

indira Vs. State of Kerala

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Court : Kerala

Decided On : Aug-10-2005

Reported in : AIR2006Ker1; [2006(2)JCR276]; 2005(4)KLT119

Judge : K.S. Radhakrishnan,; K.A. Abdul Gafoor and; M. Ramachandran, JJ.

Acts : Evidence Act - Sections 106; Kerala (Scheduled Castes and Scheduled Tribes) Regulation of Issue of Community Certificates Act, 1996 - Sections 3, 4, 5(1), 6, 7, 8, 9, 10, 12, 12(3), 14, 24 and 26; [Constitution of India](#) - Articles 15(1), 15(4), 16, 16(4), 16(4A), 29, 332, 338, 339, 341, 341(2), 342, 342(2), 365(24) and 366(24); Customary Law; Hindu law

Appeal No. : W.P. Nos. 2483, 7039 and 17317 of 2005

Appellant : indira

Respondent : State of Kerala

Advocate for Def. : K.C. Joseph and; P.K. Santhamma, Sr. Government Pleaders

Advocate for Pet/Ap. : Poly Mathai,; A.X. Varghese,; V.S. Sudheer,;

Judgement :

K.S. Radhakrishnan, J.

1. Whether children born out of inter-caste married couple could claim the status of Scheduled Caste/Scheduled Tribe for the benefit of reservation in admission to educational institutions and in public employment on the mere fact that one of their parents belongs to Scheduled Caste/Scheduled Tribe is the question that is posed for our consideration.

2. We find that what has caused anxiety and even panic is the reluctance to accept the reality and the possible ramifications which such an adjudication might bring in the community texture. Identification of scheduled tribes and scheduled castes in a State or Union Territory is a presidential prerogative as gatherable from Articles 341 and 342 of the [Constitution of India](#). Nobody other than a person who is member of a caste/tribe can claim to be a scheduled caste or tribe. Therefore claim of a person born of intercaste marriage that he is a member of one or the other caste requires an adjudication. If he is found as a member of the caste or tribe, he is entitled to be recognised as such. If not, he is disentitled from making a claim. Therefore the issue is whether there is a mechanism for adjudging such claim and rights and how far the working of such machinery is satisfactory.

3. Petitioners in W.P.C. No. 2483 of 2005 sought a direction to the Tahsildar to issue a community certificate stating that the second petitioner belongs to scheduled caste Kanakka community placing reliance on G.O.Ms. 11/77 dated 25.1.1977. When the matter came up for hearing it was referred to a Division Bench. The Bench felt that the impact of the Government order G.O.Ms 11/77 dated 25.1.1977 be examined by a larger Bench in the light of the decision of the Apex Court in Punit Rai v. Dinesh Chaudhury ((2003) 8 SCC 204) and referred the matter to a larger Bench vide order dated 9.2.2005. While so, the Government issued G.O.(Ms) No. 11/05/SCSTDD dated 22.3.2005 cancelling earlier order dated 25.1.1977. G.O(Ms) No. 11/2005 was later clarified by the Government, vide G.O.(Ms) No. 25/2005/SCSTDD dated 20.6.2005. We have therefore to examine the claims of the petitioners in the light of the above mentioned Government orders and the principles laid down by the Supreme Court in Punit Rai's case, supra : AIR 2003 SC4355 and in Sobha Hymavathi Devi v. Setti Gangadhara Swamy and Ors. : AIR 2005 SC800 and on the basis of the other decided cases.

4. [Constitution of India](#) provides that all citizens of India shall have equality of status and of opportunity. Article 15(4) of the Constitution however provides that State is competent to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Article 16(4) of the Constitution enables the State to make provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. Article 341 (2) authorises the Parliament by law to include 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. Similar is the provision contained in Article 342 in relation to scheduled tribes. The object of Article 341 as well as Article 342 is to identify the castes, races or tribes which shall for the purpose of the Constitution be deemed to be, as the case may be, scheduled castes or scheduled tribe and therefore entitled to the protective rights conferred by the Constitution. Such castes, races, tribes or tribal have been included in the notification issued under the Constitution and the laws made by the Parliament.

5. State of Kerala had extended various educational concessions to children born to inter-caste married couples. By virtue of the Government order No. J4/23203/60 dated 24.6.1960 they used to get such concessions provided their mother belonged to SC/ST and not the father. Later with a view to encourage intercaste marriage Government issued G.O.(Ms) No. 298 dated 23.6.1961 stating that children born of inter caste marriages would be allowed all educational concessions if either of the parents belongs to Scheduled Caste/Scheduled Tribe. The order dated 24.6.1960 was accordingly cancelled. Later on a query made by the Kerala Public Service Commission Government clarified vide G.O.(Ms) No. 1/77/PD dt. 25.1.1977 that the Government order dated 23.3.1961 could be adopted for determining the caste of the children born out of such intercaste marriage for all purposes. Resultantly such children were treated as belonging to Scheduled Caste or Scheduled Tribe, if either of their parents belongs to SC/ST. On the strength of the above mentioned Government order, several claims were raised claiming reservation for admission to the educational institutions as well as for appointment to various posts in public services which gave rise to several

litigations before this Court. Claims were even raised by children whose grandparents had contracted inter-caste marriage.

6. A learned single judge of this Court, Justice K.G. Balakrishnan, as His Lordship then was, in *Bijumon v. Commissioner for Entrance Examination* (1993 (2) KLT 1074) held that a combined reading of Article 366(24) and 341 of the Constitution showed that members of the caste specified in the Presidential notification alone are entitled to be treated as Scheduled Caste and that the Parliament alone is given power to exclude any caste from the Presidential notification. Learned judge also held that Government order G.O.(Ms) 11/77/DD dated 25.1.1977 to the effect that all children born to parents of whom one is a member of the SC/ST have to be treated as scheduled caste cannot be accepted in toto. The court was dealing with a case where father belonged to Hindu Pulaya community which is included in the list of scheduled caste and mother belonged to Syrian Catholic community. On facts learned Judge accepted the report of KIRTADS after having found that all the children were brought up as members of a caste other than scheduled caste. Referring to the Government order dated 25.1.1977, the learned Judge held as follows:

'This Government order creates some problems. In case whether children born of inter-caste married couple and they are brought up as a non-scheduled caste, it cannot be said that such children should be treated as scheduled caste. For example, if a member of Nair community which is a non scheduled caste community marries a member of the scheduled caste community and all the children born in that wedlock are brought up as members of Nair community and all members of the family lead a life of non-scheduled caste identity, it cannot be said that such children would belong to scheduled caste.'

A Division Bench of this Court consisting of Chief Justice Om Prakash and Justice J.B. Koshy in W.A.No. 1465 of 1995 had thereafter occasion to consider the claim based on 1977 Government order. The question which came up for consideration was whether one could claim the status of scheduled caste when his father belonged to other backward community. Referring to the Government order dated 25.1.1977, the bench held that if one makes any claim on the ground that his

mother belongs to scheduled caste he has to independently establish the same for the purpose of educational benefits. The Bench rejected the claim for declaration as a member of scheduled caste and the judgment of the learned single Judge was set aside. Another Division Bench of this Court in Commissioner & Secretary to Government v. Ramachandran (1998 (1) KLT Short Notes 58 at page 70), took the view that children born of inter caste marriage would get the benefit of the said Government order if either of the parents belonged to scheduled caste. Identical is the view taken by another Division Bench in State of Kerala v. Thushara (1998 (1) KLT 717).

7. The question again came up for consideration before a Division Bench headed by Justice AR. Lakshmanan (as His Lordship then was) in Bindu v. State of Kerala (2000 (1) KLT 425), a case where the claimant's mother belonged to Hindu Panan community listed as scheduled caste and the father belonged to a forward community. The Court distinguished the Bench decision in W.A.No. 1465 of 1995 and held that when the mother belonged to Panan community, a scheduled caste the claimant is entitled to get the benefit of the 1977 Government order. The matter was taken up before the Apex Court in S.L.P.No. 11364 of 2000 and the same was dismissed, but the point of law was left open. Another Division Bench of this Court consisting of one of us, (K.S. Radhakrishnan, J.) had also occasion to consider the scope of 1977 G.O. in Dr. Sreekala v. Union of India and Ors. (AIR 2001 Kerala 133), a case where mother belonged to Hindu Mala Arayan community, a scheduled tribe, and father belonged to Valan community, other backward class in the State of Kerala. The Court held that the offspring would get the benefit of that Government order, but would not confer any status as such. Learned brother Justice K.A. Abdul Gafoor doubted the proposition laid down in O.P. No. 21930/02 and 22379/02 about the proposition laid down in Thushara's case, supra, (1998 (1) KLT 717) and Bijumon's case, supra, (1993 (2) KLT 1074) and referred O.P. Nos. 21930 of 2002 and 22379 of 2002 to Division Bench stating that educational concessions and reservations are different and reservation can only be an exception to equality clause. Learned Judge opined that reservation for Scheduled Castes/Tribe will be available only to those groups included either in a Presidential order or by amendment thereto by the Parliament. The Division Bench however had no occasion to consider that question as the parties were not inclined

to address on the issue and the Original Petitions were dismissed.

8. The Division Bench of this Court in *Deepthy v. State of Kerala and Ors.* (I.L.R (2000) 1 Kerala 845) also examined the applicability of 1977 Government order. There father belonged to Nair community and the mother belonged to Perumannan community, a scheduled caste. The Bench held that while granting such benefit to the offsprings of intercaste married couple, the only criterion which is relevant is whether the applicant is an offspring of an intercaste married couple. The Court opined that the question whether that offspring was brought up as a member of scheduled caste or not is immaterial. Again a Division Bench headed by B.N. Sreekrishna, Chief Justice (as His Lordship then was) had also occasion to consider the impact of 1977 Government order in W.A.No. 983 of 2002 on 9.7.2002, which was filed by one K.C. Mathai and Eldos Mathew. Father belonged to Jacobite Christian community and the mother belongs to Christian Mala Arayan community. The court held that their son is entitled to be treated as a member of the scheduled tribe. Noticing that there is conflict between the judgment in W.A. 1465 of 1995 and the decision in *Bindu v. State of Kerala* (2000 (1) KLT 425) a Bench of this Court again referred the matter to a Full Bench. The Full Bench of which one of us (Justice K.A. Abdul Gafoor) was a party found no conflict between those decisions and posted the cases before the appropriate Bench and answered the reference accordingly. Though conflicting views have been expressed by various Division Benches with regard to the applicability of various government orders their constitutional validity as such was not under challenge.

9. Writ petitioners in W.P.C. No. 2483 of 2005 have approached this Court seeking a writ of mandamus directing the Tahsildar to issue community certificate to the second petitioner daughter stating that they belonged to scheduled caste Kanakkan community. First petitioner belongs to Hindu Kanakkan community of scheduled caste and her husband belongs to Christian community. Learned single Judge referred the matter to the Division Bench to examine the impact of the decision of the Apex Court in *Punit Rai v. Dinesh Chaudhury* : AIR 2003 SC4355 , case on Bindu's case, supra (2000 (1) KLT 425) and Rajeena's case (2002 (3) KLT 484). Division Bench felt that the matter required examination by a larger Bench, and hence the matter was placed before the Full Bench. While the Writ

Petition was pending, Government in the light of the decision of the Apex Court in Punit Rai's case, supra : AIR 2003 SC4355 and taking note of the legality, propriety and constitutionality of the existing directions, issued G.O.(Ms) No. 11/2005/SCSTDD dated 22.03.2005 cancelling its earlier order dated 25.1.1977 and the letter dated 12.7.1984. The Government have now placing reliance on the decision of the Supreme Court in Punit Rai's case and Sobha Hymavathi Devi's case, issued a clarificatory order G.O.(Ms) No. 11/2005/SCSTDD dated 20.6.2005 directing that the competent authorities would issue scheduled caste/scheduled tribe community certificates to the children born out of intercaste marriage only as per the caste/community of his/her father subject to the conditions of acceptance, customary traits and tenets stipulated in the judgments of the Supreme Court. Government also ordered that the children of intercaste married couple of which one is scheduled caste/scheduled tribe would continue to be eligible for the educational and monetary benefits available to scheduled caste/scheduled tribe. Children of inter caste married couples who have secured employment against the seat reserved for scheduled castes/scheduled tribes by virtue of the provisions of the government order dated 25.1.1977 were however allowed to continue till the end of their service, but would not be eligible for any benefits intended for the scheduled castes/scheduled tribes with effect from 22.3.2005. Also children of inter caste married couple who secured admission to various courses/training including professional courses against the seat reserved for scheduled castes/scheduled tribes would continue to receive all the educational benefits till the end of the respective course.

10. We are therefore called upon to examine the impact of the decision of the apex court in Punit Rai's case, and Sobha Hymavathi Devi's case, supra on the claim of the offspring of inter caste married couple as well as the legality of the government order dated 22.03.2005 cancelling the earlier order and also the impact of the clarificatory order dated 20.6.2005 and to resolve the conflict of views expressed by various Division Benches of this Court.

11. We heard learned Counsel Sri B. Gopakumar, Sri Poly Mathai, Sri A.X. Varghese, Sri V.S. Sudheer, Sri D. Kishore, Sri P.A. Abdul Jabbar, Sri. T.A. Shaji and also the Senior Government Pleaders Sri. K.C. Joseph and Smt P.K.

Santhamma.

12. Article 15(1) states that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (4) states that nothing contained in Article 15 or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes. Clause (1) of Article 16 lays down that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Clause (2) states the specific grounds on the basis of which citizen shall be eligible for or discriminated against in respect of any employment or office under the State. Clause (4) permits the State to make any provision for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State, is not adequately represented in the services under the State. Article 341 states that the President may with respect to any State or Union Territory and where it is a State after consultation with the Governor by public notification, specify the castes, races or tribes or parts for groups within castes, races or tribes which shall for purposes of the Constitution be deemed to be scheduled castes in relation to the State, or Union Territory, as the case may be. Article 342 states that the President may with respect to any State or Union Territory and where it is a State, after consultation with the Governor by public notification specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of the Constitution be deemed to be scheduled tribes in relation to that State. Article 365(24) of the Constitution defines '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. Article 366(25) states that 'scheduled tribes' means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be scheduled tribes for the purpose of the Constitution. In order to determine whether a particular caste or tribe would come within the meaning of Articles 341 and 342 respectively for the purpose of reservation under Article 15(4) or 16(4) one has to look at the terms of the Presidential order. Once Presidential order has been issued, President has no

power to vary it by any subsequent notification. That can only be done by the Parliament by law under Article 341(2) of the Constitution as well as under Article 342(2) of the Constitution. In *Basavalingappa v. D. Munichinnappa and Ors.* : [1965]1SCR316 the apex court held that it was 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. In *Bhaiya Lal v. Harkishan Singh and Ors.* : [1965]2SCR877 the Apex Court held that the object of Article 341(1) plainly is to provide additional protection to the members of the scheduled castes having regard to the economic and educational backwardness from which they suffer. In *Srishkumar Choudhury v. State of Tripura* (1990 Supp. SCC 220) the Apex Court held that it is not open to the court to make any addition or subtraction from the Presidential order.

13. Government in the counter affidavit filed in W.P.C.No. 2433 of 2005 stated that the intention of the Government Orders was not to assign caste status to any body, but to facilitate caste determination by the caste certificate issuing authorities, but these orders were misconstrued by some of the inter caste married persons, whereby their children although actually having upper class status in schools as well as in the society, started claiming SC/ST status for illegally appropriating the educational concessions meant for candidates from SC/ST communities. Large number of such cases surfaced at the time of Entrance Examinations for admission to Professional Course and a good number of cases, the parents brought up their children as members of forward caste, which is the community of one of the parents. In such cases they never made any claim for educational concessions to their children at school stage. But it was pointed out at the time of application for professional course, they used to claim SC/ST status and manage to get community certificates from the Revenue Authorities and enjoy benefits of reservation. These children who were brought up in a comparatively better social set up and who had not previously enjoyed any benefits exclusively meant for Scheduled Castes/Scheduled Tribes got selections against reservation seat by virtue of their comparatively better educational standard also. According to the Government, this proved to be nothing but a short cut method to secure admission to post metric courses, especially professional courses, which is detrimental to the interests of children of those couples, both of whom are scheduled caste/scheduled tribe.

14. Three Judges Bench of the Apex Court in Punit Rai v. Dinesh Chaudhary : AIR 2003 SC4355 considered the scope of Article 341(1) of the [Constitution of India](#) and the Circular issued by the Bihar Government in connection with the acceptance of nomination to the reserved constituency of the Legislative Assembly. In that case it has come out in evidence that Dinesh Chaudhary returned candidate, was born to parents who belong to Kurmi, other backward class, and not a scheduled caste. The Apex Court took the view that the respondent (Dinesh Chaudhary) could not establish by adducing evidence that he is a Pasi, a scheduled caste even going by the Circular issued by the Bihar State Government. The court held:

'If he had taken part in some enquiry, he had special knowledge in respect thereof within the meaning of Section 106 of the Evidence Act. He, therefore, was bound to prove the same by bringing on record relevant evidence which was in his power or possession.'

In Punit Rai's case in the concurring judgment His Lordship Justice S.B. Sinha, opined as to how the caste or tribe of the person is to be determined. Learned Judge held that the caste or tribe of the parents to be determined depended upon several factors including 'customary laws'. Learned Judge also held that the caste system is ingrained in the Indian's mind and 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. Learned Judge in paragraph 31 of the judgment held: 'If he is considered to be a member of the scheduled caste, he has to be accepted by the community'. Learned Judge also held that the question as to whether a person belonged to a particular caste or not is to be determined by the statutory authorities specified therefor. Learned Judge opined in paragraph 41 of the judgment that determination of caste of a person is governed by the customary laws and a person under the customary Hindu law would be inheriting his caste from his father. In paragraph 45 of the judgment it was held that if a customary law is to be given a go-by 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. In Punit Rai's case the Apex Court also held

that the claimant has also not adduced any evidence to show that the respondent therein was accepted or treated as a member of Scheduled Caste Community.

15. The codified Hindu Law lays down that the provisions do not apply to members of the scheduled tribe coming under Clause (25) of Article 366 of the [Constitution of India](#) unless the Central Government by notification in the official gazette directs that any of the enactments shall apply to them also. Dr Paras Diwan on Hindu Law, Second Edition, states that it does not mean that scheduled tribes which were prior to the codified Hindu Law, governed by Hindu law will not now be governed by the Hindu Law. If before codification, any scheduled tribe was governed by Hindu law, it will continue to be governed by it. However, it will be uncoded Hindu law that will apply to them. It is pointed out that if a tribe was sufficiently Hinduized, Hindu law applied to it. But whether a tribe was sufficiently Hinduized or not was a question of fact. In Punit Rai 's case, learned Judge in his concurring judgment has held that caste or tribe is to be determined depending upon several factors including customary law. It was held that person under the customary Hindu law would be inheriting his caste from his father. It is trite that by reason of conversion from SC/ST to another religion or contracting inter caste marriage a person may not be following the customs, rituals and other traits which are required to be followed by members of the SC/ST and may not be following the customary laws of succession, inheritance, marriage etc. Claim of such persons cannot be primarily determined on the customary law, but only on the question whether such persons are accepted by the SC/ST community to their hold.

16. The Apex Court in Valsamma Paul v. Cochin University : [1996]1SCR128 dealt with a case where the lady, a Syrian Catholic, married a Latin Catholic, other backward class, had applied for selection of reserved candidate. Apex Court examined whether the candidate who had the advantageous start in life being born in forward caste and had march of advantageous life but is transplanted in backward caste by adoption or marriage or conversion does not become eligible to the benefit of reservation under Article 15(4) or 16(4). Contention was raised that due to marriage she has subjected herself and suffered to all family disabilities of her husband. The recognition of the appellant by the member of Latin Catholic

would not, therefore, be relevant for the purpose of her entitlement to the reservation under Article 16(4), for the reason that she, as a member of the forward caste, had advantageous start in life and after her completing education and becoming major married a Latin Catholic, and so, she is not entitled to the facility of reservation given to the Latin Catholic, a backward class.

17. The Apex Court in *Sobha Hymavathi Devi v. Setti Gangadhara Swamy and Ors.* : AIR 2005 SC800 was dealing with the question of election to the Legislative Assembly. Appellant claimed eligibility to election from a seat reserved for scheduled tribe. The court held that benefit would be available only to those who belong to scheduled caste/scheduled tribe and not to others who claim to acquire the status by marriage. Apex Court partly overruled the decision *N.E. Horo v. Jahanara Jaipal Singh* : [1972]3SCR361 and followed the decision in *Valsamma Paul's case*, supra : [1996]1SCR128 . That was a case where appellant therein born to a forward caste father and scheduled tribe mother. Election of the appellant to the reserved constituency for scheduled tribe was set aside on the ground that she was not qualified from a constituency reserved for scheduled caste community. The court found no reason why principle of reservation laid down should not be extended to constitutional reservation of a seat for scheduled tribe in the House of the People or under Article 332 in the Legislative Assembly. The court held such reservations are also constitutional reservations intending to benefit the really underprivileged and not those who come to the class by way of marriage. To that extent the court held that Horo's case was wrongly decided. The court held that the principle relating to reservation under Articles 15(4) and 16(4) laid down by the court should be extended to the constitutional reservation of a seat for a scheduled tribe in the House of People or under Article 332 of the Legislative Assembly. The Apex Court in *State of Kerala v. Chandramohan* : 2004 CriLJ1403 had occasion to consider the question whether a person on conversion to another religion continues to remain as member of that tribe. Referring to *Punit Rai's case* the court held that the question as to whether a person is a member of that tribe or has been accepted as such, despite his conversion to another religion, is essentially a question of fact and a member of the tribe despite his change in the religion may remain of that tribe if he continues to follow the tribal traits and custom,

18. Principles laid down in Punit Rai's case, Chandramohan's case, Sobha Hymavathi's case, Valsamma Paul's case etc. have to be applied in this case bearing in mind the facts that we are dealing with a separate class of persons i.e. children born to intercaste married couple of which either the father or mother belongs to a non scheduled caste/scheduled tribe category. For getting the benefit of Article 15(4), 16(4) and 16(4A), the personal law of the couple as such may not be the criterion, but the question is whether their offsprings are subjected to the same disabilities attached to SC/ST being brought up either by the father or the mother of which one belongs to SC/ST. The basis of reservation under Article 15(4) and 16(4) is to provide additional protection to the members of Scheduled Castes and Tribes as a class of persons who have been suffering since considerable length of time due to social and educational backwardness. The protection is afforded to a homogeneous group, as held by the decision of Supreme Court in E.V. Chinnaiah v. State of A.P., : AIR 2005 SC162 . But the claimant has to prove that he has been brought up as scheduled caste/scheduled tribe either by the father or by the mother and thereby did not get the advantages in life as a non, scheduled caste and is suffering all handicaps, disadvantages having been born as a member of scheduled caste/scheduled tribe. In Punit Rai's case, supra, the court held, placing reliance on Section 106 of the Evidence Act, when any fact is especially within the knowledge of the person, the burden of proving the same is upon him. Authorities are not in a position to know under what circumstances inter caste married couple have brought up their children, a matter within the exclusive knowledge of children and parents. The burden is on the person who claims the benefit to establish that he/she is subjected to the same handicap and disadvantages having been born as a member of SC/ST.

19. Therefore, if father belongs to scheduled caste/scheduled tribe the child may inherit his caste from his father by operation of personal law. Even then, in order to get the benefit of Article 15(4), 16(4) or 16(4A) read with Articles 341 and 342 of the Constitution, the person has to further establish that he still uses the caste of his father subject to same disabilities, disadvantages, sufferings etc. of that caste or tribe. Unless and until the person establishes those factors the mere fact that by virtue of the personal law he has inherited his caste status from his father or mother, as the case may be, by itself would not be sufficient to show that he is still

subject to the same disadvantages. Even if father belongs to scheduled caste/scheduled tribe, child could be brought up in the company of the mother who belongs to forward caste without subjecting him to any sufferings, disadvantages, incapacity or ignominy which would normally be suffered by the members of scheduled caste/scheduled tribe and vice versa, like mother belongs to scheduled caste and father belongs to non scheduled caste and the child is brought up by the father and would not be subjected to the disadvantages and sufferings as if he is a member of scheduled caste/scheduled tribe.

20. Children born of inter caste marriage of which either of the parents belongs to scheduled caste/scheduled tribe should have a caste status either that of the mother or that of the father. Articles 15(4), 16(4) and 16(4A) are intended to remove all handicaps and disadvantages suffered by members of scheduled caste/scheduled tribes. Suppose a neglected or deserted SC/ST woman brings up her child, with the same handicaps, suffering, disadvantages, attached to that caste/tribe, whose father belong to non SC/ ST, it is too harsh to deny the benefit to that child on the mere reason that the child's father belongs to non scheduled caste/scheduled tribe caste. Person who claims the status of scheduled caste/scheduled tribe of his/her father or mother has to establish that on his/her birth, he/she is subjected to same social disabilities and also following the same customs and traditions and the community has accepted that person to its fold.

21. The Government, vide order G.O.(Ms) No. 25/2005/SCSTDD dated 20.6.2005 directed the competent authorities to issue SC/ST community certificates to the children born out of intercaste married couples as per the caste/community of the father subject to the conditions of acceptance, customary traits and tenets stipulated in Punit Rai's case and Sobha Hymavathi Devi's case. The above government order would also be applicable to the children born out of intercaste married couple if the mother belongs to SC/ST community. Subject to the above direction, rest of the directions contained in G.O.(Ms) No. 11/05/ and G.O.(Ms) No. 25/2005 would stand.

22. The Kerala (Scheduled Castes and Scheduled Tribes) Regulation of Issue of Community Certificates Act, 1996, is an Act enacted to provide for and to regulate

the issue of community certificates to members of the scheduled castes and the scheduled tribes in the State of Kerala. Preamble to the Act states that in order to curb effectively the evil practices of securing such certificates by persons other than those belonging to scheduled castes and scheduled tribes for claiming the benefits of reservation and such other benefits meant for the scheduled castes and the scheduled tribes and to make provision for prescribing punishment therefor and to provide for matters connected therewith or incidental thereto the Act was enacted. Section 4 of the Act deals with application from members of the scheduled castes and scheduled tribes for admission to the seats reserved for scheduled castes and scheduled tribes in educational institutions. In order to prove his claim that he belongs to scheduled caste or scheduled tribe as the case may be, he shall make an application in such form and in such manner, as may be stipulated for issue of community certificate. Section 3 says that any person belonging to any of the scheduled castes or the scheduled tribes claiming any benefit, concession, protection, exemption or reservation provided to such castes or tribes either for any appointment in public services or for admission into educational institutions, exclusively intended for members of the scheduled castes or the scheduled tribes, or for contesting for the seats reserved for them in any educational institution in the State or outside the State for the students of the State or local authority or cooperative institution, shall prove his claim by a certificate issued for the purpose under this Act by the competent authority in the prescribed manner. The Act has also constituted Screening Committee for verification of the community certificate. Screening Committee is authorised to conduct detailed enquiry through the expert agency to ascertain if the applicant actually belongs to the scheduled caste or the scheduled tribe, as the case may be. Section 8 of the Act also authorises the Scrutiny Committee for verification of community certificates. Any person belonging to scheduled castes or scheduled tribes or any appointing authority or local body or heads of educational institutions may make an application in such form and in such manner as may be prescribed by the Scrutiny Committee for verification of Community Certificates. Section 10 of the Act says that where an application is made to the competent authority under Section 4 for the issue of a community certificate in respect of a scheduled caste or scheduled tribe or in any enquiry conducted by the Competent Authority, the

Expert Agency, or the Scrutiny Committee or in any trial or offence under the Act, the burden of proving that he belongs to such caste or tribe shall be on the claimant. Section 24 of the Act states that no Civil Court shall have jurisdiction in respect of any order passed by any officer or authority under the Act and no stay or injunction shall be granted by a court in respect of any action taken or to be taken by such officer or authority under the Act in pursuance of any power conferred by or under the Act. The Act also provides penalty provisions in case of false community certificate. The Act also provides for appeal and review.

23. We find, so far as the petitioner in W.P.C. No. 13479 of 2005 is concerned, Commissioner for Entrance Examination referred the matter to the Screening Committee for its decision to determine the status of the petitioner is concerned. Petitioner had applied for admission to Post-Graduate Medical Courses claiming reservation under scheduled caste/scheduled tribe quota. According to Clause (i)(c) of the prospectus, claim for reservation under scheduled caste/scheduled tribe quota would be subject to verification and clearance by the Screening Committee constituted for the purpose by the Government as per G.O. (Ms) No. 23/89/SC/ST/DD dated 22.05.1989 and as authorised by Section 6 of Act 11 of 1996. Report submitted by KIRTADS would indicate that petitioner's father belongs to Dheevera community, which is other backward class in the State, and mother belongs to Malai Arayan community, a scheduled tribe. Petitioner could not establish before the Committee that he belongs to Malai Arayan community which is his mother's caste. No acceptable materials were adduced by the petitioner. KIRTADS concluded as follows:

'The present study has revealed that the candidate has an advantageous start in life when compared to the members of Backward Tribal communities living in hilly areas that haven't produced a single doctor now like Aranadan, Eravallan, Koraga, Kattunayakan, Cholanaicken, Kurumba, Kadar, Paniyan, Mala Vettuvan, Malai Pandaram etc. In the instant case there is no evidence to show that the candidate has followed any customary mode of life cycle pattern of the Malai Arayan community. The candidate who has been brought up in the midst of Dheevera community, is devoid of affinity of conditions, milieu and circumstances, tribal traits etc. to be deemed as a member of scheduled tribe community.'

We, in this jurisdiction, find no reason to take a different view from that of the report submitted by KIRTADAS. Petitioner in W.P.C. No. 13479 of 2005 also filed W.P.C. No. 11087 of 2005 seeking a direction to respondents 1 to 4 to intimate the decision of the enquiry directed in Ext. P6 therein and also for other consequential reliefs. Learned single Judge did not grant any interim relief against which the petitioner filed W.A.No. 910 of 2005. A Division Bench of this Court on 3.5.2005 directed the respondents to admit the petitioner provisionally at his risk and cost and liable to be removed in the event of dismissing the Writ Appeal, We have on law and on facts found that the petitioner has no claim to be admitted under the scheduled tribe quota. Consequently the order passed by the Division Bench on 3.5.2005 directing provisional admission would stand set aside.

24. W.P.C. No. 2483 of 2005 was filed by M.V. Valsala and another seeking writ of mandamus directing the third respondent Tahsildar to issue community certificate to the second petitioner as belonging to Kanakkan community, which is a scheduled caste. Second petitioner's father belongs to Christian Jacobite Syrian community and mother belongs to Kanakkan community, which is a scheduled caste. School admission records of the second petitioner would indicate that she belongs to Jacobite Syrian community. First petitioner made request to the Tahsildar stating that her husband belongs to Christian Jacobite Syrian community. Even otherwise petitioners have not established before any of the authorities that though the first petitioner belongs to scheduled caste community and she was subjected to the same disadvantages and handicaps etc. of that community. In the absence of any evidence, in our view, Tahsildar is justified in not granting the certificate. Petitioners have amended the Writ Petition incorporating challenge against the government order dated 22.3.2005. But we have found that the challenge is not sustainable. W.P.C.No. 2483 of 2005 therefore lacks merits and is dismissed.

25. W.P.C. No. 2466 of 2005 was filed seeking a declaration that the petitioner is entitled to get the community certificate from the fourth respondent stating that she belongs to Hindu Mannan community. Petitioner's father belongs to Hindu Mannan community and mother belongs to Ezhava community. In the application preferred by the petitioner, she has not mentioned the name of the caste in the relevant

column. Column was left unfilled. Anyhow, petitioner's application for caste certificate has been dealt with only under Section 5(1) of Act 11 of 1996. Petitioner has submitted an application before the fourth respondent Tahsildar for the issue of community certificate. If the petitioner has got any grievance she can invoke the provisions of Act 11 of 1996 and establish her status. We therefore find no reason to entertain this Writ Petition at this stage.

26. W.P.C. No. 18983 of 2004 was filed by K.C. Mathai and his son Alex K. Mathew seeking a writ of certiorari to quash Exts. P4 and P5 orders. Ext. P5 is the anthropological report submitted by KIRTADS. Report would indicate that the first petitioner belongs to Christian Jacobite community which is not a scheduled caste or scheduled tribe community in the State. Second petitioner's mother was born as an offspring of an inter caste marriage. Her father belongs to Malai Arayan Christian community, a scheduled tribe community and mother belongs to Christian Marthoma community. After due enquiry, KIRTADS rejected the request holding that the candidate is an offspring of a Christian Jacobite father and a Christian mother who is an offspring of Malai Arayan Christian father and Christian Marthomite mother. The claim of the candidate for scheduled tribe Malai Arayan status rests only on his maternal grandfather. The candidate is an offspring of a Christian Jacobite father and a Christian mother who is an offspring of Malai Arayan Christian father and Christian Marthomite mother. It is also stated that the candidate and his brother are identified under the caste name of their parents one of whom is Christian Jacobite as stated by the candidate's father and that they have never enjoyed any scheduled tribe benefits during their educational career. Therefore the conduct and behaviour of the candidate showed that he is devoid of any tribal status, affinity of conditions, milieu, acceptance etc. to be deemed as a member of scheduled tribe community. Cogent reasons have been stated while rejecting the application for caste certificate. We may incidentally point out that first petitioner and another son had approached this Court in W.A. No. 983 of 2002 and obtained the benefit of the government order dated 25.1.1977 holding that the second petitioner therein is to be treated as scheduled tribe community. W.A.No. 983 of 2002, with due respect, has not been correctly decided. We are therefore inclined to accept the report of KIRTADS and reject the Writ Petition in view of the principles laid down by us. W.P.C.No. 18983 of 2004 therefore stands dismissed.

27. W.P.C. No. 16576 of 2005 was filed by another son of the first petitioner in W.P.C.No. 18983 of 2005 seeking writ of certiorari to quash Exts. P6, P7 and P8 orders and for a direction that the petitioner's application be considered for admission in the quota reserved for scheduled tribe. Petitioner's application was subjected to scrutiny by KIRTADS. On the basis of the report of KIRTADS application was rejected. Cogent reasons have been stated for rejecting the application and we find no illegality in the report to be interfered by us. W.P.C.No. 16676 of 2005 therefore would stand dismissed.

28. W.P.C. No. 7039 of 2005 was filed seeking a writ of mandamus directing the second respondent to issue community certificate based on Ext. P8. Petitioner was an applicant for entrance examination for M.D.S. course. He has not furnished any certificate in the prescribed form which is left blank. Clause 7(i) of the prospectus states that candidates claiming reservation under scheduled caste/scheduled tribe quota have to submit the community certificate in the prescribed form. Since the same was not furnished, application was considered as the general category. Petitioner submits that his father belongs to Christian Jacobite community and mother belongs to Christian Mala Araya community converted from Hindu Mala Araya. Petitioner could not establish his status. Hence no direction can be given in this Writ Petition.

29. W.P.C. No. 17317 of 2005 was filed seeking a writ of mandamus to restore the government order dated 25.1.1977 and to quash Ext. P10 government order dated 22.3.2005 and for a direction to the fourth respondent to issue caste certificate to the petitioner. Petitioner submitted her application for admission to B.Ed course. She applied for caste certificate stating that she belongs to Mala Araya community, but the same was not granted by the authorities. We find no reason to grant any direction as such. If the petitioner is so advised, she may make an application under the provisions of Act 11 of 1996 in the event of which the same would be considered in accordance with law.

30. M.F.A. No. 66 of 2004 is preferred under Section 12 (3) of Act 11 of 1996 to set aside the report of KIRTADS dated 27.04.2004. KIRTADAS found that the genealogical study has revealed that the claimant's father was an offspring of a

tribal and non tribal and their mother as a non tribal. KIRTADS found that the petitioner is not entitled to get the caste certificate. We express no final opinion on merits since appeal is pending. Let the appeal be disposed of in accordance with the principle laid down by us in the judgment. M.F.A. No. 85 of 2004 is also an appeal filed under Section 12 (3) of Act 11 of 1996 challenging the order passed by KIRTADS. This has also to be disposed of on merits in accordance with the principles laid down by us.

31. For the reasons stated above, all the Writ Petitions would stand dismissed. M.F.A Nos. 66 and 85 of 2004 be posted before the appropriate court to decide on merits on the basis of the principles laid down by the Full Bench.

K.A. Adbul Gafoor, J.

32. I agree with the conclusions reached by my learned brother Radhakrishnan, J. But I do prefer to add few words.

33. Can the children, or even the grand children of 'inter caste married couple', of whom, one belongs to Scheduled Caste or Tribe, claim to be members of such Caste or Tribe for the purpose of availing the privileges, protections, concessions, exemptions, special rights and other benefits as applicable to the members of Scheduled Castes or Tribes, including those made for the advancement of socially and educationally backward classes of citizens or SC/ST or for the reservation in appointments to ensure their adequate representation in public service? This is the moot question debated in this batch of cases.

34. In their attempt to get an affirmative answer to this question, the petitioners and appellants rely ultimately on G.O. (MS)No. 11/77/DD dated 25.1.1977, (hereinafter referred as G.O. 11/77) which directs that:

G.O.(MS)No. 298/61/ReV. dated 23.3.1961 will be adopted for determining the caste of the children born of intercaste marriage for all purposes, according to which the children will be treated as belonging to Scheduled Caste or Scheduled Tribe community if either of the parents belongs to that community'.

(emphasis supplied)

Later, Government cancelled the said order, as per G.O. (MS)No. 11/05/05/SGSTDD dated 22.3.2005 (hereinafter referred to as G.O. 11/05). The petitioners and the appellants, as the case may be, seek the benefit of G.O. 11/77 and few of them challenge G.O. 11/05. Therefore, it is necessary to examine the circumstances under which the said orders were happened to be issued, before we consider the legal efficacy of the former.

35. G.O. (MS)No. 298/61/Rev. dated 23.3.1961 discloses that the offsprings of intercaste married couple, irrespective whether one belongs to SC/ST or not, were being treated as belonging to mother's community and that if the mother belongs to a community which is entitled to the special concessions, the children also would be eligible for the same, unmindful of the community of their father. The said order further reveals that, with a view to extend concessions to more such persons and for encouraging intercaste marriage, Government directed that children born of intercaste marriage would be allowed 'all educational concessions given to SC/ST provided either the father or the mother belongs to SC/ST community and the annual income of the parents does not exceed Rs. 1080/- for pre-matriculation studies and Rs. 1,440/-for post-matriculation studies and technical courses'. The intention in issuing this G.O. is 'for encouraging intercaste marriages' and to 'extend the concessions to a large number of people.' This order does not determine the caste status of the incumbents born in intercaste marriages, even if one of the couple belongs to SC/ST. The benefit granted in this Government Order is not as if such offsprings belong to SC/ST. Had it been so, there would not have been income limit as made mention of in the said order, as those belonging to SC/ST were entitled to educational concessions and reservations irrespective of the income limit. Later Government issued G.O. 11/77 as clarification to a query raised by the Public Service Commission. That Government Order - apology to repeat - reads:

'After examining all aspects of the case, Government order that the principle enunciated in the G.O. read as 1st paper above (Government Order dated 23.3.1961) will be adopted for determining the caste of the children born of

intercaste marriages for all purposes, according to which, the children will be treated as belonging to Scheduled Caste or Scheduled Tribe community if either of the parents belonged to that community'.

(Emphasis supplied)

These are, in short, the circumstances under which G.O. 11/77 was issued. Thus, by this order, Government determines the caste status of a class of people as if they belong to Scheduled Caste/Scheduled Tribe.

36. Based on this order, several incumbents claimed reservation for admission to educational institutions including to professional courses and post-graduate studies in medicine and for public employment. There were large number of disputes in applying G.O. 11/77. Instances also were there of denying such benefits to the offsprings of intercaste married couple of whom one belonged to SC/ST. Cases, therefore, reached before this Court. A provision was also made in the prospectus relating to admission to professional courses that whenever such claim is raised, it will be subjected to closer scrutiny. On such scrutiny, it was also revealed that several of such claims could not have been admitted.

37. When cases came up before this Court on several occasions including in *Bijumon v. Commissioner for Entrance Examinations* (1993 (2) KLT 1074), *Commissioner v. Ramachandran* (1998 (1) KLT (SN) 68 at page 70), *State v. Thushara* (1998 (1) KLT 717), *Bindu v. State* (2000 (1) KLT 425), *Dr. Sreekala v. Union of India* (AIR 2000 Kerala 133), *Deepthi v. State* (ILR 2000 (1) Kerala 845), W.A.No. 1465/95, W.A.No. 983/02 etc., this Court never examined as to the legal competency of the orders issued as per G.O.11/77 and as to whether the State Government could competently determine the caste of a particular class of persons and; even if they are empowered to do so, whether they could treat them as belonging to Scheduled Caste or Scheduled Tribe.

38. In this batch of cases, we are called upon to decide this legal issue of substantial and public importance.

39. In the meantime, according to the State, the Apex Court in the decision reported in *Punit Rai v. Dinesh Chaudhary* : AIR 2003 SC4355 ruled that the caste of an offspring of an intercaste married couple shall be determined based on the caste of its father. It is stated to be based on the said dictum that Government issued G.O. 11/05 cancelling G.O. 1.1/77.

8A. 'A caste is nothing but a social class - a socially homogeneous class. It is also an occupational grouping with its difference that its membership is hereditary. One is born into it. Its membership is involuntary', so held a Constitution Bench of the Apex Court in *Indra Sawhney and Ors. v. Union of India* (1992 Suppl. (3) SCC 217). A Division Bench of this Court in *Haridasan v. State of Kerala* (2000 (2) KLT 913) held that 'the question of caste depends upon the caste in which the person is born'. This court also held that 'the crucial point is to ascertain the caste at the time of birth.'

40. In the separate judgment of His Lordship S.B. Sinha, J. in *Punit Rai's* case, it was pointed out:

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

His Lordship quoted with approval a passage from 'Caste in Modern India and other Essays' by M.N. Srinivas to the effect that '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.' His Lordship also quoted with approval a passage from 'Caste and the Law in India' by Justice S.B. Wad as follows:

'Traditionally, a person belongs to a caste in which he is born. The caste of the parents determines his caste....'

41. The caste of a person, thus, depends on birth. It is, thus, obvious that the Government cannot determine the caste of a particular person or a class of persons. If there is dispute, it depends upon the evidence as to in which caste one is born and is brought up, as to the practices and customs one may follow, the

acceptance of the incumbent by the caste or group in a caste to which he/she claims to belong and several other related aspects. It is to be determined by a competent authority based on evidence, in case of doubt or dispute. Government cannot, thus, issue any general order determining the caste of any particular class of persons. So, G.O.11/77 cannot have any effect in determining the caste of one, as Government cannot determine caste of any one or a group. Moreover, this G.O. has determined the caste of persons who are yet to be born even.

42. There is yet another aspect as well. Even if G.O. 11/77 is an order competently issued or is with legal backing at the time of its issue, it is no longer relevant now for determination of caste status or for the purpose of issuance of community certificates, because of the enforcement of the Kerala (Scheduled Castes and Scheduled Tribes) Regulation of Issue of Community Certificates Act, 1996 (Act 11 of 1996 hereinafter referred to with this number). Statement of Objects and Reasons to the said Act reveals that until its enactment, there was no law to regulate the issue of Scheduled Caste and Scheduled Tribe Certificate which is the proof for Scheduled Castes and Scheduled Tribe claim of an individual and that the Act is to achieve this object as well. The preamble to the Act shows that it was enacted to 'curb effectively the evil practices of securing such certificates by persons other than those belonging to the Scheduled Castes and Scheduled Tribes for claiming the benefit of reservation and such other benefits meant for the Scheduled Castes and Scheduled Tribes'. Section 3 thereof specifically provides that:

'Notwithstanding anything contained in any other law for the time being in force, any person belonging to any of the Scheduled Castes or the Scheduled Tribes claiming the benefit, concession, protection, exemption or reservation provided to such Castes or Tribes either for any appointment in public services or for admission into educational institutions exclusively intended for members of the Scheduled Castes or the Scheduled Tribes... shall prove his claim by a certificate issued for the purpose under this Act....'

Such a claimant shall make an application for the Community Certificate to the competent authority, (See Section 4) which 'shall satisfy itself about the

genuineness or otherwise of the claim made' by following the prescribed procedure (See Section 5). Thus, a machinery is statutorily provided for determining the caste status of an incumbent applying for community certificate. This Act shall have effect 'notwithstanding anything inconsistent therewith contained in any other laws for the time being in force or any instrument having effect by virtue of any such law' as per Section 26 thereof. Because of this overriding effect no officer will be able to issue community certificates merely based on G.O. 11/77. He has to cause an enquiry. Then alone he can get satisfied himself of the claim. Community certificate can be issued only based on facts so collected in such enquiry and not based on G.O. 11/77, which shall have no effect, since the enforcement of Act 11 of 1996. So in the wake of this enactment enforced from 7.3.1996, G.O.11/77 has no relevancy or enforceability or even existence.

43. As already mentioned, ordinarily one gets his/her caste on the basis of his/her birth and depending upon the caste of his/her parents. In other words, one shall be, on birth, deemed to be belonging to the caste of his/her parents. When the parents belong to two different castes, communities or religions, necessarily, the caste of the offspring shall be based on how it has been brought up; the custom and practice followed, acceptance by the community or group, the law governing the parents and related aspects. This is a matter to be probed by the competent authority to issue community certificate or by the authority designated to decide disputes on such matters and to be proved leading evidence by the parties who claim to belong to a particular caste or tribe. However, the State cannot have jurisdiction to determine the caste of a particular group of persons by a general order and that too, without due regard to their birth, how they are brought up etc.

44. G.O. 11/77 is to the effect that G.O. (MS)No. 298/61 dated 23.3.1961 will be adopted.

'for determining the caste of the children born of intercaste marriage for all purposes, according to which the children will be treated as belonging to Scheduled Caste or Scheduled Tribe community, if either of the parents belongs to that community.'

G.O.(MS)No. 298/61 dated 23.3.1961 does not contain any yardstick to be adopted for determination of caste, nor does it determine the caste of a particular person or class of persons. It only, as already mentioned, for the purpose of extending benefits to more persons and for encouraging intercaste marriage, directs that 'children born out of intercaste marriage will be allowed all educational concessions given to SC/ST', subject to certain income limits and nothing more, provided either their father or mother belongs to SC/ST.

45. Educational concessions mean the concessions granted by the State Government in the form of reduction in fees or concessions in board in hostels, free books etc. That order issued on 23.3.1961 does not give preference or extend reservation to any one over another, and it cannot.

46. Concession granted to one cannot defeat the right of another who has superior claims for admission based on the marks, merit or talent. So, it does not, in any way, take in any special provisions made for the SC/ST in terms of Article 15(4) of the [Constitution of India](#) which, in the ordinary sense, is conceived as reservations for admission to educational institutions.

47. When, thus, no principle is mentioned in the Government Order dated 23.3.1961, there is no question of adopting any principles therein, as ordered in G.O.11/77. The Government Order dated 23.3.1961 also does not treat such children 'as belonging to SC/ST community if either of the parents belongs to that community'. Such an understanding expressed in G.O.No. 11/77 is palpably wrong. Thus, G.O.11/77 is not one issued examining its legal impact.

48. The terms 'Scheduled Castes' and 'Scheduled Tribes' do have a legal connotation with a Constitutional emphasis. The definition of Scheduled Castes as contained in Article 366(24) is as follows:

'Scheduled Castes' means 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 purpose of this constitution.'

The term 'Scheduled Tribes' is also defined in similar manner as per Article 366(25), with reference to Article 342.

49. The power to specify any castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purpose of the Constitution be deemed to be Scheduled Castes, is vested in the President in terms of Article 341(1) of the [Constitution of India](#). The specification so made by the President by way of public notification can be varied, by excluding any caste, race or group or part therefrom or including any further thereto, only by law made by the Parliament in terms of Article 341(2). Same is the position with regard to specification of tribes or tribal communities or parts of or groups within such tribes or tribal communities, as Scheduled Tribes for the purpose of the Constitution, as per Article 342 of the [Constitution of India](#). Even by this process, either the President or the Parliament does not determine caste of a group of persons, but only specifies a caste, race, tribe or group or part thereof, as the case may be, as Scheduled Caste or Scheduled Tribe.

50. So, a particular community, caste, race or tribe or part or group thereof can be declared as Scheduled Caste or Scheduled Tribe initially by the President and a new group can be added to the lists only by a legislation by the Parliament. The State Government, cannot by an executive fiat, direct to treat any particular group of persons as Scheduled Caste or Scheduled Tribe. There is no legislative competence for the State to do so in the light of Articles 341 and 342. The extent of executive power conferred on the State, in terms of Article 162 of the [Constitution of India](#), coexists with the legislative power of the State Legislature. So, G.O.11/77 does not have any legal efficacy, enforceability or backing insofar as it determines the caste of a particular class of persons and treats them as belonging to Scheduled Caste or Scheduled Tribe for all purposes. It is, thus, not one competently issued.

51. As held in Punit Rai, the offsprings of intercaste marriage

'could not have relied upon the circular letter dated 3.3.1978 (in this case G.O.11/77), in the absence of any law.'

competently made. Therefore, following the said view, it is trite, an order like G.O.11/77 cannot confer any right on any incumbent, especially to get a preference over other citizens who are more eligible, better qualified and superior in suitability than him.

52. Whether a particular person is a member of the Scheduled Caste or Scheduled Tribe shall be determined with reference to his caste or race or tribe and considering whether such tribe, caste, race or tribe is included in the Presidential notifications under Article 341(1) or 342(1) or by any law made by the Parliament in terms of Article 341(2) or 342(2), as the case may be. It is not a domain of the State to treat any particular class or group within a caste or tribe as belonging to Scheduled Caste or Scheduled Tribe, as done in G.O.11/77.

53. As G.O.11/77 thus, does not have any legal backing, it also offends the mandate of equality enshrined in Articles 14 and 16 of the [Constitution of India](#) as well, insofar as it creates preferences in favour of few over others in the matter of admission to educational institutions or for appointment to public service. It also militates against Article 15 too, as it confers preference to few on the basis of caste or community, conferring them such caste status incompetently and without the authority of law and thus being beyond the fold of Article 15(4).

54. Articles 338 and 339 of the [Constitution of India](#) provide for establishment of National Commissions for Scheduled Caste and Scheduled Tribe. The functions of such Commissions as per sub-article (5) thereof include to investigate and monitor all matters relating to safeguards provided for Scheduled Caste and Scheduled Tribe and also to inquire into specific complaint with respect to the deprivation of rights and safeguards available to Scheduled Caste and Scheduled Tribe. The Commissions are also obliged to submit reports to the President regarding the working of such safeguards, as enjoined in sub-article 5(d) and (e) thereof, including as to the measures that should be taken by the Union or State for the effective implementation of the safeguards. So, if at all any group has any such complaint of deprivation of rights and safeguards available to Scheduled Caste or Scheduled Tribe, they can raise it before the Commission concerned and such Commission can recommend to the State Government about any action to be

taken. There is no contention before us that anything of that sort had happened before G.O.11/77 was issued. On the other hand, it ex facie reveals that it was issued to determine caste status of a class of persons, only following 1961 G.O., which really extends educational concessions alone.

55. The Apex Court held in Punit Rai's that,

'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 legislation.'

Equally, the State also cannot direct to reserve a seat or post, as the case may be, for a person, who does not, as per law, belong to 'the reserved category' for whom such reservation has been made. If at all a legislation is possible, that can only be a legislation by Parliament in terms of Article 341 or 342, as the case may be, and not by executive fiat like G.O.11/77. As G.O.11/77 does not have any legal efficacy or backing, being ultra vires to the constitutional provisions as found above, on its basis, no one can claim admission to a seat in an educational institution or appointment to a post in public service reserved, earmarked or set apart for persons belonging to Scheduled Castes or Scheduled Tribes upon competent orders/legislation.

56. Thus, as held by the Apex Court in Sobha Hymavathi Devi v. Setti Gangadhara Swamy : AIR 2005 SC800 :

'On a consideration of the relevant aspects, we are of the view that whether it be a reservation under Articles 15(4) or 16(4)..., the said reservation would benefit only those who belong to Scheduled Caste or Scheduled Tribe...'.

57. Scheduled Caste or Scheduled Tribe means a caste or tribe specified in the respective Presidential Order or Legislation by Parliament and not in an incompetent order like G.O.11/77. Therefore, the claim urged by the children/grand children of intercaste married couple of whom one belongs to SC/ST, simply based on G.O.11/77 shall have to be rejected.

58. When the Government has issued an executive order like G.O.11/77 and when it is later found out that it was an erroneous and incompetent one, Government can necessarily cancel it. That is what has been done in G.O.11/05. It is perfectly within the competence of the Government. Of course, whatever benefit anybody had drawn until its issuance based on G.O.11/77 cannot be taken away, but nobody including those who enjoyed such benefits until then, can any more claim any benefit after the issuance of G.O.11/05. So challenge against G.O.11/05 shall necessarily fail.

59. Even in the absence of G.O.11/05, G.O.11/77 cannot have any legal efficacy, because as already found above, no one can claim to be a member of the Scheduled Caste or Scheduled Tribe on its strength and as it is no longer in existence, because of the overriding provisions in Section 24 of Act 11/96.

60. In few cases in this batch, the father belongs to non-Scheduled Caste or non-Scheduled Tribe Hindus. They are certainly governed by Hindu Law. As held in Punit Rai:

'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.... The caste of the father, therefore, will be the determinative factor in absence of any law.'

and

'If a customary law is to be given a go-by 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.'

61. If father is not governed by Hindu Law, the practice prevalent in his caste/community has also to be looked into.

62. If at all any one has a case otherwise or that he/she is not governed by customary Hindu Law or the law, governing his/her father, or that he/she belongs to any other caste than that certified by the competent authority, as the case may

be, it is a special case and special situation. Again as held in Punit Rai

'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'.

G.O.11/77, which does not satisfy any legal requirement on any count, therefore, will not help such persons for determination of their caste.

63. On the other hand, Act 11/96 is intended to deal with such special case, meeting the legal requirement in that regard. It provides for a procedure for and to regulate the issue of Community Certificates to members of SC/ST. As per Section 3, any one claiming reservation for admission to an educational institution or in public employment has to prove his claim by a certificate issued, for the purpose under this Act, by the Competent Authority in manner prescribed. The Competent Authority, as mentioned already, has to satisfy itself about the genuineness of the claim before the issuance of the community certificate. That means, there shall be an enquiry by the competent authority. Even if a certificate is obtained and an application for admission to an educational institution is made on its basis, it can again be subjected to scrutiny by a Scrutiny Committee, as provided in Section 6 of the Act. The Scrutiny Committee will also conduct an enquiry through expert agency to ascertain whether the applicant belongs to SC/ST. The appointing authorities and heads of educational institutions are also empowered to cause further verification, wherever necessary, as per Section 7 of the Act. A Scrutiny Committee is constituted for verification as enjoined in Section 8. Section 8 further provides that:

'Any person belonging to Scheduled Castes or Scheduled Tribes or any appointing authority.... may make an application in such form and in such manner as may be prescribed by the scrutiny committee for verification of community certificates.'

Thus, even if the competent authority issues a community certificate that one does not belong to SC/ST, he can make an application to the Scrutiny Committee for verification of that certificate. Section 9 provides that 'the Expert Agency may conduct such enquiries' into the claim of an individual or group of individuals that he/they belong to SC/ST even, 'on petitions and complaints being received by it'.

So any one, in case he is denied of his claim for a certificate showing that he belongs to SC/ST can petition to the Expert Agency.

64. The enquiry to be conducted by the Competent Authority, Scrutiny Committee or the Expert Agency will be effective, as such authorities are vested with the powers of civil court in the matter of collecting evidence during such enquiry, as per Section 14.

65. Apart from that any one aggrieved by the order of the competent authority rejecting his application for community certificate can appeal to the next higher competent authority. This appellate power is conferred by Section 12 of the Act. Government is also invested with a power of revision for the purpose of satisfying themselves of the legality, regularity or propriety of any decision or order by any authority other than the Scrutiny Committee and to modify, vary or revise such order. If the order is passed by the Scrutiny Committee, appellate power is conferred on this Court under Section 12(3).

66. Thus effective provisions are made in Act 11/96 for determining the caste status of an incumbent claiming any type of reservation or privileges as applicable to SC/ST. When there is such statutory provision, no one can claim that he/she shall be issued with a community certificate merely based on the intercaste marriage contracted by his/her parents.

When, thus, G.O.11/77 does not meet the constitutional requirement to declare any class of persons as belonging to SC/ST or to determine their caste status and when it offends the Constitutional provisions guaranteeing fundamental rights, as found above and is thus ultra vires to the [Constitution of India](#) and when it does not have existence at all in the eye of law in the wake of enforcement of Act 11/96, no one can seek a declaration that he/she belongs to Scheduled Caste or Scheduled Tribes on its basis, nor can he/she seek a direction to the authorities to issue community certificate showing him/her as belonging to Scheduled Caste or Tribe simply on the basis of G.O.11/77. Such persons also cannot get admission to educational institutions or appointment in public services, availing reservation applicable to Scheduled Caste or Scheduled Tribes, unless the competent authority certifies him/her as belonging to the Scheduled Caste or Scheduled Tribe

in accordance with procedure prescribed by Act 11/96. In none of these cases, except in M.F.A.Nos. 66 and 85 of 2004, the procedure in terms of Act 11/96 has been completed. When competent authority has declined the community certificate as applied for, the aggrieved persons can approach the higher authority by way of appeal under Section 12 and also Government in revision under Section 13. They can also approach the Scrutiny Committee or even petition to the Expert Agency as provided in Section 8 and 9 respectively. This court cannot, under Article 226 of the [Constitution of India](#), interfere in such matters involving disputed questions of facts relating to the caste status of one, which involve collection of evidence and materials at length, when efficacious machineries are provided by law to resolve such issues, and unless and until such remedies are exhausted. On the other hand, M.F.A.Nos. 66 and 85 have to be decided separately, as those are statutory appeals in terms of Section 12(3) of Act 11/96, by the concerned Bench, in accordance with law.

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