

Shri Nirmal Enem Horo

Vs

Smt. Jahan Ara Jaipal Singh

Civil Appeal No. 1465 of 1972

(D.G. Palekar, A. Alagiriswami JJ)

26.04.1973

JUDGMENT

PALEKAR, J. -

1. This appeal arises from an Order, dated April 21, 1972, passed by the Patna High Court in Election Petition No. 9 of 1971 setting aside the election of the appellant at the instance of the respondent Mrs. Jahan Ara Jaipal Singh.

2. On January 21, 1971, the Election Commission of India issued a Notification calling on the 51 Khunti Parliamentary Scheduled Tribes Constituency of Ranchi to elect a Member of the Lok Sabha in the vacancy caused by the dissolution of the Lok Sabha in the month of December, 1970. The last dated for filing nominations was February 3, 1971 and the date of scrutiny of nominations was February 4, 1971. Nearly fourteen persons filed their nominations - two of them being the appellant, Mr. Horo, and the respondent, Mrs. Jaipal Singh. It appears one of the candidates objected to the nomination of Mrs. Jaipal Singh on the ground that she was not a member of a Scheduled Tribe. That objection was considered by the Returning Officer who upheld the objection and rejected her nomination paper. In due course the election was held and the appellant, Mr. Horo, was declared elected. The petition namely Election Petition No. 9 of 1971 was filed by Mrs. Jaipal Singh on the ground that her nomination paper had been illegally rejected since by her marriage with the late Mr. Jaipal Singh who was admittedly a member of the Munda Tribe, she had obtained the status of a Munda which is one of the Scheduled Tribes recognized under the Constitution. She alleged that according to the Munda customary law when a Munda is married outside the Munda Tribe and his marriage is accepted by the Munda Tribe, he continues to be a member of that Tribe and his wife acquires membership of the Tribe and becomes a member of her husband's family. She alleged that though she was not formerly a member of that Tribe she, on her marriage to Mr. Jaipal Singh in 1954 according to the rites and rituals of the Mundas, in the presence of the elders and other members of the Tribe, had been accepted within the fold of that Tribe as a Munda and hence was not liable to be disqualified for election in the special Tribe Constituency. The appellant contested the petition on several grounds. But most of the grounds were covered by judgments between the same parties in a previous Election Petition filed by Mrs. Jaipal Singh. That petition came finally to this Court and is reported as N. E. Horo v. Jahan Ara Jaipal Singh ((1972) 1 SCC 771.).

3. The report shows that after the death of Mr. Jaipal Singh who was a member of Parliament from the Constituency referred to above, the Election Commission had on May 1, 1970, called upon that Constituency to elect a member to the Lok Sabha. Several persons filed nomination papers, Mr. Horo and Mrs. Jaipal Singh being two of them. Objection was raised to Mrs. Jaipal Singh's nomination then also on the ground that she was not a member of the Munda Scheduled Tribe. That

objection was upheld by the Returning Officer. after the polling Mr. Horo was declared elected and on July 8, 1970, Mrs. Jaipal Singh filed the election petition objecting to the election on the ground that her nomination paper had been rejected illegally. That was Election Petition No. 2 of 1970. When that petition was pending in the High Court, the Lok Sabha was dissolved, and, as already pointed out, the Election Commission called upon the Constituency on January 21, 1971, to elect a new member of the Lok Sabha. Thereupon Mr. Horo applied to the High Court to dismiss the election petition because it was now infructuous as a result of the dissolution of the Lok Sabha. The learned Judge refused to do so and heard the petition and came to the conclusion that Mrs. Jaipal Singh was entitled to be treated as a member of the Munda Tribe. But before the decision, this second contest arose between the same parties and the nomination paper of Mrs. Jaipal Singh was again rejected by the Returning Officer on the same ground on which that had been rejected by the Returning Officer in 1970. The Returning Officer did not have the benefit of the finding of the High Court at that time.

4. Since the High Court decision in the previous Election Petition No. 2 of 1970 went against Mr. Horo, he appealed to this Court. But he failed in that appeal because this Court agreed with the High Court that once the marriage of a Munda male with a non-Munda female is approved or sanctioned by the Parha Panchayat they become members of the community. This Court held that even if a female is not a member of the Tribe by birth, she having married a Tribal after due observance of all formalities and after obtaining the approval of the elders of the Tribe, would belong to the Tribal community to which her husband belongs on the analogy of the wife taking the husband's domicile. This Court's judgment was rendered on February 2, 1972, and was available to the learned Judge of the High Court when dealing with the present election petition namely Election Petition No. 9 of 1971 and naturally the points in controversy before him because very limited. There was the judgment of this Court before him which held that Mrs. Jaipal Singh had become a Munda by reason of her marriage to the late Mr. Jaipal Singh and since her nomination had been improperly rejected on the ground that she was not a Munda, the election of Mr. Horo was liable to be set aside.

5. In appeal before us Mr. Anthony appearing for Mr. Horo tried to persuade us that the judgment of this Court in the previous petition requires to be reconsidered - the contention being that Mrs. Jaipal Singh who was a Christian could not change her ethnic group by merely marrying a Munda. That point had been considered at great length by this Court and we do not think there is any good reason for a review of that decision by a larger Bench.

6. The only point on which argument was addressed to us was on the finding that a certain ground put forward by Mr. Horo was barred by constructive res judicata. It was contended by Mr. Anthony that the principle of constructive res-judicata did not apply to the ground put forward, and, hence, in the absence of a trial on merits of that ground the Order passed by the learned Judge setting aside the election was wrong. We shall first state what the ground was and then decide whether the ground was available to Mr. Horo for re-agitation.

7. It appears that Mrs. Jaipal Singh is a Ceylonese Tamil Christian. Her first marriage was with Mr. Curtis. But that marriage ended in a divorce. In the course of her evidence in the previous petition, namely, Election Petition No. 2 of 1970 it seems to have been elicited that she had married Mr. Jaipal Singh on May 7, 1954 and that the decree nisi had been made absolute on May 6, 1954. It was contended before the learned Judge that in view of Section 57 of the Indian Divorce Act, 1869 Mrs. Jaipal Singh could not enter into a second marriage until after the expiry of six months from the date the decree had been made absolute. The learned Judge pointed out that this very point had been taken before the Supreme Court in the previous petition and, therefore, must be deemed to

have been finally decided. The learned Judge was of the opinion that the bar under Section 57 of the Indian Divorce Act, 1869 was a matter which might and ought to have been made a ground of defence in the former election petition and consequently it was deemed to be a matter directly and substantially in issue in the previous election petition and, therefore, cannot be allowed to be raised in the present petition.

8. This Court's judgment in the previous petition clearly goes to show that this Court refused to entertain this ground as it had not been pleaded or pressed before the trial court. Mr. Anthony, appearing for Mr. Horo in that appeal, had distinctly raised this point as is seen from Para 11 of the judgment at Page 1844 of the report. That point was disposed of by this Court with these observations to be found in Para 12.

"As regards the first point it was never canvassed or argued before the High Court. No plea was taken by Shri Horo in the written statement that there could be no valid marriage between the respondent and late Shri Jaipal Singh owing to the provisions contained in Section 57, of the Indian Divorce Act, 1869 until after the lapse of a period the six months from the date the decree of divorce was made absolute. None of the issue which were framed by the High Court involves the question now sought to be agitated based on the provisions of Section 57 of the Indian Divorce Act. It appears that advantage is sought to be taken from the statement of the respondent that advantage is sought to be decree absolute was granted when the marriage took place between the respondent and late Shri Jaipal Singh. In the absence of any pleading or issues no material has been placed on the record to show that in view of the provisions of Section 57 of the aforesaid Act there could not be a valid marriage according to the Munda customary law. It must be remembered that the respondent contracted a marriage with late Shri Jaipal Singh according to Munda rites and ceremonies and not as one Christian marrying another Christian. Nor was the matter pursued in cross-examination of the respondent and she was not asked as to how she could get over the bar of Section 57 in the way of remarriage before the expiry of the proscribed period. In these circumstances we do not consider that such a point can be allowed to be agitated for the first time before this Court."

9. The above passage goes to show that the point was finally disposed of. Some snap answers given by the respondent in her evidence in that case were sought to be exploited in this Court for the purpose of supporting a new argument under Section 57 of the Indian Divorce Act, 1869 although there was no plea either in the pleadings or in the arguments before the learned Judge who decided the petition. The observations proceed on the basis that it was open to put forward the plea which Mr. Horo later put forward before the Supreme Court and since the same was not done, this Court could not permit the plea to be taken for the first time in this Court. It is not as if this Court kept the matter open for re-agitation. It definitely rules out the plea because it was not pressed before the learned Judge who dealt with the election petition. Mr. Anthony submitted that the question of res judicata does not arise under Explanation 4 of Section 11 of the Code of Civil Procedure because the expression "any matter which might and ought to have been made ground of defence" postulates knowledge of a fact by the party making the defence. he further submitted that Mr. Horo could not possibly know about the past of Mrs. jaipal Singh and his only source of knowledge at the time was Mrs. Jaipal Singh herself. The answer to this is already given in the judgment. If Mr. Horo's source of information was Mrs. Jaipal Singh when she was in the witness-box it was open to him as pointed out in the judgment to pursue the cross-examination with a view to show that the bar under Section 57 of the Divorce Act would be effective. Even after getting the two dates in the course of the

evidence no body though of Section 57, which may either be because counsel appearing for Mr. Horo then of Mr. Horo himself did not believe the dates given by Mrs. Jaipal Singh to be accurate or because they did not want to make any capital of the snap answers given in the course of the evidence since the point was not raised in the pleadings nor put in issue. The judgment clearly suggests that it was open to agitate the matter before the High Court hearing the petition on the basis of Section 57. But the point was not pressed and must be deemed to have been given up. That was why this Court did not allow the point to be raised in appeal. In these circumstances it is not open to re-agitate it between the parties in a subsequent proceeding.

19. No other point was pressed before us and therefore the appeal will have to be dismissed with costs.

</html