

(2013) 09 GUJ CK 0001
In the Gujarat High Court

Case No : Special Civil Application No. 8177 of 2013

Amisha Chirag Shah

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 06-09-2013

Acts Referred:

Citation : (2014) 1 GLR 754

Hon'ble Judges : Bhaskar Bhattacharya, C.J.;J.B. Pardiwala, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, C.J.—By this Special Civil Application, a female councillor of Godhra Municipality has prayed for a declaration that the provisions of the Gujarat Municipalities (Reservation of S.C., S.T., B.C., Women for the Office of the President) 2nd Amendment Rules, 2013 ("the amended Rules", hereafter) is ultra vires, unconstitutional and violative of Arts. 14, 15, 19 and 243T of the Constitution of India and Sec. 33 read with Sec. 277 of the Gujarat Municipalities Act, 1963 ("the Act, hereafter"). The case made out by the petitioner may be summed up thus:

(a) The petitioner is an elected councillor of the respondent No. 3-Godhra Municipality and was so elected from Ward No. 10 in the election held in the year 2010. The petitioner was elected on a reserved seat for women and the petitioner's name appears in the voters' list of ward No. 10. The term of the petitioner as a councillor will expire in the year 2015.

(b) Under the provisions of the Act, the election of the President and the Vice-President is done from amongst the elected councillors and their term is for 2 years and six months.

(c) In exercise of powers conferred under Sec. 33 read with Sec. 277 of the Act, the State Government has framed Rules known as the Gujarat Municipalities (Reservation of S.C., S.T., B.C., Women for the office of the President) Rules,

1994 ("the Rules" hereafter). Under these Rules, the office of the President is reserved in favour of S.C., S.T., B.C. and women candidates as per the roster shown in the Schedule to the Rules. Some amendments have been made in the year 1995 in the aforesaid Rules.

(d) The reservation for women is made in furtherance of the constitutional mandate contained in Art. 243T and the avowed policy of the Government. The duration of the roster as per the provisions of the Rules is upto ten-point. In Godhra Municipality, the ten-point roster was implemented as per the aforesaid Rules and accordingly the present President, Rajesh Chauhan, is elected from the Scheduled Caste. Once, the ten-point roster in the chronology of reservation mentioned in the schedule is implemented, the roster will restart unless very drastic changes take place in the facts and circumstances. Accordingly, the next President has to be elected from women councillors only.

(e) The 2010 election in the Municipality was based on the Census and other data available at the relevant time. Since, councillors are elected for 5 years on the basis of the aforesaid data, there cannot be any change as regards the applicability of the roster during one single term. Therefore, even if it is assumed that the respondent No. 1 has legislative competence to amend or enact new reservation rules and to adopt a new roster, such rule cannot be made applicable in respect of the elections held on the basis of the Census and other data available in the year 2010.

(f) On 28th March, 2013, the respondent No. 1 issued a draft notification with the same roster schedule whereunder the next election of the President for Godhra Municipality will have to be made from amongst women only. However, instead of passing the proposed amendment, a final Notification dated 26th April, 2013 was issued in total variance of the proposed amendment. By the impugned amendment, the State has issued a one-point roster only, and thus, instead of reservation for a women candidate for the imminent election for the post of President, the seat is allotted to a general category candidate.

(g) By letter dated 10th April, 2013, the respondent No. 3 has already intimated to the District Election Officer for appointment of Returning Officer on the basis of the proposed amendment where the office of the President for this terms is to be filled in from amongst the women councillors. However, the amended Rules and the Schedule thereto provide for filling the vacancy of President from general category candidates.

1.1. Hence, the present writ application.

2. The respondent-State has opposed the present application by filing an affidavit, and its defence may be summed up thus:

(i) The petitioner is a councillor belonging to general category, and therefore, she can contest the election even this year under the general category.

(ii) Before publishing the amended Rules, the objections and suggestions were

invited and thereafter, the final decision was taken. The petitioner has not raised any objections nor has given any suggestions in respect of the same and hence she cannot now challenge the validity of the amended Rules.

(iii) No fundamental rights of the petitioner are, in any manner, violated inasmuch as the reservation is not prescribed under the Constitution so far as women category is concerned and reservation is not equated with the constitutional reservation under Art. 335 of the Constitution.

(iv) So far as the provisions made in Art. 243E of the Constitution of India for reservation of women along with S.C., S.T. and B.C., it is the sole discretion of the competent authority to decide inter se reservations amongst women, S.C., S.T. and B.C. and the petitioner, as a matter of right, cannot claim a priority over other in respect of reservation. Moreover, right to contest election is not a fundamental right.

(v) By virtue of the roster prescribed for the office of the President in Municipality in the State of Gujarat, post of the President of Godhra Municipality is categorised for general category candidate, and the petitioner being a candidate belonging to general category, is entitled to contest the election as a general category candidate. Therefore, the present writ application is not maintainable.

(vi) General election of Godhra Municipality had taken place on 8th May, 2010. There are 42 seats in the Municipality, and the petitioner being a woman can contest the election as a candidate belonging to general category.

(vii) The State Government, in exercise of powers conferred upon it under the provisions of Act invited objections or suggestions from all the persons likely to be affected thereby, within a stipulated period from the date of publication of the said notification in the Official Gazette, and after considering the objections and suggestions, the amended Rules of 2013 were enacted. The petitioner had not made any objection or suggestion. So far as Godhra Municipality is concerned, two persons had made suggestions, viz. Nimesh Shah and Nilesh, and their representations were that the seat should be considered as general seat. Accordingly, at final stage, a decision was taken by which the above seat was declared as a general seat.

(viii) The entire exercise of Census work was completed in India at every level. The data is being formulated and calculated. The official figures of the recent Census figures are yet not received by the competent authorities, and therefore, with a view to see that the system functions smoothly till the new population data is received, as a stop-gap arrangement, the entire exercise was undertaken. In other words, in every Municipality and every area, the new figure as per the new Census will come which will be reflecting the population of women, S.C., S.T. and B.C. and till the data is made available, the present roster is issued of one point as this one point would be for a period of 2 years and 6 months. By that time, the new Census figures would be officially published and on the basis of those new figures, the State Government would be considering the population of

different group of people, viz. women, S.C., S.T. and B.C. and will take appropriate decision for fixation of roster point in a particular Municipality. Therefore, as a stopgap arrangement till new Census figures are available, these roster points are declared which is for two and a half years" period as the post of President is for a period of two and a half years.

3. This Court, after hearing the learned Counsel for the petitioner and the learned Government Pleader, being prima facie satisfied with the case made out by the petitioner, passed an interim order in this matter on 2nd May, 2013 staying the operation of the amended Rules, 2013 in relation to Godhra Municipality till the disposal of this writ application.

4. Subsequently, the two persons who gave objection to the draft rules were also made parties, and they are represented by Mr. Dhaval Dave, learned Senior Advocate.

5. In the course of hearing of this matter, this Court found that the State Government, in their affidavit, had not disclosed the reasons for deviating from the earlier roster based on last Census done in the year 2001. This Court also found that in the proposed schedule in the draft amendment, it was the turn of women so far as Godhra Municipality was concerned, as a result, the petitioner had no occasion to raise any objection but subsequently, it has been changed to general category on the basis of objections given by the added respondents. In course of argument, we directed the State Government to disclose the reasons by filing an affidavit as to why it has deviated from the policy taken in the existing roster although no further publication of the new Census has been made. We also directed the respondent-State to state whether there has been any official publication of the 2011 Census.

6. Pursuant to such direction, the State-respondent has filed an affidavit on 23rd August, 2013 wherein the State has disclosed the following reasons for change of the roster:

The reasons for changing the point of roster:

(1) In this regard, it is respectfully submitted that the State Government invited suggestions and objections for determining the roster point by Notification dated 28th March, 2013 (Page No. 20 of the writ petition). Accordingly, Mr. Nimesh A. Shah, Vice-President of Godhra Municipality gave the objections. A copy of the objections is annexed hereto and marked as Annexure-I.

In the objections, submitted by Mr. Nimesh A. Shah it was stated that the notification dated 28th March, 2013 (Draft Rules) by which the State Government has intended the post of President to be reserved for woman. It was stated by the objector that in the year 2000 the first term of the President was reserved for the Category belonging to O.B.C. and the second term was for all the Categories (General). In the year 2005, the first term of the President was reserved for woman and second term was for all the Categories (General). In the

year 2010, the first term of the President was reserved for the candidate belonging to S.C. category, and therefore, the second term as per the rotation should be for all Categories (General).

(2) The State Government had received suggestions and objections in relation to 11 Municipalities out of 46 Municipalities for whom the suggestions and objections were invited.

(3) The State Government considered all the objections in relation to 11 Municipalities together and it was stated that for making changes in roster point the Census figures are to be collected, and thereafter, the roster point of particular category can be determined. It was further noted, that therefore, it was not possible to accept the demand for making changes in roster point. Alternatively it was stated in the note with regard to all the Municipalities (46), presently only one roster point may be determined and representation and demand in relation to Dabhoi, Gondal and Rajpipla Municipalities be accepted. Thereafter, on availability of Census figures of 2011 the roster point may be determined.

(4) The aforesaid decision was approved by the State Government in accordance with Rules of Business and having the file processed at every level. Accordingly, based on this decision taken on file, the roster point was determined and Notification dated 26th April, 2013 (Page No. 8 of the writ petition).

7. As regards the second point whether the figures of the 2011 Census are published, it is stated in the affidavit that the said figures have been released by the Commissioner of Census, Union of India on 18th June, 2013, and on 22nd August, 2013, the Directorate of Census Operations, Gujarat, has provided the Census details of six Municipalities of Gujarat based on 2011 Census figures. It is also stated in the affidavit that this will prima facie show that Census figures of 2011 based on the Census work carried out in 2011 are now in public domain.

8. So far as the answer to the second question put by this Court, we find that Census figures of only six Municipalities were given and there is no statement that there has been any final publication of the 2011 Census by the competent authority. Even when the impugned schedule was prepared, admittedly, there was no publication of the Census of 2011. The word "prima facie" used in the affidavit indicates that the State Government is conscious of the fact that there is no final publication of the 2011 Census.

9. Therefore, the only question that arises for determination in this writ application is whether in the facts of the present case, the publication of the impugned amendment in Schedule 8 of the Rules can be said to be in violation of the provisions of the Constitution or the principal Act. At this stage, we should bear in mind the well-settled law that the basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. A rule-making authority has no plenary power. It has to act within the limits of the power granted to it (See Bimal Chandra Banerjee Vs. State of Madhya Pradesh

etc.,).

10. In order to appreciate the above question, it will be profitable to refer to the provisions contained in Sec. 2(20) of the Act, the amended Rule impugned and Art. 243T of the Constitution of India as also the ten-point roster provided under the Rules in respect of Godhra Municipality. Those are quoted below:

Section 2(20) of the Act:

2(20) "Population" in relation to the Municipal Borough means the population as ascertained in the last preceding Census of which the relevant figures have been published.

Gujarat Municipalities (Reservation of S.C., S.T., B.C. and Women for the office of the President) 2nd Amendment Rules, 2013.

NOTIFICATION Urban Development and Urban Housing Department
Sachivalaya, Gandhinagar Dated the 26th April, 2013

No. KV-74 of 2013-N.P.L.-4513-103-M:-WHEREAS, certain draft rules further to amend the Gujarat Municipalities (Reservation of S.C., S.T., B.C. and Women for the Office of the President) Rules, 1994 were published as required by sub-sec. (3) of Sec. 277 of the Gujarat Municipalities Act, 1963 (Guj. 34 of 1964) at pages 12-1 to 12-3 in the Gujarat Government Gazette, Extraordinary, Part I-A, dated the 28th March, 2013, inviting objections or suggestions from all persons likely to be affected thereby, within a period of fifteen days from the date of publication of the said Notification in the Official Gazette;

AND WHEREAS the objections and suggestions which were so received on the said draft have been considered by the Government;

NOW, THEREFORE, in exercise of the powers conferred by sub-sec. (1) of Sec. 277, read with sub-sec. (3) of Sec. 33 of the Gujarat Municipalities Act, 1963 (Guj. 34 of 1964) the Government of Gujarat hereby makes the following rules further to amend the Gujarat Municipalities (Reservation of S.C., S.T., B.C. and Women for the Office of the President) Rules, 1994, namely:-

1. These Rules may be called the Gujarat Municipalities (Reservation of S.C., S.T., B.C. and Women for the Office of the President) to be verified by the department (2nd Amendment) Rules, 2013.

2. In the Gujarat Municipalities (Reservation of S.C., S.T., B.C. and Women for the Office of the President) Rules, 1994 (hereinafter referred to as "the said Rules"), in Rule 2, for the words and figures "Schedule 6 and Schedule 7", the words and figures, "Schedule 6, Schedule 7 and Schedule 8" shall be substituted.

3. In the said rules, after Schedule 7, the following Schedule and the note there under shall be added at the end, namely:-

SCHEDULE 8 ROSTER FOR THE OFFICE OF THE PRESIDENT OF THE MUNICIPALITY

Note on abbreviations used in the Scheduled above:-

G: General, W: Women, S.C.: Scheduled Caste, S.T.: Scheduled Tribe, B.C. Backward Class, S.C.-W.: Scheduled Caste Women, S.T.-W.: Scheduled Tribe Woman.

By order and in the name of the Governor of Gujarat,

Sd/- Under Secretary to Government.

Article 243-T of the Constitution of India:

243-T. Reservation of seats:-(1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality.

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

(4) The offices of Chairpersons in the Municipalities shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide.

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in Art. 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Municipality or offices of Chairpersons in the Municipalities in favour of backward class of citizens.

(7) Ten-point roster provided under the rules in respect of Godhra Municipality:

SCHEDULE 1 ROSTER FOR THE OFFICE OF THE PRESIDENT OF MUNICIPALITY

11. After hearing the learned Counsel for the parties and after going through the materials on record, we find that the Rules incorporating the ten-point roster was based on the 2001 Census published under the provisions of the Census Act of 1948. According to the Schedule, in the last point, it was the turn of reservation for "S.C." and if the order of the points based on the last roster is maintained,

this time, the turn will be for the "women". In the draft proposal, the State Government also suggested that the present turn should be reserved for women for this year, but the roster proposed was only for the present year and it was not a ten-point roster.

12. As pointed out earlier, on the objection of the two added respondents, the State Government changed the said proposal and accepted their objection by deciding to change the proposal from "women" to "general category".

13. As provided in sub-sec. (20) of Sec. 2 of the Act, "population" in relation to the Municipal Borough means the population as ascertained in the last preceding Census of which the relevant figures have been published.

14. There is no dispute in the case before us that the figures available in 2001 Census is the last preceding Census of which the relevant figures have been published, and according to the provisions contained in Art. 243-T of the Constitution, seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be, the same proportion of the total number of seats to be filled in by direct election in that Municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality. Sub-Art. (4) of the said Article provides that the office of the Chairpersons in the Municipalities shall be reserved for the Scheduled Caste, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide.

15. We find that by virtue of the aforesaid provisions contained in Art. 243-T(4), based on 2001 Census, and in accordance with the Principal Act, the State Government provided for a ten-point roster. Although, the said ten-point roster is exhausted and it is the time for framing a fresh roster, we find that in the meantime, there being no further publication of Census figures, the same roster point should be maintained in the same way as was originally prepared based on the figures available from the Census published in the year 2001. We also find that in the draft publication, the same order was maintained so far as Godhra Municipality was concerned, but on the basis of the objections raised by the private respondents, the State has changed the same from "women" to "general category".

16. We, thus, find substance in the contention of Mr. Pandya, the learned Advocate appearing on behalf of the petitioner, that no specific reasons have been given disclosing why there is a deviation of the order of the point of the existing roster although there has been no publication of figures of the new Census showing change of population of S.C., S.T., B.C. and women etc. We find no substance in the contention of Mr. Jani, the learned Government Pleader appearing for the State, that as the 2011 Census figures were not available, the State Government was constrained to publish a one-point roster deviating from

the order of reservation reflected in the earlier roster.

17. In our opinion, if there has been no publication of any Census after the ten-point roster was exhausted, it was the duty of the State-respondent to continue the same order of reservation based on the earlier one because according to the Act enacted by the State Legislature, it is the last published Census that should be the basis of reservation. In the mean-time, there being no further publication indicating any change in the pattern of population from the last one published, it was the duty of the State-respondent to continue with the same order of reservation prevailing in the last published one.

18. We, therefore, find that it is a fit case where the amended Rules of 2013 which is impugned in the writ application should be set aside as by the said amendment, the order of reservation in favour of "women" has been changed to "general category" notwithstanding the fact that no further Census Report has been published and at the same time, no plausible explanation has been given why for this year, the roster point should be reserved for the general category.

19. We also do not find any substance in the contention of Mr. Jani that the petitioner before us has no locus standi to maintain this application as she is not aggrieved by the amended Rules of 2013. We find substance in the contention of Mr. Pandya that the petitioner, although belongs to the general category, will have better prospect of success if the reservation is restricted to the women only, and that her right to contest for the post of President has been partially curtailed by forcing her to contest in the general category with male candidates who according to the last Census have no right to contest for the post of President for this year.

20. We, consequently, find that the amendment of the Rules impugned herein is ultra vires the Act and the provision contained in Art. 243-T(4) of the Constitution.

21. Since, this application succeeds only on the above ground of change of the order of reservation roster from the existing roster in the absence of any fresh publication of Census, we have not gone into the question whether it is within the exclusive province of the State Government to decide the question of fixation of the points of roster of reservation and whether any person can challenge the fixation of the roster of reservation by contending that a particular point should have been placed at an earlier or at a later point. We have already pointed that it was the State Government which itself had enacted the roster points based on the 2001 Census figures and there being no change in it, it cannot deviate from the existing order of point of the roster of reservation, otherwise the fixation of point becomes inconsequential.

22. We, therefore, allow this application and declare that the Gujarat Municipalities (Reservation of S.C., S.T., B.C., Women for the Office of the President) 2nd Amendment Rules, 2013 ultra vires the Constitution, and the Act in respect of Godhra, and is liable to be set aside.

23. We direct the State Government to take immediate steps for the election of the President by reserving it for women category in terms of its earlier roster unless in the mean-time, the 2011 Census figures are published, and in that event, the State will prepare a new roster in accordance with the last published Census, viz. Census, 2011. The petition is allowed accordingly. In the facts of the case, there shall be, however, no order as to costs.

Direct Service is permitted.