(2010) 02 MAD CK 0191

Madras High Court

Case No: W.A. No. 2182 of 2000

The Tahsildar, Taluk Office and Others		APPELLANT
	Vs	
Arivudai Senthil and Others		RESPONDENT

Date of Decision: Feb. 1, 2010

Acts Referred:

- Constitution of India, 1950 - Article 15(1), 15(4), 340
- Hindu Marriage Act, 1955 - Section 7A, 7A(2)

Hon'ble Judges: R. Banumathi, J; M.M. Sundresh, J

Bench: Division Bench

Advocate: M. Dhandapani, Special Government Pleader, for the Appellant; No appearance, for the Respondent

Final Decision: Allowed

Judgement

M.M. Sundresh, J.
This writ appeal has been filed by the Appellants being aggrieved against the order passed by the learned single Judge in allowing the writ petition filed by the Respondents.

2. The brief facts of the case in a nutshell are as follows:

The Respondents are the children of one B. Eraiyarasan and Kamalam. Eraiyarasan belongs to Sozhiya Vellala Community and his wife Kamalam belonged to Vanniya Kula Kshatriya Community. Hence, the marriage between the parents of the Respondents was an inter caste marriage. At the time of marriage, both the community of the parents of the Respondents were Backward Class community. However, the community of the mother of the Respondents was subsequently classified as Most Backward Class Community.

3. The sixth Appellant herein has passed the Government Order in G.O. Ms. No. 477, Social Welfare Department, dated 27.6.1975, whereby the children born out of inter-caste marriages have been considered to belong to either the community of the father or the mother, according to the way of life, in which they are brought up. The parents of the children are also directed to file a declaration to that effect that they have been brought up as belonging to either the community of the father or the mother as the case may be. The said Government Order is extracted hereunder:

GOVERNMENT OF TAMIL NADU ABSTRACT

Children born to inter-caste married couple -Determination of Community - Orders issued.

SOCIAL WELFARE DEPARTMENT

G.O. Ms. No. 477 Dated: 27.6.1975

ORDER

The Government haven been extending certain concessions to the members of Scheduled Castes, Scheduled Tribes and Backward Classes from time to time. A question has arisen about the determination of the community of the children born of inter-caste marriage.

2. The Government after carefully examining the question direct that the children born of inter caste marriages, that is marriages--

i) between a person of Scheduled Tribe and another of a Scheduled Caste or Backward Class or Forward Class;

ii)between a person of a Scheduled Caste and another of a Backward Class or Forward Class; and

iii) between a person of a Backward Class and of a Forward Class".

Shall be considered to belong to either the community of the father of the community of the father of the community of the mother according to the declaration of the parents regarding the way of life in which the children are brought up and that the declaration in respect of one child will apply to all children.

(BY ORDER OF THE GOVERNOR)

4. Claiming the status of the mother, who was parent in a Most Backward Class community, the first Respondent made an application. The first Appellant has rejected the request of the first Respondent for issuance of the community certificate as the one belonging to that of the mother on the ground that the Government Order passed in G.O. Ms. No. 477, Social Welfare Department, dated 27.6.1975 does not apply to a case of inter-caste marriage between Backward Class

community person and Most Backward Class community person. In other words, the first Appellant has rejected the request of the first Respondent by holding that the Government Order in G.O. Ms. No. 477 dated 27.6.1975 does not apply to the case of the first Respondent, since it does not cover an inter-caste marriage between Backward Class community and Most Backward Class community parents. Secondly, the first Appellant has also rejected the case of the first Respondent on the ground that the declaration from the parents especially from the mother of the first Respondent having not obtained the request for issuance of the certificate as the one belonging to the Most Backward Class community cannot be considered. Challenging the said order passed by the first Appellant dated 9.7.91, the first Respondent preferred an appeal to the second Appellant, who also rejected the same in proceeding dated 24.7.91. Being aggrieved against the above said order, the Respondents preferred a writ petition seeking a writ of cer-tiorarified mandamus to quash the proceedings of the Respondents 1 and 2 with a further direction to the first Appellant to issue the community certificate to the Respondents as belonging to Most Backward Community.

5. The learned single Judge upon hearing the Respondents and the Appellants, has allowed the writ petition. Being aggrieved against the said order, the Appellants have preferred the writ appeal.

6. We have heard the Government Pleader Mr. K. Dhandapani for the Appellants and none appeared for the Respondents

7. The question to be decided in the appeal is as to whether the Government Order passed by the sixth Respondent in G.O. Ms. No. 477, Social Welfare Department, dated 27.6.1975 is applicable to the case of the Respondents or not. A reading of the Government Order referred above would clearly show that the said order deals with inter casts marriages between the following categories of classes.

i) between a person of Scheduled Tribe and another of a Scheduled Caste or Backward Class or Forward Class;

ii) between a person of a Scheduled Caste and another of a Backward Class or Forward Class; and

iii) between a person of a Backward Class and of a Forward Class.

Therefore, the said Government Order does not deal with a marriage between a person belonging to Backward Class community and Most Backward Class community. Admittedly, at the time of the marr age, both parents of the Respondents belonged to Backward Class community. Subsequently, the community of the mother has been declared as Most Backward Class community. The learned Special Government Pleader Mr. K. Dhanda-pani on instructions submitted that there is no Government Order governing the inter-caste marriage between Backward Class community and Most Backward Class community. Even

among the Backward Class inter-caste marriages, there is no Government Order indicating the community which should be adopted by the children. The mother of the Respondents is said to have died at the time of making the application. The affidavit filed in support of this writ petition does not make any mention about the date of the death. Since, the Respondents have not appeared before this Court, no particulars about the said fact could be obtained.

8. The Government Order passed by the sixth Appellant governing the children born out of the inter-caste marriages is only a concession granted by the State Government. Such a concession cannot be extended by the Court of law in favour of a party. Further, it is seen that in view of the death of the mother of the Respondents, the declaration could not be furnished to the first Appellant. In our considered view, such declaration is required to be considered provided the Respondents are eligible to get a community certificate as that of their mother as stipulated under the Government Order. Therefore, in the absence of the same, the Respondents cannot seek as a matter of right that they are entitled to get community certificate as if they belong to the same community as that of their mother.

9. The Constitution of India strives for a classless society. Such a classless society is the ideal society which is the ultimate object of the Constitution. The Constitution by its Preamble, Fundamental Rights and Directive Principles has created a secular state and the duty of such state is to establish an egalitarian social order. Therefore, the sixth Appellant herein with a laudable object has passed the Government Order providing certain concession to the children born out of the inter-cast marriages by encouraging inter-caste marriages. If the goal of secularism is to be achieved, inter-caste marriages would ultimately go a long way in creating a classless society. The caste is identified as a form of class. Therefore, the object of the sixth Appellant in issuing the Government Order is laudable and in accordance with the Constitution. It is also to be noted that the Government order passed by the sixth Appellant has also been upheld by the Full Bench of this Hon''ble Court reported in (2003) 1 MLJ 1, M. Arthi (Minor) represented by mother v. Sate of Tamilnadu and others.

10. The said concession has been granted by the State Government by virtue of the Government Order in order to give social uplift-ment to the children born out of the inter-caste marriages. The children born out of the said wedlock form an independent and distinct group of their own. Therefore, unless and until, the said newly emerging group is encouraged the ultimate object of the Constitution and the state cannot be achieved.

11. Further, in the present case on hand as observed earlier, the Respondents were born out of the marriage between Backward Class community and Most Backward Class community parents. The children born out of the such marriages have not been considered in the said Government Order and there is no other Government

Order governing such children. In Hindu law, a husband and wife are considered as one. After the marriage, a wife is considered as half of the husband and she is a sapinda. Therefore, when the wife becomes part of the husband and husband being the head of the family, the children born between them would partake the community of the husband in the normal circumstances. However, the said children can claim the status of their mother provided that the relevant Government order allows such a claim on the satisfaction of the condition mentioned therein that they have been following the community of, the mother. Of course, the question as to whether the children are following the community of the mother or father depends upon the facts of each case to be enquired and decided by the competent authority. It is also to be seen that in the present case, there is no averment in the affidavit filed in support of this writ petition by the Respondents that they have been following the community of the mother while she was aliving and even thereafter. Further, as observed above, the Government Order relied on by the Respondents does not provide for such a contingency as in the case of the Respondents. In the judgment reported in Mrs. Valsamma Paul Vs. Cochin University and others, , the Hon''ble Supreme Court has observed as follows:

16. The Constitution seeks to establish a secular socialist democratic republic in which every citizen has equality of status and an opportunity, to promote among the people dignity of the individual, unity and integrity of the nation transcending them from caste, sectional, religious barriers fostering fraternity among them in an integrated Bharat. The emphapsis, therefore, is on a citizen to improve excellence and equal status and dignity of person. With the advancement of human rights and constitutional philosophy of social and economic democracy in a democratic polity to all the citizens on equal footing, secularism has been held to be one of the basic features of the Constitution (Vide: S.R. Bommai v. Union of India) and egalitarian social order is its foundation. Unless free mobility of the people is allowed transcending sectional, caste, religious or regional barriers, establishment of secular social-ist order becomes difficult. In State of Karnataka v. Appa balu Ingale this Court has held in para 34 that judiciary acts as a bastion of the freedom and of the rights of the people. The Judges are participants in the living stream of national life, steering the law between the dangers of rigidity and formlessness in the seamless web of life. A Judge must be a juris endowed with the legislator''s wisdom, historian''s search for truth, prophet''s vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future to decide objectively, disengaging himself/herself from every personal influence or predilections. The Judges should adapt purposive interpretation of the dynamic concepts under the Constitution and the Act with its interpretative armoury to articulate the felt necessities of the time. Social legislation is not a document for fastidious dialects but means of ordering the life of the people. To construe law one must enter into its spirit, its setting and history. Law should be capable to expand freedom of the people and the legal order can weigh with utmost equal care to provide the

underpinning of the highly inequitable social order. Judicial review must be exercised with insight into social values to supplement the changing social needs. The existing social inequalities or imbalances are required to be removed readjusting the social order through rule of law. In that case, the need for protection of right to take water, under the Civil Rights Protection Act, and the necessity to uphold the constitutional mandate of ebolishing untouch-ability and its practice in any form was emphasised.

17. Usha M. Apte in her The Sacrament of Marriage in Hindu Society from Vedic period to Dharmasastras (1978 Ed.) stated at p.13 that inter-caste marriages were prevalent in the period of Rig Veda. She quoted thus:

Savasva, Kaksivat and Vimada all belonged to Brahmin families but they married daughters of the kings i.e. Ksatriya girls. Even Cyavana married a Ksatri) a girl. On the other hand Sasvati i.e. daughter of the saga Angirasa, was married to king Asanga. The king Svanaya Bhavayavya i.e. brother-in-law of Kaksivat was married to Brahmani wife of Angirasa (of VIII 1.34). Even marriage of Yayati and Devayani (X.63.1) is of the same type i.e. Ksatriya male marrying a Bralimani.

From the Brahmanas and the Upanishads, she also quoted at p.41 thus:

Mahidasa Aitareya was the seer of the Ai-tareya Brahmana. He was the son of Itara i.e. a mother who was other than a Brahmani. The word can be interpreted also as ''son of Itara''. In this case he would be a child born of extramarital connections."

18. At p.189 she stated that although the Sastrakaras accept the inter-caste marriage of anu-loma type, certainly they did not approve of it. To them such marriages led to intermixture of Varnas which could lead to social chaos. She pleaded for simplification of the marriage rights and avoidance of waste of money and material.

19. In Hindu Law of Marriage and Stridhana by G. Banerjee, 2nd Edn., 1896, it has been stated at pp.68-69 that by inter-caste marriages amongh Brahmanas, Kshatriyas, Vaisyas and Sudras, which were allowed in Vedic period, there arose a number of mixed classes, which have been treated in the 10th Chapter of Manu; and further, by a division of the Sudras according to their occupations, there arose a number of sub-castes; such being the nature and origin of caste, the prohibition of inter-marriage applies only with reference to the foru primary castes, and was inapplicable to sub-division of the Sudra caste. Quoting from Pandaiya Telaver v. Puli Telaveri from the judgment of Scotland, C.J., it was concluded that the general law applicable to all classes or tribes does not seem opposed to marriage between individuals of different sects or divisions of the same clas or tribe, and even as regards the marriage between individuals of a different class or tribe, the law appears to be no more than directory. Although it recommends and inculates a marriage with a woman of equal class as a preferable description, yet the marriage of a man with a woman of a lower class or tribe than himself appears not to be an

invalid marriage, rendering the issue illegitimate.

20. Dr Paras Diwan in his 2nd Edn. Of Law of Marriage and Divorce stated at p.75 that in inter-sect marriages in anuloma form, a male of superior caste marries a female of inferior caste; and in pratiloma marriage a male of inferior caste marries a female of superior caste. During British Raj, pratiloma marriage came to be considered as invalid and obsolete but anuloma marriage was held valid. Customary inter-caste marriages were held valid. They were performed under Special Marriages Act, 1872. The Arya Marriages Validation Act, 1937 permitted performance of both anuloma and pratiloma marriages under the auspices of the Arya Samaj. Inter-sub-caste marriages were validated under the Hindu Marriage (Removal of disabilities) Act, 1946. The Hindu Marriage Validity Act, 1949 permitted performance of both forms of inter-caste marriages. Under the Hindu Marriage Act, 1955 inter-caste marriages among all castes are valid as under the Act marriage between any two Hindus is a valid one. At p.76 he stated that under muslim law intersect marriages between Muslims belonging to different sects or schools are vlaid. The Christian Marriage Act permitted marriage between Roman Catholics and Protestants. Among Parsis there are no sects or denominations. It would thus be clear that in Hindu social order, the prohibition of inter-caste couple resulted in shunning the inter-caste marriages as a social mobility and resulted in rigidity in social structure. The Hindu Marriage Act has done away with that rigidity and made valid the inter-caste marriages. Section 7-A of the Hindu Marriage Act introduced an amendment in the State of Tamil Nadu providing that marriages made between any two Hindus in any form solemnised in the presence of relatives, friends or other persons in a simplified form are a valid marriage; and by statutory operation of Sub-section (2), such marriages held earlier to the commencement of Hindu Marriages (Madras Amendment) Act, 1957 are to be regarded as good and valid in law, doing away with any customary practice or usages to be mandatory. The Tamil Nadu Act 21 of 1957 cam into force with effect from 20.1.1968.

21. The Constitution through its Preamble, Fundamental Rights and Directive Principles created a secular State based on the principle of equality and non-discrimination, striking a balance between the rights of the individuals and the duty and commitment of the State to establish an egalitarian social order. Dr K.M. Mun-shi contended on the floor of the Constituent Assemble that

We want to divorce religion from personal law, from what may be called social relations, or from the rights of parties as regards inheritance or succession. What have these things got to do with religion, I fail to understand? We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If, however, in the past, religious practices have been so construed as to cover the whole filed of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation. Religion must be restricted to spheres which

legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation"

22. In the onward march of establishing an egalitarian secular social order based on equality and dignity of person, Article 15(1) prohibits discrimination on grounds of religion or caste identitties so as to foster national identity which does not deny pluralism of Indian culture but rather to preserve it. Indian culture is a product or blend of several strains or elements derived from various sources, in spite of inconsequential Variety of forms and types. There is unity of spirit informing Indian culture throughout the ages. It is this underlying unity which is one of the most remarkable everlasting and enduring feature of Indian culture that fosters unity in diversity among different populace. This generates and fosters cordial spirit and toleration that make possible the unity and continuity of Indian traditions. Therefore, it would be the endeavour of everyone to develop several identities which constantly interact and overlap, and prove a meeting point for all members of different religious communities, caste, sections, Sub-sections and regions to promote rational approach to life and society and would establish a national composite and cosmopolitan culture and way of life.

Reading of the said judgment would clearly indicate that the community other than that of a father is not a matter of right. The Hon''ble Apex Court has also observed in para 13 of the judgment as follows;

13. In A.S. Sailajav. Princiual, Kurnool Medical College the Petitioner, daughter of A.S. Radhakrishna, an advocate of Cuddapah in Andhra Pradesh, had initially appeared for Common Entrance Examination for 1984-85 for admission into Medical College but failed. For the Common Entract Examination for 1985-86 she described herself to be daughter of the natural father Radhakrishna but in the application for admission made on 13.7.1985, she claimed that she was adopted by one B. Si-varamaiah, (Shephered), a Backward Class in Andhra Pradesh and sought admission on that basis. She secured 417 marks out of 600 and when she claimed to be an OBC, but was not given admission, she filed a writ petition in the A.P. High Court for direction to the College to admit her as a Backward Class Group-D. The High Court considered the interplay of adoption under the Hindu Adoption and Maintenance Act, 1956 and the protective discrimination under Article 15(4). It held that the negative endowments of men are by no means equal, The mind of children brought up in culturally, educationally and economically advanced atmosphere is accounled highly they are bound to start the race of life with advantages. It would apparently have its inevitable profound effect on the quality of the child bora in that atmosphere. The children born amongs Backward Classes would not start the race of life with the same quality of Life. It would, therefore, be necessary to identify the competing interest between diverse sections of society and it is the duty of the Court to strike a balance between competing claims of different interests. Citizens

belonging to a group of Backward Classes identified by a appropriate authority or the commission, as a part of that class, fulfilling the traits of socially and educationally backward among that group, would alone be eligible for admission as Backward Class citizens under Article 15(4). In that event, the Court declined to go into the question whether such person is socially or educationally backward which is an exclusive function of the commission/authority appointed under Article 340 of the Constitution. But any person who would attempt, by process of law, and seek to acquire the status of such a Backward Class, should satisfy that he/she suffered the same handicaps or disadvantages due to social educational and cultural backwardness.

The said observation would make it clear that a duty is cast upon the person who claims the concession of the status of the parent who was born in Backward Class community by satisfying the authorities that he was born and brought up in a social environment which was educationally, culturally and economically placed in a disadvantageous position. Therefore, in the absence of the same, a certificate from the first Respondent is not automatic. That is the reason why a declaration has been insisted by the first Respondent and also made as a condition precedent in the Government Order.

12. Hence, on a consideration, the above said legal position and also on the facts of the present case on hand, we are constrained to hold that in as much as the Government Order is not applicable to the Respondents, they are not entitled to get a relief sought for in the writ petition. The learned single Judge has merely proceeded that the Government Order is applicable to the Respondents which as observed earlier does not apply to the Respondents. Therefore, we are constrained to allow the writ appeal filed by the Appellants. Accordingly the same is allowed and the order of the learned single Judge is hereby set aside.

13. While allowing the writ appeal, we also note that at the time of passing the Government Order, the division between the Backward Class community and Most Backward Class community was not available. We were also informed on our enquiry by the Special Government Pleader that there is no specific Government Order covering the children born out of the inter-cast marriage between a person belonging to the Backward class community and Most Backward Class community. When the present Government Order covers an inter-caste marriage between a person of Backward Class and Forward Class, then there cannot be any reason for not providing a Government order covering children born out of a person of Backward community and Most backward community. We hope that the Government would consider the said anomaly, objectively and take appropriate steps. We also direct the Registry to mark a copy of the order passed in the writ appeal to the learned Advocate General to forward the same to Government for appropriate action in this regard.

14. The writ appeal is allowed. No costs.