
(2024) 05 OHC CK 0101

Orissa High Court

Case No: AHO No.79 Of 2001

Munda Gudia Tula

APPELLANT

Vs

Ishan Kumar Paul

RESPONDENT

Date of Decision: May 8, 2024

Acts Referred:

- Constitution of India, 1950 - Article 15(3), 15(4), 16(4), 39, 46

Hon'ble Judges: Chakradhari Sharan Singh, CJ; M.S. Raman, J

Bench: Division Bench

Advocate: S.K. Dash, Abinash Nayak, Swapnil Roy

Final Decision: Dismissed

Judgement

Chakradhari Sharan Singh, CJ.

1. The present intra-Court appeal has been filed under Clause 10 of the Letters Patent Appeal of the High Court of Patna read with Clause 4 of the

Orissa High Court Order, 1948 assailing an order dated 18.10.2000 passed by a learned Single Judge in a writ petition i.e. OJC No.4774 of 1999

whereby a learned Single Judge of this Court has quashed an order dated 30.01.1993 passed by the respondent No.4, whereby he had declared a sale

deed dated 19.03.1964 as void with a direction for restoration of the land in favour of the appellant herein.

2. TheÂ foundationalÂ factsÂ relevantÂ forÂ adjudicationÂ ofÂ the present case are not all in dispute. The appellant is a member of the

Schedule Tribe (in short, "ST"). Her father-in-law, also a member of the ST owned an immovable property admeasuring 6.47 acres (in short

land in question"). The appellant had made an application before respondent No.4 with an allegation that the land in question was under unlawful occupation of respondent No.6 (not a member of ST). In a proceeding under the provisions of the Odisha Scheduled Areas Transfer of Immovable Property (by Schedule Tribes) Regulation, 1956 (hereinafter referred to as "the Regulation") the respondent No.6 denied the allegation with a plea that his father-in-law, a member of ST, had purchased the land in the name of his daughter respondent No.7 who was married to him (respondent No.6) and requisite permission from the competent authority in that regard was obtained. He produced an attested copy of the permission order No.13434/79 issued in OSATTP Case No.37/1979 of 21.11.1979 in respect of Plot No.139 under Khata No.65/5 in village Similiguda admeasuring 2.79 acres. Respondent No.6 claimed himself to be a member of ST which was found by the respondent No.4 to be untrue. Respondent No.4 concluded, in his order dated 30.01.1993 that the permission order No.13434/79 issued in OSATTP Case No.37/1979 on 21.11.1979 was incompetent to validate the registered sale deed dated 19.03.1964. He also concluded that respondent No.7, in whose name the land in question was purchased, ceased to be a member of the ST for the purpose of Regulation 2 of the Regulation consequent upon her marriage to respondent No.6, not a member of ST. Respondent No.4 accordingly held that respondent No.6 had grabbed the land of a member of ST fraudulently taking advantage of simplicity, ignorance and illiteracy of the vendor. Accordingly, respondent No.4 had directed for restoration of the land in favour of the appellant after declaring the said registered sale deed dated 19.03.1964 executed in favour of respondent No.7 to be void. While directing correction of the records accordingly, respondent No.4 imposed penalty on respondent No.6 @ Rs.200/- per acre per year of unauthorized occupation.

3. Challenging the said order dated 30.01.1993, respondent Nos.1, 2 & 3 approached this Court by filing the aforesaid writ petition i.e., OJC No.4774 of 1999. By the impugned order dated 18.10.2000, the learned Single Judge allowed the writ petition setting aside the order passed by the respondent No.4, taking into account the admitted fact that respondent No.7 was admittedly a member of ST. As has been noticed above, the respondent No.4

had set aside the sale deed invoking Section 3(1) of the Regulation on the ground that respondent No.6 ceased to be a member of the ST after her marriage to respondent No.6 (since deceased). The learned Single Judge opined in the impugned order that merely by virtue of marriage to a non-member, a member of the ST does not cease to be a member of the ST and therefore, no permission was required for the transaction made in the year 1964. A submission was advanced before the learned Single Judge that the transaction was Benami inasmuch as the property was purchased by the father of respondent No.6 in the name of respondent No.7. The learned Single Judge found that father of respondent No.7, in any case, was a member of a ST.

4. Assailing the impugned order passed by the learned Single Judge, learned counsel appearing on behalf of the appellant has submitted that the status of respondent No.7 as ST, in whose name the property was purchased by the sale deed dated 19.03.1964, stood altered with her marriage to respondent No.6, not a member of ST. In support of his submission, he has heavily relied on the Explanation added to Section 3 of the Regulation introduced by the Odisha Scheduled Areas of Transfer of Immovable Property (By Scheduled Tribe) Amendment Regulation, 1976 (â€˜Amendment Regulation, 1976â€™ for short) which came into force with effect from 31.01.1977, which reads as under:

â€œExplanation- for the purposes of this sub-section, a transfer of immovable property in favour of a female member of a Scheduled Tribe who is married to a person who does not belong to any Scheduled Tribe, shall be deemed to be a transfer made in favour of a person not belonging to a Scheduled Tribe.â€

He has argued that the said explanation being clarificatory in nature, should be read as if it was there since very promulgation of the Regulation with effect from 04.10.1956.

5. Learned counsel for the appellant has relied on the following Supreme Court's decisions to contend that the explanation appended to the Regulation by way of subsequent insertion is not a substantive provision which is merely clarificatory in nature and, therefore, the explanation should be read as if it has existed from the very inception of the Regulation:-

(i) Bengal Immunity Co. Ltd. v. State of Bihar (AIR 1955 SC 661);

(ii) Yeddapati Venkateswaralu v. State of Andhra Pradesh (AIR 1991 SC 704);

(iii) Sulochana Amma v. Narayan Nair, (AIR 1994 SC 152); and

(iv) S. Sundaram Pillai v. V.R. Pattabhiraman, (AIR 1985 SC 582).

6. Reliance has also been placed on the Supreme Court's decision in the case of Bihta Co-operative Development and Cane Marketing Union

Ltd. v. Bank of Bihar (AIR 1967 SC 389) to submit that there could be more than one reason for a statutory explanation, namely, to make clear

what seems to be obscure, or to make explicit that which is implicit, to render patent and obvious that which is latent.

7. He has also relied on a decision of this Court in the case of Kalara Dei and others v. Sudam Charan Mohanty and others

reported in 1989 (II) OLR 580 wherein, while considering the challenge to a transaction made by a lady belonging to ST marrying a non-tribal

Khandayat without necessary permission of the competent authority, underlying purpose behind the promulgation of regulation and subsequent

insertion of the explanation, i.e., to provide protection against exploitation of ST persons has been explained.

8. We deem it apt to record at this juncture itself that this Court's decision in the case of Kalara Dei (supra) has no

application in the present facts and circumstances of the case, which was rendered after coming into force of the Amendment Regulation, 1976 with

effect from 31.01.1977. The decision rendered in the case of Kalara Dei (supra) is because of the said Explanation introduced in 1977.

9. The controversy involved in the present case poses the following two questions of seminal significance:-

(i) Whether a woman, who by birth is a member of ST consequent upon her marriage to a man not belonging to ST, ceases to be a member of the ST?

(ii) Whether the Explanation inserted by way of amendment under Regulation 3 of the Regulation can be said to be clarificatory in nature, and therefore, it should have retrospective effect, despite clear stipulation in the Amendment Regulation, 1976 that it shall come into force at once?

10. Mr. S.K. Dash, learned counsel appearing on behalf of the appellant has attempted to convince this Court that a woman, on marriage becomes a

member of the family to which her husband belongs to and she gets herself transplanted in that family. He submits that respondent No.7, a member of ST after having married to respondent No.6 lost her status as a ST, and therefore, the sale deed executed by the appellant in her favour was a forged document by operation of Regulation 3 of the Regulation.

11. In our opinion, this question is no more res integra in view of series of decisions of the Supreme Court laying down the law that caste is determined

by birth and cannot be changed only by marriage. It will be useful to refer to the decision in the case of Valsamma Paul (Mrs.) vs. Cochin

University and others reported in (1996) 3 SCC 545, to begin with.

12. In the said case, Valsamma, a Syrian Catholic Woman (a forward class) had married a Latin Catholic man (a backward class). A question fell for

consideration before the Supreme Court as to whether by virtue of her marriage to a person belonging to a backward class, she could claim the benefit

of reservation in appointment. The Supreme Court answered the said question in negative and held in paragraph 34 as under: -

“34. In Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde and R. Chandavarappa v. State of Karnataka this Court had held that economic

empowerment is a fundamental right to the poor and the State is enjoined under Articles 15(3), 46 and 39 to provide them opportunities. Thus, education,

employment and economic empowerment are some of the programmes the State has evolved and also provided reservation in admission into educational

institutions, or in case of other economic benefits under Articles 15(4) and 46, or in appointment to an office or a post under the State under Article 16(4).

Therefore, when a member is transplanted into the Dalits, Tribes and OBCs, he/she must of necessity also have had undergone the same handicaps, and must have

been subjected to the same disabilities, disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation. A 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 either under Article 15(4) or 16(4), as the case may be. Acquisition of the status of

Scheduled Caste etc. by voluntary mobility into these categories would play fraud on the Constitution, and would frustrate the benign constitutional policy under

Articles 15(4) and 16(4) of the Constitution.

(emphasis added)

It may be noted at this juncture that in a subsequent decision in the case of Rameshbhai Dabhai Naika v. State of Gujarat and Others reported in

(2012) 3 SCC 400 the Supreme Court explained the observations made in paragraph 31 of Valsamma (supra) which reads as under: -

“31. It is well-settled law from Bhoobun Moyee Debia v. Ramkishore Acharj Chowdhary that judiciary recognised a century and half ago that a husband and wife are one under Hindu law, and so long as the wife survives, she is half of the husband. She is 'Sapinda' of her husband as held in Lulloobhoy Bappoobhoy Cassidass

Moolchund v. Cassibai. It would, therefore, be clear that be it either under the Canon law or the Hindu law, on marriage wife becomes an integral part of husband's

marital home entitled to equal status of husband as a member of the family. Therefore, the lady, on marriage, becomes a member of the family and thereby she becomes a member of the caste to which she moved. The caste rigidity breaks down and would stand no impediment to her becoming a member of the family to which the husband belongs and she gets herself transplanted.”

In case of Rameshbhai Dabhai Naika (supra), the Supreme Court ruled that ratio of Valasamma’s decision lies in paragraph 34 of the judgment

and what was said earlier in paragraph 31 of the judgment, was in facts of that case and it would be an error to take it as the ratio of the decision. The

Supreme Court added that it would be wrong to take paragraph 31 of the Valsamma (supra) as a premise for drawing the corollary or the direction

that the child born from an inter-caste marriage or marriage between a tribal and a non-tribal would invariably take his caste from his father.

13. The Supreme Court further held in the case of Rameshbhai Dabhai Naika (supra) that the view expressed in Valsamma Paul (Mrs.) (supra) that

in an inter caste marriage between a tribal and a non-tribal, the woman gets transplanted into the family of her husband and takes her husband was

clearly in not affirming with the view expressed by the Constitution Bench of the Court in V.V. Giri vs. Dippala Suri Dora (AIR 1959 SC 1318).

14. It is noteworthy that in the case of V.V. Giri (supra) the election of an returned candidate was challenged on the ground that he had ceased to be a member of ST and had become a Kshatriya which was deemed to be proved by the leading evidence to show that he had adopted customs and rituals of Kshatriya caste and marriages in his family were celebrated as they would be amongst the Kshatriya. Rejecting the said contention, a three

Judge Bench of the Supreme Court held in paragraph 23 as under: -

“In dealing with this contention it would be essential to bear in mind the broad and recognized features of the hierarchical social structure prevailing amongst the Hindus. It is not necessary for our present purpose to trace the origin and growth of the caste system amongst the Hindus. It would be enough to state that whatever may have been the origin of Hindu castes and tribes in ancient times, gradually castes came to be based on birth alone. It is well known that a person who belongs by birth to a depressed caste or tribe would find it very difficult, if not impossible, to attain the status of a higher caste amongst the Hindus by virtue of his volition, education, culture and status. The history of social reform for the last century and more has shown how difficult it is to break or even to relax the rigour of the inflexible and exclusive character of the caste system. It is to be hoped that this position will change, and in course of time the cherished ideal of casteless society truly based on social equality will be attained under the powerful impact of the doctrine of social justice and equality proclaimed by the Constitution and sought to be implemented by the relevant statutes and as a result of the spread of secular education and the growth of a rational outlook and of proper sense of social values; but at present it would be unrealistic and utopian to ignore the difficulties which a member of the depressed tribe or caste has to face in claiming a higher status amongst his co-religionists. (emphasis added)

15. It is also noteworthy at this juncture that the following question had come up for consideration on reference before a Full Bench of Bombay High Court in case of Rajendra Shrivastava vs. The State of Maharashtra reported in (2010) 112 (2) Bom LR 762:-

“If a woman, who by birth belongs to a scheduled caste or a scheduled tribe marries to a man belonging to a forward caste, whether on marriage she ceases to belong to the scheduled caste or the scheduled tribe?”

16. After having examined Valsamma Paul (Mrs.) (supra) and V.V. Giri (supra), the Full Bench of Bombay High Court in Rajendra Shrivastava

(supra) opined that the observations made in paragraph 31 of the decision in Valsamma Paul (Mrs.) (supra) could not be read as the ratio laying down

that on marriage, a wife is automatically transplanted into the caste of her husband. The Bombay High Court held in the case of Rajendra Shrivastava

(supra) that when a woman born in SC/ST and marries to a person belonging to a forward caste, her caste by birth does not change by virtue of

marriage. A person born as a member of SC/ST has to suffer from disadvantages, disabilities and indignities only by virtue of belonging to the

particular caste which he or she acquires involuntarily on birth. The suffering of such a person by virtue of caste is not wiped out by a marriage with

the person belonging to a forward caste. The label attached to a person born into a scheduled caste or a scheduled tribe continues notwithstanding the

marriage.

17. The opinion of the Full Bench decision of the Bombay High Court in the case of Rajendra Shrivastava (supra) has been fully endorsed by the

Supreme Court in the case of Rameshbhai Dabhai Naika (supra), as the only correct view. After having said so, the Supreme Court leaving no scope

of ambiguity held in paragraph 47 as under: -

“47. In light of the discussion made above it is clear that the view expressed in Paragraph 31 of the Valsamma judgment that in an inter-caste marriage or a marriage

between a tribal and a non-tribal the woman must in all cases take her caste from the husband, as a rule of constitutional law is a proposition, the correctness of which

is not free from doubt. And in any case, it is not the ratio of the Valsamma decision and does not make a binding precedent.”

Further, in the case of Sunita Singh vs. State of U.P. reported in (2018) 2 SCC 493, the Supreme Court has reiterated the view that the caste is

determined by birth which cannot be changed by way of marriage only.

18. In view of the above discussion, after having noticed some of the Supreme Court's decision, we come to a definite conclusion, while answering

question No.1 that if a woman belongs to ST by birth and marries to a man not belonging to ST does not cease to be a member of ST.

19. Coming to the question no.(ii) as to whether the Explanation introduced by Amendment Regulation, 1976 can have retrospective effect, the same

being clarificatory in nature as argued by Mr. S.K. Dash, learned counsel for the appellant, we deem it apt to delve into the consequence of

incorporation of the said Explanation by way of amendment. Regulation 3 (1) of the Regulation is a non-obstante clause and provides that

notwithstanding anything contained in any law for the time being in force, any transfer of immovable property situated within a scheduled area, by a

member of the ST shall be absolutely null and void and of no force or effect whatsoever unless made in favour of another member of ST. The

said regulation, thus, proscribed transfer of immovable property by a member of ST to a person, not a member of an ST. To put it differently, the said

provision permitted, transfer of an immovable property by a member of ST in favour of another member of ST, for which no previous consent in

writing of the competent authority was required.

20. While answering question No.(i) as above, we have reached a definite conclusion that the status of a woman as a member of the ST, does not

change consequent upon her marriage to a person, who is not a member of ST. For the first time, with the insertion of Explanation in Section 3, the

regulation provides that transfer of immovable property in favour of a female member of ST, who marries to a person, who does not belong to any ST,

shall be deemed to be transferred made in favour of a person not belonging to ST. Apparently, thus, by a deeming fiction, transfer of an immovable

property by a member of ST in favour of a person married to someone who does not belong to ST, thus, came to be prohibited by inserting Explanation

by way of amendment though Amendment Regulation, 1976 which came into force with effect from 31.01.1977 which is the date of its publication in

the official gazette.

21. It is trite that unless contrary intention appears, no statute can be construed to have a retrospective operation. In the present case, we find that no

such intention appears on careful reading of the Amendment Regulation, 1976. It rather mentions that the regulation shall come into force at once i.e.

from the date when it was notified in the official gazette. Had it been the legislative intent to give a retrospective effect, the same would have been mentioned in the Amendment Regulation, 1976.

22. Further, if the Explanation inserted by way of Amendment Regulation, 1976 is to be read retrospectively right from the date of promulgation of the Regulation, 1956, it shall have disastrous consequences of all the such transactions right from 1956 till 1976 becoming null and void which were otherwise valid. We are, however, of the view that the Explanation was inserted with a purpose i.e. to remedy a mischief in the nature of acts of the persons to frustrate the legislative intent enshrined in Regulation 3 of the Regulation, i.e., acquisition of immovable property by persons, who are not members of the ST, in the name of members of ST, in the garb of marriage of such member of ST to a non-member. The Explanation in question puts a new bar on transfer of immovable property by a member of ST consequent upon his/her marriage to a person, who is not a member of ST.

23. We reiterate, with reference to the law laid down by the Supreme Court in the case of L.R. Bothers Indo Flora Ltd. Vs. Commissioner of Central Excise reported in (2020) SCC Online SC 705; Hitendra Vishnu Thakur vs. State of Maharashtra reported in (1994) 4 SCC 602 and Union of India Vs. Zora Singh reported in (1992) 1 SCC 673 that all amendments are deemed to apply prospectively unless expressly specified to apply retrospectively or intended to have been done so by the legislature.

24. In the case of S. Sundarraman Pillai vs. V.R. Pattabiraman (AIR 1985 SC 582), the Supreme Court has explained the object of an Explanation as under:

“Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is-

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.â€(Highlighted for emphasis).

Merely because of a particular provision in a statute is labelled as an Explanation, it does not mean that it is inserted merely with an view to explain the meaning of words contained in Section of which it forms a part. True scope and effect of an Explanation can only be judged by its express language and not merely by label given to it. (See *Vrajalal Manilal and Co. v. State of MP* (1986) 63 STC 1 (SC) : AIR 1986 SC 1085.

25. In the case of *Hiralal Ratanlal vs. State of U.P.* (AIR 1973 SC 1034), the Supreme Court has observed that if on a true reading of an Explanation, it appears that it has widened the scope of main section, effect should be given to legislative intent, notwithstanding the fact that the legislature named that provision as an Explanation.

26. We may not, at this juncture, lose sight of the fact that by operation of the Explanation, the transfer of immovable property in favour of a female member of ST, who is married to a person who does not belong to any ST has been treated as transfer made in favour of a person not belonging to ST for the purpose of regulation 3 by a deeming fiction, which is suggestive of the fact that such transfer of immovable property which did not fall earlier within the mischief of Regulation 3 of the Regulations, by the said deeming provision have been brought within the purview of the said regulation.

27. In view of the discussions noted above, we conclude while answering question No.(ii) that the Explanation under Regulation 3 of the Regulations inserted by the Amendment Regulation, 1976 is not clarificatory in nature rather it introduces a substantive provision prohibiting transfer of an immovable property by a member of ST to a female member of ST after her marriage to a person, who is not a member of ST. In the absence of any

legislative intent to apply the said Explanation retrospectively, the said regulation cannot be given retrospective effect. We hold that the said

Explanation under Regulation 3(1) of the Regulation came into force with effect from 31.01.1977 i.e. the date of publication of notification in the official gazette.

28. After having answered two questions noted above, we are of the view that the opinion recorded by the learned Single Judge in the impugned order

that merely by virtue of marriage, a member of ST does not cease to be a member of ST, is based on sound principles of law. That being the position,

no permission was required for the transactions which had taken place in 1964, stipulated under Regulation 3(1) of the Regulation by a competent authority.

29. We, accordingly, do not find any merit in the present intra-Court appeal, which is dismissed. There shall be no order as to costs.

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