Sobha Hymavathi Devi vs Setti Gangadhara Swamy & Ors on 28 January, 2005

Equivalent citations: AIR 2005 SUPREME COURT 800, 2005 (2) SCC 244, 2005 AIR SCW 718, (2005) 1 CLR 294 (SC), (2005) 1 SCALE 626, 2005 (3) SRJ 150, 2005 (2) ALL CJ 935, (2005) 1 JT 496 (SC), 2005 (1) CLR 294, 2005 (2) SLT 20, 2005 ALL CJ 2 935, (2005) 26 ALLINDCAS 1 (SC), (2006) 2 JCR 236 (SC), (2005) 2 ANDHLD 53, (2005) 1 SUPREME 617, (2005) 1 RECCIVR 799, (2005) 2 KCCR 138, (2005) 2 BLJ 150, (2005) 2 CIVLJ 871, (2005) 58 ALL LR 630, (2005) 3 ANDH LT 8, (2005) 2 SCJ 3, (2005) 1 PAT LJR 457, 2004 BLJR 3 2268, (2005) 1 BLJ 244

Author: P.K. Balasubramanyan

Bench: Chief Justice, G.P. Mathur, P.K. Balasubramanyan

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           CASE NO.:
Appeal (civil)  4413-4414 of 2003

PETITIONER:
SOBHA HYMAVATHI DEVI

RESPONDENT:
SETTI GANGADHARA SWAMY & ORS.

DATE OF JUDGMENT: 28/01/2005

BENCH:
C.J.I,G.P. MATHUR & P.K. BALASUBRAMANYAN

JUDGMENT:
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J U D G M E N T P.K. BALASUBRAMANYAN, J.

1. The election of the appellant from Sringavarapukota 28 S.T. Assembly constituency in Vizianagaram District of Andhra Pradesh to the legislative assembly in the elections of the year 1999 was challenged under the Representation of the People Act before the High Court of Andhra Pradesh in three Election Petitions. Two of them were by defeated candidates and one of them by a voter in the constituency. The election petition [E.P.No. 25 of 1999] filed by one of the defeated candidates abated due to the death of the petitioner therein during the pendency of the election petition in the High Court. The other two election petitions were allowed by the High Court upholding the challenge to the election of the appellant on the ground that the appellant was not qualified to contest from a constituency reserved for Scheduled Tribe candidates. Thus the election of the appellant was set aside. Aggrieved thereby, the appellant has filed these appeals under Section

116A of the Representation of the People Act, 1951.

2. The question that fell for decision before the High Court in the Election Petitions filed under Section 81 read with Section 100 of the Act and that falls for decision before us, is whether the appellant belongs to a Scheduled Tribe and hence qualified to contest the election from a constituency reserved for a Scheduled Tribe. According to the Election Petitioners, the appellant belonged to a forward community, Patnaik Sistu Karnam, while according to the appellant, she belongs to the Bhagatha Community, which was a notified Scheduled Tribe. The High Court, on evaluation of the pleadings and the evidence adduced before it, came to the conclusion that the appellant was a Patnaik Sistu Karnam and was not a member of Bhagatha Community, a Scheduled Tribe community. It was thus that the election of the appellant was set aside. The High Court posed the question whether the Election Petitioners have established that the appellant did not belong to Bhagatha Community as claimed by her and on coming to the conclusion that they have established that she belonged to the Patnaik Sistu Karnam community and further finding that the said community was not a Scheduled Tribe, granted the relief to the Election Petitioners,. What is contended in these appeals on behalf of the appellant, is that the said finding by the High Court was not justified and the appellant was entitled to be treated as belonging to Bhagatha Community, a Scheduled Tribe.

3. Certain facts are not in dispute. One Sobha Rama Raju belonged to Bhagatha Community. He had two wives, Mallamma and Gowramma. Through Mallamma he had a daughter Simhachalam. The appellant is the daughter of Simhachalam. According to the Election Petitioners,, Simhachalam had married one Murahari Rao belonging to the Patnaik Sistu Karnam caste and in that wedlock, was born the appellant and five other children. The appellant admitted that she was the daughter of Simhachalam through Murahari Rao. But she pleaded that she and five of her siblings, were the illegitimate children of Murahari Rao, a Patnaik Sistu Karnam and Simhachalam, of the Bhagatha Community. Simhachalam had earlier married Ladda Appala Swamy who belonged to the Bhagatha Community and that marriage was never terminated and there was no marriage between Simhachalam and Murahari Rao, though there was intimacy and cohabitation between them resulting in progeny, six in all including herself, all illegitimate. To add strength to her contention, the appellant also raised a plea that Murahari Rao had himself earlier married his Sister's daughter Kalavathi and that marriage had also not been terminated and, therefore, there was no possibility of Murahari Rao, her father formally marrying Simhachalam, her mother. The appellant further pleaded that she had married one Appala Raju, her maternal uncle belonging to the Bhagatha Community and being the wife of a person belonging to a Scheduled Tribe, she was also entitled to be treated as belonging to the Scheduled Tribe. Thus she had the status of a Scheduled Tribe and hence was qualified to contest the election from a constituency reserved for Scheduled Tribes. The Election Petitioners,, on the other hand, denied that Simhachalam had earlier married Ladda Appala Swamy as alleged by the appellant and also denied that Murahari Rao, her father, had earlier married Kalavathi as claimed by the appellant. They pleaded that Murahari Rao and Simhachalam were married and all the six children including the appellant were born to them in a lawful wedlock. The High Court, on the evidence, came to the conclusion that there was no evidence to establish that the mother of the appellant Simhachalam had earlier married Ladda Appala Swamy. It further held that even if there was any such marriage, the same must be taken to have been terminated before

Simhachalam started living with Murahari Rao. The High Court held that Murahari Rao had married Simhachalam, the mother of the appellant, and six legitimate children were born to Murahari Rao and Simhachalam. Since a child took the caste of her father, the appellant had to be considered a Sistu Karnam and could not be considered to be a member of the Bhagatha Community. The High Court also held that the appellant had failed to establish that there was a marriage between Murahari Rao and Kalavathi as alleged by her. There was, thus, no impediment in Murahari Rao formally and legally marrying Simhachalam and begetting six children through her. It then considered the question whether by virtue of the marriage of the appellant with Appala Raju, her maternal uncle who belonged to the Bhagatha Community, she could be considered to be a member of the Bhagatha Community, a Scheduled Tribe. The High Court, based on a decision of this Court, held that she could not claim the benefit of reservation to contest from a reserved constituency merely because of her marriage to a Scheduled Tribe when she herself belonged to a forward community. It was on these findings that the challenge to the election of the appellant was upheld.

4. Before the trial court, PWs, 1 to 11 were examined on behalf of the Election Petitioners, in addition to marking Exhibits A.1 to A.6. On behalf of the appellant, RWs. 1 to 10 were examined and Exhibits B.1 to B.35 were marked. Exhibits X.1 to X.32 were marked through witnesses summoned. The evidence on the side of Election Petitioners was to the effect that the father of the appellant had married Simhachalam, the mother of the appellant, that they were living together; that they had begotten six children including the appellant; that they were recognized as husband and wife in the village and that the children were brought up as Sistu Karnams and not as persons belonging to the Bhagatha Community. On behalf of the appellant, her father, her mother, her husband, Kalavathi, the alleged wife of Murahari Rao, the brother of Kalavathi, the father of Kalavathi and three others were examined in addition to she herself getting examined. Simhachalam and Murahari Rao, the mother and father of the appellant, even while admitting parenthood, tried to give evidence that they were never formally married. An attempt was made by the other relatives to support that story. But the trial court, on a proper appreciation of the evidence, in the light of the circumstances disclosed and the admissions made by these witnesses, came to the conclusion that the plea of absence of marriage between Murahari Rao and Simhachalam could not be accepted in the light of the evidence available and in the light of the long cohabitation and the birth of six children including the appellant and the presumption arising therefrom.

5. We were taken elaborately through the judgment of the High Court, the pleadings and the evidence of the witnesses examined on either side with particular reference to the evidence of the appellant as RW-1, her father RW-2, her mother, RW-7 and RW-4, 8 and 10, Kalavathi, her brother and her father. On going through the evidence of these witnesses, we are inclined to agree with the conclusion of the High Court that there are enough admissions in the evidence of these witnesses which clearly go to prove that Murahari Rao and Simhachalam, the parents of the appellant, long cohabited together, begot children and were recognized as husband and wife by the community. This especially in the context of the documentary evidence adduced in the High Court which were again brought to our notice by learned counsel for the respondents. In short, we find that the finding of the High Court that Murahari Rao and Simhachalam were married and the six children including the appellant were born in that wedlock and that it was not possible to hold that there was only a

concubinage and the six children including the appellant were born out of that relationship and out of wedlock is unexceptionable. Similarly, we also do not find much merit in the challenge to the finding that the appellant had failed to prove that Simhachalam had earlier married Ladda Appala Swamy or that there was any subsisting relationship between Simhachalam and Ladda Appala Swamy which could stand in the way of a valid marriage between Murahari Rao and Simhachalam. Equally, we find that the finding rendered by the High Court that the appellant had failed to show that her father Murahari Rao had earlier married Kalavathi, his sister's daughter, is also fully justified especially if one were to read the evidence of Kalavathi, her brother, her father and RW-9, examined on behalf of the appellant.

6. We find that the conclusion that there was a valid marriage between Murahari Rao, the father of the appellant and Simhachalam, the mother of the appellant, stands strengthened by the presumption available in law arising out of the long cohabitation of Murahari Rao and Simhachalam. The Privy Council in Mohabbat Ali Khan vs. Muhammad Ibrahim Khan and others, AIR 1929 PC 135, held that the law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years. This Court in Gokal Chand vs. Parvin Kumari AIR 1952 SC 231, held that continuous cohabitation of a man and a woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage. But the presumption which may be drawn from long cohabitation is rebuttable, and if there are circumstances which weaken or destroy that presumption, the Court cannot ignore them. We must say that on the evidence here, including the documentary evidence relied on by the High Court, the presumption arising from long cohabitation of Murahari Rao and Simhachalam of a valid marriage between them, gets strengthened and there is no material circumstance which can be said to rebut such presumption arising from long cohabitation. The arising of a presumption, though rebuttable, has also been noticed by this Court in S.P.S. Balasubramanyam vs. Suruttayan Alias Andalipadayachi and others., (1994) 1 SCC 460, and in Ranganath Parmeshwar Panditrao Mali and another vs. Eknath Gajanan Kulkarni and another, (1996) 7 SCC 681. We may also incidentally notice that even assuming that there was any earlier marriage between Simhachalam, the mother of the appellant and Ladda Appala Swamy at a time when Simhachalam was allegedly eight years old, the same also can be presumed to have been terminated especially in the context of the subsequent long cohabitation of Murahari Rao and Simhachalam and the evidence on the side of the appellant herself that the alleged marriage between Simhachalam and Ladda Appala Swamy was when Simhachalam was eight years old; that the said marriage was never consummated and that Simhachalam had left Ladda Appala Swamy immediately after marriage and had never lived with him. It is undisputed that divorce was permitted in the community. In this context the ratio of the decision in Raja Ram vs. Deepa Bai (1973 MPLJ 626) could be applied. Thus, on the whole, we agree with the finding of the High Court that there was a valid marriage between Murahari Rao and Simhachalam, the father and the mother of the appellant and that the appellant was a legitimate daughter of that union.

7. Learned counsel for the appellant, in spite of her efforts, could not show any serious flaw in the appreciation of evidence by the High Court while coming to the conclusion that there was a marriage between Murahari Rao and Simhachalam. Learned counsel could not successfully challenge the finding of the High Court that the appellant could not prove that her mother Simhachalam was

earlier married to Ladda Appala Swamy and that marriage was subsisting or that the father of the appellant Murahari Rao had earlier married Kalavathi and that marriage was subsisting. Learned counsel, no doubt, contended that the appellant must be treated to be an illegitimate daughter of Murahari Rao and Simhachalam and if so treated, the appellant could be considered to be a person of the caste of her mother and so viewed, could be considered to belong to Bhagatha Community, a Scheduled Tribe. Learned counsel further contended that in any view, since the appellant had married Appala Raju, a person belonging to the Bhagatha Community, and she having been brought up as a member of the Bhagatha Community and accepted by that community as a member thereof, her status as a member of the Bhagatha Community had to be upheld especially in the context of the certificate issued to her by the concerned authority under the Andhra Pradesh (Scheduled Castes, Scheduled Tribe and Backward Classes) Regulation of Issue of Community Certificate Act, 1993.

8. Elaborating her argument, learned counsel for the appellant contended that even though the appellant was born to Murahari Rao, a Sistu Karnam, she was still being treated as a member of the Bhagatha Community to which her mother belonged and that she had married a person belonging to the Bhagatha Community; that the Bhagatha Community had always accepted her as belonging to that community and in such a situation, she must be considered to belong to the Bhagatha Community, a Scheduled Tribe and hence eligible to contest from a constituency reserved for the Scheduled Tribes. That the appellant had married Appala Raju, her maternal uncle belonging to the Bhagatha Community, is not in dispute. But the claim of the appellant that she was being brought up and was being recognized as a member belonging to the Bhagatha Community, cannot be accepted in the face of the evidence discussed by the High Court including the documentary evidence relied on by it. The document Exh. 10 and the entry therein marked as Exh. X-11 relating to the appellant, show her caste as Sistu Karnam and not as Bhagatha. This entry was at an undisputed point of time. Moreover, the evidence also shows that she was always being educated at Visakhapatnam and she was never living as a tribal in Bhimavaram village to which her mother's family belongs. There is no reason for us to differ from the conclusion of the High Court on this aspect. Faced with this position, learned counsel for the appellant pitched her case on the fact that the appellant had married a person belonging to a Scheduled Tribe and had thereby acquired membership in that community and consequently, she must be treated as a member of the Scheduled Tribe. Learned counsel placed reliance on the decision of this Court in N.E. Horo vs. Smt. Jahan Ara Jaipal Singh , AIR 1972 SC 1840, to contend that once a marriage of a male pertaining to a Scheduled Tribe with a female pertaining to a non Scheduled Tribe was approved or sanctioned by the concerned Panchayat they became members of the community and even if a female is not a member of a tribe by virtue of birth, but she had been married to a tribal after due observance of all formalities and after obtaining the approval of the elders of the tribe, she would belong to the tribal community to which her husband belongs on the analogy of the wife taking the domicile of the husband. Learned counsel also referred to the decision in Valsamma Paul (Mrs.) vs. Cochin University and others, (1996) 3 SCC 545, in support, though the said decision has been relied on by the High Court for negating the claim of the appellant in that regard.

9. What is contended by learned counsel for the appellant is that on the marriage of the appellant with Appala Raju in the customary form of the Bhagatha Community, the appellant had been recognized as a member of the Bhagatha Community and accepted as such by the members of that

community and consequently, the appellant must be taken to have acquired membership of the Bhagatha Community. First of all, we must point out that the High Court, in our view, has rightly held that there was nothing to show that the marriage of the appellant with Appala Raju took place in the customary mode followed by the Bhagatha Community. On the other hand, as noticed by the High Court, the available evidence tends to indicate that the marriage was more in the form followed by Sistu Karnams, the community to which her father belonged. Secondly, as noticed by the High Court, there is nothing to show that the appellant was accepted by the Bhagatha Community of Bhimavaram as a member of that community. As discussed by the High Court based on the evidence in the case, the indication available was that the appellant hardly resided in Bhimavaram village to which her maternal grand-father belonged and there was no occasion for that community to treat her as a member of that community. There is also nothing to show that the appellant followed the way of life of that community.

10. What then remains is the fact that the appellant though assigned the caste of her father Murahari Rao, namely, the Sistu Karnam community, had married a tribal belonging to the Bhagatha Community. On the basis of this marriage, it is argued that she must be taken to have acquired membership in the community of her husband and consequently treated as a member of that community. It is in that context that the decision in Horo (supra) was relied on. It is also contended that the decision in Horo (supra) related to an election dispute and consequently, the ratio of that decision should govern the present case. We have already indicated that there is nothing to show that the marriage of the appellant with Appala Raju was sanctioned or approved by the elders of the Bhagatha Community or the concerned Panchayat or was in tribal form or that the formalities attending such a tribal marriage were observed and the marriage was performed after obtaining the approval of the elders of the tribe. Even otherwise, we have difficulty in accepting the position that a non-tribal who marries a tribal could claim to contest a seat reserved for tribals. Article 332 of the Constitution speaks of reservation of seats for Scheduled Tribes in Legislative Assemblies. The object is clearly to give representation in the legislature to Scheduled Tribe candidates, considered to be deserving of such special protection. To permit a non-tribal under cover of a marriage to contest such a seat would tend to defeat the very object of such a reservation. The decision of this Court in Valsamma Paul (Mrs.) vs. Cochin University and others (supra), supports this view. Neither the fact that a non-backward female married a backward male nor the fact that she was recognized by the community thereafter as a member of the backward community, was held to enable a non- backward to claim reservation in terms of Articles 15(4) or 16(4) of the Constitution. Their Lordships after noticing Bhoobun Moyee v. Ram Kishore, (1865) 10 MIA 279, and Lulloobhoy Bappoobhoy Cassidass Moolchund v. Cassibai, (1879-80) 7 IA 212, held that a woman on marriage becomes a member of the family of her husband and thereby she becomes a member of the caste to which she has moved. The caste rigidity breaks down and would stand as no impediment to her becoming a member of the family to which the husband belongs and to which she gets herself transplanted. Thereafter, this Court noticed that recognition by the community was also important. Even then, this Court categorically laid down that the recognition of a lady as a member of a backward community in view of her marriage would not be relevant for the purpose of entitlement to reservation under Article 16(4) of the Constitution for the reason that she as a member of the forward caste, had an advantageous start in life and a marriage with a male belonging to a backward class would not entitle her to the facility of reservation given to a backward

community. The High Court has applied this decision to a seat reserved in an election in terms of Article 332 of the Constitution. We see no reason why the principle relating to reservation under Articles 15(4) and 16(4) laid down by this Court should not be extended to the constitutional reservation of a seat for a Scheduled Tribe in the House of the People or under Article 332 in the Legislative Assembly. The said reservations are also constitutional reservations intending to benefit the really underprivileged and not those who come to the class by way of marriage. To the extent the decision in Horo (supra) can be said to run counter to the above view, it cannot be accepted as correct. Even otherwise, in the absence of evidence on the relevant aspects regarding marriage in tribal form and acceptance by the community, the decision in Horo (supra) cannot come to the rescue of the appellant. On a consideration of the relevant aspects, we are of the view that whether it be a reservation under Articles 15(4) or 16(4) or 330 and 332, the said reservation would benefit only those who belong to a Scheduled Caste or Scheduled Tribe and not those who claim to acquire the status by marriage, like the appellant in this case. Thus, in our view, the High Court was fully justified in coming to the conclusion that the appellant could not claim the right to contest a seat reserved for a Scheduled Tribe in terms of Article 332 of the Constitution of India merely by virtue of her marriage to a person belonging to a Scheduled Tribe.

11. What remains is the argument based on the certificates allegedly issued under The Andhra Pradesh (Scheduled Castes, Scheduled Tribes and Backward Classes) Regulation of Issue of Community Certificate Act, 1993. The High Court has not accepted the certificates as binding for the reason that the evidence showed that the certificates were issued based on the influence exercised by the appellant as a member of the Legislative Assembly, one after another, immediately on an application being made and without any due or proper enquiry. We are impressed by the reasons given by the High Court for not acting on these certificates. That apart, a reference to Section 3 of the Act would indicate that a certificate thereunder, insofar as it relates to elections, is confined in its validity to elections to local authorities and co-operative institutions. It does not embrace an election to the Legislative Assembly or to the Parliament. Therefore, in any view of the matter, it cannot be said that the High Court, exercising jurisdiction under The Representation of The People Act in an Election Petition is precluded from going into the question of status of a candidate or proceeding to make an independent inquiry into that question in spite of the production of a certificate under the Act. At best, such a certificate could be used in evidence and its evidentiary value will have to be assessed in the light of the other evidence let in in an Election Petition. Therefore, nothing turns on the factum of a certificate being issued by the concerned authority under the Act of 1993. We are also satisfied as the High Court was satisfied, that no proper inquiry preceded the issuance of such a certificate and such a certificate was issued merely on the say so of the appellant. We have, therefore, no hesitation in overruling this argument raised on behalf of the appellant.

12. Before we part with this case, we wish to express our dismay at the extent to which a person could go to sustain her seat in the legislature. The appellant brands her five siblings and herself as bastards, and her mother a concubine. We desist from making any further observations on this aspect.

13. On an anxious reconsideration of all relevant aspects, we are satisfied that the High Court was right in declaring the election of the appellant to the concerned Legislative Assembly of Andhra Pradesh invalid. We, therefore, confirm that decision of the High Court and dismiss these appeals with costs.