

N. E. Horo vs Jahan Ara Jaipal Singh on 2 February, 1972

Equivalent citations: 1972 AIR 1840, 1972 SCR (3) 361

Author: A.N. Grover

Bench: A.N. Grover, M. Hameedullah Beg

PETITIONER:

N. E. HORO

Vs.

RESPONDENT:

JAHAN ARA JAIPAL SINGH

DATE OF JUDGMENT 02/02/1972

BENCH:

GROVER, A.N.

BENCH:

GROVER, A.N.

BEG, M. HAMEEDULLAH

CITATION:

1972 AIR 1840

1972 SCR (3) 361

1972 SCC (1) 771

CITATOR INFO :

RF 1973 SC1406 (2)

ACT:

Representation of the People Act (43 of 1951), s. 123(2) and (7)-Scope of.

Customary Law-Mundas-Marriage between Munda male and a non-Munda-Whether wife becomes a Munda.

HEADNOTE:

The respondent, who was a Tamil by birth and Christian by religion, had married a member of the Munda Schedule Tribe in the State of Bihar. On the death of her husband, who was a member of the Lok Sabha, she stood for election from a Parliamentary (Schedule Tribe) Constituency in the State. Another candidate B filed objections to her nomination that she was not a Munda and her nomination was rejected by the Returning Officer, and the appellant was elected. She filed an Election Petition for setting aside the election of the appellant. She alleged that according to, the Munda Customary Law when a Munda male married outside the tribe,

if his marriage was accepted by the tribe, he continued to be a member of the tribe and his wife also acquired its membership, and so, she became a Munda. In the petition it was also stated that while hearing B's objections the Returning Officer allowed irrelevant personal aspersions to be cast against her and that the Returning Officer had been influenced by B. The High Court allowed the petition.

Dismissing the appeal to this Court, on the questions : (1) Whether B. was a necessary party to the Election Petition; (2) Whether the marriage of the respondent, who was a divorcee, was a nullity under s. 57 of the Indian Divorce Act, 1869, in that she married her Munda husband within six months from the date of the decree being made absolute; and- (3) Whether the petitioner became member of the Munda Tribe,

HELD : (1) According to s. 82(b) of the Representation of the People Act, 1951, a petitioner must join as a respondent any candidate against whom allegations of any corrupt practices are made in the election petition. Section 123 deals with corrupt practices. The essential ingredient of s. 123(7) on which reliance was placed, is to obtain, procure etc. by a candidate of any assistance (other than the giving of a vote) for the furtherance of the prospects of that candidate's election from any person in the service of the Government and belonging to the classes mentioned in the sub-section. In the present case, there was absolutely no allegation or suggestion that the Returning officer was influenced by B for the purpose of rendering assistance for the furtherance of the prospects of a candidate's election. The influence, mentioned in the election petition, had reference only to the conduct of the Returning Officer in allowing personal aspersions to be cast against the respondent. The allegations do not also amount to any suggestion of direct or indirect interference or attempt to interfere on the part of a candidate with the free exercise of any electoral right, and hence, do not amount to undue influence under s. 123(2). Therefore, since there was no allegation of any corrupt practice against B he was not a necessary party. [366 D-H;368 A-G]

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2 The respondent had contracted a marriage with a Member of the Munda Tribe according to Munda rites and ceremonies and not as one Christian marrying another Christian. In the absence of any pleadings or issues or material on record to show that in view of the provision, of s. 57 of the Indian Divorce Act

there could not be a valid marriage, a

according

to Munda customary law, such a contention could not be allowed to be agitated for the first time in this Court. [369 D-G]

3(i) The information contained in

authoritative books dealing with Munda Customary Law and the evidence of witnesses who had made special research in the matter, show that : (a) The Mundas are endogamous and intermarriage with non-Mundas is normally prohibited; (b) A Munda male along with his family, on marrying a non-Munda girl, is often excommunicated or outcasted; (c) the rule of endogamy is, however, not so rigid that a Munda cannot marry a non-Munda even after performing special ceremonies; (d) Such marriages have been and are being sanctioned by Parha Panchayat, and (e) Where a Munda male and his family are outcasted for marrying a non-Munda they are readmitted to the tribe after certain special ceremonies are performed. [376 C-F]

In the present case, there is no evidence that the deceased husband of the respondent was excommunicated or outcasted because he had married a non-Munda; on the contrary, the evidence is that the rule of endogamy has not been observed in a rigid or strict form, and that the marriage was accepted as valid and was approved by the Parha Panchayat and the elders of the Tribe. Once the marriage of a Munda male with a non-Munda female is approved or sanctioned by Parha Panchayat they become members of the community. The contention that a person can be a Munda by birth alone can be sustained only if the custom of endogamy is established without any exception. [377 A-D]

(ii) Munda is one of the specified tribes or tribal communities in the 'Schedule to the Constitution (Schedule Tribes) Order 1952. The term 'tribal community' is of wider connotation than the expression 'tribe'. A "person who, according to the strict custom of a tribe, cannot be regarded as a member of that tribe may be regarded as a member of that tribal community. Where a non-Munda woman is married to a Munda male and the marriage is approved and sanctioned by the Parha Panchayat of that tribe, and the marriage is valid, she may not, on the assumption that 'the rule of endogamy prevails, become a member of the Munda tribe in the strict sense as not having been born in the tribe. But a marriage between a Hinduised Munda and a Munda converted to Christianity is permitted. That being so, the wife cannot be excluded from the larger group, namely, the tribal community.

In the present case the respondent's marriage with a Munda male having been approved and sanctioned by the Pahra panchayat of the Munda tribe, it can be said that she became a member of the Munda tribal community. When a person, in course of time, has been assimilated into the community that person cannot be denied the rights and privileges which may be conferred on that community, even though tribal, by Constitutional provisions. [377 E, H; 378 A-E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 909 of 1971. Appeal under s. 116-A of the Representation of the People Act, 1951 from the judgment and order dated May 21, 1971 of the Patna High Court in Election Petition No. 2 of 1970.

Frank Anthony, A. T. M. Sampath and E. C. A Agrawala, for. the appellant.

L. M. Singhvi, Basudeva Prasad, Ravinder Narain and P. C. Bhartari, for the respondent.

The judgment of the Court was delivered by Grover, J. This is an appeal from a judgment of the Patna High Court holding that the nomination papers of the respondent Smt. Jahan Ara Jaipal Singh had been illegally rejected by the Returning Officer. For that reason the election of the returned candidate Shri N. E. Horo from the 51 Khunti Parliamentary (Scheduled Tribe) Constituency in the State of Bihar was set aside.

On May 1, 1970 the Election Commission of India issued a notification calling upon the above-named Parliamentary Constituency to elect a Member to the Lok Sabha in the vacancy caused by the death of late Shri Jaipal Singh. The last date for filing the nomination papers was May 8, 1970. The date for scrutiny was May 9, 1970. Several persons filed nomination papers including Theodore Bodra and others. Two nomination papers were filed on behalf of the respondent who was a Congress (Ruling) candidate for the aforesaid by-election. According to the respondent she was the widow of late Shri Jaipal Singh and was a member of the Munda Scheduled Tribe in the State of Bihar. She filed certain certificates to that effect. Bodra filed an objection petition to the nomination papers of the respondent. The Returning Officer, after hearing arguments, passed an order rejecting the nomination papers of the respondent. The nomination papers of all the other candidates were accepted. After the polling took place, the result of the election was announced on June 3, 1970 and the appellant Shri Horo was declared elected to the Lok Sabha. On July 8, 1970 the respondent filed an election petition. In the election petition it was stated inter alia that the petitioner (who is now respondent before us) was the widow of Late Shri Jaipal Singh and belonged to the Munda Scheduled Tribe although she was a Christian by religion. It was averred in paragraph 3 of the petition that according to the Munda Customary Law when a Munda male married outside

the Munda Tribe if his marriage is accepted by the Tribe he continues to be a member of that Tribe and his wife also acquires its membership. It was pleaded that the wife being a member of her husband's family had the right of succession to her husband's property as well. In para 4 of the petition it was stated that the petitioner was a Tamil by birth. She married late Shri Jaipal Singh in the year 1954 according to the rights and rituals of Mundas in the presence of Parha Raja, Parha Munda, Parha Pahan, relatives of the deceased and the members of the Tribe at Morabadi a Mohalla of Ranchi. In paragraph 5 the ceremonies which were performed according to Munda custom were mentioned. These ceremonies inter alia were the washing of the wife's feet by the elder sister of the husband and the holding of the feast of the male goat meat and drinks of Handia etc. A new name was given by her mother-in-law to the petitioner, that name being Lankashri. All these functions were witnessed by Parha Raja, Parha Munda, Parha Pahan and other members of the Tribe. In paragraph 6 more details were given of the various other ceremonies also which were performed in connection with the marriage. After referring to the relevant provisions of the Representation of People Act 1951, hereinafter called the 'Act', it was stated that the Returning Officer had illegally allowed irrelevant personal aspersions to be cast against the petitioner by her opponents. It was alleged that the Returning Officer had been influenced by Bodra who was the Chairman of the Bihar Legislative Council. The decision of the Returning Officer that the status of a Munda could be acquired only by birth and not by marriage and that the petitioner did not belong to the Munda Scheduled Tribe was challenged principally on the ground that the Returning Officer had not considered the custom by which if a Munda male marries a woman not belonging to Munda Tribe and that is accepted by the Tribe the wife acquires the membership thereof.

In his written statement the returned candidate Shri Horo maintained that even though the election petitioner might be living as wife of late Shri Jaipal Singh she was never married in accordance with the custom of the Munda Tribe prevalent in Chhota Nagpur. It was denied that she was ever accepted as a member of the Munda community as no such custom is prevalent in that community. It was denied that the ceremonies and rituals mentioned in the election petition had been performed in respect of the marriage of the election petitioner with the late Shri Jaipal Singh. In paragraph 25 of the written statement it was asserted that a non-Munda merely by virtue of the marriage with a Munda could not ipso facto become a Munda. If a person was not born of a father belonging to a Scheduled Tribe he or she could not legally claim to be a member of the said Tribe. It was asserted that since the election petitioner was not the daughter of a member of the Munda Tribe she could not claim to be a member of that Scheduled Tribe. The allegations of mala fides made against the Returning Officer were described as baseless and extraneous. During the pendency of the election petition the Lok Sabha was dissolved on December 27, 1970. A petition was filed before the High Court on behalf of Shri Horo that the election petition should be dismissed as having become infructuous. The court made an order on January 14, 1971 holding that the election petition could not be dismissed on that ground.

On the pleadings of the parties seven issues were framed. Issues 1, 2 and 3 which are material need be mentioned.

- (1) Is the election petition maintainable ?
- (2) Whether the petitioner was the legally married wife of late Shri Jaipal Singh according to the custom of Munda Tribe

prevalent in Chhota Nagpur ?

(3) Whether the petitioner could legally acquire the status of a Munda by virtue of her marriage to late Shri Jaipal Singh and whether she had been accepted as a member of the Munda Tribe by the said Tribe ?

It may be mentioned that so far as issue No. 1 was concerned the objection taken was that the election petition was defective on account of the non-joinder of necessary parties. When the election petition was filed only Shri Horo the returned candidate was impleaded but subsequently a petition was filed on behalf of the election petitioner making a prayer that the other contesting candidates were also necessary parties and should be impleaded. The court directed that they be added as parties. Shri Bodra who was one of the contesting parties was consequently impleaded as a party. Later on it was prayed on behalf of the petitioner that on a further consideration it was found that the persons who had been subsequently added were not necessary parties and their names might be deleted. Bodra's name was therefore deleted. The argument raised before the High Court was that Bodra being a necessary party to the petition under cl. (b) of s. 82 of the Act the petition became defective as soon as his name was struck off at the instance of the election petitioner. The High Court was of the view that although in paragraph 21 of the election petition an allegation had been made that Bodra had influenced the Returning Officer, no evidence was led on that point and the case of the election petitioner was based solely on the ground that the nomination paper had been illegally and improperly rejected. No relief had been sought on the ground that undue influence had been exercised on the Returning Officer by Bodra. The High Court was also of the view that the allegation made in the election petition that Bodra had exercised his influence in getting the nomination paper of the election petitioner rejected did not fall within the ambit and scope of sub-s. (7) of s. 123 of the Act. The contention that the petition was not maintainable was consequently rejected.

On the main issues, namely (2) and (3) it was expressly stated in the judgment that the factum of the marriage of the elec-

tion petitioner with the late Shri Jaipal Singh had not been disputed. The real controversy between the parties in the High Court centered round the point whether the marriage was in such form that the wife acquired the membership of the Tribe. According to the arguments on behalf of Shri Horo as the election petitioner was not a Munda she could not belong to the Munda Tribe and that by marriage such a status could never be acquired. The High Court examined the evidence relating to the question whether the marriage of the election petitioner with late Shri Jaipal Singh had been performed in accordance with the Munda custom and was in such form that she was accepted and treated as a member of the Munda Tribe. The court also considered the various authoritative books and other works relating to the Mundas and came to the conclusion that on a survey of the entire evidence and the circumstances there was no reason to discredit the evidence which had been led on behalf of the petitioner that she was married according to the Munda custom and that it was with the approval and sanction of the Tribe that she had been accepted as a member of the Munda tribe.

The first contention raised by Mr. Frank Anthony on behalf of the appellant relates to issue No. 1. It has been maintained by him that Bodra was a necessary party. Apart from the fact that he was the only person who had filed a written objection to the nomination of the respondent the election petition filed by the respondent contained serious allegations of corrupt practice against Bodra. As he had been given up as a party although impleaded at one stage the petition became defective and was not maintainable. According to clause (b) of s. 82 of the Act the petitioner must join as a respondent any candidate against whom allegations of any corrupt practices are made in the petition. Section 86(1) provides that the High Court shall dismiss any election petition which does not comply inter alia with the provisions of s. 81.

There can be little doubt that if the allegations made in the election petition against Bodra amounted to the commission of a corrupt practice by him it was obligatory on the part of the election petitioner to join him as a respondent to the petition. It is equally clear that in that event the petition would have become liable to dismissal. For finding out what a corrupt practice is we have to turn to s. 123 of the Act. According to Mr. Anthony the allegations made against Bodra fell within sub-s. (7) of s. 123 which is in the following terms :

S. 123 "The following shall be deemed to be corrupt, practices for the purposes of this Act:--

.lm15 (7) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person with the consent of a candidate or his election agent, any assistance other than the giving of vote for the furtherance of the prospects of that candidate's election, from any person in the service of the Government and belonging to any of the following classes, namely :-

- (a) gazetted officers;
- (b) stipendary judges and magistrates;
- (c) members of the armed forces of the Union:
- (d) members of the police forces;
- (e) excise officers;
- (f) revenue officers other than village revenue officers known as lambardars, malguzars, patels, deshmykhs or by any other name, whose duty is to collect land revenue and who are remunerated by a share of, or commission on, the amount of land revenue collected by them but who do not discharge any police functions; and
- (g) such other class of persons in the service of the Government as may be prescribed.

Explanation(1) In this section the expression "agent" includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate. (2) For the purposes of clause (7) a person shall be deemed to assist in the furtherance of the prospects of a candidates's election if he acts as an election agent of that candidate".

The allegations against Bodra are contained in para 21 of the election petition which may be set out :

"That the Returning Officer, while hearing the objections illegally allowed irrelevant personal aspersions to be cast against the petitioner by her opponents and the aforesaid Shree Theodore Bodra even after protests made by and on behalf of the petitioner, Shrimati Jahanara Jaipal Singh, against the same'. plain reading of the above paragraph shows that no such alleation was made that Bodra had influenced the Returning Officer I-L887 Sup CI/72 for the purpose mentioned in S. 123(7) of the Act. The essential ingredient of that provision is to obtain, procure etc. by a candidate of any assistance (other than the giving of a vote) for the furtherance of the prospects of that candidate's election from any person in service of the Government and belonging to the classes mentioned in the sub-section. There is absolutely no allegation or suggestion in para 21 that the Returning Officer was influenced by Bodra for the purpose of rendering assistance for the furtherance of the prospects of the election of any candidate. All that has been stated in that paragraph is that while hearing the objection the Returning Officer allowed irrelevant personal aspersions to be cast against the election petitioner by her opponents and Bodra. It was further stated that on inquiry the election petitioner came to learn that the Returning Officer had been influenced by Bodra. This influence apparently can have reference only to the conduct or act of the Returning Officer in allowing personal aspersions to be cast against the election petitioner. Even by stretching the language it is not possible to discover any of the ingredients which would constitute a corrupt practice under s. 123(7) of the Act. Faced with this situation Mr. Anthony sought to rely on sub- s. (2) of S. 123 the relevant part of which is as follows :

"(2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person with the consent of the candidate or his election agent with the free exercise of any electoral right:

Provided that--"....."

It is not possible to comprehend how the allegation contained in para 21 can be understood to amount to a suggestion of direct or indirect interference, or attempt to interfere on the part of the candidate etc. with the free exercise of any electoral right. We are accordingly satisfied that no allegation of any corrupt practice had been made in the election petition against Bodra and therefore he was not a necessary party within S. 82 of the Act. In this view of the matter it is not necessary to examine the

criticism of Mr. Anthony of that part of the judgment of the High Court according to which one of the reasons given for deciding issue No. 1 in favour of the present respondent was that no relief had been sought on the ground that undue influence had 'been exercised on the Returning Officer by Bodra and that no evidence was led on that point.

On issues 2 and 3 Mr. Anthony has raised three main points The first was that the respondent who was a Christian by birth, was a divorcee and according to her own statement the decree nisi in the divorcee proceedings had been made absolute on May 6, 1954. According to her she got married to late Shri Jaipal Singh on May 7, 1954. This marriage was a nullity as under s. 57 of the Indian Divorce Act 1869 she could not enter into a second marriage until after the expiry of six months from the date the decree had been made absolute. Secondly the High Court had palpably erred in holding that the respondent had become a member of the Munda tribe by marrying Shri Jaipal Singh and set aside the order of the Returning Officer who had held that she was a Christian by birth and Munda tribe being an ethnic group its membership could not be acquired by marriage but could be acquired only by birth. Thirdly it has been strongly urged that the respondent failed to prove the custom that a non-Munda could be initiated into tribe as its full fledged member either by performance of certain rituals and ceremonies or by the acceptance as such by the tribe or its panchayat. As regards the first point it was never canvassed or argued before the High Court. No plea was taken by Shri Horo in the written statement that there could be no valid marriage between the respondent and late Shri Jaipal Singh owing to the provisions contained in s. 57 of the Indian Divorce Act 1869 until after the lapse of a period of six months from the date the decree of divorce was made absolute. None of the issues which was framed by the High Court involve the question now sought to be agitated based on the provisions of s. 57 of the Indian Divorce Act. It appears that advantage is sought to be taken from the statement of the respondent about the various dates when the decree absolute was granted and the date when the marriage took place between the respondent and the late Shri Jaipal Singh. In the absence of any pleadings or issues no material has been placed on the record to show that in view of the provisions of S. 57 of the aforesaid Act there could not be a valid marriage according to the Munda customary law. It must be remembered that the respondent contracted a marriage with late Shri Jaipal Singh according to Munda rites and ceremonies and not as one Christian marrying another Christian. Nor was the matter pursued in cross-examination of the respondent and she was not asked as to how she could get over the bar of S. 57 in the way of remarriage before the expiry of the prescribed period. In these circumstances we do not consider that such a point can be allowed to be agitated for the first time before this Court. On the second and the third points, a great deal of reliance has been placed on the following statement in the well known book of S. C. Roy "Mundas and their country", 1912 Edn.

"The Munda tribe is divided into a large number of exogamous groups called kilis. According to Munda tradition, all the members of the same Kili are descended from one common ancestor. But such a tradition may not be quite correct with regard to the original kilis. Though exogamous as regards the kilis, the Mundas are endogamous so far as other tribes are concerned. Thus, there can now be no valid marriage, according to Munda custom, between a Munda and the member of any other 'kolarian' tribe, such as the Santals, the Kharias the Asurs, or the Bir-hors".

According to Roy the family came to be evolved from tribes and sub-tribes. Communal marriage was superseded by the individual marriage and Matriarchal Age was superseded by Patriarchal. Kinship came to be traced not as before, through a common female ancestor but through a male ancestor. D. N. Mazumdar in his work on the Ho tribe entitled "Affairs of a Tribe", 1950 Edn. points out that the rule of endogamy has its base in superstitious belief. According to him villages which are closely allied by ties of marriage are those which share the same God and Spirits and the same Deonwa. The influence of Deonwas, in other words, the knowledge of the Bongas of an area, determines the limit of exogamy, for there is a risk in marrying in villages the Bongas of which are unknown; (pp. 237-238). From the account given by S. C. Roy himself it appears that according to the Munda custom the rule of endogamy is not absolute; for instance, in the case of Munda female married or unmarried found to have gone astray with a man of a different caste or tribe, it is said, that the latter is summoned before a Panchayat and a heavy fine is imposed on the lover and the fine, if realised, is paid as compensation to the parents of the seduced maiden or the husband of the married female and the seducer is compelled to take the girl or woman as a wife or a mistress and in case of refusal (which is rare) to submit to the orders of the Panchayat. The family of the seduced female remains outcaste until a purificatory ceremony is performed and thus restored to caste. The members of the family then cook rice. and pulse and themselves distribute the food to the assembled relatives; (see pp. 544-545.) The question that has to be enquired into is whether the strict rule of endogamy of the Munda tribe has been deviated from and whether custom has sanctioned such deviation. D. W. Mazumdar in his work "Races and Cultures of India" deals with tribal organisations in Chapter 17. According to him the definition that is found in the current literature on the subject is given in the Imperial Gazetteer which is, "A tribe is a collection of families bearing a common name, speaking a common dialect occupying or professing to occupy a common territory and is not usually endogamous though originally it might have been so". Endogamy is an essential feature of the tribe though intertribal marriages are breaking the limits of endogamy. It is further stated by him that "the importance of the blood bond or the kinship group is forced to the background, the communal economy of the clan is superseded by individual desire for gain and property, money assumes an importance it seldom had before, and the ties of reciprocity and mutuality of obligation are reoriented to suit new conditions. Tribal custom and practices which established social life lose their value and the choice of 'leader and of mate is guided by different considerations". The Munda tribe cannot be said to be immune from the above process of change in their social Organisation. Changes in their belief, customs, traditions and practices have taken place under the influence of Hinduism, Christianity, and on account of the impact of western education, urbanisation, industrialisation and improved means of communication. The sense of individualism and lack of love for, the traditional code of conduct and social taboos, are stated to be apparent among the emerging urban-industrial oriented adivasi communities. D. N. Mazumdar has made an intensive study of the rule of

endogamy among the Ho tribe which is an off-shoot of the Munda tribe. A reference to, the Ho practice may, therefore, help us in understanding the practice among the Mundas. According to D. N. Mazumdar "A Ho does not marry outside the tribe as a rule but there is today no legal or social prohibition against his doing so. Though tribal code has relaxed considerably those who work in the mining and industrial centers in and outside Kolhan contract such alliances and when they come back to their villages they are not outcasted by the society;" (pp. 124-125, "Races and Cultures of India"). At another place he records :-

"The endogamy of the tribe is not sacred today, with the result that many marriages have taken place between the Hos and other tribes. Liaison between Diku men and Ho girls is increasing, and cases that have occurred in Chaibassa during the last ten years or so would fill a volume. Thus, there being no longer, my deterrent to mating with strangers, social authority vested in the Killi punch has to exercise its prerogative to ensure a compliance with social traditions. Killi exogamy has not led to an indiscriminate alliance between the different killis and as far as our knowledge goes, taboo on marriage outside a particular local area can be traced to a dread of unfamiliar Bongas, who were conceived as hostile, and therefore dangerous". (p. 236).

L. P. Vidyarthi in his work mentioned before based on his study of the social life of the Oraon and Munda tribes living in the city of Ranchi points out that a good number of cases of marriage between tribals and non-tribals have occurred and that in his investigation he came across 53 cases of non-tribal males marrying tribal girls. He points out that greater percentage of love marriages and marriages by 'Kept' have been socially disapproved while 83.3% and 100 % of arranged and legal (civil) marriages have been approved. (See pages 102-103).

We may now deal with the evidence produced by the parties on the above points. P.W. 1 who was working as District Welfare Officer in May 1970 at Ranchi and who belongs to the Munda tribe stated that if a Munda male married a non-Munda girl and such marriage was accepted by the society it would be a valid and proper marriage. The wife would, therefore, be accepted as a member of the tribe. He had himself married an Oraon girl and his wife though a non-Munda has been accepted as a member of the Munda tribe. He further deposed that if the Munda married a non-Munda a feast is given and if the elders of the society accept the marriage and participate in the feast that by itself would show that the tribal society has accepted the marriage and the wife has become a member of the tribe. P.W. 2 who is a nephew of the late Shri Jaipal Singh gave details of the ceremonies which were performed when the marriage between his uncle and the respondent took place. After the performance of those ceremonies the members of the tribe and the family declared that the respondent had been accepted as a member of the tribe. He himself is married to a non-Munda girl though he was married according to Munda marriage rights as well as according to Hindu law. P.W. 3 who was at the material time working as Assistant Director in Sociology, Bihar Tribal Welfare Institute, stated that

he had been doing research on the subject of Bihar Tribal Marriage and Family Transformation with special reference to Family law. One of his major duties was to ascertain from the members of different tribes facts relating to the subject of his research. According to his evidence a Munda male can marry a non-Munda girl. After adopting a special procedure in some cases a non-Munda wife is accepted as a member of the tribe. A certain procedure or formality has to be gone through. The council of elders of the tribal people has to be consulted and the special reason for the marriage is to be stated. Then various rituals are gone through and the marriage is allowed by the elders. He gave instances where, a Munda male had married a non-Munda girl and their marriage had been accepted by the tribal people. One of these instances given by him related to persons belonging to the Santhals and Ho tribes. He maintained that the customs prevalent among these tribes were broad-

ly the same as among the Mundas. In cross-examination he stated that he had met the members of the Munda elder council and he had remained in touch with that council since 1952. He had made special research of Jojo Hatu which was a Munda village. He claimed to have submitted a report to the government in which he had collected hundreds of cases where a girl of a particular tribe had married outside her tribe. P.W. 4 was the Superintendent of the Anthropological Survey of India, Ministry of Education. As an Anthropologist he had to undertake full study in different parts of India mostly among the tribal community. He had studied Munda tribal custom which assignment had been given to him in 1965-66. In course of the research he found that a Munda could marry a non-Munda girl even before 1954. He gave three kinds of unusual marriages one of which was where a Munda male married a non-Munda female. The social consequences of that marriage was called Jati Bora. That meant that the Munda male had committed an offence against the whole community. Normally he would be ostracised along with his family but there was a process by which he and his wife could be admitted into the community. This process was known 'Niyar' which means "to bring in or take in". The offending party invites the members of the Parha gives them a feast at which a white goat is sacrificed and the blood is smeared on the body of the boy and the girl along with Tarmolik and then they are allowed to sit along with the members of the community in the same Pankti. After that they are formally considered as members of the community. He was specifically asked a question with regard to the manner in which a Munda boy marrying a non-Munda girl would be accepted by the community and his reply was that in his opinion the Parha was the ultimate authority in the matter of acceptance of a non-Munda girl in the community. If a Parha accepted her that was final. In cross-examination he stated that if a marriage of the nature under discussion is not approved by Parha he did not think it would be accepted by the members of the society. It may be mentioned that the evidence of this witness has been subjected to a good deal criticism by Mr. Anthony for the reason that he was only expressing an opinion on the last matter and was not making a definite statement of fact. P.W. 5, who was attached to the office of the Deputy Commissioner, Palamau, gave an account of the ceremonies which were performed of the marriage between the

respondent and late Shri Jaipal Singh. According to him the elders of the community unanimously decided that since permission had been given by the elders they would be taken as members of the tribe. He denied the suggestion that it was on account of the influence of late Shri Jaipal Singh that Pahans had given sanction to the marriage. According to him there had been other cases also where such sanction had been given.

P.W. 8 who claimed to be a Parha Raja of three Parhas, viz., Takara Parha, Sada Parha and Sagha Parha comprising 36 villages also gave evidence about the ceremonies which were performed at the marriage of late Shri Jaipal Singh with the respondent. After the performance of the ceremonies the Samaj of the Munda tribe accepted the marriage, according to him. He deposed to other instances where Munda had married non-Mundals. He had attended a marriage of a Munda who had married a Ho girl. Sanction was given by the elders to that marriage. It is unnecessary to refer to the evidence of P.W. 10 who is also a Pahan and who claimed to have been present at the time of the marriage in question. He made a statement which has been subjected to justifiable criticism by Mr. Anthony about the document Exht-3. His evidence, therefore, does not deserve consideration. Out of the witnesses examined on behalf of the respondent mention may be made of the statement of Shri Horo himself who appeared as R.W. 6. After stating that the late Shri Jaipal Singh who was a leader of the Jharkhand Party and was an Adivasi and a Munda professing the Christian religion, he affirmed that the respondent did not have the right and status of a Munda on the basis of established custom. He admitted that there was a custom that a Munda who had been excommunicated from the tribe could be taken back but according to him that person must be a Munda and no non-Munda could be accepted as a member of the tribe. The Munda could of course marry a non-Munda but in the manner in which the Munda usually married a Munda. The custom among the Mundas is changing and it is dynamic and not static. The other witnesses produced by Shri Horo are not impressive and do not afford much assistance in deciding the points under discussion. According to the observations of the High Court Shri Horo did not examine any witness on his behalf who could say that he had made a special study and research of the marriage custom of the Munda tribe and that such a marriage was not acceptable in the present times in spite of all the changes which have taken place in the life and social structure of the community owing to the impact of the various factors which have been mentioned in the authoritative studies of eminent Anthropologists mentioned before. Our attention has been drawn by Mr. Anthony to certain decisions for the proposition that in a tribe which is endogamous birth alone can confer the status of membership of the tribal community. In *V. V. Giri v. D. Suri Dora & Others*(1) one of the questions raised, was whether respondent No. 1 in that case had ceased to be a member of the Schedule Tribe at the material time because he had become a Kshatriya. This court observed that it (1) 21 E. T. R. 188.

was essential to bear in mind the broad and recognised features of the hierarchical social structure prevalent amongst the Hindus. It was considered enough to state that whatever might have been the

origin of the Hindu castes and tribes in ancient times, gradually status came to be based on birth alone. It was pointed out that a person who belonged by birth to a depressed caste or tribe would find it very difficult, if not impossible, to attain the status of a higher caste amongst the Hindus by virtue of his volition, education, culture and status. We are unable to see how this case can be of any assistance in deciding the matter before us, namely, whether a non Munda can by marriage be recognised as a member of the Munda tribe in certain circumstances.

The High Court, after discussing the evidence and referring to other authoritative books like "Tribes and Castes of Bengal" by H. H. Risley and "Encyclopedia Mundarica" by Rev. John Hoffman as also the statement in Encyclopedia Britannica, Vol. 15, and the Encyclopaedia of Religion and Ethics by James Hastings, Vol. IX, apart from the work of J. Reid, I.C.S., on Chhota Nagpur Tenancy Act, observed that although originally very severe restrictions were imposed amongst the Mundas as far as marriage in their own Kili or seat was concerned, the process of Munda assimilation to the larger Indian society facilitated by improved communications and the introduction of formal system of education was being accelerated under the independent Government of India. In Encyclopedia Britannica, Vol. 15 in the Chapter relating to Mundas it is also mentioned. "The Munda speaking people, with the other Indian tribal groups, are being encouraged to adopt new customs and to become fully participating members of Indian society". (page 991). Similarly in the Encyclopedia of Religion and Ethics by James Hastings, Vol. IX, it has been stated as to how Munda customs are being changed with the impact of the influence of Christianity. Referring to the Chapter in Reid's book it has been noticed by the High Court that according to the Munda conception a wife becomes a member of the Kili of her husband by legal fiction. The High Court further relied on the decision in Wilson Reads v. C. S. Booth⁽¹⁾ in which it was held that the question whether a person can be regarded as a member of the Khasi tribe was a question of fact depending upon the evidence produced in the case. It was said that the whole object of reserving a seat for a particular tribe was to afford the community, as a whole, a right of representation and therefore the question of the membership of a particular individual of that community could not be considered divorced from the very object of legislation. Thus the conduct of the community which had been given the right of special representation, the manner and how the (1) A. T. R 558 Assam 128 community regarded a particular individual and whether the community as a whole intended to take the individual within its fold were all matters which would be relevant for consideration of the question whether a particular person could be regarded as a member of the-Scheduled Tribe. The High Court was alive to the fact and this point of distinction has been greatly emphasised by Mr. Anthony-that in that case the appellant claimed to be a Khasi, his father being a European and his mother a member of the Khasi tribe. Even though the facts were different, the approach in such matters which commended itself to the Assam High Court can hardly be regarded as unsound.

It appears to us, on a full consideration of the entire material, that the following matters stand established in the present case :--

(1) The Mundas are endogamous and inter-

marriage with non-Mundas is normally prohibited.

(2) That a Munda male along with his family on marrying a non-Munda girl is often ex-

communicated or outcasted.

(3) That the rule of endogamy is not so rigid that a Munda cannot marry a non-Munda after performing special ceremonies.

(4) That such marriages have been and are being sanctioned by the Parha Panchayat.

(5) That where a Munda male and his family are 'outcasted for marrying a non-Munda they are admitted to the tribe after certain special ceremonies are performed.

Even in the account given by S.C. Roy as well as by P.W. 4 a Munda male is excommunicated for marrying a non-Munda girl but such excommunication is not automatic. It is left to the discretion of the panchayat. If the panchayat approved of a particular marriage with a non-Munda then no question of excommunication arises. Thus several inroads appears to have been made on the rigid system of endogamy which might have existed at one time but over the course of years several matters are left to be decided by the panchayat or elders of the tribe itself. There is no evidence whatsoever that the late Shri Jaipal Singh was excommunicated or outcasted because he had married a non-Munda. On the contrary there is abundant evidence that his marriage was accepted as valid and was approved by the Parha Panchayat or the elders of the tribe.

Reverting to the argument that a non-Munda women cannot become a member of the Munda tribe by marriage even if the marriage be valid because the Mundas are a patriarchal society and constitute an ethnic group, we have already referred to the evidence of the witnesses produced by the respondent who had made, special research in the matter and even if we exclude the opinion of P.W. 4 who was Superintendent of Anthropological Survey of India that the Parha was the final authority in the matter of acceptance of an non-Munda girl in the community but the rest of his evidence cannot be brushed aside. From all this evidence it is proved that once the marriage of a Munda male with a non- Munda female is approved or sanctioned by the Parha panchayat they become members of the community. They contention of Mr. Anthony that a person can be Munda by birth alone can be sustained only if the custom of endogamy is established without any exception. We have already held that the rule of endogamy has not been proved to exist in the rigid or strict form canvassed by Mr. Anthony. That rule has not been strictly followed and the marriage of a Munda male with a non-Munda woman has been and is being approved and sanctioned by the Parha panchayat. If a non- Munda woman's marriage with a Munda male is valid it is difficult to say that she will not become a member of the Munda tribe. The, concept of a tribe is bound to undergo changes, when numerous social, economic, educational and other like factors in a progressive country start having their impact. It is noteworthy that a Hinduised Munda and a Munda converted to Christianity can inter-marry and conversion to Christianity has not become an obstacle in the way of such marriage among the Mundas. Mr. Horo himself in all fairness affirmed that custom among the Mundas was not static but was dynamic and was changing. We do not find cogent or weighty

reasons for disagreeing with the view of the High Court on the points under discussion. We may also refer to Article 330 of the Constitution according to which the seats reserved for the Scheduled Tribes are to be reserved in the House of the People, inter alia, for members of these Tribes. Under S. 33 (2) of the Act a candidate for a reserved seat has to file a declaration specifying a particular caste or tribe of which he is a member. Article 342(1) empowers the President to specify 'the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall, for the purposes of the Constitution, be deemed to be Scheduled Tribes in relation to the State or Union territory as the case may be. In Parts 1 to 12 of the Schedule to the Constitution (Scheduled Tribes) Order 1952 are specified the tribes or tribal communities or parts of or groups within the tribes or tribal communities who are to be deemed to be Scheduled tribes. Munda is one of such specified tribes or tribal communities. It can well be said that the term "tribal community" has a wider connotation than the expression "tribe". A person who, according to the strict custom of a tribe'

cannot be regarded as a member of that tribe may well be regarded as a member of that tribal community. Where a non- Munda woman is married to a Munda male and the marriage is approved and sanctioned by the Parha Panchayat of that tribe and the marriage is valid she may not, on the assumption that the rule of endogamy prevails, become a member of the Munda tribe in the strict sense as not having been born in the tribe. She cannot, however, be excluded from the larger group, namely, the tribal community. The High Court has taken the view that the use of the term "tribal communities" in addition to the term "tribes" in Article 342 shows that a wide import and meaning should be given to these words and even if the respondent is not a member of the Munda tribe by virtue of birth she having been married to a Munda after due observance of all formalities and after obtaining the approval of the elders of the tribes would belong to the tribal community to which her husband belongs on the analogy of the wife taking the husband's domicile. Even without invoking the doctrine of domicile the respondent's marriage with late Shri Jaipal Singh who was a Munda having been approved and sanctioned by the Parha Panchayat of the Munda tribe it can be said that she became a member of the Munda tribal community. We have not been shown any infirmity in the reasoning of the High Court on this point. When a person, in the course of time, has been assimilated in the community it is somewhat difficult to comprehend how that person can be denied the rights and privileges which may be conferred on that community even though tribal by constitutional provisions. In the result this appeal fails and it is dismissed but in view of the nature of the points involved we leave the parties to bear their own costs in this Court. V.P.S. Appeal dismissed.