

# **BOMBAY HIGH COURT**

Vaishali V. Ambekar

Vs.

Union of India

Special Civil Application No. 1848 of 1976 (with Special Civil Application No. 1502 of 1976)

(Deshpande and Joshi, JJ.)

30.07.1976

## **JUDGMENT**

### **Deshpande, J.**

1. These two petitions are directed against the promotion of Mrs. Mhaprolkar, the respondent No. 4 in both the cases, to the post of the head clerk in the office of the Chief Mechanical Engineer, Western Railway, Bombay, under the order dated October 15, 1975. The petitioners in both the cases are working in the said office as senior clerks; so was the respondent No. 4 till her promotion. A vacancy arose in the post of the head clerk before the said date. According to the Roster in force at the relevant time, the post was liable to be filled in by a member of a Scheduled Caste, in terms of the Rules providing for reservations to the Scheduled Caste employees, in compliance with the constitutional mandate. The respondent No. 4 till her marriage was a caste Hindu and admittedly not a member of any Scheduled Castes. Her husband is a "Chamar", a caste notified as such Scheduled Caste under Article 341 of the Constitution. Respondent No. 4 was so promoted on the assumption that she belonged to the Scheduled Caste since her marriage. All the petitioners in Special Civil Application No. 1502 of 1976 are senior to her in the cadre of senior clerks but do not belong to any Scheduled Caste, while the petitioners in Special Civil Application No. 1848 of 1976 are junior to her but admittedly belong to Scheduled Caste. Thus respondent No. 4's promotion is challenged on the ground that she, not being a member of any Scheduled Caste, was not entitled to the post reserved for the Scheduled Caste.

2. In an affidavit sworn by one Mr. Nagpal, on behalf of respondents Nos. 1 to 3, the post being reserved for the Scheduled Caste is admitted. The respondent No. 4 however is claimed to have become a member of the Scheduled Caste because of her marriage with Mr. Mhaprolkar, belonging to the said caste.

3. Mr. D. V. Gangal and Mr. R.V. Gangal, the learned advocates appearing for the petitioners, contend that a caste Hindu can never become a member of any Scheduled Caste by merely marrying a member of such caste. There is much substance in this contention. Importance of being a member of the Scheduled Caste lies in that, such members are entitled to reservations in services at all stages and also in assemblies, educational institutions and various statutory bodies, as provided in chap. XVI and Articles 14 to 16 of the Constitution in an attempt to ensure equality for them. Their economic social and educational backwardness as a class disables them from securing their legitimate place in the society but for such reservations. Article 341 enables the President to notify different such castes, for different States and Parliament is also authorized to amend such notification from time to time by an enactment. On such notification, the members of the caste so scheduled and notified get the benefit of the reservations.

4. Now, ordinarily a person becomes a member of any caste because of his or her birth therein. The Article 341 only provides for notifying certain castes as Scheduled Castes. It does not deal with their origin, constitution, admission or expulsion of the membership therein. The said Article or the Presidential Order or the enactment thereunder does not indicate if any person can or cannot be a member otherwise than by birth. The matter is to be regulated by the ordinary law applicable thereto. This branch of Hindu law is not codified presumably because of the expected decreasing importance of caste in the present economic set up and social life. The codified Hindu law does recognise the entry in all such castes of other persons, not born therein. In the case of *C.M. Arumugam v. Section Rajgopal*<sup>1</sup>, the Supreme Court had occasion to deal with the origin, and membership of such castes while considering the effect of reconversion of any Hindu on his membership in his caste. According to the Supreme Court: (1) A caste is a voluntary association of persons for certain purposes. (2) It is a fluctuating group of persons governed by their own rules and regulations and (3) Castes are based not only on community of religion, but also on community of functions. (4) A change in the occupation sometimes creates a new caste.

5. After indicating how castes are formed by community of functions and occupations, and how change in occupation and place thereof can change the caste, the Court observed (p. 876):

"Since a caste is a social combination of persons governed by its rules and regulations, it may, if its rules and regulations so provide, admit a new member just as it may expel an existing member. The rules and regulations of the caste may not have been formalized they may not exist in black and white: they may consist only of practices and usages.

The following passage from 'Hindu Law' by Ganapati Iyer, is quoted with approval:

"caste is a social combination, the members of which are enlisted by birth and not by enrolment. People do not join caste or religious fraternities as a matter of choice (in one respect); they belong to them as a matter of necessity; they are born in their respective castes or sects. It cannot be said, however, that membership by caste is determined only by birth and not by any thing else.

6. These passages do indicate that, membership of the caste, under the Hindu law is not dependent on birth alone. This is why the Constitution makers did not seem to have thought it proper to limit the benefits of such reservations specifically to those who are born in the caste. Though the protection is primarily intended for them, who suffer from

<sup>1</sup>[1976] S.C.C. 863

social, economic, other disabilities due to their birth in such castes, the legal possibility of outsiders entering into such caste and subjected to similar disabilities is not ignored by the Constitution. With the changes in social, economic and political trends, the structural basis of the caste system itself is undergoing rapid alterations. It is difficult to conceive of compulsions of occupations requiring any one to change his caste in the present day conditions of life at any rate in cities and towns. However, the castes still exist and there has been no statutory change in regard to their formation, admission to it and expulsion therefrom. The possibility of an entry in such Scheduled Castes by choice, howsoever remote and theoretical, cannot be ignored as a matter of law. Validity of any claim of change of caste shall have to be tested however by reference to the customs and usages and rules of such castes in this behalf.

7. The respondent No. 4 has not chosen to appear and explain how she became a member of the Scheduled Caste. Nothing is known about the compulsion, her competency to renounce her own caste, or the forms required to be observed for her entry in the caste of Chamar. It is not known if she has been so accepted by the caste as its member. It is difficult to imagine how any occupational or functional compulsion could have goaded, an educated girl in service, like the respondent No. 4, to give up her own caste and accept that of her husband. The only circumstance relied on by Mr. Tipnis, the learned Counsel appearing for respondents Nos. 1 to 3, in support of this supposed change of caste, is the fact of her marriage with a person who admittedly belonged to a Scheduled Caste. Now, marriage by itself, in the absence of something more, cannot be said to be the evidence of respondent No. 4 having so elected to be the member of the said caste or having been admitted to the caste by the caste people, or her competency to do so. Our attention is not drawn to any law or authority in support of such proposition. With the enforcement of the Hindu Marriage Act, 1955, caste ceases to operate as a bar for a marriage between two Hindu spouses and there is nothing in the enactment to indicate that after marriage the wife or the husband gets converted to the caste of her husband or of his wife. Under the Hindu law as it stood before the enactment of 1955, the marriage of caste Hindu girl with a boy of the Chamar community, could not have been legal and the question of her being admitted to the caste of the husband by virtue of being married to him could not have arisen at all. The provisions of the Hindu Marriage Act, 1955, have not altered this position the least. There is nothing in this Act to require either of the spouses to renounce his or her caste and accept that of the other to facilitate such a marriage. This could not be otherwise, as the enactment is aimed at eliminating caste as a factor in the matter of marriages. This again is based on the recognition that in the present set up, happy married and family life is possible without any interference by caste considerations. There is thus no warrant for assumption that mere marriage would change the caste of respondent No. 4.

8. This apart, if marriage alone is assumed to change the caste of the wife, there is no reason why the husband should not be presumed to have changed his caste by accepting that of wife. In the absence of any authority of law, either of the presumptions are open, leading to no definite conclusion. No inference is possible merely from the fact that, on marriage, not the husband, but the wife invariably ceases to be a member of her parents family according to the existing practice. Cases are not rare where on such marriages, husband, wife and their children alone constitute the family. Some other glaring infirmities also can be noticed. On her marriage with a non-scheduled caste boy, a Scheduled Caste girl can also be said to have lost her caste and also the constitutional protection, and mere divorce would result in unsettling the attainments if caste and the attendant benefits or disadvantages were to depend entirely on the circumstance of marriage. This will defeat the very object of the scheme of reservation contemplated under the Constitution.

9. Thus, the law no doubt recognizes the possibility of a person's becoming a member of any Scheduled Caste otherwise than by birth. But, not mere marriage, but admission therein in accordance with usages and customs of the caste, alone can clothe anyone with the attribute of having joined the caste. Whatever be the position in the past, it will be unrealistic to ignore, how meagre and remote is the possibility, to-day, of any outsider seeking entry in any such Scheduled Caste on occupational or functional basis adverted to by jurists of Hindu Law. In the cases of educated persons in service presumptions can safely be raised to the contrary. But attendant benefits may tempt many, to set up fake claims and; to masquerade as such Scheduled caste's men. Authorities concerned may well be advised to frame rules insisting on authentic evidence such as a decree of the Court in support of such claims to ensure that claims of indisputable claimants are not defeated.

10. The respondents Nos. 1 to 3 obviously were in error in treating respondent No. 4 to have become a member of the Scheduled Caste merely because of her marriage with the person belonging to the Scheduled Caste without anything more.

11. The promotion of respondent No. 4 as head clerk in the circumstances is unwarranted and is liable to be quashed. The applications deserve to be allowed. We accordingly allow the applications and make the rules absolute to the above extent. In the circumstances of this case, there shall be no order as to costs.

Applications allowed.