasuya was the daughter of the appellant and the caste was described as Bedar. The appellant denied that it related to his daughter. He said that he had only one daughter by name Shankuntala and that the certificate produced was not of his daughter. No evidence was led to establish that the certificate related to the daughter of the appellant. The other document (Ex. P-2) was a certified extract of a school leaving certificate relating to one Lakshmappa Siddappa Naik. The appellant denied that it was his school leaving certificate. Again no attempt was made to connect the certificate with him. The original of Ex. P-2 was not summoned from the school office. These facts were capable of being proved. There was not even cross-examination of the appellant with reference to these documents. The High Court rejected both the documents. As regards the oral evidence it is sufficient to say that it did not exist. The four witnesses summoned by the election petitioner only proved that Cholivadi, Lamani and Kurubar were also called Nayaka and that the Bedars had sub-castes known as Talawars, Valmiki and Nayaka Makkalu. None of these witnesses, however, displayed any knowledge of the Gokak area or the position of the Bedars and Nayakas in that area. In fact, they clearly stated that they knew nothing about it. The election petitioner as witness stated that he had heard that the appellant was a Bedar and he did not examine any person in support of his statement. His evidence was obviously hearsay and when he was questioned he could not even name the person from whom he had learnt these facts.

The evidence on the part of the appellant was also nothing on both the points. He filed a document Ex. R-1 said to be a certified copy of the extract relating to his birth from the Births and Death Register issued by the Tehsildar, Gokak. The High Court summoned the original which we have also seen. There is a correction in the appropriate column. Some writing appears to have been erased where Nayaka is mentioned and it is possible to read the first letter, which is "w" (equal to B) and this shows that the original writing was perhaps Bedar. There is nothing to show when the correction was made. In the Register there are 58 entries and many of them relate to Bedars but there is no other entry of a Nayaka. No doubt this is a suspicious circumstance but the question still is : does the appellant suffer ? In a case of this type when both sides lead no evidence the matter must be decided on the basis of the original onus which clearly lay on the election petitioner.

Mr. Gopal Krishnan argues that as an objection was raised before the Returning Officer and was repelled on the acceptance of R-1, now found unacceptable, the appellant is relegated to the original burden. Here again this is a wrong approach to the question. The Returning Officer was entitled to act on the evidence before him. The original was not seen by him and the doubt, now created, was not present in his mind. Once the nomination paper was accepted the burden must be assumed again by the party challenging the fact a candidate belonged to a particular community. If prima facie evidence had been led by the election petitioner the burden might have shifted to the candidate but as he led no evidence whatever he must obviously fail. This is not one of those cases in which both sides having led evidence the question where onus lies, becomes immaterial, since the court can reach a conclusion on the totality of the evidence before it. There was no evidence in this case one way or the other. In these circumstances, the election petitioner could not succeed because of the weakness of the appellant's case.

The High Court did not approach this problem from his angle. As it could not reach any conclusion on the evidence before it, the High Court turned to Census Reports of the Bombay Presidency of 1911, 1921 and 1931, the Bombay Karnatak Gazetteer of 1893, Hutton's book on Castes in Indian (1931), Mysore Tribes and Castes, Vol. II by Nanjundayya and Iyer, Hindu Tribes and Castes, Vol. II by Sherring, Castes and Tribes of Southern India by Thurston, certain Government Orders issued

in 1959 and 1960 and the Administration Report of the Welfare Department of 1956-57. These documents could be consulted to find out the distinguishing customs and manners of different tribes but not to reach a conclusion about the appellant. The conclusion drawn from this material was that Naikda is a distinct tribe, that Nayakas are not mentioned and that the Bedars could not be called 'Naikda'. Reverting to the plea of the appellant that he was not a 'Naikda' but a Nayka and that Nayakas were also known as Bedars, the learned Judge reached the conclusion that the appellant was a Bedar. He found no evidence in these Reports of the existence of Nayakas in this district and as the appellant claimed to be a Nayaka he felt that he must be a Bedar because there was no Nayaka in this area.

It has been pointed out in this Court, in the cases to which we have referred, that one must accept the Presidential Order. The Presidential Order shows that Naikdas or Nayakas are to be found not only in the districts of Mysore but also in Maharashtra and Rajasthan. This tribal community is, therefore, quite wide-spread and it is not possible to say that there was no Nayaka in the district to which the appellant belonged. Even if he was the solitary Nayaka he would be covered by the Presidential Order and would be entitled to stand for the reserved seat for the tribal communities mentioned in the Presidential Order. He claimed to be a Nayaka and this claim was upheld by the Returning Officer. It is significant that he was not an independent candidate but one chosen by a party. This party would not have been easily imposed upon and would have taken care to select the right person for the seat. There were two others who also came forward as Nayakas. In these circumstances, the learned Judge was in error in attempting to establish that the tribal community mentioned as Nayakas was not to be found in this area and that only Naikdas were found and as the appellant did not claim to be a Naikda he must be held to be disentitled to be chosen to fill this seat for the tribal communities. A heavy burden obviously lay upon the election petitioner to displace his claim by evidence. He did not even lead prima facie evidence and therefore the claim cannot be said to have been negatived.

An election is something which cannot be readily set aside. There must be proof and convincing proof that a person is not properly chosen to fill a particular seat. Mere suspicion or surmise is not sufficient after the Returning Officer accepts a candidature and the candidate is chosen in the election. Once a community has gone to the polls and the voters have exercised their franchise it is necessary for an election petitioner to show that the candidate is not entitled to the seat. In other words, the burden originally lies on the election petitioner and he cannot succeed unless he discharges that burden. The High Court recognized that there was no evidence in the case but went into the matter from a different angle and attempted to contradict the Presidential Order which it was not entitled to do.

We are accordingly satisfied that the election petitioner had failed to establish his case and that the election of the appellant could not be set aside. The appeal will accordingly be allowed. The order of the High Court will be set aside. The election petitioner must pay the costs of the appellant here and in the High Court.

Appeal allowed.

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