

Palghat Jilla Thandan Samudhaya ... vs State Of Kerala (Bharucha, J.) on 3 December, 1993

Equivalent citations: 1994 SCC (1) 359, JT 1993 (6) 622, AIRONLINE 1993 SC 635

Author: S.P Bharucha

Bench: S.P Bharucha, R.M. Sahai, N Venkatachala

PETITIONER:

PALGHAT JILLA THANDAN SAMUDHAYA SAMRAKSHNA SAMITHI

Vs.

RESPONDENT:

STATE OF KERALA (Bharucha, J.)

DATE OF JUDGMENT 03/12/1993

BENCH:

BHARUCHA S.P. (J)

BENCH:

BHARUCHA S.P. (J)

SAHAI, R.M. (J)

VENKATACHALA N. (J)

CITATION:

1994 SCC (1) 359 JT 1993 (6) 622

1993 SCALE (4) 584

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by BHARUCHA, J.- Leave granted in the two special leave petitions, SLP (C) Nos. 6457 of 1990 and 3746 of 1992.

2.The principal question that arises in these writ petitions and appeals is in regard to the validity of the decision of the State of Kerala not to treat members of the Thandan community belonging to the erstwhile Malabar District, including the present Palghat District, of the State of Kerala as members

of the Scheduled Castes.

3.The writ petitions pray that the State Government should continue to grant to members of the Thandan community belonging to the erstwhile Malabar District, including the present Palghat District, all the benefits due to a caste included in the Schedule to the Constitution (Scheduled Castes) Order.

4.The appeals arise out of a writ petition (O.P. 2421 of 1982) filed in the High Court of Kerala by Miss O.K. Lakshmikutty. She had, in an earlier writ petition (O.P. No. 2000 of 1980), claimed that she belonged to the Thandan community and, therefore, to a Scheduled Caste and sought a direction that she be issued a community certificate accordingly. The High Court allowed that writ petition. Miss Lakshmikutty had then to file the writ petition out of which the principal appeal arises because she was denied admission to the first year MBBS course, 1981-82, in a seat reserved for the Scheduled Castes on the ground that she was not a Thandan. In the judgment and order under appeal, the High Court noted that Miss Lakshmikutty had earlier obtained relief as aforesaid. It then noted the affidavit filed on behalf of the State Government in reply to the writ petition before it wherein it was stated that there was no Thandan community in the Palghat District except in certain parts of Chittur Taluk which were formerly part of the erstwhile Travancore-Cochin State. The State Government had, after the inclusion of Thandans in the Scheduled Castes Order by reason of the Amendment Act, 1976, made enquiries which had revealed that a section of Ezhavas/Thiyyas (Para 23) of the Malabar area and certain Taluks of Trichur District who were called Thandans had nothing in common with the Scheduled Caste Thandans. Reference to authoritative texts seemed to indicate that there was a serious controversy. The High Court, therefore, directed the State Government to conduct a public enquiry to determine whether there was a community called Thandan distinct from Ezhavas in Palghat District and in areas other than in the erstwhile Chittur Taluk and also in any other place in the erstwhile Malabar District. The enquiry was also required to determine whether Miss Lakshmikutty belonged to the Thandan community. In the meantime Miss Lakshmikutty was given provisional admission to the MBBS course in a reserved seat and it was made clear that if it was found that she was not a member of the Thandan community entitled to the benefit of reservation, she would forfeit her seat.

5.Upon completion of the MBBS course Miss Lakshmikutty applied for admission to a postgraduate course in a reserved seat and, upon being denied admission, filed another writ petition before the High Court (O.P. No. 2609 of 1989). She was given admission subject to the result of these matters before us. The appeal arising out of SLP (C) No. 6457 of 1990 is filed by the State of Kerala there against.

6.One K. Swamidasan filed before the High Court a writ petition (O.P. No. 6780 of 1987) in similar circumstances. He was also given admission by the High Court subject to the result of these matters before us. The appeal arising out of SLP (C) No. 3746 of 1992 is filed by the State of Kerala there against.

7.Article 366(24) defines for the purposes of the Constitution of India the expression "Scheduled Castes" to mean "such castes, races or tribes or parts of or groups within such castes, races or tribes

as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution". Article 341 reads thus:

"341. (1) The President may with respect to any State or Union Territory, and where it is a State after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

8. The Constitution (Scheduled Castes) Order, 1950, was promulgated by the President in consultation with the Governors and Rajpramukhs of the various States. Part XVI thereof related to the then State of Travancore-Cochin. At item 22 of Part XVI was specified the caste Thandan for the purposes of the entire State. The Constitution Scheduled Castes (Modification) Order, 1956, modified the Scheduled Castes Order. In the list in Part V, applicable to the State of Kerala (the successor to the State of Travancore-Cochin), at item 14, was specified the caste Thandan for the purposes of the entirety of the State except Malabar District. The Scheduled Castes and Scheduled Tribes (Amendment) Act, 1976, came into force on July 27, 1977. In the First Schedule thereof, under Part VII relative to the State of Kerala, Thandan was specified at item 61. In Part VII only in respect of two castes, namely, Boyan and Malayan, were specific areas of the State of Kerala designated. In other words, all other castes listed in Part VII, including Thandan, were Scheduled Castes for the purposes of the entirety of the State.

9. On May 17, 1979 the Government of Kerala issued an order which noted that upon the coming into force on July 27, 1977, of the Scheduled Castes and Scheduled Tribes (Amendment) Act, 1976, the Thandan community throughout the State of Kerala came to be included in the list of Scheduled Castes. Complaints were received and reports showed "that there is a section of the Ezhavas/Thiyyas of Malabar area and of certain Taluks of Trichur District who were called Thandans. These Thandans have nothing in common with the Scheduled Caste Thandans. In fact these two categories of Thandans are quite different and distinct from each other"

It was, therefore, ordered that "the applications for the issue of Community Certificates to the Thandans of all the four Districts of Malabar area and of the Taluks of Thalapilly, Vadakkancherry and Chavakka in Trichur District may be enquired into in detail to ascertain whether the applicant belongs to the Thandan Community of the Scheduled Castes or the Thandan section of the Ezhava/Thiyya Community and while issuing Community Certificates to the Thandans who are Scheduled Castes, the authorities issuing the certificates in respect of the areas mentioned above viz. the four Districts of Palghat, Malappuram, Kozhikode and Cannanore and the Taluks of Thalapilly, Vadakkancherry and Chavakkad in Trichur District should note the name

of the community in the certificates as Thandans other than Ezhava or Thiyya". On October 15, 1984 the Government of Kerala issued an order which stated that, having reconsidered the matter in all its aspects, the 1979 order was cancelled and "Thandans throughout Kerala would be treated as members of Scheduled Caste as existing in the list of Scheduled Castes of this State as per Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 and Community Certificate issued accordingly". The 1984 order was modified by the order of the Government of Kerala dated November 24, 1987, which is under challenge before us. The operative portion of the 1987 order reads thus:

"Government have again considered the matter in all its aspects and in partial modification of the Government order read above as second paper Government now order that persons belonging to the Thandan Caste throughout Kerala would be treated as members of Scheduled Caste as existing in the list of Scheduled Castes of this State as per the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976. While issuing such caste certificate the Revenue authorities should clarify after proper verification that the person concerned belongs to Thandan caste and not Ezhava/Thiyya."

10.Learned counsel for Miss Lakshmikutty and for the petitioners in the writ petitions submitted that once a group of persons known by a caste name was specified in the Scheduled Castes Order, the same was binding upon all. The State Government was not empowered to modify the same in the manner in which it had purported to do by the issuance of the 1987 order. A modification of the Scheduled Castes Order could only be made by Parliament under the provisions of Article 341. The Thandans of the Malabar area were a distinct class from the Ezhavas/Thiyyas. In any event, even if it be assumed that there was a section of the Ezhavas/Thiyyas community which was called Thandan in the Malabar area of the State, that section also fell within the scope of the Scheduled Castes Order by virtue of the Amendment Act, 1976, and the State Government was not entitled to order to the contrary.

11.Learned counsel for the State Government contended that persons named or called Thandan in the Malabar area were not intended to be covered by the Scheduled Castes Order and the State Government was, therefore, entitled to issue the 1987 order.

12.In the first place, we must notice that the contention of learned counsel for the State Government does not accord with the case of the State Government put forward on its behalf in the counter-affidavit to the writ petition filed by R.B. Pathak, Secretary to the State Government in the Harijan Welfare Department, dated September 4, 1984. In paragraph 4 of the counter-affidavit it is stated that after the Amendment Act, 1976, was passed by Parliament, "it has come to the notice of the Government that in the erstwhile Malabar area, particularly in Palghat Jilla, a section of Ezhava/Thiyya community are called Thandans. These Thandans are different from the recognised backward Scheduled Caste Thandans. Such a section of Thandans who are allied to Ezhava/Thiyya Community are not entitled to the benefits meant for Scheduled Caste Thandans". In paragraph 6 it is stated that the High Court was satisfied "that the Thandan community of the erstwhile Malabar

area, Palghat Jilla is a controversial community and that the position is not clear whether this community in these areas can be conclusively treated as a Scheduled Castes Thandan community". In paragraph 7 the controversy is stated to be "about the status of this community in the said Malabar area, by reason of which the High Court had directed the State Government to conduct an enquiry". In paragraph 11 It is stated, "Pending the proposed investigation into the status of the Thandan community in the Malabar area, the Thandans from all over Kerala will continue to be treated as a Scheduled Caste". In paragraph 12 it is stated, "Based on the report of the proposed enquiry, Government will consider the issue and, if necessary, the Government will submit necessary proposals to the Government of India. Parliament alone is competent to make any change in the law on the subject". In paragraph 14(e) it is stated that a study by various authors shows "that there are Thandans belonging to the Scheduled Caste as well in certain families belonging to backward classes. Because of this position, it is all the more necessary to identify the Thandans belonging to Scheduled Caste separating the other class of Thandans in the Malabar area". In paragraph 14(f) it is stated, "The scope of the proposed enquiry is to find out whether there is a community called Thandan distinct from Ezhava in Palghat District and also in other places in erstwhile Malabar District".

13. From the counter-affidavit it is, therefore, clear that the case of the State Government is that there is a community called Thandan which is not entitled to the benefits available to Scheduled Castes under the Scheduled Castes Order. This case is very different from the submission of its counsel that persons named or called Thandan in the Malabar area are not intended to be covered by the Scheduled Castes Order and that the 1987 order is only intended to exclude such individuals named or called Thandan. Patently, in the circumstances, we must base our decision upon the case of the State Government put on oath in the counter-affidavit filed on its behalf.

14. The State Government's counter-affidavit is noteworthy also because it states in paragraph 11 that, pending the proposed enquiry into the status of the Thandan community in the Malabar area, Thandans from all over Kerala would continue to be treated as a Scheduled Caste. Having regard to this statement on oath on its behalf before this Court the State Government ought not to have issued the 1987 order. Again, in paragraph 12 of the affidavit it is stated that the State Government would, if necessary, submit the necessary proposals to the Government of India since "Parliament alone is competent to make any change in the law on the subject". As we shall hereafter show, this is a correct statement of the law which the State Government recognised when the counter-affidavit was filed but from which position it would appear to have resiled by issuing the 1987 order.

15. We now proceed upon the basis that the State Government is right when it says that there is a section of the Ezhavas/Thiyyas community which is called Thandan in the Malabar area of the State.

16. Article 341 empowers the President to specify not only castes, races or tribes which shall be deemed to be Scheduled Castes in relation to a State but also "parts of or groups within castes, races or tribes" which shall be deemed to be Scheduled Castes in relation to a State. By reason of Article 341 a part or group or section of a caste, race or tribe, which, as a whole, is not specified as a Scheduled Caste, may be specified as a Scheduled Caste. Assuming, therefore, that there is a section of the Ezhavas/Thiyyas community (which is not specified as a Scheduled Caste) which is called

Thandan in some parts of Malabar area, that section is also entitled to be treated as a Scheduled Caste, for Thandans throughout the State are deemed to be a Scheduled Caste by reason of the provisions of the Scheduled Castes Order as it now stands. Once Thandans throughout the State are entitled to be treated as a Scheduled Caste by reason of the Scheduled Castes Order as it now stands, it is not open to the State Government to say otherwise, as it has purported to do in the 1987 order.

17. We may usefully draw attention to the judgment of a Bench of three learned Judges of this Court in *Srish Kumar Choudhury v. State of Tripura*¹. This judgment considered the Constitution Bench judgments in *B. Basavalingappa v. D. Munichinnappa*² and *Bhaiyalal v. Harikishan Singh*³ and certain other judgments. It held that the two Constitution Bench judgments indicated that any amendment to the Presidential Orders could only be by legislation. The Court could not assume jurisdiction and order an enquiry to determine whether the terms of the Presidential Order included a particular community. A State Government was entitled to initiate appropriate proposals for modification in cases where it was satisfied that modifications were necessary and, if after appropriate enquiry, the authorities were satisfied that a modification was required, an amendment could be undertaken as provided by the Constitution.

18. These judgments leave no doubt that the Scheduled Castes Order has to be applied as it stands and no enquiry can be held or evidence let in to determine whether or not some particular community falls within it or outside it. No action to modify the plain effect of the Scheduled Castes Order, except as contemplated by Article 341, is valid.

19. The Thandan community in the instant case having been listed in the Scheduled Castes Order as it now stands, it is not open to the State Government or, indeed, to this Court to embark upon an enquiry to determine whether a section of Ezhavas/Thiyyas which was called Thandan in the Malabar area of the State was excluded from the benefits of the Scheduled Castes Order.

20. Learned counsel for the State relied upon the decision in *Bhaiya Ram Munda v. Anirudh Patar*⁴ referred to in paragraph 15 of the judgment in *Srish Kumar Choudhury case*¹ for the view taken there was that evidence was admissible for the purpose of showing what an entry in the Presidential Order was intended to mean. In paragraphs 8, 9, 10 and 11 of the judgment in *Srish Kumar Choudhury case*¹ the Constitution Bench judgments referred to above are discussed, as also two other judgments taking the same view. Then, in paragraph 14, the judgments of this Court in the case of *Dina v. Narayan Singh*⁵ and *Bhaiya Ram Munda v. Anirudh Patar*⁴ are referred to and it is stated that both were rendered by the same Bench of two learned Judges. Paragraph 14 goes on to set out the substance of the decision in *Dina case*⁵ and paragraph 15 sets out the substance of the decision in *Bhaiya Ram*¹ 1990 Supp SCC 220 2 (1965) 1 SCR 316: AIR 1965 SC 1269: 26 ELR 446 3 (1965) 2 SCR 877 : AIR 1965 SC 1557 4 (1970) 2 SCC 825 : (1971) 1 SCR 804 5 38 ELR 212 (SC) case 4. In paragraph 16 it is said, "These authorities clearly indicate, therefore, that the entries in the Presidential Order have to be taken as final and the scope of enquiry and admissibility of evidence is confined within the limitations indicated. It is, however, not open to the court to make any addition or subtraction from the Presidential Order". There is, therefore, no doubt that the Court in *Srish Kumar Choudhury case*¹ accepted and followed, as it was bound to do, the Constitution Bench judgments and not the two-Judge judgments in the *Dina*⁵ and *Bhaiya Ram Munda*⁴ cases.

21.The enquiry that was ordered by the High Court in the order under appeal to "find out whether there was a community called Thandan distinct from Ezhavas in Palghat District in areas other than in the erstwhile Chittur Taluk and also in any other place in erstwhile Malabar District"

has proceeded to a conclusion on the basis of an interim order passed by this Court on January 16, 1989. It is not for the State Government or for this Court to enquire into the correctness of what is stated in the report that has been made thereon or to utilise the report to, in effect, modify the Scheduled Castes Order. It is open to the State Government, if it so deems proper, to forward the report to the appropriate authority to consider whether the Scheduled Castes Order needs amendment by appropriate legislation. Until the Scheduled Castes Order is amended, it must be obeyed as it reads and the State Government must treat Thandans throughout Kerala as members of the Scheduled Castes and issue community certificates accordingly.

22.K.V. Kumaran, who claims to be the Chairman of the Kerala Scheduled Castes Protection Council, sought impleadment to these matters. We declined to implead him but we heard him in the character of an intervener. His submission, in the main, was that in Malabar Ezhavas/Thiyyas are known as Thandans but this did not mean that they belonged to the Scheduled Castes. As we have indicated, it is not for this Court to go into the question. It is for the appropriate authority to do so and, if satisfied, initiate proceedings to amend the Scheduled Castes Order.

23.In the result, the writ petitions are allowed and the State Government is directed to grant to all members of the Thandan community, including those belonging to the erstwhile Malabar District and the present Palghat District, the benefits due to a Scheduled Caste included in the Schedule to the Constitution Scheduled Castes Order as amended up to date and to issue to them community certificates accordingly. The order of the State Government dated November 24, 1987, is quashed and set aside. Civil Appeal No. 4807 of 1984 is allowed to the extent that the High Court's directions that Miss O.K. Lakshmikutty's admission to the MBBS course and to the postgraduate course were provisional are set aside. The appeals by the State of Kerala arising from SLP (C) No. 6457 of 1990 and SLP (C) No. 3746 of 1992 are dismissed.

24. There shall be no order as to costs.