Reserved
A.F.R.

IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

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Special Appeal (Defective) No. 788 of 2004

The State of U.P. & Ors.
Vs.
Shiv Kumar Bhardwaj

With

Special Appeal No. 1313 of 2004

The Registrar, Vibhagiya Prikshyan (U.P.), Allenganj, Alld. & Ors.
Vs.
Arun Kumar

With

Special Appeal 1314 of 2004

The Registrar, Vibhagiya Prikshyan (U.P.), Allenganj, Alld. & Ors.
Vs.
Nirmala Rai

Appearance:

For the Appellants : Mr. M.S. Pipersenia, S.C.
For the Respondents : L.D. Rajbhar, Advocate

Hon'ble C.K. Prasad, C.J.
Hon'ble Arun Tandon, J.

All these appeals arise out of a common judgment dated 10.03.2004 passed by a learned Single Judge in Civil Misc. Writ Petition No. 2958 of 2004, Civil Misc. Writ Petition No.3357 of 2004, Civil Misc. Writ Petition No. 3359 of 2004 and analogous petitions.
Shorn of unnecessary details, facts giving rise to the present appeals are that the writ petitioner - respondents (hereinafter referred to as the 'respondents') were candidates for admission to B.T.C. Course - 2001. For welfare of Backward Classes and for grant of concession to the most backward amongst the Backward Classes, the State Government by Order dated 12th May, 1961 decided to issue list of De-notified and Vagrant Tribes. It has been observed in the said Order that 'though there are no Scheduled Tribes recognised as such in this Pradesh yet there are certain tribes residing in the State which deserve special attention in the same way as is available to Scheduled Tribes in other States'. The notification itself included few tribes and it further provided that lists of De-notified and Vagrant Tribes shall be issued separately. In the list of De-notified Tribes, the community Bhar is amongst the De-notified Tribes within the districts of Azamgarh, Varanasi, Faizabad, Jaunpur and Gorakhpur. Respondents averred that their community 'Bhar' finds place in the list of de-notified Tribes (Vimukt Jati) and, therefore, entitled for admission to the B.T.C. Course - 2001 treating them as members of Scheduled Tribes. The plea was accepted and the learned Single Judge directed the appellants herein to consider the candidature of the respondents treating them as Scheduled Tribe candidates belonging to Vimukt Jati for admission to the said B.T.C. Course to the seats reserved for Scheduled Tribe category.
Respondents-appellants, aggrieved by the aforesaid direction, have preferred these appeals.
Mr. M.S. Pipersenia, Standing Counsel, appears for the appellants, whereas respondents are represented by Mr. L.D. Rajbhar.
Article 366 (25) of the Constitution of India defines the Scheduled Tribes. Same reads as follows:-
"Article 366. In this Constitution, unless the context otherwise requires, the following expression have the meanings hereby respectively assigned to them, that is to say -
(1)X X X X
(25)"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 purposes of this Constitution."

Article 342 (1) of the Constitution of India, inter alia, confers power on the President to specify the tribes to be Scheduled Tribes in relation to a State. Article 342 reads as follows:-
Article 342. (1) The President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or part of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union Territory, as the case may be.
(2) Parliament may be law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

In exercise of the power conferred under Article 342 (1) of Constitution, the President has notified the Constitution (Scheduled Tribes) Order, 1950. Article 342 (2) of the Constitution confers power on the Parliament by law to include or exclude from the list of Scheduled Tribes specified in the notification issued under Clause (1) any tribe or tribal community or part thereof. The community Bhar does not find place either in the notification issued by the President under Article 342 (1) of the Constitution or any law made by the Parliament under Article 342 (2) of the Constitution of India.
In view of aforesaid, only question, which falls for determination is as to whether a tribe, not finding place either in the Presidential Order made under Article 342 (1) or law made by the Parliament under Article 342 (2) of the Constitution of India, can be treated as Scheduled Tribe by an Order of the State Government?
Clause (1) of Article 342 of the Constitution, as quoted above, provides for specification of the tribes or tribal communities or part of or groups within tribes or tribal communities as the Scheduled Tribes in relation to a State or Union Territory and Clause (2) thereof confers power on the Parliament to include or exclude from the list of Scheduled Tribes specified in the Presidential Order issued under Clause (1), any tribe or tribal communities etc. In our opinion, if any change is needed in the list appended to the Presidential Order, that can be done only by law made by the Parliament. Nobody can either include or exclude or substitute or declare synonyms of the Scheduled Tribes mentioned in the Presidential Order, except the Parliament by law. Reference in this connection can be made to a decision of the Supreme Court in the case of Prabhat Kumar Sharma Vs. Union Public Service Commission & Ors., (2006) 10 SCC 587, in which it has been held as follows:-
"16. There is no dispute on the proposition that if the Presidential Notification does not contain any specific class or tribe or a part of, then it is for Parliament to amend the law and the schedule and include in and exclude from the schedule, a tribe or tribal community or part of or group within any tribe or tribal community for the State. The Courts must read the lists of the Scheduled Castes and Scheduled Tribes under Articles 341 and 342 read with Articles 366(24) and (25) as they find them and accept their ordinary meaning. Neither the Government nor the judiciary can add or subtract to the list of Scheduled Castes and Scheduled Tribes. But, the Court would have the limited jurisdiction to the extent of finding out whether the community which claims the status as Scheduled Caste or Scheduled Tribe, was, in fact, included in the schedule concerned. To that limited extent, the court would have the jurisdiction but, otherwise, the court is devoid of power to include in or exclude from or substitute or declare synonyms to the Scheduled Castes or Scheduled Tribes or parts thereof or group of such castes or tribes."

We are, therefore, of the opinion that in case the State Government is satisfied that a particular tribe is to be included in the list of Scheduled Tribes and requires modification in the Presidential Order, it can make an enquiry and forward its recommendation so that a legislation is introduced in the Parliament to amend the Presidential Order. Reference in this connection can be made to a decision of the Supreme Court in the case of Palghat Jilla Thandan Samudhaya Samrakshna Samithi & Anr. Vs. State of Kerala & Anr., (1994) 1 SCC 359, in which it has been held as follows:-
"21. The enquiry that was ordered by the High Court in the order under appeal to "find out whether there was a community called Thandan distinct from Ezhavas in Palghat District in areas other than in the erstwhile Chittur Taluk and also in any other place in erstwhile Malabar District" has proceeded to a conclusion on the basis of an interim order passed by this Court on January 16, 1989. It is not for the State Government or for this Court to enquire into the correctness of what is stated in the report that has been made thereon or to utilise the report to, in effect, modify the Scheduled Castes Order. It is open to the State Government, if it so deems proper, to forward the report to the appropriate authority to consider whether the Scheduled Castes Order needs amendment by appropriate legislation. Until the Scheduled Castes Order is amended, it must be obeyed as it reads and the State Government must treat Thandans throughout Kerala as members of the Scheduled Castes and issue community certificates accordingly.

Under our Constitutional scheme, no authority, other than the Parliament, has been conferred with the power to amend the Presidential Order. Opinion of the State Government in regard to backwardness of a community shall not itself confer the State Government the power to declare a particular community as a Scheduled Tribe. The Supreme Court had the occasion to consider this question in the case of State of Maharashtra & Ors. Vs. Mana Adim Jamat Mandal, (2006) 4 SCC 98, in which, in categorical terms, it has been held as follows:-
"9. It is now well-settled principle of law that no authority, other than Parliament by law, can amend the Presidential Orders. Neither the State Governments nor the courts nor the tribunals nor any authority can assume jurisdiction to hold inquiry and take evidence to declare that a caste or a tribe or part of or a group within a caste or tribe is included in the Presidential Orders in one entry or the other although they are not expressly and specifically included. A court cannot alter or amend the said Presidential Orders for the very good reason that it has no power to do so within the meaning, content and scope of Articles 341 and 342. It is not possible to hold that either any inquiry is permissible or any evidence can be led in, in relation to a particular caste or tribe to say whether it is included within the Presidential Orders when it is not so expressly included or exclude a particular caste or tribe or group of castes or tribes when they are expressly included."

A Division Bench of this Court in the case of Vijay Prakash Vs. State of U.P. Ors., 2005 All. L.J. 1697, had the occasion to consider this question. In the said case, a writ petition was filed to treat the members of Bhar/Rajbhar community as belonging to Scheduled Tribes in view of Circulars and Government Orders issued by the State Government from time to time. Said writ petition was dismissed and, on appeal, the Division Bench, in paragraphs 21 and 22 of the judgment, held as follows:-
"21. Thus, it is apparent that the Courts are not the competent forum to decide the controversy involved in this writ petition. The Circulars/Government Orders issued by the State of Uttar Pradesh from time to time have microscopically been examined by the learned Single Judge and a finding has been recorded that the State itself is not competent to bring such a Circular/Government Order and the learned Judge has also examined the provisions of Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes (Amendment) Act, 2002, wherein the castes Bhar and Rajbhar have been included in the Backward Classes. There is nothing on record to show that the petitioner/appellant being a candidate belonging to de-notified tribe automatically becomes entitled to the benefit meant for Scheduled Tribes.
22. More so, there could be no justification for any authority to declare a particular candidate belonging to Scheduled Tribes for the purpose of admission in educational institution and O.B.C. for service purpose. Such a circular order being outside the scope of the competence of the State is liable to be ignored or quashed suo motu..."

In view of what we have observed above, we, unhesitatingly, hold that the State Government does not possess any power to declare a particular tribe as a Scheduled Tribe.
To put the record straight, Mr. Rajbhar, appearing on behalf of the respondents, submits that the only prayer made by the respondents was to implement the Order of the State Government conferring members of Bhar community the benefits available to Scheduled Tribes and the learned Single Judge had directed for its enforcement, which can not be said to be illegal. In support of the submission, reliance has been placed on a Full Bench decision of this Court in the case of Tara Prasad Misra Vs. State of U.P. & Ors., (1990) 2 UPLBEC 905, and our attention has been drawn to the following passage from paragraph 19 of the judgment:-
"19......
In this case there was an office memorandum which provided certain benefits to the employees and the Honble Supreme Court issued a writ for implementation of such office memo as the said memo created a right in favour of the respondent. In view of these citations it is now settled that administrative orders can also be enforced by the Court if the said orders confer upon a person any right or interest."

We do not find any substance in the submission of Mr. Rajbhar and the authority relied on is clearly distinguishable. In the present case, as we have held that the State Government does not possess the power to declare a particular community as a Scheduled Tribe and that being beyond the competence of the State Government, no writ can be issued for its enforcement. In the case of Para Prasad Misra (supra), there was no such deficiency in the office memorandum and in the background thereof, the Court held that it confers right on the person.
In view of what we have observed above, the order of the learned Single Judge cannot be allowed to stand.
In the result, the appeals are allowed, impugned judgment dated 10.03.2004 passed by the learned Single Judge is set aside, but without any order as to costs.
February 4th, 2010
AHA
(C.K. Prasad, C.J.)

(Arun Tandon, J.)

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