(1993) 08 PAT CK 0032

Patna High Court

Case No: Civil Writ Jurisdiction Case No. 10593 of 1992

Nityanand Sharma and another	APPELLANT
Vs	
The State of Bihar and others	RESPONDENT

Date of Decision: Aug. 11, 1993

Acts Referred:

- Constitution of India, 1950 - Article 14, 21, 341, 342, 342(1)
- Official Languages Act, 1963 - Section 5

Citation: (1993) 2 PLJR 535

Hon'ble Judges: S.B. Sinha, J; G.C. Bharuka, J

Bench: Division Bench

Advocate: M.S. Madhup, Rajeshwar Rai and Bijoy Kumar Bose, for the Appellant; P.K. Sahi, Rajesh Prasad Chowdhury and Abhimanyu Sharma, for the Respondent

Judgement

S.B. Sinha, J.

Whether the petitioners who are ''Lohar'' by caste are members of the Scheduled Tribe is the question involved in this writ application. Shortly put the fact of the matter reads thus :

Pursuant to an advertisement, the petitioners applied for taking admission in the Medical College. According to the petitioners, they are ''Lahars'' by caste and, thus, are members of Scheduled Tribes in view of the notification issued by the President of India in the year 1976 and the information book issued by the Bihar Public Service Commission, a copy whereof is contained in Annexure 4 to the writ application; from a perusal thereof it would appear that in item no. 20 shows that ''Lohar'' has been mentioned as one of the Scheduled Tribes for the entire State of Bihar. The petitioners have also annexed a caste certificate dated 10.10.1991 granted by the Sub-Divisional Officer, Muzaffarpur, to the effect that they are ''Lohar'' by caste which is contained in Annexure 5 to the writ application.

2. Admittedly, the petitioners were declared successful in the written entrance test held for admission in the Medical College and in the merit list the name of petitioner no. 1 is at serial no. 12 and that of petitioner no. 2 at serial no. 46. They, however, were denied admission on the ground that they are not members of Scheduled Tribe.

3. The petitioners in support of their claim that ''Lohars'' are members of Scheduled Tribe have relied upon a judgment of this Court in C.W.J.C. No. 1034 of 1991 (Hari Sharan Vs. The State of Bihar) which is contained in Annexure 7 to the writ application, a judgment of Supreme Court of India dated 21.9.1992 passed in SLP No. 8429 of 1992 as also the judgment dated 12.9.1990 of the Supreme Court of India passed in Civil Appeal No. 4361 of 1990.

4. The State, on the other hand, has contended that in terms of Constitution (Scheduled Tribes) Order, 1950, ''Lohars'' are not members of Scheduled Tribe, but only ''Lohras'' or ''Loharas'' are.

5. In the counter-affidavit filed on behalf of the State it has been contended :

That ''Lohara'', ''Lohra'' which is listed as a Scheduled Tribe in Bihar appear to have definite tribal origin. H.H. Risley in his book "Tribes and Castes" of 1981 reprint mentions ''Lohara'' as a sect of Mundas in Chotanagpur and ''Lohra'' as a synonym for Asura and ''Lohar''. It may be noted that both Mundas and Asura are notified as Scheduled Tribes in Bihar. Apparently, only those ''Loharas'' (sic) origin to Asur and Munda seem to have been notified as Scheduled Tribes in Bihar. It is thus evident that Lohar is a distinct occupational group and can''t be treated as identical and community to Lohara, Lohra.

That the aforesaid facts are further evident from perusal of English version of order of Bihar and West Bengal and Hindi version of the said order, while in Hindi version of order for West Bengal Lohara, Lohra is given as equivalent of Lohara, Lohra, in Bihar. Lohar is apparently a mistake for Lohara.

That thus it is manifest that petitioner being Lohar does not belong to Scheduled Tribes and is thus not entitled to any benefit of a Scheduled Tribe.

6. Article 341of Constitution of India empowers the President of India to specify the castes, races or tribes or parts of or groups within castes, races or tribes by public notification who shall for the purposes of Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory, as the case may be.

7. Article 342of the Constitution of India reads as follows :

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 parts of or groups within tribes or tribal communities who 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.

Parliament may by 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.

(Underlining is ours)

8. The list of Scheduled Tribes, admittedly, is contained in Constitution (Scheduled Tribe) Order, 1950.

9. In terms of Article 342(1) of the Constitution of India, only ''tribe'' or ''tribal community'' or groups within the tribes or tribal communities'' can be declared as Scheduled Tribes in relation to the State or the Union Territory, as the case may be.

10. Under Article 342of the Constitution of India, thus, a person who does not belong to member of a tribe or a tribal community, cannot be specified as Scheduled Tribe.

11. The word ''Tribe'' or ''Tribal community'' have definite connotation. The Dictionary meaning of ''Tribe'' is :

A race of people, now applied esp. to a primary aggregate or people in a primitive or barbarous condition.

12. Admittedly, the petitioners Nityanand Sharma and Manoj Kumar Sharma are residents of Muzaffarpur and Deoghar districts respectively. It is not their case that they are members of any tribe or tribal communities. The Districts of Muzaffarpur and Deoghar have also not been declared as "Scheduled Areas".

13. In terms of Article 342of the Constitution of India, Parliament enacted the Constitution (Scheduled Tribe) Order, 1950. The said Order was amended by Scheduled Caste and Schedule Tribes Orders (Amendment Act) 1976, being Act No. 108 of 1976. In terms of section 4of the said 1976 Amendment Act, the Scheduled Tribes Order was amended in the manner and to the extent specified in Second Schedule thereof.

Constitution (Scheduled Tribes) Order, 1950, as amended by the said 1976 Amendment Act is contained in the appendix 3 there to Item No. 22 of the said Order specifics ''Lohara'', ''Lohra'' as Scheduled Tribes.

14. In the said Act, therefore, ''Lobar'' has not been mentioned as a member of the Scheduled Tribe whereas ''Lohra'' or ''Lohara'' have been.

15. What has been produced before us is the Hindi version of 1976 Notification as also the Information Book published by the Bihar Public Service Commission. In the Hindi version of the aforementioned 1976 Notification ''Lobar'' has been mentioned

as a member of Scheduled Tribe.

16. It is not in dispute that ''Lobars'' ate blacksmiths or Karmakars being an occupational group and belonged to Backward Classes.

17. Article 342of the Constitution of India creates a legal fiction. Such a legal fiction has to be given its full effect to but there by any caste or tribe or tribal community which does not come within the purview of Constitution Scheduled Castes and Scheduled Tribes Order cannot be included therein.

In terms of Article 342(2) of the Constitution of India, the same can be only done by an Act of Parliament. By reason of the aforementioned 1976 Act, inter alia, ''Lohra'' or ''Lohara'' have been added in Item No. 22 of 1976 Amendment Act.

18. The fact that on the one hand ''Lohar'' or ''Lohra'' and ''Lohara'' on the other, are different is evident from the Book ''Tribes and Castes of Bengal'' Volume II written by H.H. Risley wherein ''Lobar'' has been described as Blacksmith of Behar, Chota Nagpur, and Western Bengal.

19. In that treatise, it has been stated :

Lohar, a sub-caste of Barhi in Bihar who only work in Iron. They are, however, distinct from, and do not inter marry with the Lohar caste. The latter are probably Dravidian descent, while former appear to be an occupational group.

Lohar, a synonym for Kamar in Behar; a mul or section of the Naomulia or Majraut sub-caste of Goalas in Behar ; a section of Kamis in Darjeeling.

So far as ''Lohar'' of Behar are concerned, the Learned Author says :

In Bihar the caste work as blacksmiths and carpenters while many have taken to cultivation. They buy their material in the form of pigs or bars of iron. Iron smelling is confined to the Lohars of Chota Nagpur, and is supposed to be a much less respectable form of industry than working up iron which other people have smelted. In the Santhal Parganas Lohars often cultivate themselves while the women of the household labour at the .....

The other sub-caste of ''Lohra'' or ''Loharas'' have been stated by the Learned Author as follows :

Lohara, a sept of Mundas in Chota Nagpurm, Lohar-Agaria, a sub-tribe of Agarias in Chota Nagpur. Loharatengi, a section of Rejwars in Western Bengal. Loharbans, iron, a totemistic sept of Chiks; a section of Ghasis in Chota Nagpur. Lohar-kamar-, a sub-caste of Kamars in Midnapur. Loharkoriya, a section of Bhats. Lohar Manjhi, a sub-caste of Lohars in Manbhum. Lohra, a synonym for Asura and Lohar, Lohra, Asur, a sub-tribe of Asuras inn Chota Nagpur.

20. ''Lohra'' or ''Loharas'' are different than the ''Lohars'' in Bihar as ''Lohars'' as noticed hereinbefore ranked with ''Koiris'' and ''Kurmis'' whereas ''Lohra'' or

''Loharas'' are merely sub-castes, a sept of Mundas in Chota Nagpur or sub-tribes of Asurs.

21. In Ranchi District, ''Lobar'' has never been considered to be a tribal communities whereas ''Loharas'' have been.

22. In the book Manual of Chota Nagpur Tenancy Laws written by Sinha & Chattopadhyaya, it has been stated as follows :

Lohra-Lohara : In Chotanagpur, the Lohras live with other tribal and non- tribal people viz., the Mundas, the Oraons, the Chilkbaraiks, the Ahirs, the Swansis, the Rajputs, the Hajams etc. In such mixed villages, the number of Lohra families varies from one to ten. Their villages are surrounded by hill ranges covered with thick forests. These forests contain a number of game viz., the hares, the porcupines, the tigers, wild fowls, etc., besides valuable timbers, namely, Sal, Deodar, Simal, Imli, Bair, Pipar, Mango, Jamun, Bel, Mahua, Kusum, Ked. Blacksmithy is the main occupation of the Lohras but availability of game in their locality lends them to practice hunting, when they are free from their main occupation. Their women and children collect seasonal fruits from the jungle which are consumed by them and are not sold. Besides this, the wood is used by them in the house construction.

It settles all disputes of grave nature. Of late, a panchayat has been established by the Government. Uptill now the Lohras have not become interested in it, or in its election.

Some of their traditional laws are as follows :

1. Inheritance is patrilincal. The property is partitioned equally after father''s death.
2. Sexual relationship or marriage within the clan is a social offence.

3. Divorce is granted on grounds of cruel treatment, barrenness and adultery.

4. The position of witches are unsatisfactory. When detected they are liable to be expelled from the village.

Marriage : Marriage negotiation is started by the boys''s side. The boys'' father along with other relatives goes to girl''s village for starting the negotiation. The girl is before them. They, then fix up the bride-price. The bride-price includes Rs. 12/- or more and three saris. If it is accepted by the boy''s father, the marriage date is finalised.

The marriage takes place in the month of Chait, Baisakh, Jeth, Magh and Falgun. On the fixed day, the boy''s side go to the girl''s village for performing the marriage. They are received cordially and are given food and drink. After taking rice-beer, they dance and sing. On the other hand, the boy and the girl sit parallel to each other in the marriage booth called Marwa. The boy applies vermillion on the forehead of the girl thrice from the little finger of his right hand. The girl repeat the same thing. Their hands are then united. They, then leave the marriage booth and join the

dancing party. The Barat returns with the bride, the same day.

Death : The Lohras bury their dead in the grave yard called Masna. Those who the of small pox, Cholera, pregnancy are not buried, in the Masna. They are carried to the river and are buried there. The corpse is carried on a cot by four persons. The women do not go to the Masna with the corpse. On reaching there the corpse is laid into the gravel, head to the north. It is then filled with stones, earth and twig or trees.

Festival : The festivals observed by the Lohras are Fagua and Sohrai. On ''Fagua'' they spray colour and Abir on their kinsmen and villagers. Sohrai puja is celebrated in the month of Kartik. This is done by those Lohras who own cattle. A fowl is sacrificed in the cattle-shed and in the evening the houses are lighted.

The learned Authors having bracketted ''Lohras'' and ''Loharas'', therefore, appear to be of the opinion that they belonged to the same tribe.

23. This vexed question came up for consideration before different Courts in connection with litigations arising out of the provision of section 71-A of the Chota Nagpur Tenancy Act.

24. In the Scheduled areas of Chota Nagpur region, entries found in respect of some persons are Lobars, although they have been claiming themselves to be Lohras or Loharas.

25. This aspect of the matter had also been considered in various decision of Ranchi Bench of this Court. Reference in this connection may be made in Nand Kumar Sahu Vs. The State of Bihar (1988 BLT 17) Liton Sahu Vs. The State of Bihar (1988 BLT 4) and Chand Mahto and others vs State of Bihar (1989 BBCJ 296).

26. The question as to whether Lobar castes in Bihar should be extended the benefits of the tribe in the State of Bihar cannot, the respondents have relied upon the comments of the Registrar General of India dated 14.1.1992 as contained in Annexure A to the counter-affidavit which reads as follows :

According to available ethnographic information Lohar is a genetic term representing those who work on iron. Being an occupational group one finds Lohar who owe origin to different castes. Even among tribes there are sects of group who work on iron and are known as Lohar.

According to Riliey, "The Lohars are large and heterogeneous aggregate, comprising members of several different tribes and castes, who in different parts of the country look up the profession of working in iron, of the various sub-castes...the Kanaujia claim to be the highest in lank, and they alone have a well marked set of exogamous sections. They regard Vishwani...as their legendary ancestors, and worship him as the tuolary deity of their crafts. The Magahaiya seems to be the indigeneous Lohars of Bihar, or opposed to the Kanuajia and Motiniya, who profess

in have come in terms the North-West Provinces. The Kamia Lohars found in Champaran have immigrated from Nepal and are regarded as ceremonically ucloan...The Manbhum Lohars acknowledge three sub-caste-Lohar Manjhi, Danda Manjhi and Bagdi Lohar, names which suggest a connection with the Bagdi castes. Lastly, in Lohardagga we have the Sad-Lohars, claiming to be immigrant Hindus; the Manjha Turiyas who may well be a branch of the Turi caste; and the Munda Lohars who are certainly Mundas.

The above description about the origin of different sub-groups of Lohar portray them (Lohar) as a heterogeneous group. The different sections of which owe their origins to different castes, tribes or communities. This confirms that Lohar is an occupational term and represents a generic name.

On the other hand, Loharas which is listed as a Scheduled Tribe in Bihar appear to have definite tribal origin. Risley mentions "Lohara" as a sect. of Mundas in Chota Nagpur and Lohra as synonym for Asur and Lohar." It may be noted that both Munda and Asurs are notified as Scheduled Tribes in Bihar. Apparently, those Lohars who owe origin to Asur and Munda seem to have been notified as Scheduled Tribes in Bihar.

From the above description, it is evident that Lohar is a distinct occupational group and cannot be treated as identical community to Lohara, Lohra.

27. In the Ranchi District Gazeteer, persons belonging to Scheduled Tribes have been mentioned at Page-99 item no. 2f whereof states that in the Ranchi district 69, 928 persons belonged to Lohara''s tribe at the census of 1961.

28. In the Ranchi District Gazeteer at page 126 it has been stated as follows :

Loharas : The Loharas consist partly of immigrants from Bihar who are known as Kanaujia Loharas and partly of indigeneous blacksmiths who are known as Kol Loharas or Nagpuria Loharas or Lohras.

The Nagpuria Loharas are divided into two sub-castes, viz. Sad Kamar and Lohara proper. The Sad Kamars have abandoned their caste-occupation and are engaged in agriculture. They still speak Mundari and in some villages follow the Munda custom of burial in a sasandiri. They do not drink pachwai, do not take cooked food from Mundas and will take water only from those who observe the same distinctions in the matter of food as themselves. On the other hand, they admit into caste the children of Munda women, though the woman herself may be regarded as a concubine. The Loharas are much lower in the social scale than the Sad Kamars, they observe very few restrictions about food and drink, for they take cooked food both from Mundas and Oraons, and even eat the carcases of dead animals. Inter-marriage between Sad Kamars and Loharas is unknown.

According to the 1911 census the total number of Loharas in the district was 46,946 of whom 30,313 were Hindus, 16,055 Animists and 574 Christians. This rose to

69,928 at the census of 1961. Our investigations indicate that this rise is mainly due to natural accretion. The Loharas are distributed all over the district, though, the main bell of Sad Kamar Loharas is in the Panch Parganas (south-eastern part of the district). The Loharas speak Sadri and Mundari. They have no exclusive villages of their own but live together with other communities in the same village.

They have a nuclear type of family. It consists of father, mother and their unmarried children. By and large they are monogamous. Their marriages are arranged by parents. The father of the bride-groom pays dalitaka or bride price, usually Rs. 12 together with three saris. The marriage is solemnised at the place of the bride''s father in the months of Magh, Falgun, Baisakh or Jeth. A marwa is set up where the marriage is performed. The bridegroom applies Vermillion on the forehead of the bride thrice by the little finger of his right hand and the bride repeats the same and this concludes the marriage. On the birth of a child, they observe a period of 9 days as one of pollution. The clan system is prevalent among them. They are totemistic. The share of the father in the property is equal to that of his sons. The females have no right in the properly. They can only claim maintenance.

Blacksmithy is the main occupation of this community. They manufacture sickle axe, iron-head of the arrow and plough-shares after obtaining the iron materials from the local markets. Through stone cutting and agriculture also they supplement their living. The Lohara women also attend delivery cases in villages and thus earn a little.

The incidence of drink is heavy among them. They have no akharas of their own, but go to the village akhara occasionally and dance and sing there along with other tribals.

29. From what has been seen hereinbefore, it is clear that even in the District Gazeteer, Lohras or Loharas have been mentioned as members of the Scheduled Tribe, although, blacksmith is the occupation of Lobar in the State of Bihar in general, they have been declared as Backward Class.

30. In Chand Mahto and others vs. The State of Bihar and others 1989 BBCJ 296 it was held by a Division Bench of this Court as follows :

It is not in dispute that a ''Lobar'' is not a Scheduled Tribe within the meaning of the Scheduled Castes and Scheduled Tribes List Notification Order, 1956. It is also not in dispute that there is a tribe named ''Lohra'' or ''Lohara'' which is Scheduled Tribe. Law is well settled that if a person, who is in fact a ''Lohra'' or ''Lohara'' has been wrongly or fraudulently recorded in the record of rights or in other deeds as ''Lohar'' the same is not conclusive and can be adjudicated by the authorities concerned, whether the person concerned belongs to the caste ''Lohar'' or is a member of the Scheduled Tribe Lohra or Lohara.

Therefore, the contention of the appellants that the authorities have extended the ambit of the caste Lohra or Lohara by including in the same as Lohar is

unacceptable and to this extent the judgment and order under appeal appears to be correct.

The Division Bench of this Court held:

It is well settled that in terms of section 84 (3) of the Chotanagpur Tenancy Act, a strong presumption arises about the correctness of the entries made in the record of rights. Such an entry made in the record of rights, although, is rebuttable, but for the purpose of arriving at such conclusion there must be a strong evidence on record to show that the presumptive value attached to such an entry has been rebutted.

In Liloo Sahu and others Vs. The State of Bihar and others, it has been held that it could not be determined whether a person was a ''Lohar'' by caste or a ''Lohara'' merely on the basis of a caste certificate is sued by a person unless the person graining the certificate was examined on oath.

31. From the discussions made hereinbefore, it is evident that ''Lohara'' or ''Lohra'' form a distinct group who have their own culture and customs. Thus those who are ''Lohar'' by caste, their history, traditions, lore, culture are absolutely distinct, which could be found out upon intensive researches made by various anthropologists and Scholars. It is inconceivable that ''Lohars'' would bury their deeds or would have the same marriage custom as ''Loharas''.

It is also evident that "Lohara" or ''Lohra'' have been treated by all concerns, as ''Scheduled Tribe'', but ''Lohar'' has been treated as Backward Class.

32. In the Scheduled Castes and Scheduled Tribes Amendment Order, 1976, ''Lohar'' has not been mentioned as a member of Scheduled Tribe but ''Lohras'' or ''Loharas'' have been so mentioned. It is, however, there fore, clear that in the English text ''Lohra'' or (Loharas'' have been specified as a member of Scheduled Tribe and not ''Lohar''.

In order to come within the purview of ambit of Scheduled Tribe, a caste has to be a tribe or tribal community. As indicated hereinbefore, ''Lohras'' or ''Loharas'' are really sub-caste of Minuda tribe or Astir Tribe. Minuda tribes or Asur Tribes are normally found in Chotunagpur district of Bihar and both of them have been mentioned as Scheduled Tribe.

33. It is now well known that an entry in the Schedule of an Act or Constitution has to be construed in the same way as that of the Statute. Reference in this connection may be made to Tata Iron and Steel Co. Ltd. Vs. The State of Bihar and Others wherein it was held as follows :

Further, now it is well known that entry in the list of the 7th Schedule of the Constitution has to be given a broad meaning (See M/s Ujagar Prints v. Union of India & ors reported in AIR 1989 SC 516), wherein the law has been laid down in the

following terms :

Entries to the Legislative Lists, are not sources of the legislative power but are merely topics or fields or legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The expression "with respect to" in Art, 246 firings in the doctrine of "Pith and substance" in the understanding of the exertion of the legislative power and wherever the question of legislative competence is raised the test is whether the legislation, looked at as a whole, is substantially with respect to the particular topic of legislation. If the legislation has substantial and not merely a remote connection with the entry, the matter may well be taken to be legislation on the topic.

This interpretation of the entry no. 97 has also been made in the case of Union of India (UOI) Vs. Shri Harbhajan Singh Dhillon, and Municipal Corporation of Municipal Corporation of Jullundur City Vs. Union of India and Others,

34. Thus, the entries in the 1976 Act must be given a contextual meaning and thus has to be understood as bringing only such persons who belong to a ''tribe'' or ''tribal'' community.

''Lohar'' who does not belong to any ''tribe'', thus cannot be included in the list of ''Scheduled Tribe'' in terms of entry no. 22 of Scheduled Tribes Order, 1950;

Further as ''Lohra'' and ''Lohara'' have been bracketted together, evidently, the Parliament intended to convey that they are members of the same tribe. Had the intention of the Parliament been otherwise ''Lohra'' and ''Lohara'' would have been mentioned as two different items. This has also to be viewed in the context that some authors, as noticed hereinbefore have bracketted both ''Lohara'' and ''Lohra'' together.

36. Thus evidently a mistake has been committed in the Hindi version of the notification. It is now well known that an apparent printing error in the Statute can be ignored. In Ram Adhin Singh Vs. The State of Bihar 1993 (1) PLJR 673 one of us (G. C. Bharuka, J.) held as follows :

From the discussions as made before, it is now quite clear that the word ''Anya'' (other) appearing in Section 8 (1) (ga) before the word ''building'' and the cut off date as 1st November, 1941, are the result of obvious misprints and have occurred due to clerical errors. In this background, the question which immediately falls for consideration is as to whether such obvious misprints and errors can be corrected by the Court or not.

Dealing with somewhat similar situation in "CRAIES ON STATUTE LAW" (7th Edition at page 521), it has been said,

But if there is an obvious misprint in an Act of Parliament, the Court will not be bound by the letter of the Act, but will take care that its plain meaning is carried out.

"It is our duty", said Tindal C.J. in Everett V. Wells (1841) 2M & G. 269, 277 Cf. R.V. Dowling (1857) 8E & B., 605," neither to add to nor to take away from a Statute, unless we see good grounds for thinking that the legislature intended something which it has failed precisely to express". Thus, in Chancellor of Oxford V Bishop of Coventry, (1615) 10 Co. Rep. 53 b, it was resolved that "when the description of a Corporation in an Act of Parliament is such that the true Corporation intended is apparent though the name of the Corporation is not precisely followed, yet the Act of Parliament shall take effect."

Maxwell in its celebrated commentary on "The Interpretation of Statutes", 12th Edition, after noticing various decisions had opined that :

Mere clerical errors or slips in drafting will sometimes be corrected." On reference to The Arabert (1963) P. 102 he has said that :

Where a word appears in a consolidating statute but was not to be found in the Acts consolidated, the Court may treat it as inserted per incuriam.

In R.V. Wilcock (1845) 7 Q. B. 317, it has been held that though the Act of the Parliament intended to repeal several Acts bill by their title and date including an Act passed in 13th Geo. 3, but agreeing in title with Stat. 1763, C. 56 and with no Act Panel in 13G.3, the Court realising that a mistake was committed by the legislature having regard to the subject matter and on looking to the content of the Act itself read Act of i.3 G. 3 as Act of 17G. 3 by expressly rejecting the incorrect year.

36. Further, in terms of Article 348of the Constitution of India, the authoritative lexis of all bills to be introduced or amendments thereto to be moved in either house of Parliament or in either house of the Legislature of a State and inter alia orders, rules, regulations and bye-laws issued under the Constitution or under any law made by the Parliament or the Legislature of a State shall be in English language.

In M/s. Mahabir Flour, Bakhtiyarpur Vs. The Commissioner of Commercial Taxes, Bihar, Patna and another 1987 PLJR 624, a Division Bench of this Court held as follows :

It is well settled that if the inconsistency/contradiction between the Notification is sued in English and the Notification issued in Hindi does not affect the substance of the matter, it is the notification published in English language which must prevail in view of the provision of constitution of India over the Notification published in Hindi.

Even if there was divergence between the two versions, i.e. Hindi version of the Notification and the English version of the Notification, by virtue of Article 348of the Constitution of India, it is the English version that will prevail.

The Division Bench further held :

It is also true that a State which has prescribed Hindi as the language for the official use in the State, both the Hindi version as also the English translation of the

Notification (Bill, Act etc.) published in the official Gazette are valid and authorised and both of them can be looked into and put to official use. There is no competition between the two. It is only in case of conflict or divergence between the two versions that the English version may reign supreme and supersede the Hindi one.

37. It is also pertinent to quote clause (3) of Article 348of the Constitution of India. which is as follows :

(3) Notwithstanding anything in sub clause (b) of clause (1), where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in, or Acts passed by, the Legislature of the State or in Ordinance promulgated by the Governor of the State or in any order, rule, regulation or bye-law referred to in paragraph (iii) of that sub clause, a translation of the same in the English language published under the authority of the Governor of the State in the Official Gazette of that State shall be deemed to be authoritative text thereof in the English language under this Article.

38. As all the Parliamentary Acts are introduced in the English language, the same shall prevail over the Hindi version.

In that view of the matter, the Constitution (Scheduled Tribe) Order, 1950 as amended by 1976 Amendment Act having been published in English language, the same would prevail over Hindi translation thereof. In case, however, of any conflict, Notification published in English language would prevail over the Notification published in Hindi language.

The State in its counter-affidavit has clearly stated and we have also found the same to be correct that in the original text ''Lohras'' or ''Loharas'' have been mentioned and not ''Lobar'' as mentioned in the Constitution (Scheduled Tribe) Order, 1950.

39. The petitioners have relied upon some judgments in support of their case i.e. C. W. J. C. No. 1034 of 1991 Sri Hari Sharan Thakur Vs. The State of Bihar and Others, decided by this Court and the other being Civil Appeal No. 4631 of 1990 (Shamboo Nath Vs. Union of India) decided by the Supreme Court of India on 12.9.1990. In those cases, these aspects of the matter have not been considered. Even in Hari Sharan Thakur''s case (Supra), the Bench has taken into consideration the fact that the Department of Personnel and Administrative Reforms had issued a letter bearing no. 756 dated 10.11.1978 whereby ''Lohar'' and ''Karmakars'' have been specified as ''Kamar'' in the category of their backward classes.

The Bench merely considered the Hindi version of aforementioned notifications and came to the conclusion that in view thereof, the notification issued by the President of India amending the Scheduled Caste and Scheduled Tribe Order was binding.

40. It is now well known that the judgment which has not taken into consideration the relevant provision of law or the Statute, the decision passes sub-silentio. This aspect of the matter has been considered by a Full Bench of this Court in Mohd.

Jainul Ansari and Others Vs. Mohd. Khalil, wherein it has been held as follows :

In A. R. Antulay Vs. R. S. Nayak & another : 1988 (1) SCC 602: a Constitution Bench of the Supreme Court held that if a judgment which has been rendered by the Supreme Court ignoring a provision of law, the same must be held to have been rendered per incuriam and is not binding upon another Bench.

In American Express International Banking Corporation Vs. S. Sundaram and Others, the Supreme Court held as follows :

Quotability as ''law'' applies to the principle of a case, its ratio decidendi. The only thing in a judge''s decision binding as an authority upon a subsequent judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The tasks of finding the principle is fraught with difficulty because without an investigation into the facts, as in the present case, it could not be assumed whether a similar direction must or ought to be made as a measure of a social justice. That being so, the direction made by this Court in Jamna Das case could not be treated to be a precedent. The High Court failed to realise that the direction in Jamna Das case was made not only with the consent of the parties but there was an interplay of various factors and the court was moved by compassion to evolve a situation to mitigate hardship which was acceptable by all the parties concerned. The court no doubt made incidental observation to the Directive Principles of State Policy enshrined in Article 38 (2) of the Constitution and said :

Article 38 (2) of the Constitution mandates the State to strive to minimise amongst others, the inequalities in facilities and opportunities amongst individuals. One who tries to survive by one''s own labour has to be encouraged because for want of opportunity destitution may disturb the conscience of the society. Here are persons carrying on some paltry trade in an open space in the scorching heat of Delhi sun, freezing cold or torrential rain. They are being denied continuance at that place under the specious plea that they constitute an obstruction to easy access to hospitals. A little more space in the access to the hospital may be welcomed but not at the cost of someone being deprived of his very source of livelihood so as to swell the ranks of the fast growing unemployed. As far as possible, this should be avoided which we propose to do by this order.

This indeed was a very noble sentiment but incapable of being implemented in a fast growing city like the Metropolitan City of Delhi where public streets are over-crowded and the pavement squatters create a hazard to the vehicular traffic and cause obstruction to the pedestrians on the payment.

Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in Jamna Das case and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without

argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachment from any public place like pavements or public streets and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the court on the question whether or not any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a pavement squatter. Professor P. J. Fitzgerald, editor of the Salmond on Jurisprudence, 12th edn. explains the concept of sub-silentio at p. 153 in these words :

A decision is passed sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is nut perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although, point B was logically involved in the facts and, although, the case had a specific outcome the decision is not an authority on point B. Point B is said to pass sub-silentio.

In Gerad Vs. Worth of Paris Ltd (k) the only point argued was on the question of priority of the claimant''s debt, and on this argument being heard, the court granted the order. No consideration was given to the question whether a garnishee order properly be made on an account standing in the name of liquidator. When, therefore, this very point was argued in a subsequent case before the court of Appeal in Lancaster Motor Co. (London) Ltd. Vs. Bremith Ltd., the Court held itself not bound by its previous decision. Sir Willrid Greene, M. R., said that he could not help thinking that the point now raised had been deliberately passed sub-silentio by counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier court before it could make the order which it did, nevertheless, since it was decided "without argument, without reference to the crucial words of the rule and without any citation of authority", it was not binding and would not be followed. Precedents sub-silentio and without argument are of no moment. This rule has ever since been followed. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not he allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of judge, however, eminent, can he treated as an ex-cathedra statement, having the weight of authority.

42. Recently again in Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., after exhaustive study with regard to law of precedent and treating the history thereto the Supreme Court laid down the law relating to value of precedent but stated in no uncertain terms that in appropriate case, particularly when the earlier decisions of the court or the relevant provisions of the law were not brought to the notice of the Court, the Judgment rendered therein shall not be binding upon a subsequent Bench. Salmond in his Jurisprudence (12th Edition) at page 153 states as to when a judgment passes sub-silentio. In M/s. Goodyear India Ltd. & another Vs. State of Haryana and another analogous cases, 1990 (2) SCC 72 96 it was held as follows :

Whereby reason of the judgment of the Supreme Court, fundamental rights of the petitioners therein as enshrined under Articles 14and 21of the Constitution of India, were violated in ignorance of salutary principles of law, judgment must be held to have been rendered per-incuriam and such a judgment is not binding upon a subsequent Bench. In that case, it was further held that a larger Bench is not bound by the decisions of the smaller Bench.

It has been further held :

that a decision which is obiter-dicta or rendered per-incuriam or in sub-silentio or with consent of the parties or with a reservation that the same should not be treated as precedent, is not binding upon another Bench.

42. Reference in this connection may also be made in Durga Pada Benerjee Vs. Smt. Sushmita Banerjee 1993 (1) BLJ 313 wherein it has been held as follows :

Question which now arises for consideration is as to whether the decision of this Court in Bankim Chandra Roy''s case (Supra) is binding on me?

There is no doubt that a coordinate Bench is bound by judgment of another coordinate Branch of the same Court. But as noticed in Bankim Chandra Roy''s case, the attention of the learned Judge was not drawn to section 26of the Act nor the submissions which have been made before me were made in the said case.

It is well known that a judgment which is rendered without considering the statutory provisions passes sub-silentio. It is also well known that a decision on the question which has not been argued cannot he created as precedent.

Reference in this connection be made to A.R. Antulay Vs. R.S. Nayak and Another, in Municipal Corporation of Delhi Vs. Gurnam Kaur, Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., ; M/s. Goodyear India Ltd. Vs. State of Haryana, 1990 (2) SCC 72 96, which have been followed by me in a recent Full Bench decision in Md. Zainul Ansari Vs. Md. Khalil, 1990 (2) PLJR 378).

It, therefore, must be held that the decision of this Court in Bankim Chandra Roy''s case (supra) is not a binding precendent and must be held to have been passed

sub-silentio.

In this view of the matter, it must be held that decisions of the Supreme Court of India as also of this Court as referred to hereinbefore must he held to be rendered per-incuriam.

43. For the reasons aforementioned, there is no other option but to hold that ''Lohar'' is not a Scheduled Tribe within the meaning of Constitution (Scheduled Tribes) Order, 1950, as amended by Constitution (Scheduled Castes and Scheduled Tribes) Amendment Order, 1976.

44. The petitioners, thus, being ''Lohar'' by caste which is a backward class and not ''Lohra'' or ''Loharas'' who are the members of the Scheduled Tribe, cannot get any benefit of the seals reserved in Medical College for the Scheduled Tribes.

45. This application is, therefore, dismissed. In the facts and circumstances of the case, there will be no order as to costs.

G.C. Bharuka, J.

46. I am in full agreement with my learned Brother S. B. Sinha, J. in arriving at the conclusion that the petitioners are not entitled to any benefit of reservation as members of any Scheduled Tribe. But I would like to assign certain reasons of my own for the said conclusion.

47. The petitioners in this application have sought for a mandamus for their admission in M. B. B. S. course against the seals reserved for the Scheduled Tribe. According to the petitioners they are ''Lohar'' by caste and are admittedly not the members of any tribe or tribal community. But they are claiming that since ''Lohara'', ''Lohra'' has been included in the schedule of the Constitution (Scheduled Tribe) Order, 1950 (hereinafter, in short, ''the Order'' only), therefore, fictionally they should be deemed to be the members of the Scheduled Tribe entitling them to the benefits of reservation meant for the members of the Scheduled Tribe.

48. The Order has been framed under Article 342 (1) of the Constitution of India. Paragraph 2 of the Order reads as under :

The tribes or tribal communities or parts of or groups within, tribes or tribal communities, specified in Parts 1 to XVI of the Schedule to this Order shall, in relation to the States to which those parts respectively relate, be deemed to be Scheduled Tribes so far as regards members thereof resident in the localities specified in relation to them respectively in those parts of that schedule.

(emphasis supplied)

It is manifest from a bare reading of Article 342 (1) of the Constitution that the President can declare only tribes or tribal communities or parts of or groups within tribes or tribal communities (hereinafter, in short ''the tribes'' only) as ''Scheduled

Tribes'' in relation to the any State or Union territory. Paragraph 2 of the Order is also absolutely clear in its intendment, to the effect that only the tribes placed in the Schedule will be deemed to be Scheduled Tribe so far as regards members thereof only. Therefore, in analysis of the aforesaid provisions clearly shows that the President can declare only ''the tribes'' to be the Scheduled Tribes and under the Order, the members of the tribes placed under the Schedule in relation to the declared areas can only be deemed to be Scheduled Tribes. Any effort to transgress this Constitutional limit will make the declaration ultra vires.

48. In the case of Government of Andhra Pradesh and Others Vs. Dasari Subbayamma and Another, 154 Jeevan Reddy, J. (as he then was), speaking for the Bench, while dealing with a similar matter, after noticing the requirements and the limitation of Article 342of the Constitution, has held that,

The power conferred by Art. 341the Constitution does not extend to converting the non-tribals into tribals even for the purpose of the Constitution. The power is merely to specify; not to create or convert. In other words, a person or a member of a backward class who does not belong to a tribe, tribal community or a group within the tribe or tribal community, can not be specified by the President as a member of a Scheduled. Tribe for the purpose of the Constitution, nor does the President purport to do say.

(emphasis supplied).

49. In the present case, as is evident from the various authorities and texts noticed by learned Brother Sinha, J. ''Lohar'' (Blacksmith) is a occupational group which has been declared to be a Backward Class in this State. This class is admittedly non-tribal. ''Lohara'' or ''Lohar'' are the sub-groups of the Tribal community ''Munda'' or ''Asura''. Therefore, even if it be presumed that ''Lohara'' in English should be read as ''Lohar'' in Hindi, even then the petitioners being Non-tribals can not claim any benefit on the basis that they should he deemed to be the members of the Scheduled Tribes. Acceptance of any such fiction will be unconstitutional and accordingly will be against the settled canons of interpretation.

50. So far as the judgment of the Supreme Court in Civil Appeal No. 4631 of 1990 (Shambhu Nath vs. Union of India and another) disposed of on 12th September 1990 (Annexure 6) and Bench decision of this Court in C.W.J.C. No. 1034 of 1991 (Sri Hari Sharan Thakur Vs. State of Bihar and others) disposed of on 28-2-1992 (1992 (2) PLJR 594) (Annexure 7) are concerned, those cases have possibly proceeded on the footing that the petitioners in those cases were the members of the certain tribes or tribal communities. There is no discussion on this aspect either way in those judgments. The Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 by which the schedules to the Order have been substituted, was passed by the Parliament in English language. Its authoritative Hindi translation made u/s 5of the Official Languages Act, 1963, has been published by the Central Government in the

Gazette of India dated the 29th November, 1979, (Annexure 8/A). Section 5of the Official Languages Act, 1963, is in pari-materia with Article 348 (3)of the Constitution. In the Hindi translation ''Lohara'' has been printed as (Lohar) under item no. 41. There is obvious conflict between the original English text and its translation in Hindi. The petitioners have sought to built up their arguments primarily on the basis of Hindi version, which can not be said to be tenable as said by Brother Sinha, J. I agree with him that in the present case the English version should prevail over the Hindi translation But I do not agree with the reasonings given by him for the same. It will be wrong to say that English version has always superiority over the Hindi version. The superiority of a particular text either in English or in Hindi is to be judged keeping in view as to which of the two texts is original. I have taken similar view in the case of Ram Adhin Singh Vs. State of Bihar and others, 1993 BBCJ, 263 Ram Adhin Singh Vs. The State of Bihar and others, Pr. 18 by placing reliance on a decision in the case of Rajendra Vs. Vice Chancellor, Magadh University 1984 PLJR, 316 wherein L. M. Sharma, J. (as he then was) speaking for the Bench has held that "English translation though official cannot override the Hindi text. The English version is the interpretation of the person entrusted with the task of translation. It can not be equated with the original text".