

SUPREME COURT OF INDIA

T.Kocha

Vs.

State of Kerala & Ors.

C.A.No.6126-6127 of 2013

(A.K.Sikri and R.K.Agrawal,JJ.)

13.04.2016

JUDGMENT

A.K.Sikri.J.

1. In these appeals, the legal issue which needs determination is identical. The background facts under which the said issue arises are also somewhat similar. Therefore, without being repetitive, it would serve our purpose to take note of the facts appearing in Civil Appeal Nos. 6126-6127 of 2013 in order to spell out the issue involved and decision thereupon shall govern both the appeals.

2. The appellant in Civil Appeal Nos. 6126-6127 of 2013 is T Kocha who claims to be the member of the Thandan Community, which is a Scheduled Caste in the State of Kerala. She applied for the post of High School Assistant (Physical Science) in a Government School under reserved category claiming herself to be the Scheduled Caste as belonging to Thandan Community. She was given appointment to the said post, after being successful in the selection process, w.e.f. 03.02.1989.

3. There was some dispute about Thandans as members of the Scheduled Caste which travelled up to this Court and was decided in the case of *Palghat Jilla Thandan Samudhaya Samrakshna Samithi and another v. State of Kerala and another*¹. We shall be referring to the said judgment at length and the decision taken therein by this Court at the appropriate stage. We may mention at this juncture that on the basis of another judgment rendered by Full Bench of High Court of Kerala in O.P. No. 6758/87 (decided on 14.03.1995), the Vigilance Cell of KIRTADS (respondent No. 3 herein) had examined the cases of those persons who had changed their caste name after the promulgation of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1976. In respect of the appellant, the respondent No. 3 came to the conclusion that she did not belong to Thandan Community but was a member of Ezhava/Thiyya Community and, therefore, was not a person belonging to Scheduled Caste Community. Based on that report, the Scrutiny Committee, for verification of Community Certificates of Scheduled Castes and Scheduled Tribes Department in the Government of Kerala (respondent No. 2 herein), issued a show cause notice dated 03.06.2003 to the

appellant as to why she should not be treated as non-Scheduled Caste person. The appellant submitted her written explanation dated 06.09.2003 along with as many as 46 documents in support of her plea that she was of Thandan Caste and, therefore, rightly given the Government appointment under the quota meant for Scheduled Caste persons. It was followed by an affidavit dated 02.12.2003 of the appellant wherein she requested respondent No. 2 to furnish the name and addresses of those persons from whom respondent No. 3 had allegedly collected evidence. A request was also made to afford an opportunity to cross examine those witnesses. This request was not allowed.

4. After considering the written explanation and the documents submitted by the appellant, respondent No. 2 concluded that she did not belong to Thandan Community and, therefore, was not a Scheduled Caste person. Order dated 13.04.2004 was passed to this effect which was served upon the appellant on 28.06.2004. The appellant challenged the aforesaid order of the respondents by filing the writ petition in the High Court of Kerala. The said writ petition was admitted and interim stay vide order dated 13.04.2004 was granted in favour of the appellant. However, when the said writ petition was finally heard in the year 2012, vide judgment dated 05.09.2012, the High Court dismissed the same. The appellant preferred the Review Petition No. 1224/2012 seeking review of the said judgment which was also dismissed on 07.02.2013. Main judgment as well as the order passed in the review petition are challenged by the appellant via special leave petition in which leave was granted and that is how the instant appeals have come up for final hearing wherein issue regarding the status of the appellant as to whether she belongs to Thandan Community or not falls for consideration.

5. Before we discuss various documents filed by the appellant in support of her claim, it would be advisable to traverse through the judgments referred to above as well as some other judgments and also the relevant statutory orders/enactments in this behalf. A scanning through the aforesaid material would clear much of the haze which surrounds the issue in question. We would like to start our discussion with the judgment of this Court in Palghat Jilla's case which traces out the history about the inclusion of Thandans as Scheduled Caste in the State of Kerala. A perusal of the judgment reveals that Thandan Community in the erstwhile Travancore and Cochin State alone was included in the Scheduled Caste list by the Constitution (Scheduled Castes) Order 1950. Scheduled Caste list of Kerala State was amended, as per Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1976 (Act 108/76) by including Thandans throughout Kerala State in the Scheduled Caste list. After inclusion of the Thandan Community throughout the State in the Scheduled Caste list, the State Government issued instructions to the caste certificate issuing authorities not to issue Scheduled Caste certificates to the members of Thandan Community stating that Thandan Community of Malabar is synonymed Ezhava/Thiyya Community. The purport of the aforesaid considerations was to clarify that Ezhava/Thiyya Community in Malabar was not the same as Thandan Community and those belonging to Ezhava/Thiyya Community could not claim the status of Scheduled Caste category by equating themselves to be the members of Thandan Community. Certain writ petitions were directly filed in the High Court questioning the validity of the aforesaid order dated 24.11.1987. Some of the persons had filed the writ petitions in the High Court of Kerala which were decided by the High Court

one way or the other and those decisions were also challenged before this Court. All these writ petitions and appeals were decided together.

6. The principal question in the said writ petitions and appeals was with regard to the validity of the decisions of the State of Kerala not to treat members of Thandan Community belonging to the erstwhile Malabar District, including the present Palakkad District of the State of Kerala, as the members of the Scheduled Castes. This Court noted that Article 366 (24) of the Constitution of India defines the expression “Scheduled Castes” to mean “such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution.” Under Article 341, President is empowered to 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. Parliament is also empowered, by the said Article, to make law to include in or exclude from the list of Scheduled Castes specified in a notification issued by the President under the said provision. The President, in consultation with the Governors and Rajpramukhs of the various States had issued The Constitution (Scheduled Castes) Order, 1950 specifying various castes to be Scheduled Castes in respect of different States. Part XVI thereof related to the then State of Travancore-Cochin. At item 22 of Part XVI was specified the caste Thandan for the purposes of the entire State. The Constitution Scheduled Castes (Modification) Order, 1956, modified the Scheduled Castes Order. In the list in Part V, applicable to the State of Kerala (the successor to the State of Travancore-Cochin), at item 14, was specified the caste Thandan for the purposes of the entirety of the State except Malabar District. The Scheduled Castes and Scheduled Tribes (Amendment) Act, 1976 came into force on 27.07.1977. In the First Schedule thereof, under Part VII relative to the State of Kerala, Thandan was specified at item 61. In Part VII only in respect of two castes, namely, Boyan and Malayan, were specific areas of the State of Kerala designated. In other words, all other castes listed in Part VII, including Thandan were Scheduled Castes for the purposes of the entirety of the State. On 17.05.1979, the Government of Kerala issued an order which noted that upon the coming into force on 27.07.1977, of the Scheduled Castes and Scheduled Tribes (Amendment) Act, 1976, the Thandan community throughout the State of Kerala came to be included in the list of Scheduled Castes. As certain complaints were received to the effect that there was section of Ezhavas/Thiyyas of Malabar area and of certain Taluks of Trichur District who were called Thandans but have nothing in common with the Scheduled Caste Thandans. After going through these complaints, the Government of Kerala issued the Order dated 15.10.1984 stating that after reconsideration of the matter in all respects, the 1979 Order was cancelled and “Thandans throughout Kerala would be treated as members of Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 and Community Certificate issued accordingly”. This was modified by another order dated 24.11.1987 which further added that while issuing caste certificates, the Revenue authorities should clarify after proper verification that the person concerned belongs to Thandan caste and not Ezhava/Thiyya. As pointed out above, this order was under challenge before this Court.

7. The Court proceeded on the basis that the State Government was right in saying that there is a section of Ezhava/Thiyya community which is called Thandan in the Malabar District.

Notwithstanding the above, this Court ruled that so long as Thandan was mentioned as Scheduled Caste in the notification, Ezhava/Thiyya community which is also called Thandan in the Malabar District would get the benefit thereof and would be treated as Scheduled Caste persons. The discussion in this behalf is contained in Paras 16, 17 and 18 of the judgment, which reads as under:

“16. Article 341 empowers the President to specify not only castes, races or tribes which shall be deemed to be Scheduled Castes in relation to a State but also “parts of or groups within castes, races or tribes” which shall be deemed to be Scheduled Castes in relation to a State. By reason of Article 341 a part or group or section of a caste, race or tribe, which, as a whole, is not specified as a Scheduled Caste, may be specified as a Scheduled Caste. Assuming, therefore, that there is a section of the Ezhavas/Thiyyas community (which is not specified as a Scheduled Caste) which is called Thandan in some parts of Malabar area, that section is also entitled to be treated as a Scheduled Caste, for Thandans throughout the State are deemed to be a Scheduled Caste by reason of the provisions of the Scheduled Castes Order as it now stands. Once Thandans throughout the State are entitled to be treated as a Scheduled Caste by reason of the Scheduled Castes Order as it now stands, it is not open to the State Government to say otherwise, as it has purported to do in the 1987 order.

17. We may usefully draw attention to the judgment of a Bench of three learned Judges of this Court in *Srish Kumar Choudhury v. State of Tripura*² This judgment considered the Constitution Bench judgments in *B.Basavalingappa v. D. Munichinnappa*³ and *Bhaiyalal v. Harikishan Singh*⁴ and certain other judgments. It held that the two Constitution Bench judgments indicated that any amendment to the Presidential Orders could only be by legislation. The Court could not assume jurisdiction and order an enquiry to determine whether the terms of the Presidential Order included a particular community. A State Government was entitled to initiate appropriate proposals for modification in cases where it was satisfied that modifications were necessary and, if after appropriate enquiry, the authorities were satisfied that a modification was required, an amendment could be undertaken as provided by the Constitution.

18. These judgments leave no doubt that the Scheduled Castes Order has to be applied as it stands and no enquiry can be held or evidence let in to determine whether or not some particular community falls within it or outside it. No action to modify the plain effect of the Scheduled Castes Order, except as contemplated by Article 341, is valid.”

8. The effect of the aforesaid judgment, or the ratio thereof, is pointed out succinctly a recent judgment of this Court in *R. Unnikrishnan and another v. V.K. Mahanudevan and others*⁵ in the following words:

“32. What followed from the above is that Thandans, regardless of whether they were Ezhavas/Thiyyas known as Thandans belonging to the Malabar area, were by reason

of the above pronouncement of this Court in Palghat case held entitled to the benefit of being treated as Scheduled Caste by the Presidential Order, any enquiry into their being Thandans who were Scheduled Caste having been forbidden by this Court as legally impermissible. The distinction which the State Government sought to make between Ezhuva/Thiyyas known as Thandans like the respondent on the one hand and Thandans who fell in the Scheduled Caste category, on the other, thus stood abolished by reason of the above pronouncement. No such argument could be countenanced against the respondent especially when it is not the case of the appellants that the respondent is not an Ezhuva from Malabar area of the State of Kerala.”

9. It so happened that after the judgment in Palghat Jilla’s case, there was an amendment of the Presidential Order in terms of the Constitution (Scheduled Castes) Order (Amendment) Act, 2007 which received the assent of the President on 29.08.2007. By this Act, following changes were made in Part VIII - Kerala for Entry 61:

“61. Thandan (excluding Ezhuvus and Thiyyas who are known as Thandan, in the erstwhile Cochin and Malabar areas and carpenters who are known as Thachan, in the erstwhile Cochin and Travancore State).”

10. It, thus, becomes clear that after the said judgment, Ezhuvus and Thiyyas who are also known as Thandan in the erstwhile Cochin and Malabar are no longer Scheduled Castes in the State of Kerala. However, this amendment is prospective and, therefore, the aforesaid change position become effective only from 30.08.2007, the date when the amendment was notified. In R. Unnikrishnan's judgment, this Court made it clear that having regard to the ratio of Palghat Jilla's case, Ezhuvus and Thiyyas known as Thandans were entitled to be treated as Scheduled Castes till 29.08.2007 and such an entitlement could not be taken away retrospectively. The Court was, thus, categorical in holding that those who were Ezhuvus/Thiyyas known as Thandans in Cochin and Malabar region and were given the benefit of Scheduled Caste status prior to 30.08.2007 could not be deprived of such benefit already bestowed on them. We would like to reproduce the following discussions from this judgment:

“36. The law declared by this Court in Palghat Jilla case entitled all Thandans including those who were Ezhuvus and Thiyyas from Cochin and Malabar region to claim the Scheduled Caste status. That entitlement could be taken away retrospectively only by specific provisions to that effect or by necessary intendment. We see no such specific provision or intendment in the amending legislation to hold that the entitlement was taken away retrospectively so as to affect even those who had already benefited from the reservation for Scheduled Caste candidates. At any rate, a certificate issued to an Ezhuva known as Thandan who was a native of Cochin and Malabar region of the State could not be withdrawn as the Constitution (Scheduled Castes) Order, 1950 did not make a distinction between the two categories of Thandans till the Amendment Act of 2007 for the first time introduced such a difference.

37. That apart, the question of ouster of Ezhuvas and Thiyyas known as Thandan on account of the confusion that prevailed for a considerable length of time till the decision of this Court in Palghat Jilla case would be unjustified both in law and on the principles of equity and good conscience.

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40. In *Sandeep Subhash Parate v. State of Maharashtra*⁶ also dealing with a similar confusion between “Halba” and “Halba-Koshti” and applying the principle underlying in *Milind case*⁷ this Court held that ouster of candidates who have obtained undeserved benefit will be justified only where the court finds the claim to be bona fide. In *State of Maharashtra v. Sanjay K. Nimje*⁸ this Court held that the grant of relief would depend upon the bona fides of the person who has obtained the appointment and upon the facts and circumstances of each case.

41. In the instant case there is no evidence of lack of bona fides by the respondent. The protection available under the decision of *Milind case* could, therefore, be admissible even to the respondent. It follows that even if on a true and correct construction of the expression “Thandan” appearing in the Constitution (Scheduled Castes) Order, 2007 did not include “Ezhuvas” and “Thiyyas” known as “Thandan” and assuming that the two were different at all relevant points of time, the fact that the position was not clear till the Amendment Act of 2007 made a clear distinction between the two, would entitle all those appointed to serve the State up to the date the amending Act came into force, to continue in service.”

11. The cumulative reading of the aforesaid two judgments viz. in the case of Palaghat Jilla and R. Unnikrishnan, clinches the controversy by tilting the balance in favour of the appellant herein. We may record that the appellants have laboured to demonstrate that they are in fact Thandans on the basis of various documents filed by them and have attentive to argue that the Scrutiny Committee did not arrive at a correct decision. However, it is not even necessary to go into this aspect in the facts of these cases. As pointed out above, the appellant was treated as Thandan and, thus, Belonging to Scheduled caste community on the basis of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1976 and she was appointed as High School Assistant (Physical Science) in Government School on 03.02.1989 treating her as Scheduled Caste. Even if we proceed on the basis that she belongs to Ezhuvas/Thiyyas, that is irrelevant insofar as the appellant is contained as these castes were treated as part of Thandan Community and were held entitled to be treated as Scheduled Caste. This principle is categorically stated in Palaghat Jilla’s case. R. Unnikrishnan’s case clarified that the position changes only w.e.f. 30.08.2007 with the Amendment Act of 2007 when Thiyyas and Ezhuvas are not to be treated as part of Thandan and, thus, Scheduled Caste but those who have already conferred the benefit would entitled to continue to reap the fruits thereof.

12. In the another appeal also, we find that appellant was treated as belonging to Thandan Community and given benefit much prior to 2007.

13. For the reasons stated above, these appeals succeed and are accordingly allowed. Since the appellants have been continued in service because of the interim order passed by this Court, they are treated as validly appointed giving them the benefit of members of Scheduled Caste category. The impugned judgment is accordingly set aside thereby allowing the writ petitions filed by the appellants and quashing the orders of respondent Nos. 2 and 3. The appellants shall also be entitled to the cost of these proceedings.

Judgment Referred.

¹(1994) 1 SCC 0359

²(1990) Supp. SCC 0220

³(1965) 1 SCR 0316

⁴(1965) 2 SCR 0877

⁵(2014) 4 SCC 0434

⁶(2006) 7 SCC 0501

⁷(2001) 1 SCC 0004

⁸(2007) 14 SCC 0481