Babulal and ors. Vs. Shantabai Widow of Hari Dekate

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SooperKanoon Citation : sooperkanoon.com/354658

Court : Mumbai

Decided On : Mar-27-1989

Reported in : 1990(2)BomCR70

Judge : A.A. Desai, J.

Acts : Hindu Succession Act, 1956 - Sections 2(2); Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976 - Sections 4; Hindu Widows Remarriage Act, 1856 - Sections 2; Constitution of India - Articles 342, 342(1), 366 and 366(25); Constitutional (Scheduled Tribes) Order, 1950

Appeal No. : Second Appeal No. 183 of 1980

Appellant : Babulal and ors.

Respondent : Shantabai Widow of Hari Dekate

Advocate for Def. : A.B. Choudhary, Adv.

Advocate for Pet/Ap. : S.N., ;S.K. Deshpande and ;S.V. Purohit, Advs.

Disposition : Appeal dismissed

Judgement :

A.A. Desai, J.

1. This appeal raises the questions as to whether :---

A. Members of the tribes notified by the Constitutional (Scheduled Tribes) Order, 1950, (hereinafter referred to 'the order of 1950') are deemed to be scheduled tribe regardless of the area specified in relation to them for the purposes of exception as provided under sub-section (2) of section 2 of the Hindu Succession Act, 1956 (hereinafter referred to 'the Act of 1956) ?

B. The Scheduled Castes and Scheduled Tribes Order (Amendment) Act of 1976 (hereinafter referred to the Act of 1976) being a declaratory Statute, operates retrospectively ?

2. The plaintiff Shantabai married to late Hari. She was his second wife. She gave birth to daughter Suman. Hari died in 1961. Suman died in 1966. Defendants Nos. 1 and 2 are respectively brother and mother of Hari. Defendant No. 3 Smt. Chindhi is a daughter of Hari from first wife.

The parties have been the residents of District Wardha which is within the region known as Vidarbha. The region was a part of the erstwhile State of Madhya Pradesh.

3. According to the plaintiff, Ramnath father of Hari, died in 1947 leaving behind him the property more specifically described in the schedule. In the property, her husband Hari had a 1/3rd share. She further claimed that herself, Suman and Chindhi each had a 1/3rd share in the property of late Hari; since Suman died

she is entitled to 2/3rd share. In the entire property left by Ramnath the plaintiff thus claimed 2/9th share. In 1968 she filed suit for partition and separate possession.

4. According to the defendants, there was a partition of the joint family property in the year 1952 and Hari was given his separate share. The plaintiff is entitled only to 1/2 share in the 1/3rd share of Hari.

The defendants contended that they being Halba Koshtis by caste have been notified as a Schedule Tribe. As such, as laid down under sub-section (2) of section 2, the provisions of the Act of 1956, have no application. The parties are governed by old Hindu law as well customary law. They further contended that the plaintiff in 1966 remarried with one Shri Mahadeo Dekate. As per the provisions of Hindu Widows Remarriage Act, 1856 her right in the estate of Hari has completely been extinguished. She met with a civil death.

5. The learned trial Judge after taking into consideration, the evidence on record upheld the contention of the defendants and dismissed the suit. In appeal by the plaintiff, the Appellate Court confirmed the finding of partition and also allotment of 1/3rd share in favour of Hari. The Appellate Court also maintained that parties being Halba Koshti belong to Scheduled Tribes. The plaintiff remarried by Pat with Mahadeo Dekate.

6. The learned Appellate Judge has, however, held that the parties came to be notified as a Scheduled Tribe by the Act of 1976. The Act has no retrospective effect. The provision of the Act, 1956 would be applicable to them when succession opened on the death of Hari in 1961. It is further held that subsequent remarriage of the plaintiff would not divest the right so vested in the plaintiff. She cannot be said to have met with civil death. The Appellate Judge, therefore, set aside the judgment and decree dismissing the suit. The appeal was partly allowed. The original defendants presented the instant second appeal raising the questions as formulated.

7. The Parliament enacted the Act of 1956 to amend and codify the law relating to intestate succession among Hindus. As per sub-section (2) of section 2, however, the Act has no application to the members of any Schedule Tribes within the meaning of Clause 25 of Article 366 of the Constitution of India. This Article defines, 'Scheduled Tribes', which means 'such Tribes or Tribal-communities or parts or groups within such Tribes or communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution. Clause 1 of Article 342 authorises the President to notify the Tribe or Tribe communities for the purposes of the Constitution. As per Clause 2 of the articles, the Parliament by law include or exclude any tribe or community from the list of the Schedule Tribe as notified by the Presidential order under Clause 1.

8. The President in exercise of the power under Clause 1 of Article 342 on 6-9-1950 issued the Order of 1950, the notifying the Scheduled Tribes Part IV of the Schedule appended therewith relates to the State of Madhya Pradesh. Item No. 13 therein refers to the community 'Halba'. Members of the Community who are the residents of the area in relation to them as specified in the schedule are deemed to be Schedule Tribe. On Re-organisation of the states on 1-11-1956, the territories known as Vidarbha had been withdrawn from the erstwhile State of Madhya Pradesh and included in the former Bilingual State of Bombay. Clause 3 of the Order of 1950 was accordingly modified by Order of 1956. It is provided that any reference to the State or District shall be to those constituted as from 1-11-1956. Part IV of the Schedule relates to the re-organised State of Bombay. Sub-item 13 of the Item 7 therein refers to be community known as 'Halba' or 'Halbi'. Area in relation to them as specified earlier so far as Vidarbha Region has been maintained in the concerned part of the schedule, pertaining to the State of Bombay. The District Wardha has not been included in the area as specified in relevant part of the Schedule.

8-A. Both the Courts recorded concurrent findings that the parties are 'Halba Koshti' by caste and they belong to Halba, or Halbi, community. This Court also in case of Milind v. State of Maharashtra, reported : 1986(1)BomCR403 , has held that Halba Koshits are the part of the parcel of Halba, or Halbi Tribe.

Mr. Deshpande, the learned Counsel for appellants, made a submission that the Appellate Court reached the erroneous conclusion on the question of applicability of the Act of 1956 as the order of the 1950 was not

brought to the notice. No doubt the parties are not resident of the area relating to Halba or Halbi, communities as specified in the schedule. However, according to Mr. Deshpande as per Clause 2 of the Order of 1950 Tribe and Tribe communities as notified are in relation to the State. Residence of the parties outside the area specified as such does not make any difference. Mr. Deshpande placed reliance on the observation in para 10 of the case of Milind cited supra. The Division Bench referred to the decision of the Madhya Pradesh High Court. The Madhya Pradesh High Court which was dealing with the case of withdrawal of the Caste Certificate issued in favour of the petitioner who was a Halba Koshti on the ground that the petitioner was resident of Wardha District. The Madhya Pradesh High Court held that the family of the petitioner took to the profession of weaving in Wardha, and the fact that Wardha District was no in the specified area mentioned in the said order made no difference.

It is not the case before me that the parties were originally resident of the area specified and they have subsequently settled themselves in Wardha District. As such, the ratio as laid down according to me has no application.

9. Clause 2 of the Order of 1950 reads as thus :---

'The tribes or tribal communities, or parts of, or groups within, tribes or tribal communities, specified in Parts I to XVI of the Schedule to this order shall, in relation to the States to which those parts respectively relate, be deemed to be Scheduled Tribes so far as regards members thereof resident in the localities specified in relation to them respectively in those parts of that Schedule.'

The scheduled appended with the Order of 1950 has been divided in several parts in reference to the State. Communities which are identified by particular castes in that State have been notified as Scheduled Tribe. However, the members of the certain such communities if they are resident of area in relation to them as specified have been so notified. In relation to the State in Clause 2 has reference to the corresponding part in the corresponding part in the schedule pertaining to that state. It does not mean particular community irrespective of resident in the area relating to them as specified would be deemed to be Scheduled Tribe for that State as tried to be urged. Second part in Clause 2 has specifically envisaged that members of such tribes or communities residing in the localities specified in relation to them are deemed to be Scheduled Tribe. It is, therefore, explicit that a person though a member of the community as enlisted, but of not the resident of area specified in relation to his community cannot be deemed to be Scheduled Tribe under Clause 1 of Article 342. The Order of 1950 had conferred the status of Scheduled Tribe on those members of Halba or Halbi community who are resident of the area specified for that community.

10. Area restriction in relation to Halba or Halbi community as specified in relation to the erstwhile State of Madhya Pradesh has subsisted even after 1-11-1956 in relation to the re-organised State of Bombay. It is pertinent to note at this stage that the Parliament has subsequently withdrawn the area restriction under the Act of 1976.

The object of the Order of 1950 is thus definite and explicit. To construe, a member of the community deemed to be a Scheduled Tribe regardless of area specified in relation to the community tantamounts to usherp the power of President under sub-clause (1) of Article 342. Such interpretation would lead to defeat the Constitutional policy. Halba Koshits of Wardha District, therefore, could not be deemed to be a notified Tribe, under the Order of 1950. They, therefore, at the relevant time in 1961 cannot be regarded as Scheduled Tribe within the meaning of Clause 25 of Article 366 so as to attract the exception as provided in sub-section (2) of section 2 of the Act of 1956.

11. The Parliament as provided under Clause 2 of Article 342 passed the Act of 1976. As per the preamble, it is enacted to provide inclusion or exclusion in the scheduled appended to the Order of 1950 and consequent readjustment in the Constituencies of Parliament and State Legislature. Second Schedule as amended under section 4 enumerates the Scheduled Tribe. Part IX of the Schedule relates to the State of Maharashtra which came into being on 1-5-1960 along with Vidarbha Region. Item 19 refers to the community 'Halba or Halbi'.

The Act of 1976 does not specify the area in relation to these communities as contained in the Order of 1950.

12. Mr. Deshpande made a submission that the Act of 1976 has revised the list of the Scheduled Tribe as declared earlier by the Order of 1950. By inclusion and exclusion, the Act has corrected the Schedule. The revision is predominent object of the Act and readjustment of Constituencies and the matters connected thereto are the ancillary. The Act does not create the Tribes. It merely recognises, and makes declaration in that behalf. The Act of 1976 is, therefore, according to Mr. Deshpande, a declaratory statute. As per settled Rule of interpretation it is retroactive in operation. The declaration of such recognition relates backs to the inception. In the submission of Mr. Deshpande, therefore, Halba Koshtis of Wardha District are deemed to be a notified tribe within the meaning of Clauses 25 of Article 366 even at the time of death of Hari in 1961. As such rights of parties would not be governed by the provisions of Act of 1956.

13. Mr. Deshpande invited my attention to Page 290 of the Commentaries on the Principles of Statutory Interpretation by Mr. G.P. Singh-4th Edition 1988. Declaratory Statutes means an 'Act to remove doubts existing as to the common law, or the meaning or effect of any statute.' Craies on Statute Law (Page 58). 'An Act is said by black stone to be declaratory where the old custom of the realm is almost fallen into disuse or became disputable in which case Parliament has thought proper in 'perpenium retestamonium' and for avoiding all doubts and difficulties to declare what the law is and ever has been'. Normally, the declaratory statute are to be passed to set aside what the Legislature consider to be a judicial error either in the statement of common law or in the interpretation of statute. The Preamble of the statute ordinarily contains a declaration in that behalf.

14. It thus follows that the Declaratory Statute aims to achieve : to :

A. Remove doubt, judicial error in misstatement of common law, or interpretation of Statute;

B. Explain the earlier Act :

C. Supply omission or meaning of the previous Act :

D. The preamble invariably contains the word 'declare'.

15. The Parliament, in discharge of the Constitutional obligation as laid down in sub-clause (2) of Article 342, passed the Act of 1976. As has been seen from the Preamble, it is enacted to make inclusion or exclusion in the schedule appended to the Order of 1950. It does not intend to declare on any of the aspect of the Order of 1950. Section 4 provides for the amendment in the Schedule Tribe Order of 1950. Such amendment is explicit and contemplated by the Article itself. The amendment does not aim to remove any error or omission occurred in the Order of 1950. Such amendment is not revisional in nature to correct the schedule. Inclusion or exclusion, by the Act may not be for the reason that certain communities are erroneously added or omitted from the schedule. The Act brings amendment in the schedule taking into consideration numerous aspects connected with the communities such as, social back ground, cultural notions, linguistic dialect, origin of tradition or custom, life style. Such characteristics of a particular community can not remain in perpetuity. The President in his judgment, considered the inclusion of certain communities, in the Order of 1950. The Parliament does not exercise the revisional jurisdiction, over the judgment of the President. In the wisdom of Parliament certain communities, though rightly included in the Order of 1950, taking stock of situation may not deserve to be continued as such. And those who were excluded in the course of time might deserve inclusion. The Act has regulated the status of such communities for the purposes of Constitution. The Act of 1976 by inclusion and by lifting area restriction has enhanced the ambit in relation to certain communities and by exclusion reduced the same.

16. On examination of the Scheme and Object, the Act of 1976, does not aim to achieve either of the purpose of a declaratory statute. It does not satisfy any of the test of characterise it as a declaratory statute. The Act of 1976, according to me, is not declaratory and cannot for that reason be held to be retrospective.

17. Sub-section (1) of section 5 of the Act of 1976 provides for the determination of population of Scheduled Castes and Scheduled Tribes. Section 6 authorities the Election Commission to readjust the Constituencies, according to the population as ascertained for giving proper representations to the Scheduled Castes and Scheduled Tribes. Section 8 deals with publication of amendment and their date of operation. Sub-section (4) lays down that the order so amended shall apply in relation to every election, hereafter the publication in the Gazette of India. Sub-section (5) unequivocally lays down the amendment shall not affect the representation existing on the date of its publication. Section 10 provides for validation of the Act done or steps taken by the authorities prior to the commencement of the Act so far they are consistent with the provisions as contained therein and shall be deemed to have been taken under the provisions as if such provisions were in force at the time of such Acts or steps were taken. The provisions do not invalidate any previous Act which is inconsistent with the provisions of the Act of 1976. On the contrary, they are protected under sub-section (5) of section 8. The Parliament has thus explicitly made the operation of the Act prospective.

18. According to the Act of 1976, the parties in 1961 cannot be deemed to be Schedule Tribe within the meaning of Clause 25 of Article 366, so as to bring them within the exception as provided under sub-section (2) of section 2 of the Act of 1956.

19. Mr. Deshpande inviting my attention to the provisions of re-marriage of Widow Act, 1856, made a submission that the plaintiff met a civil death on her remarriage in 1967 and, therefore, she is not entitled to claim share in the property devolved on her husband Hari. The right vested in the plaintiff in 1961 on death of her husband Hari, cannot be extinguished on her remarriage in the year 1967. The submission thus made is therefore, without any force. The view taken by the learned Appellate Judge is just and proper. In view of the discussion, I dismiss the appeal and confirm the judgment and decree of the first Appellate Court. No order as to costs.