

SUPREME COURT OF INDIA

Punit Rai

Vs.

Dinesh Chaudhary

C.A.No.659 of 2003

(V. N. Khare, C.J.I., Brijesh Kumar and S. B. Sinha, JJ.)

19.08.2003

JUDGEMENT

BRIJESH KUMAR, J. (For himself and **V. N. KHARE, C.J.I.**):-

1. The instant appeal arises out of a judgment and order passed by the Patna High Court, dismissing the Election Petition No. 2 of 2000 preferred by the appellant, challenging the election of the respondent herein - Dinesh Chaudhary, the returned candidate to the Legislative Assembly.

2. The dispute relates to the election held in 204 Fatua Reserved Assembly Constituency (S.C.) in the State of Bihar, in the year 2000. The appellant, amongs others in the fray, was a candidate for the election as a nominee of Janata Dal (U). He belongs to Scheduled Caste. The respondent, Dinesh Chaudhary was a nominee of Janata Dal (R) claiming to be belonging to Pasi community which is one of the Scheduled Caste communities. It appears that some objections were raised regarding the nomination of the respondent Dinesh Chaudhary on the ground that he does not belong to Scheduled Caste community; rather he is Kurmi by caste which falls in the category of Other Backward Classes. The caste certificate furnished by the respondent before the Returning Officer was also

under cloud, in respect whereof, the Returning Officer entertained grave suspicion as a result of which she lodged an FIR on the basis of which a Criminal case has also been registered against the respondent. He was also arrested in connection with that case. However, the Returning Officer accepted the nomination paper of the respondent for contesting the aforesaid election. The election was held on 17-2-2000 and the result was ultimately declared on 26-2-2000 declaring respondent-Dinesh Chaudhary as elected, having polled 46850 votes whereas the petitioner-appellant had secured 39897 votes which was next to the highest polled in favour of the respondent.

3. As indicated above, the petitioner filed an election petition challenging the election of the respondent, amongst other, on the ground that he was not entitled to contest from a reserved constituency as a Scheduled Caste candidate since he is Kurmi by caste. In this light, the case of the petitioner was that the nomination paper of the respondent was wrongly accepted by the Returning Officer. More particularly, since the Returning Officer herself had initiated criminal proceedings by filing an FIR relating to the certificate furnished by the respondent, being a fabricated document. The definite case of the appellant is that the respondent is a resident of Surangpur of Jehanabad Assembly Constituency and he is the son of Bhagwan Singh who married to Jago Devi and both are Kurmi by Caste. Evidence has been led to indicate that Dinesh Chaudhary and his brother are also married in Kurmi families. The voters' list of Jehanabad Assembly Constituency was also summoned indicating the respondent as son of Bhagwan Singh and Jago Devi is shown to be Bhagwan Singh's wife. Dinesh Chaudhary and his brother have been shown to be two sons of Bhagwan Singh.

4. The case of the respondent as pleaded in the written statement is that his father Bhagwan Singh, a Kurmi by caste, had married one Deo Kumari Devi at village Adai, who is Pasi by caste. The respondent and his brother are borne to the said Smt. Deo Kumari Devi. The two brothers remained in village Adai with their mother at the house of their maternal uncle until they attained majority, whereafter they, along with their mother, shifted to Patna. Bhagwan Singh had been visiting their mother occasionally at village Adai. According to the respondent in view of certain Circulars issued by the State Government, in case of an inter-caste marriage where the wife is a Scheduled Caste, the children borne out of the wedlock would be treated as Scheduled Caste. The voters' list of village Adai also seems to have been filed indicating the respondent as son of Bhagwan Singh and Deo Kumari Devi. So far the question of submission of caste certificate before the Returning Officer is concerned, the respondent's case is that the same was brought to him by someone who happened to be a man of the petitioner-appellant. As such he has been implicated in the case of furnishing a false certificate. The original certificate issued by the Collector, Gaya has not been challenged.

5. Out of the four issues framed, the relevant issues with which we are concerned in the present appeal are, issue Nos. 3 and 4 as quoted below :

"(iii) Whether the nomination paper of the sole respondent has been improperly and illegally accepted as per the allegations made in the election petition?

(iv) What relief, if any, the petitioner is entitled to?"

6. The main controversy under issue No. 3 is undoubtedly on the question as to whether the respondent-Dinesh Chaudhary is Kurmi by caste or is a Pasi having allegedly borne of Deo Kumari Devi belonging to S. C. community. Both parties understood the issue No. 3 in the same manner and have led oral and documentary evidence on the point. The oral evidence led on behalf of the petitioner is to the effect that Bhagwan Singh, the father of Dinesh Chaudhary is Kurmi by caste and his wife Jago Devi is also a Kurmi. Some residents of village Adai have also been examined by the petitioner to state that there was no person by the name of Dinesh Chaudhary in that village and they denied the fact that the respondent was borne of Deo Kumari Devi in village Adai. The respondent also examined several witnesses to support his case. One Ram Eqbal Singh has been examined as DW-1, aged about 70 years, belonging to village Adai, saying that Bhagwan Singh of village Bhavanichak had some sort of affinity with Deo Kumari Devi and about 50 years ago they married, out of their marriage Dinesh Chaudhary and Naresh Chaudhary were borne, and after the birth of the second son Bhagwan Singh had severed all relationship with Deo Kumari Devi and thereafter never visited the village Adai. Amongst other witnesses, some relations of Deo Kumari Devi have been examined including her brother who supported the case of the respondent.

7. The High Court, while dealing with the evidence, observes that the evidence which has been led by the petitioner is more of a circumstantial nature. For example, the fact that undisputedly father of Dinesh Chaudhary is Kurmi by caste married to Jago Devi who is also Kurmi. Dinesh Chaudhary and his brother are also married in Kurmi families. It is also noted in the judgment that the whole story of marriage of Bhagwan Singh with Deo Kumari Devi, a Pasi lady, had not been disclosed at the time of the scrutiny of the nomination paper to explain as to on what basis Dinesh Chaudhary claimed to be a Pasi. The caste certificate was issued even though his father is a Kurmi married to a Kurmi lady namely, Jago Devi. At this stage it would be appropriate to quote some of the findings recorded by the High Court. After observing that the petitioner-appellant could not produce any direct evidence about the caste of the respondent-Dinesh Chaudhary, it is found :

"As the election-petitioner is not from the family of the respondent or his relation, so it cannot be possible to have any special knoweldge regarding the caste, but he could not produce any person from the family of Bhagwan Singh or Bhagwan Singh himself who can prove that Dinesh Chaudhary, the respondent, is a Kurmi by caste through a Kurmi mother i.e. Jago Devi".

(Emphasis supplied)

To us the above observations seems to be unsustainable. There would obviously be no occasion for the election-petitioner to examine Bhagwan Singh in support of his case while challenging the election of none else but the son of Bhagwan Singh himself. A person borne in a Kurmi family, which details have been provided, would normally be taken to be Kurmi by caste. But it is only in special circumstances, as may have been provided under a Circular of the Government of Bihar, that the caste of the mother would be taken as the caste of the children, if she happens to be a Scheduled

Caste, married to a non-Scheduled Caste. There is no denial of the fact that Bhagwan Singh is a Kurmi as well as Jago Devi, wife of Bhagwan Singh. The story as put forward by the respondent about his caste is something which would be in the special knowledge of the respondent and Bhagwan Singh and Deo Kumari Devi. There was no occasion for the appellant to examine Bhagwan Singh or any member of his family once it was given out by the appellant that Bhagwan Singh and his wife Jago Devi both are Kurmi by caste. The facts of which special knowledge is with the respondent, he alone had to prove those facts by adducing the best evidence on the point of his being a Pasi by caste. It may, however, be pertinent again to quote one of the observations of the High Court, which is as follows :

"The position of burden of proof as would be on principle of law that any fact which has been asserted by a person should be proved by him and if the same has been proved prima facie then only the burden is shifted to the adverse party to rebut the same. But such sort of shifting of burden and placing of variations remain only an academic one when both parties adduce evidence in support of their contention on the vexed issue."

In the light of the above observations it is only to be decided on the basis of the evidence adduced by both the parties as to who has been able to prove one's case. It is true that the respondent has examined some witnesses belonging to village Adai including his maternal uncle to support his case but neither Bhagwan Singh nor Deo Kumari Devi, both of whom are alive have been examined to prove the fact, in respect of which they alone would be the best witnesses to depose. In this connection, the High Court has also observed thus :

"Very peculiarly both the mother and father of Dinesh Chaudhary are alive but none of them have been cited as witness by either of the parties. In the list of witnesses Deo Kumari Devi and Bhagwan Singh were cited as witnesses for the respondent but for the reasons best known to them they have not been produced as witnesses."

It is clear that the respondent well understood the relevance and weight of the evidence of Bhagwan Singh and Deo Kumari Devi who were cited as witnesses in the list of his witnesses but they have obviously been withheld and not produced before the Court. Respondent has not indicated any reason for their non-production. At the same time the Court is led by the case of the respondent as asserted in the written statement that his father did not care of his sons after their birth and had left them. The Court observes that this may be a cogent reason for not adducing the evidence of Bhagwan Singh from the side of respondent. Surprisingly, the Court loses sight of the fact that despite such an averment made in the written statement Bhagwan Singh has been cited as witness of the respondent. Further so far mother is concerned, she is with the respondent and there is no reason of any kind of bad relations between the respondent and his mother Deo Kumari Devi, to not to produce her. The reason imagined by the Court for non-production of Bhagwan Singh will not apply to Deo Kumari Devi. It is observed by the High Court itself as follows :

"But no explanation has been given from the side of the respondent as to why their mother Deo Kumari Devi could not be examined in the case as it has been vehemently argued from the side of the election-petitioner that withholding Deo Kumari Devi from being a witness brings an adverse inference against the respondent as contemplated under Section 114 of the Evidence Act."

It may further be worthwhile to refer to some of the other observations made by the High Court, e.g. that Bhagwan Singh and his wife Jago Devi both are Kurmis but it would not mean that respondent was borne of Jago Devi, which fact it is observed, is not anywhere mentioned specifically in the election petition. It is a queer observation and the approach adopted by the High Court. There was no occasion to state further in the election petition that the respondent was borne of Jago Devi out of her wedlock with Bhagwan Singh who are husband and wife and Kurmis by caste unless it is proved by the other side by any evidence that the petitioner had knowledge of the alleged marriage of Bhagwan Singh with a Pasi lady namely, Deo Kumari Devi in another village namely, Adai, where Bhagwan Singh never resided nor Deo Kumari Devi was ever brought to reside with Bhagwan Singh in his village. However, on the basis of untenable observation, as indicated above, the High Court found :

"So the prima facie fact regarding the case of the respondent could not be proved from the side of the election-petitioner. But definitely a doubt could be created regarding the caste of the respondent as already stated above."

8. Strangely enough we again find yet another fragile and strange observation as follows :

"The election-petitioner himself in his evidence had not denied categorically that the respondent had not been born to the womb of Deo Kumari Devi. Only vague statement has been made that both father and mother of Dinesh Chaudhary were Kurmi by the caste."

9. The conclusion drawn by the High Court that respondent was a competent person to contest from reserved constituency is accompanied with the following observation :

"Definitely, if a person is born of a Kurmi father or in a Kurmi family then the presumption goes that the child is Kurmi by caste. But here the respondent could make out a special case that, although, he has been born of a Kurmi father but mother being a Pasi, he is a Scheduled Caste and as such, a competent person to contest from the Reserved Constituency."

It is again in that context observed :

"It is true that the controversy can be well thrashed out if Bhagwan Singh and Deo Kumari Devi have been examined by either of the parties."

We have already observed that there was no occasion for the petitioner-appellant to examine either of them. But there is no such cogent reason for the respondent not to examine them. It is again observed :

"Then question comes of Deo Kumari Devi. She had not been produced by the respondent and she is in custody of the respondent himself as per his statement during the course of evidence. No reasons have been stated as to why she has not been produced. This may cast some adverse inference against the respondent. But such adverse inference alone is not sufficient enough to hold that the respondent is not a Pasi by caste."

It is then observed that the petitioner is not proved his case to the hilt though a suspicion or doubt has been cast.

10. We may consider a few cases on the point of drawing adverse inference in the event of withholding of a witness. In AIR 1968 SC 1413 at 1416, Gopal Krishanji Ketkar v. Mahomed Haji Latif and others, it has been held that a party who is in possession of best evidence which would throw light on the issue in controversy withholds such evidence, an adverse inference under Section 114(g) of the Evidence Act ought to be drawn against such a party notwithstanding that the onus of proof may not lie on him. It is observed that a party cannot rely on abstract doctrine of onus of proof or on the fact that he was not called upon to produce such evidence.

11. In the instant case, however, the onus of proof that the respondent was Pasi by Caste due to alleged marriage of Bhagwan Singh with Deo Kumari Devi in some other place was wholly within the special knowledge of the respondent.

12. In AIR 1974 SC 1957, Virendra Kumar Saklecha v. Jagjiwan and others, the allegation of threatening voters with divine displeasure in speech delivered in some meetings was not accepted and an adverse inference was drawn due to non-production of material witness and the notes made by him at the meeting. In yet another case reported in AIR 1964 SC 40, Lachman Utamchand Kirpalani v. Meena alia Mota. a matrimonial dispute in which the question as to whether or not the wife had left the husband's place with the consent of husband's parents, non-production of parents of the husband led to adverse inference drawn against the husband.

13. In the case in hand the respondent was supposed to prove the facts within his special knowledge by adducing best evidence namely, Bhagwan Singh and Deo Kumari Devi, which he failed to do. In these circumstances, the High Court erred in observing that the appellant should have examined Bhagwan Singh.

14. The case of the parties is clear from their pleadings and the evidence adduced by them as indicated above. The petitioner challenged the status of respondent-Dinesh Chaudhury as a Scheduled Caste person belonging to the S.C. community. Precisely what was indicated in support of that case is that father of Dinesh Chaudhury and Naresh Chaduhary is Bhagwan Singh who is Kurmi by caste married to Jago Devi, also a Kurmi lady. The High Court has also observed that a person borne in a Kurmi family normally would be presumed that he is Kurmi by caste. In this background the initial burden of the petitioner would stand discharged and it would shift upon the respondent to prove his case which, in normal course of things, would be and is within his special knowledge. A case which has been set up by the respondent through his witnesses as well that his father had taken a fancy for Deo Kumari Devi, a resident of village Adai, who is Pasi by caste and married her who gave birth to two children including the respondent, would normally be not in the knowledge of people in general particularly when according to the case of the respondent himself Jago Devi lived in another village and she was never brought from there by Bhagwan Singh. Moreso, when Bhagwan Singh, a Kurmi by caste, is living with his wife Jago Devi, also a Kurmi, in their village Jahanabad. The best evidence, as also according to the High Court to prove the case of the respondent was, to produce Bhagwan Singh and Deo Kumari Devi but they have been withheld after being cited as witnesses for the respondent. These facts clearly make out a case for drawing an adverse inference that in case they had been produced they would not have supported the case of the respondent. AIR 1961 SC 1316, Kundan Lal Pallaram v. Custodian, Evacuee Property, Bombay, AIR 1917 PC 6; T. S. Murugesam Pillai v. M.D. Gnana Sambandha Pandara Sannadhi and others and 1977 (3) SCC 540; Thiru John and another v. The Returning Officer and others may also be referred on the point. AIR 1977 SC 1724

15. On behalf of the respondent, the citation of certain decisions has also been furnished but those decisions would be of no help to the respondent. Reliance has been placed upon 1999 (9) SCC page 386, Jeet Mohinder Singh v. Harinder Singh Jassi, where it has been held that a party upon whom the burden lies to prove a fact, but fails to discharge his onus, it is not open for him to bank upon the plea of non-examination of witness by the other party. The appellant, it was held, cannot be permitted to derive strength from the weakness of the case of the other party. We feel that this case would not be applicable in the facts and circumstances of the case in hand. On the other hand, the onus to prove facts within the special knowledge of respondent No. 1, would lie upon him alone to prove those facts. We have already held that best evidence of the respondent's case that his mother was a Pasi has been withheld. In this connection, we may peruse Section 106 of the Evidence Act also which reads as under:- "when any fact is especially within the knowledge of any person, the burden of proving to that effect is upon him.". Apart from the above, the appellant had also discharged his burden by proving the fact that the father of respondent No. 1 is Bhagwan Singh, a Kurmi by caste married to Jago Devi also a Kurmi by caste. The natural inference in such circumstances would be that the respondent would, in normal course of events, be a Kurmi by caste.

If there is anything contrary to the normal course of events, as pleaded in this case of another marriage of Bhagwan Singh in some other village namely Adai with Deo Kumari Devi who never came to live with Bhagwan Singh in his village nor Bhagwan Singh ever lived there. Such facts in the special knowledge of the respondent have to be proved by him alone. The respondent was under duty to prove his case both ways namely, in view of the special knowledge of facts pleaded and again in view of the fact that the appellant had discharged his initial burden of showing that the respondent was Kurmi by caste being son of Bhagwan Singh, Kurmi married to Jago Devi also Kurmi. The other decision which has been referred to on behalf of the respondent is reported in AIR 1959 SC 914, *Dolgobinda Paricha v. Nimai Charan Misra and others*. It is in connection with the fact that the evidence of the brother of Deo Kumari Devi that Bhagwan Singh had married her, was relevant for the purposes of relationship of one person to another since brother of Deo Kumari Devi, is a person who is a member of the family or otherwise has special means of knowledge of the particular relationship. The decision is in reference to Section 50 of the Evidence Act. It may be observed that the evidence of persons who belong to village Adai including the brother of Deo Kumari Devi have been examined by the respondent to establish the allegation of marriage between Bhagwan Singh and Deo Kumari Devi. Undoubtedly, the evidence of brother of Deo Kumari Devi would be relevant for the relationship between Bhagwan Singh and Deo Kumari Devi but his evidence would not be of any help, in view of the adverse inference drawn under Section 114(g) of the Evidence Act due to withholding of the best evidence available on the point. When the persons concerned are not coming forward to the Court to depose about the alleged relationship and an adverse inference has been drawn that if they had come to the Court to depose, their evidence would have gone against the respondent, in such circumstances, there is no occasion to act upon the statement of DW (5), the brother of Deo Kumari Devi or other witnesses. AIR 2000 SC 256 : 1999 AIR SCW 4361

16. Reliance has also been placed on two decisions, reported in AIR 1969 SC 1201, *Samant N. Balakrishna etc. v. George Fernandez and others* and 2002 (1) SCC 160, *Santosh Yadav v. Narender Singh* on the proposition that full particulars and all the material fact must be pleaded in the Election Petition. It is not AIR 2002 SC 241 : 2001 AIR SCW 4916 understandable as to how these cases would help the respondent. The petitioner has pleaded that respondent is son of Bhagwan Singh who is Kurmi by caste and wife of Bhagwan Singh is Jago Devi also a lady Kurmi by caste. It is also stated that the respondent and his brother are married with Kurmi ladies. These are the material facts relating to the plea raised by the appellant that the respondent is not a Scheduled Caste. We don't think if the respondent means to say that the petitioner should have stated in the petition that the respondent is not born of Deo Kumari Devi said to be married to Bhagwan Singh in Village Adai. If at all these facts would be in the special knowledge of respondent, Bhagwan Singh and Deo Kumari Devi hence not required to be pleaded in the Election Petition. It is not possible as well. In this connection, a reference may be made to a decision of this Court, reported in AIR 1960 SC 770, *Balwan Singh v. Lakshmi Narain and others*. This case also relates to Election matter and it was held that facts which are in the special knowledge of the other party could not be pleaded by the Election-Petitioner. It was found that particulars of the arrangement of hiring or procuring a vehicle would never be in the knowledge of the petitioner, such facts need not and cannot be pleaded in the petition.

17. The learned counsel for the respondent then submits that in fact the issue framed by the High

Court was not to the effect as to whether the respondent is a Kurmi or Pasi by caste. Rather it is to the effect whether the nomination paper of Dinesh Chaudhary had been improperly and illegally accepted as per allegations made in the election petition or not. In this connection it may be observed, in the background of the allegations made in the election petition, the core issue was as to whether Dinesh Chaudhary belongs to a Scheduled Caste community or not. Both parties led evidence on the question. Hence both sides understood the case in the same way and no party was misled due to framing of the issue No. 3 as it has been framed.

18. We may, however, consider the argument of the learned Counsel for the respondent from the angle as sought to be canvassed as well, namely, the nomination paper of respondent was improperly and illegally accepted by the Returning Officer or not on the basis of the evidence on the record. In that connection we may refer to the statement of P.W. 3 Smt. Safina, Returning Officer, who was posted as Sub-Divisional Magistrate, Patna city. She has stated that as Returning Officer she had scrutinized the nomination paper of the respondent filed for Fatua Assembly Constituency. She had received some complaints about his nomination paper. She has stated that prima facie on looking into the case a doubt was created in her mind regarding its veracity. She had received such information beforehand through the District Magistrate. She had also got the matter inquired through the District Welfare Officer, Gaya. The District Magistrate had also considered the report of the District Welfare Officer to be correct. In the above circumstances she had lodged a Report against the respondent-Dinesh Chaudhary with the police. She had however, postponed the matter of scrutiny of nomination paper from 1-2-2000 to 2-2-2000. The next day she accepted the nomination paper of the respondent-Dinesh Chaudhary. She has admitted that before she had lodged the FIR she was in receipt of the report of the District Welfare Officer, Gaya. She also states that lodging of the FIR definitely goes against the candidature of Dinesh Chaudhary. In cross-examination she states that, according to the relevant provisions, she did not find it necessary that a caste certificate must be filed along with the nomination paper. She also states that on the date of scrutiny objectors could not produce any document or proof to the effect that Dinesh Chaudhary did not belong to Scheduled Caste. Amongst several objections filed against the nomination of Dinesh Chaudhary, it is given out there that Dinesh Chaudhary belongs to Kurmi community and his father and mother both are Kurmis. The fact which is quite clear is that the Returning Officer had grave doubt about the veracity of the caste certificate to the extent that she lodged an FIR against the candidate namely Dinesh Chaudhary. In support of the suspicion entertained about the caste certificate being fabricated, she had a report from the District Welfare Officer, Gaya. A criminal case was registered and the respondent was also arrested. It is only surprising that despite such a grave suspicion and initiation of criminal proceedings against the candidate the Returning Officer still accepted his nomination paper. She has stated that on 1-2-2000 after she had lodged the report there was lot of opposition in respect of the nomination paper of the respondent. She has admitted that the respondent was a nominee of the ruling party in the State. She postponed the matter for the next day when she accepted the nomination paper of the respondent. Going by normal conduct no prudent person would accept such a nomination paper in respect of which there is an information that caste certificate entitling to be a candidate from a reserved constituency, is suspected to be forged and fabricated supported by a report subsequently by none else but a responsible Officer, namely, the District Welfare Officer, Gaya. After taking a decision to criminally prosecute a person on the charge of filing fabricated caste certificate it goes against the normal human conduct of a prudent person who still accept such a nomination paper. The nomination if rejected, the respondent could further agitate the matter by filing an election petition. This question would not depend upon the fact as to ultimately case of which of the party would be found to be correct or false. The question is

after having entertaining such a grave doubt so as to decide to criminally prosecute a person still to accept the nomination paper runs contrary to normal conduct of a prudent and responsible Officer. On the above basis it can well be said without any hesitation that nomination paper of return candidate (Respondent) was improperly accepted by the Returning Officer. It ought to have been rejected by the Returning Officer in the background of the above facts and circumstances.

19. Thus, examining the matter from any angle, we do not find the judgment of the High Court sustainable.

20. In the result, the appeal is allowed with costs and the judgment and order passed by the High Court is set aside, as well as the election of the Respondent to 204 Fatua Assembly Constituency of State of Bihar. The Election Commission of India is called upon to hold election for filling up the vacancy caused by the setting aside of the election of the Respondent.

21. As per requirement of Section 103 of the Representation of the People Act, the substance of the decision shall be intimated to the Election Commission and the Speaker of the Legislative Assembly of the State of Bihar. An authenticated copy shall also be sent to the Election Commission at the earliest.

22. **S. B. SINHA, J.** (Concurring) :-Matter relating to castes, races and tribes of a person is governed by Articles 341 and 342 of the Constitution of India. Article 341 reads thus :

"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."

23. The object of Clause (1) of Art. 341 is to provide preferential right by way of protection to the members of the Scheduled Caste having regard to the economic and educational backwardness from which they suffer. It is in relation thereto the President has been authorised to limit the notification to parts or groups within the castes. The notification issued in terms of the said provision is exhaustive.

24. How the caste or tribe of the person is to be determined depends upon several factors including the customary laws.

25. The President of India in exercise of his power conferred under Art. 341(1) of the Constitution of India notified Constitution (Scheduled Castes) Order, 1950. The tribe 'Pasi' admittedly finds place in the said notification whereas 'Kurmi' does not. By reason of Arts. 341 of the Constitution, a legal fiction is created which is to be given its full effect.

26. Caste has been defined in Collins English Dictionary as "any of the four major hereditary classes, namely, the Brahman, Kshatriya, Vaisya and Sudra into which Hindu society is divided".

27. The caste system in India is engrained in Indian mind. A person, in the absence of any statutory law, would inherit his caste from his father and not his mother even in a case of inter-caste marriage.

28. In 'the caste system in India - Myth and Reality' by Dr. Rajendra Pandey, the different attributes of the caste as unit mentioned by various writers has been stated thus :

"1. Basic (pivotal) attributes : Endogamy.

2. Sufficiently relevant attributes :

(i) Membership by birth

(ii) Common occupation

(iii) Caste Council.

3. Peripheral attributes :

(i) Name

(ii) Diacritical signs.

Following the same pattern of attribute-hierarchy, the attributes that characterize caste as system have been drawn up and set in as follows :

1. Basic attribute : Plurality of interacting endogamous groups.

2. Sufficiently relevant attribute : Hierarchy.

3. Peripheral attribute : Traditional division of labour.

Besides these, Ghurye among others, has also mentioned segmental division of society, hierarchy, restriction on feeding and social intercourse, and civil and religious disabilities and privileges of the different sections as characteristics of the caste. Above them all, Nagendra has made mention of the principle of individual freedom as one of the attributes of the caste, which seems to have been omitted by most of the authors.

In summary, then, hierarchy, restricted commensality and connubium, hereditary occupation and a clear-cut differentiation of functions, ritual observance, and the principle of individual freedom are characteristics of the caste system till today."

29. In 'Caste in Modern India and other Essays' by M. N. Srinivas at page 3, it is stated :

"A sociologist would define caste as a hereditary, endogamous, usually localized group, having a traditional association with an occupation, and a particular position in the local hierarchy of castes. Relations between castes are governed, among other things by the concepts of pollution and purity, and generally, maximum commensality occurs within the caste."

30. 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 re-conversion 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 on 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 right to outcaste a person."

31. If he is considered to be a member of Scheduled Caste, he has to be accepted by the community. (See C. M. Arumugam v. V.S. Rajgopal and others (1976) 1 SCR 82 and Principal, Guntur Medical College v. V. Y. Mohan Rao (1976) 3 SCR 1046). AIR 1976 SC 939

AIR 1976 SC 1904

32. A Christian by birth when converted to Hinduism and married a member of Scheduled Caste was held to be belonging to her husband's caste on the evidence that she had not only been accepted but also welcomed by the important members, including the President and Vice-President of the community. (See Kailash Sonkar v. Smt. Maya Devi (AIR 1984 SC 600).)

33. In the instant case there is nothing on record to show that the Respondent has ever been treated to be a member of Scheduled Caste. In fact evidence suggests that he has not been so treated. He as well as his brothers and other members of his family are married to persons belonging to his own caste i.e. 'Kurmi'.

34. There was no attempt on the part of the respondent herein to bring on records any material to the effect that he was treated as a member of 'Pasi' community. Furthermore, no evidence has been brought on record to show that the family of the respondent had adopted and had been practising the customary traits and tenets of 'Pasi' community.

35. The question as to whether a person belongs to a particular caste or not has to be determined by the statutory authorities specified therefor.

36. In *B. Basavalingappa v. D. Munichinnappa* ((1965) 1 SCR 316), a Constitution Bench of this Court considered the scope of Art. 341(1) and (2) (which is in pari materia with Art. 342(1) and (2)), and held that it is not open to any person to lead evidence to establish that the caste to which he belongs to is the same as and/or part of another caste, which is included in the Constitution (Scheduled Castes) Order, it was observed : AIR 1965 SC 1269

Para 6

"It may be accepted that it is not open to make any modification in the Order by producing evidence to show (for example) that though caste A alone is mentioned in the Order, caste B is also a part of caste A and, therefore, must be deemed to be included in caste A. It may also be accepted that wherever one caste has another name it has been mentioned in brackets after it in the Order (see *Aray (Mala) Dakkal (Dokkalwar)* etc.). Therefore, generally speaking it would not be open to any person to lead evidence to establish that caste B (in the example quoted above) is part of caste A notified in the Order.

(See also *Parsram v. Shivchand*, AIR 1969 SC 597 paras 38 and 39)

37. In *Kumari Madhuri Patil v. Addl. Commissioner, Tribal Development and other* ((1994) 6 SCC 241), this Court denounced the practice of persons claiming benefits conferred on STs by producing fake, false and fraudulent certificates observing : AIR 1995 SC 94 : (1994 AIR SCW 4116)
Para 12

"The admission wrongly gained or appointment wrongly obtained on the basis of false social status certificate necessarily has the effect of depriving the genuine Scheduled Castes or Scheduled Tribes or OBC candidates as enjoined in the Constitution of the benefits conferred on them by the Constitution. The genuine candidates are also denied admission to educational institutions or appointments to office or posts under a State for want of social status certificate. The ineligible or spurious persons who falsely gained entry resort to dilatory tactics and create hurdles in completion of the inquiries by the Scrutiny Committee. It is true that the applications for admission to educational institutions are generally made by a parent, since on that date many a time the student may be a minor. It is the parent or the guardian who may play fraud claiming false status certificate."

38. Similar observations have also been made in *Director of Tribal Welfare v. Laveti Giri* ((1995) 4

SCC 32). AIR 1995 SC 1506 : 1995 AIR SCW 2289

39. A person in fact not belonging to Scheduled Caste, if claims himself to be a member thereof by procuring a bogus caste certificate, would be committing fraud on Constitution. No Court of law can encourage commission of such fraud.

40. yThis Court in Kumari Madhuri Patil and another v. Addl. Commissioner, Tribal Development, Thane and others (Second) ((1997) 5 SCC 437) laid down the law thus : AIR 1997 SC 2581 : 1997 AIR SCW 2532

"3. As regards prayer (b) read with direction No. (iv) of the Order of this Court, we too appreciate the inconvenience caused due to vast area of the State. Therefore, instead of one committee of three Officers, there will be three Scheduled Tribe/Caste Scrutiny Committees comprising of five members with quorum of three members, as suggested in para 4 of the directions, to take a decision. At Pune, Nasik and Nagpur, six Caste Scrutiny Committees for SCs, Denotified Tribes, Nomadic Tribes, Other Backward Classes and the Special Backward Category in existence at Mumbai, Pune, Nasik, Aurangabad, Amaravati and Nagpur would continue to scrutinise the certificates issued by the respective Officers and take a decision in that behalf. In this regard, it is also suggested by Shri Dholakia, learned Senior Counsel for the applicant, that in case any certificate has been wrongfully refused by the certificate issuing authority, the aforesaid Committee s also would go into the question and decide in that behalf, whether refusal was wrongful and in case it finds that the refusal was wrongful, they are at liberty to direct the authority to grant the certificate.

5. With regard to prayer (d), along with the Vigilance Cell, one Research Officer/Tribal Development or Social Welfare Officer would be associated in finding the social status of eligibility of the Officers."

41. Determination of caste of a person is governed by the customary laws. A person under the customary Hindu Law would be inheriting his caste from his father. In this case, it is not denied or disputed that the respondent's father belonged to a 'Kurmi' caste. He was, therefore, not a member of Scheduled Caste. The caste of the father, therefore, will be the determinative factor in absence of any law. Reliance, however, has been placed upon a Circular dated 3-3-1978 said to have been issued by the State of Bihar which is in the following terms :

"Subject : Determination of caste of a child born from Non-Scheduled Caste Hindu father and Scheduled Caste mother.

Sir,

In the aforesaid subject as per instruction I have to state for the determination of a child born from Non-Scheduled Caste father and Scheduled Caste mother, upon deliberation it has been decided that child born from such parents will be counted in the category of scheduled caste.

2. In such cases before the issue of caste certificate there will be a illegible enquiry by the block development officer/circle officer/block welfare officer."

42. The said Circular letter has not been issued by the State in exercise of its power under Art. 162 of the Constitution of India. It is not stated therein that the decision has been taken by the Cabinet or any authority authorized in this behalf in terms of Art. 166(3) of the Constitution of India. It is trite that a Circular letter being an administrative instruction is not a law within the meaning of Art. 13 of the Constitution of India. (See Dwarka Nath Tewari and others v. State of Bihar and others, AIR 1959 SC 249).

43. A person can take the benefit of a reserved category candidate if he satisfies the test laid down by the Constitution of India, the Representation of the People Act, 1950 and the guidelines issued by the Election Commission, if any.

44. In our opinion, the State has no jurisdiction to reserve a Constituency for a person who does not belong to the reserved category for whose benefit it was constituted except by way of a legislation.

45. If a customary law is to be given a go-bye for any purpose whatsoever and particularly for the purpose of enlarging the scope of a notification issued by the President of India under clause (1) of Article 341 of the Constitution of India, the same must be done in terms of a statute and not otherwise.

46. The High Court itself noticed that the caste certificate of the Respondent was found to be forged by the Returning Officer and a criminal case is pending. It was held :

"Definitely, if a person is born of a Kurmi father or in a Kurmi family then the presumption goes that the child is Kurmi by caste. But here the respondent could make out a special case that, although, he has been born of a Kurmi father but mother being a Pasi, he is a Scheduled Caste and as such, a competent person to contest from the Reserved Constituency."

47. The High Court, therefore, erred insofar as it failed to consider that for the purpose of determination of caste, the Respondent could not have relied upon the Circular Letter dated 3-3-1978 in absence of any law. In any event, it has not been shown by the Respondent as to what enquiry was made for determination of his caste. If he had taken part in some enquiry, he had special knowledge in respect thereof within the meaning of S. 106 of the Evidence Act. He, therefore, was bound to prove the same by bringing on records relevant evidence which was in his power or possession.

48. If a special case is to be made out, the same has to be done in accordance with law. It must meet the legal requirement. Unfortunately, this aspect of the matter has not been considered by the High Court. The impugned judgment, therefore, cannot be sustained.

49. Subject to aforementioned, I respectfully agree with the opinion of my learned brother.

Appeal allowed.