

(1991) 02 GUJ CK 0011
In the Gujarat High Court

Kumbhar Yakub Jusab

APPELLANT

Vs

Bhuj Municipality and Others

RESPONDENT

Date of Decision : 06-02-1991

Acts Referred:

Constitution of India, 1950 — Article 170, 226, 81

Gujarat Municipalities Act, 1963 — Section 13(3), 263(A), 6, 6(3), 6(3)(a)

Citation : (1991) 2 GLR 755

Hon'ble Judges : S.D. Shah, J

Bench : Single Bench

Judgement

S.D. Shah, J.—Petitioner in this petition challenges the notification notifying the election programme for Bhuj Municipality-respondent No. 1

herein pursuant to the order passed by the D.B. of this Court, dated 11th October, 1990 and he further challenges the notification insofar as it

relates to reservation of seats for Scheduled Caste in Ward Nos. 6 & 9.

2. This litigation has a chequered history. The election of Councillors of Bhuj Municipality was due in May, 1990. The notification of election

programme and reservation of seats for women and Scheduled Caste candidates was issued. It was subject-matter of challenge in Special C.A.

No. 4171 of 1990 wherein the failure to rotate the reserved seats of women in three wards was the main and perhaps the only ground of

challenge. The learned single Judge of this Court stayed the election which gave rise to the two Letters Patent Appeals. Finally, by judgment and

order, dated 11-10-1990 which was the order passed by consent and concurrence of all parties appearing before the Division Bench, the Court

upheld the challenge to the reservation of seats for women in Ward Nos. 1, 8 & 12 and further directed that seats for women shall be rotated and

reserved for Ward Nos. 6, 9 & 13. The Division Bench also fixed the entire election programme with the consent and concurrence of all the

parties appearing before the Court, it is required to be noted that Bhuj Municipality-respondent No. 1 herein and the State of Gujarat-respondent

No. 2 herein were parties to the proceedings before the Division Bench. Both these respondents, however, did not point out to the Division Bench

of this Court that there was failure to rotate the reserved seats for Scheduled Caste from Ward Nos. 6 & 9 to Ward Nos. 5 & 10. This failure is

one of the grounds of challenge to subsequent notification in this petition.

3. It appears that in exercise of powers conferred by Sections 6(3) and (2) read with Sub-section (1A) of Section 7 of the Gujarat Municipalities

Act, 1963 (hereinafter referred to as the "said Act") the State of Gujarat-the respondent No. 2 herein having regard to the population of Bhuj

Municipality determined the total number of Councillors required to be elected as 35 and also determined number of seats required to be reserved

for women as three and number of seats required to be reserved for Scheduled Caste as two. As regards reservation of three seats of women and

two seats for Scheduled Caste, it was stipulated in the said notification that the reservation shall rotate as indicated in columns 4(a) and 4(b) of the

schedule to the said notification. The said notification refers to reservation of seats for women vide column 4(a) and vide column 4(b) refers to

reservation of seats for Scheduled Caste candidates. In the said Schedule against Ward Nos. 6 & 9 in column 4(b) it is stated that one seat shall

rotate in Ward Nos. 6 & 9 beginning with Ward No. 6 and one seat shall rotate in Ward Nos. 9 and 10 beginning with Ward No. 9. It appears

that by the said notification, Government exercised powers u/s 6(3)(a) and (b) and reserved seats for women as well as for S.C. candidates and

also provided as to how such reservation shall rotate. It may be mentioned that the validity of said notification is not under challenge. It is also not

in dispute that pursuant to this notification, wards were constituted and seats were determined and reserved for the election of Councillors of Bhuj

Municipality that took place in the year 1988. It is admitted position that there were two seats reserved for S.C. candidates in the election held in

1985 and one seat was reserved from Ward No. 6 and another seat was reserved from Ward No. 9. If the said notification is to operate in the

election which was due in the year 1990 the reserved seats for S.C. candidates shall rotate to Ward Nos. 5 & 10.

4. It appears that since the election of the respondent No. 1-Municipality was due, the Collector-respondent No. 3 herein issued notification,

dated 23-4-1990 announcing the election programme and fixed the date of polling as 24th June, 1990. The third respondent also issued order,

dated 31st May, 1990 reserving 3 seats for women in Ward Nos. 1, 12 & 8, one seat in each ward respectively and two seats for S.C.

candidates reserving them for Ward Nos. 6 & 9. While issuing the said order, the Collector has relied upon 5 documents referred to in the

preamble of the order, and on perusal of the said order, it transpires that the Collector has passed the said order by specific reference to the

documents mentioned at SI. Nos. 1 to 4 in the preamble of the said order. One of such documents is notification issued by the State of Gujarat,

dated 30th June, 1983 by which in exercise of powers conferred upon it the State Government determined the total number of Councillors

required to be elected and the seats to be reserved for women and Scheduled Caste candidates. It, therefore, cannot be said that while issuing

order, dated 31st May, 1990, the Collector was not aware of the reservation of seats as determined by the Government vide its order, dated 30th

June, 1983.

5. It appears that after declaration of the election programme by notification, dtd. 23-4-1990, a Special C.A. No. 4171 of 1990 was filed in this

Court challenging the said election programme on various grounds and one of the grounds was that the reservation of seats for women candidates

was not made in accordance with law and that reserved seats, in fact, were not rotated as we stipulated in the notification of 1983. It was

contended before the Court that Collector did not rotate reserved seats for women and this Court was pleased to admit the said petition and to

grant stay of holding of the election. It appears that the said proceedings have given rise to aforesaid two L.P. As. being Nos. 206 of 1990 and

209 of 1990. The Court while disposing of the petition as well as two L.P. As. has noted that had the guidelines with regard to allotment and

reservation of seats by rotation been followed strictly, seats for women should have been allotted to Ward Nos. 6, 9 & 13 for ensuing election of

Bhuj Municipality instead of Ward Nos. 1, 8 and 12 as declared by the Collector vide his order, dated 31st May, 1990. However, by consent of

the parties which would include the present petitioner, the Bhuj Municipality and the State of Gujarat the Court directed that seats reserved for

women will be allotted to Ward Nos. 6, 9 & 13 instead of Ward Nos. 1, 8 and 12, and to that extent the order of the Collector came to be

modified. It also appears that by the consent of parties the Court undertook the exercise of fixing the election programme, an exercise which this

Court rarely undertakes. It appears that in view of the fact that the election was stayed by this Court and it was delayed for a period of about 5

months and with a view to see that a democratically elected body is in-charge of the Municipality as early as possible and at the request and with

the concurrence of all the parties the D.B. of this Court, in fact, fixed the entire election programme. As per the said election programme, 3rd, 4th

and the 5th December, 1990 were the dates fixed for filing of nominations and the election was scheduled to take place on 23rd December, 1990.

6. It appears that the Collector of Kutch, thereafter, in exercise of powers vested in him under Rule 7 of the Gujarat Municipalities Election Rules,

1966, issued notification publishing the election programme as fixed by the D.B. of this Court. While exercising that power he, in fact, followed the

judgment and order, dated 11th October, 1990 of the D.B. of this Court, and as per the said judgment and order the reservation of seats for

women shall in Ward Nos. 6, 9 & 13 while reservation of seats for S.C. candidates shall remain to be in Ward Nos. 6 & 9 as declared by the

Collector in his order, dated 31st May, 1990. It is difficult to state as to whether the attention of the Court was focussed or not on the question as

regards the rotation of reserved seats for Scheduled Caste candidates as per the notification of 1963. A bare reference to the order of the

Collector, dated 31st May, 1990 makes it clear that he, in fact, failed to rotate the reserved seats for Scheduled Castes from Ward Nos. 6 & 9 to

Ward Nos. 5 & 10 and that resulted into non-compliance of notification of 1983 and actually not rotating the reserved seats for S.C. candidates. It

appears that this defect has gone unnoticed, or if noticed by some parties, they did not point out the same to the Court with the result the Court in

its order, dated 11th October, 1990 maintained the order of Collector for reservation of seats for Scheduled Caste candidates and did not disturb

it. It goes without saying that had the defect in the order of the Collector been pointed out to the D.B. of this Court, it would have, as it dealt with

the case of reservation of seats for women, changed the reservation for Scheduled Caste from Ward Nos. 6 & 9 to Ward Nos. 5 & 10 as

stipulated by notification of 1983.

7. Present petition was filed on 30th November, 1990, and the learned single Judge of this Court was pleased to issue notice to respondents

making it returnable on 3rd December, 1990. In response to notice the respondents appeared and the matter was heard on 4th December, 1990

and the learned single Judge of this Court (Coram: C.K. Thakker, J.) was pleased to admit the petition and to grant interim relief restraining the

respondents from holding election pursuant to Notification, dated 16th October, 1990.

8. It appears that being aggrieved by the said interim relief granted by the learned single Judge respondents Nos. 16, 18 and others preferred

Letters Patent Appeal being No. 365 of 1990 and the D.B. of this Court, vide its order, dtd. 11th December, 1990 vacated the interim stay

granted by the learned single Judge on 4-12-1990.

9. It appears that thereafter Civil Application No. 2101 of 1990 was filed seeking appropriate direction from the D.B. directing the Collector,

Kutch to take further action for holding election and it appears that on 28th December, 1990 the D.B. of this Court directed the Collector, Kutch

to refix one more date for filing nomination papers being 21st January, 1991 so the additional date for filing nomination papers, and further directed

the Collector, Kutch to refix the subsequent stages of election in accordance with law and rules.

10. The Collector, Kutch, thereafter refixed the election programme and notified that nominations shall be received on 21st January, 1991 as being

the last date for nominations and election was scheduled on 10th February, 1991.

11. One more development took place at this stage when the State of Gujarat filed Civil Application No. 119 of 1991 inter alia stating to the Court

that it was not possible for the State Govt, to hold election of Bhuj Municipality on the basis of 1981 Census and also seeking appropriate

direction from the Court directing the Collector, Bhuj-Kutch for refixing the date of nomination and for refixing the other stages of election after

receipt of new figures of 1991 Census. The said application was placed before the D.B. on three or four dates and ultimately on 1-2-1991 the

Court was pleased to dismiss the said applicant. While passing the said order it was clarified by the D.B. that the order passed on 28th December,

1990 will not preclude the single Judge to pass appropriate order on the facts and circumstances of the case. The D.B. however, clarified that

there was no stay of election granted by this Court.

12. It is required to be stated that after the said C.A. No. 119 of 1991 was circulated before the D.B. and after it was adjourned once, the news-

item appeared in the newspaper of Bhuj ""Kutch Mitra"". dt. 24-1-1991 to the effect that the election of Bhuj Municipality has been stayed by the

Hon"ble Gujarat High Court on account of Civil Application filed by the State of Gujarat. In fact, the Court has not granted any stay; and that is

the reason why while dismissing the said application the D.B. was required to clarify that this Court has, in fact, not granted any stay of the election

of Bhuj Municipality.

13. It may be stated that despite the order passed by this Court, in fact, beyond accepting the nomination papers, no further steps are taken in the

process of election by the respondents. I am told at the bar by Mr. J.R. Nanavati, learned Advocate for respondent Nos. 4 to 22, that the

nominations are not scrutinised nor are any steps taken for the purpose of actually holding elections on 10th February, 1991.

14. It is in this factual background that the present petition is required to be decided.

15. Mr. G.R. Udhwani, the learned Advocate for petitioner, makes the following submissions in support of his challenge to the notification:

(i) The Notification, dated 31st May, 1990 issued by the Collector, Bhuj, reserving seats for S.C. candidates in Ward Nos. 6 & 9 of the Bhuj

Municipality is contrary to and inconsistent with the notification, dated 30th June, 1983 Annexure ""A"" to the petition, inasmuch as it fails to rotate

the two seats of S.C. candidates from Ward Nos. 6 & 9 to Ward Nos. 5 & 10, and therefore, the said notification is required to be quashed and

set aside.

(ii) The allocation of seats to various wards of Bhuj Municipality was not in connection with the actual population and it was based on last

preceding census of the year 1981 which did not reflect the correct inhabitant population, and therefore, the best criterion for delimitation of

constituencies being inhabitant population was absent when the notification was issued in the month of May, 1990 while the same is now available

or likely to be available very soon in view of commencement of census in January, 1991, and therefore, also the notification dated 31st May, 1990

is required to be quashed and set aside. He further submits that the seats to be reserved for S.C. candidates would also depend upon the total

population of S.C. inhabitant and if there is a change or shift in the total population of S.C. candidates the reservation of seats of S.C. candidates is

likely to be increased from 2 to 3. Therefore, delimitation of wards and fixation of seats based on 1981 census for election which is now be hold

in the year 1991 is unrealistic.

16. It may be stated that Mr. B.P. Tanna, learned Advocate for Bhuj Municipality, fully supports the petitioner and he makes almost identical

submissions to those made by Mr. Udhwani, learned Advocate for the petitioner.

17. Mr. P.M. Raval, learned Addl. A.G. for respondent-State, submits that this election cannot be and should not be permitted to be held, firstly

because the notification, dtd. 31st May, 1990 issued by the Collector, Kutch, was in disregard of notification, dated 30th June, 1983 inasmuch as

he failed and or neglected to rotate seats for candidates from Ward Nos. 6 & 9 to 5 & 10, and it being very serious and should not be permitted

to be perpetuated because that would result into non-rotating the reserved seats for S.C. candidates. He submits that in view of notification, dated

30th June, 1983 which is not in challenge and validity thereof is not the subject-matter in this petition, the Collector, Kutch as well as the State

Government and the Municipality must insists for rotation of seats for Scheduled Caste candidates from Ward Nos. 6 & 9 to Ward Nos. 5 & 10.

Any reservation of seats in contravention of said notification, submits Mr. Raval, learned Addl. A.G. is illegal and election held contrary to such

reservation would also be illegal. In his submission this would result and or lead to permanent reservation of seats for Scheduled Caste candidates

in Ward Nos. 6 & 9. He submits that though the Government was party to earlier proceedings, in fact, the serious defect was not brought to its

notice nor was any authority alive to this serious mistake. He further relied upon

powers of State Government u/s 263(A) of the said Act, and he extensively referred to C.A. No. 119 of 1991 filed by State Government to took permission from the Court for exercising said powers. He submits that the State Government, in fact, made bona fide attempt by filing application before this Court for permitting the State Government to take action under the said section and in his submission he stated that Government itself is satisfied that it is not possible to hold election in Bhuj Municipality for the reasons stated by the State Government in its Civil Application No. 119 of 1991. As regards second submission made by Mr. Udhwani, learned Advocate for the petitioner, Mr. Raval, learned Addl. A.G. submits that it would be unrealistic to direct the State Government to hold election on the basis of census of 1981 when 1991 census has commenced in the month of January, 1991 and according to his information it is likely to be over by 8th March, 1991.

18. Before proceeding to deal with the rival submissions of the parties, I must note preliminary objection raised by Mr. J.R. Nanavati, learned Advocate for respondents Nos. 4 to 22. Mr. Nanavati submits that the earlier notification notifying election programme was issued on 23-4-1990 and the order was passed by the Collector on 31st May, 1990 wherein seats for women and S.C. candidates were reserved. It is this notification which is sought to be challenged in this petition filed on 30th November, 1990. he submits that the present petition was party respondent to the earlier proceedings in Spl. C.A. 4171 of 1990 and he was conscious of both the reservation of seats vide order, dated 31st May, 1990 issued by the Collector as well as necessity of rotating seats as per the Govt, notification, dated 30th June, 1983. Present petitioner could have at that point of time seen that there is reservation of seats for S.C. candidates and could have pointed out to the Court that in fact for S.C. candidates are also not rotated from Ward Nos. 6 & 9 to Ward Nos. 5 & 10. he having failed to do that he should not be permitted to challenge the said notification of 30th May, 1990 by filing petition in the month of November, 1990. He further submits that when the consent order was passed by the D.B. of this Court on 11th October, 1990 present petitioner as party respondent was present and at that time also he could have pointed out to the Hon"ble D.B. of this Court that he has objection to the reservation of seats for

S.C. candidates since there is no rotation of seats from Ward Nos.

6 & 9. His silence at that point of time would mean that he has acquiesced in the process of election and he was, in fact, giving up or abandoning

any challenge to the notification of 31st May, 1990. Even after 11th October, 1990 the petitioner could have filed petition immediately but he

waited upto 30th November, 1990. He submits that even after the order of the Division Bench there is gross delay on the part of the petitioner,

and therefore, no relief should be granted to petitioner who is not vigilant to protect his right and who has in fact acquiesced in the process of

election by not challenging the said notification, dated 31st May, 1990 at the earliest possible opportunity.

19. While dealing with this preliminary objection raised by Mr. Nanavati, I shall have to bear in mind the fact that the learned single Judge has

admitted this petition on 9th December, 1990 after hearing the parties, and therefore, I shall have to decide that whether a petition which is already

admitted can be thrown out on the ground of delay in filing petition if challenge appears to the Court to be substantial and one which is supported

by the decisions of this Court. The Division Bench of this Court in the case of Rameshchandra Ramanbhai Patel v. Collector of Kheda reported in

(1979) 20 GLR 191 was faced with identical preliminary objection in the matter involving election dispute. Justice P.D. Desai (as he then was)

speaking on behalf of D.B. referred to relevant consideration which are required to be borne in mind before deciding whether a failure to promptly

challenge the impending election to a local authority can defeat a petition under Article 226 of the Constitution on the ground of delay and laches

and such considerations are (at page No. 198 of GLR):

First, the rule which says that the Court may not enquire into belated or state claims is not a rule of law but a rule of practice based on sound and

proper exercise of discretion and there is no inviolable rule that whenever there is delay, the Court must necessarily refuse to entertain the petition.

Each case must depend on its own facts.

Secondly, a Municipal election is not a matter which relates to the enforcement of the personal or individual rights of a citizen. It is a matter of

public concern. That such an election should be validly and fairly held in due compliance with the statutory requirement is a matter in which the

public at large have a vital interest.

Thirdly, a Municipal election is not a matter of momentary importance having only a transitory effect. A Municipality duly constituted after a general election functions for a period of five years and the legal constitution of the Municipal Government, therefore, is a matter which vitally concerns the residents of Municipal Borough.

Fourthly, when the defect in the process of election brought to the notice of the Court, goes to the root and vitiates the entire election process, as in

the present case, the Court cannot easily allow itself to be persuaded to refuse relief solely on the jejune ground of delay or laches.

Fifthly, on the facts and in the circumstances of the present case, there is no such delay as would defeat the petition on a sound and proper exercise of discretion.

Sixthly, the petitioners have, in any case, approached the Court before the election process as notified had commenced and at a point of time when

the date of poll was nearly one month and three days away.

Seventhly, at the stage of the issuance of Rule nisi the respondents were duly heard. No objection appears to have been raised by them to the admission of the petition on the ground of delay.

20. Keeping the above relevant considerations in mind, I shall have to decide the preliminary objection raised by Mr. Nanavati. It cannot be

gainsaid that when the reservation of seats for women and non-rotation thereof was the subject matter of challenge in the earlier proceedings

before this Court, reservation of seats for Scheduled Caste candidates and non-rotation of thereof ought to have and must have occurred to those

who are parties to the earlier proceedings, and to the Bhuj Municipality, Collector and the State Government. Any one with reasonable intellect

dealing with omission to rotate reserved seats as per Notification of 30-6-1983 would have noticed that there was no rotation of reserved seat for

Scheduled Caste candidates. It would not be permissible for me to state as to why one did not challenge the action at that point of time. It would

be an exercise in mere guess work and this Court should not undertake such an exercise. At the same time, facts as they stand disclose that the

Collector while issuing notification, dated 31st May, 1990 did refer to and reply upon the notification, dated 30th June, 1983. By the said

notification the reservation of seats for Scheduled Caste was to rotate from Ward Nos. 6 & 9 to Ward Nos. 5 & 10. He, in fact, failed to rotate

the seats reserved for S.C. candidates. In view of the decision of the learned single Judge of this Court in the case of Manibhai Haribhai Barot and

Anr. v. Kheralu Nagar Panchayat and Anr. reported in 1986 GLH (UJ-44) 46 : 1986 GLT 311 the said failure to rotate reserved seats for S.C.

candidates is fatal, and in fact, a notification which fails to comply with such requirement was struck down in the said decision. That being the

position of law, and in view of the fact that the election has not taken place so far and when the Bhuj Municipality as well as the State Government

admitted the illegality which has crept in the notification of 31st May, 1990. I do not think the petition can be thrown out only on the ground of

delay and laches. Municipal election is not a matter of enforcement of personal or individual right, but it is a matter of public concern and the

holding of such an election validly and fairly in due compliance with the statutory requirements is a matter in which the public at large have vital

interest. If there is no legal reservation of seats for Scheduled Caste candidates by rotating the same from Ward Nos. 6 & 9 to Ward Nos. 5 & 10

there is going to be an illegality and when such an illegality is pointed out to the Court it would be the duty of the Court to see that the illegality is

cured and the election is held thereafter. The Municipality duly elected functions for a period of five years. Municipal election is not a matter of

momentary importance. The legal constitution of Municipal Board is a matter which vitally concerns the inhabitants of Municipal borough.

Therefore, when a defect is brought to the notice of the Court in the reservation of seats for S. C. candidates by omission to rotate the seats, the

rights of representatives of S. C. from different wards either to contesting election or by exercise franchise in favour of candidates belonging to

reserved category are vitally affected. It is true, in this case the election process has commenced, but it shall have to be noted that the said election

process which was notified earlier in May, 1990 came to be thwarted or halted because of stay granted by this Court on the ground that there was

no rotation of reserved seats for women. If that was the ground permissible to stop the election process, the same ground of non-rotation of seats

for S. C. candidates cannot be said to a jejune ground or no ground at all. Moreover, when the learned single Judge issued notice and made its

returnable on 4th December, 1990 the election process has already commenced and yet relying on the decision reported in (1979) 20 GLR 191 in

the case of Rameshchandra Ramanbhai Patel v. Collector, Kheda (supra) the election process was stayed. I am of the opinion that since the

petition is already been admitted and the process of election was at least stayed for a few days by ad interim relief issued by the Court and when the

challenges raised in the petition is one which is substantial and squarely covered by the decision of this Court, it would not be fair and proper to me

to throw out the petition on the ground of delay and laches. I, therefore, overrule the objection of Mr. Nanavati, learned Advocate for

respondents Nos. 4 to 22.

21. I shall now deal with the submission of Mr. Udhwani, learned Advocate for the petitioner. Section 6 of the Gujarat Municipalities Act, 1963

provides for election of Councillors to the Municipality. The number of Councillors to be elected to the Municipality depends on the population of

Municipal borough and in case where the population exceeds 50,000 but does not exceed one lac, number of Councillors to be elected is stated to

be 35. Bhuj Municipality has at the relevant time population of 50,000 and below one lac, and therefore, it has the strength of 35 Councillors. The

last election was held in the year 1985. Obviously, at that time, population was taken on the basis of census of 1981. It may be mentioned at this

stage that it is now the case of the State Government as well as Bhuj Municipality that its population has far exceeded one lac and therefore there is

likely to be change in the number of Councillors. The census of 1991 has already commenced from January, 1991 and Mr. P. M. Raval, learned

Addl. A. G. for State has stated at the bar that it is likely to be over by 8th March, 1991 or at least the figures are likely to be available by that

time. It will have some repercussion on the second submission of Mr. Udhwani, learned Advocate for petitioner.

22. Sub-section (3) of Section 6 insofar as it is relevant for the purpose of this petition is reproduced herein:

6(3) Out of the total number of seats of the Councillors in a Municipality there shall be reserved seats for women, Scheduled Castes and

Scheduled Tribes as follows, namely.

(a) For women, two seats where the total seats do not exceed twenty-five, three

seats where total seats exceed twenty five, do not exceed thirty-

five, four seats where total seats exceed thirty-five but do not exceed forty and five seats where total seats exceed forty;

(b) For Scheduled Castes such number of seats, not being less than two as the State Government may determine on the basis of the proportion

which the population of Scheduled Castes in the Municipal borough bears to the total population therein.

From the said provisions, it becomes clear that there is an obligation to reserve seats for women and for S.C. candidates and S.T. candidates. For

women reservation of seats depends on the total number of Councillors. If total seats exceed 25 but do not exceed 35 three seats are to be

reserved for women. If total seats exceed 35 but do not exceed 40, four seats are to be reserved for women. Reservation of seats for women is

thus a statutory obligation which shall have to be complied with. Similarly, it is a statutory obligation to reserve seats for S.C. candidates and such

provision is consistent with the constitutional mandate. In fact this provision enacted by Clause (b) of Sub-section (3) of Section 6 is intended to

give meaningful effect to the said constitutional mandate. It is left to the State Government to determine on the basis of proportion which the

population of Scheduled Castes in the Municipal borough bears to the total population therein, but in any case, such number of seats should not be

less than two. Therefore, it is an exercise to be undertaken by the State Government to determine everytime the number of seats to be reserved for

Scheduled Candidates based on the proportion which the population of Scheduled Caste candidates in the Municipal borough bears to the total

population therein. The State Government undertook this exercise with respect to Bhuj Municipality in the year 1983 while issuing notification

dated 30th June, 1983 and it reserved two seats for Scheduled Caste candidates. Based on that reservation, in fact, election in the year 1985 was

held. Based on that very reservation present election of 1990 was to be held. However, the Collector while issuing notification, dated 31st May,

1990 despite provisions of notification, dated 30th June, 1983 failed to rotate the seats for Scheduled Castes from Ward Nos. 6 and 9 to Ward

Nos. 5 and 10. With the result, for ensuing election seats for Scheduled Caste candidates are reserved in Ward Nos. 6 and 9 where they were

reserved in the earlier election of 1985 also. Undoubtedly, the reservation is contrary to the notification dated 30th June, 1983. Mr. Nanavati

learned Advocate for respondents Nos. 4 to 22 cannot, and in fact, does not dispute the fact that the reservation of seats for S.C. candidates in

Ward Nos. 6 & 9 is inconsistent with the notification of 1983 inasmuch as it fails to rotate the reserved seats for S.C. candidates from Ward Nos.

6 & 9 to Ward Nos. 5 & 10. What is the effect of omission to rotate the reserved seats for S. C. candidates notification, dated 31st May, 1990

should be cancelled and the respondents should be directed to issue fresh notification redeclaring the reservation of seats is the answer of Mr.

Udhwani while Mr. Nanavati submits that the election should be permitted to be held as per the notification, dated 31st May, 1990 because the

petitioner, Bhuj Municipality and the State Govt, have never objected to the reservation of seats in Ward Nos. 6 & 9 for S.C. candidates, even if

such reservation is inconsistent with notification of 1983.

23. Mr. Udhwani, learned Advocate for petitioner in this behalf invites my attention to the decision of this Court in the case of Manibhai Haribhai v.

Kheralu Nagar Panchayat (supra) where Justice M.R. Shah was faced with identical problem. In that case the election authority issued an order

under the provisions of Panchayats Act for reconstituting the wards and reserving the seats for women, S.C. and S.T. candidates. The contention

before the Court was that such reservation was violative of provisions of Section 13(3) of Gujarat Panchayats Act, which is in pari materia with

Section 6(3) of Gujarat Municipalities Act. In view of provisions of Rule 43(a) of Gujarat Panchayat Election Rules, 1973 it was contended that

there was obligation to rotate the reserved seats in different wards and even if there is no population of S.C. or S.T. in a particular ward the seats

are required to be rotated. The stand of the Government was that where there is no population of S.C. or S.T. candidates in a ward question of

reserving the seat of S.C. candidate or S.T. candidate in that ward would not arise. Faced with this problem the Court examined the various

provisions of the Act and the Rules and it held that the seats reserved for S.C. candidates are required to be rotated and they are required to be

rotated even in wards where there is no population of Scheduled Castes and Scheduled Tribes. The Court held that the reservation of seats would

be by rotation in different wards which would mean that seats for S.C. candidates and S.T. candidates would be reserved by rotation in wards. If

the reserved seats are not rotated the reservation of seats in particular ward become permanent thereby denying the benefits of reservation to the

population of S.C. residing in other wards. For the benefit of those who want to contest and those who are to be represented it is necessary that

the reserved seats are rotated. this Court, therefore, declared the order issued by the Collector to be bad in law inasmuch as the seats for S.C.

candidates and women were not rotated, and quashed and set aside the order further directing the authority to pass appropriate order regarding

reservation for women, S.C. and S.T. candidates by rotation. In the case before me, in fact, the D.B. of this Court interfered in the process of

election when it found that the reserved seats for women were not rotated as per notification, dated 30th June, 1983. While passing the order,

dated 11th October, 1990, the D.B. saw to it that the reserved seats for women are rotated from Ward Nos. 1, 5 and 12 to Ward Nos. 6, 9 and

13. The D.B. of this Court therefore in Special C.A. No. 4171 of 1990 and of parties appearing before the D.B. including the present petitioner,

respondents Nos. 4 to 22, Bhuj Municipality and the State of Gujarat accepted the principle of rotation of reserved seats. In fact, process of

election was required to be halted because this Court found that the reserved seats for women were, in fact, not rotated. Unfortunately, at that

point of time none noticed that there was no rotation of reserved seats for Scheduled Caste. Omission to notice such an illegality or fact that none

pointed out such illegality to the Division Bench of this Court cannot and should not preclude the present petitioner from challenging the illegality. In

view of the decision of this Court in the case of Manibhai Haribhai v. Kheralu Nagar Panchayat reported in 1986 GLH (UJ-44) 46 (supra). I am

of the opinion that the reserved seats for Scheduled Caste candidates are required to be rotated from Ward Nos. 6 & 9 to Ward Nos. 5 & 10

and the notification issued by the Collector, dated 31st May, 1990 is declared illegal and bad insofar as it fails to rotate the reserved seats for S.C.

candidates to Ward Nos. 5 & 10. The first submission of Mr. Udhwani learned Advocate for petitioner is, therefore, required to be accepted.

23A. On my accepting the first submission, it is not necessary to decide the second submission of the Advocate for the petitioner, Mr. Udhwani,

but since both Mr. Udhwani and Mr. Raval learned Addl. A.G. have pressed into service the second submission also I would like to decide the same.

24. Mr. P.N. Raval, learned Addl. A.G. for State and Mr. B.P. Tanna, learned Advocate for Bhuj Municipality submit that it would be highly

unrealistic to permit the election of the Municipality to be held on the basis of population as determined by census of 1981. They submitted that the

principle of "one man one vote" is well accepted by the Division Bench of this Court. The said principle means that as nearly as is practicable, one

man's vote at one election is to be worth as much as another's vote. Therefore, when members of an elected body are chosen from separate

constituencies, such constituency must be established on the basis which will ensure, as far as practicable, that equal number of people vote for

proportionately equal number of representatives. They further submitted that there is no fetter in Gujarat Municipalities Act providing that only last

census figures should be taken into consideration. In their submission, inhabitant population is best criterion for delimitation of constituencies.

Discernible indications regarding population must be taken into consideration. If there is any obvious material showing shift or increase in

population, the authorities must take the same into consideration. When census of 1991 has also commenced in the month of January, 1991 and

when the same is likely to be over and figures of such census are likely to be available by 8th March, 1991 it would not be realistic and practicable

to hold the election of Bhuj Municipality based on the population of 1981 census. They submit that if population after present census exceeds one

lac, there shall be increase in number of Councillors. If the Councillors are increased it must result into increase of reserved seats for women and

also result into increase in reserved seats for S.C. candidates. In May, 1990 the election of Councillors could not be held. When the election is

already delayed partly because of stay granted by this Court, there is no justification in directing the State Government and the Collector to hold

elections on the basis of Census of 1981. In support of this submission, Mr. Raval and Mr. Udhwani rely upon the decision of D.B. of this Court in

the case of Vishnubhai Natwarlal Patel v. State of Gujarat reported in 1980(2) 21(2) GLR 189. The D.B. of this Court in that case was concerned

with a petition filed by the voters of Ahmedabad Municipal Corporation challenging the notification of division of two existing wards and re-

allocation of seats to such wards. After referring to the decision of D.B. of this Court in the case of Rameshchandra v. Collector, Kheda reported

in (1979) 20 GLR 191 (supra) the Court referred to the following observations made by that in judgment (at page No. 195 of 1980 (2) GLR):

The Municipal Government performs important public functions within the area under its jurisdiction. The functions which it performs have sufficient

impact throughout the Municipal borough and on the inhabitant population residing therein. Each and every soul inhabiting the borough is not

entitled to vote. Having regard to the qualification and disqualifications which the statute prescribed some out of those souls will be eligible to be

entered in the voters' list and will be qualified for voting. When such qualified voters' vote they speak for and on behalf of the population of the

ward of which they are residents and their voters and the expression of the will of such population. The inhabitant population and not the voting

population must be determinative factor.

The D.B. also noticed the contention that even if inhabitant population is required to be taken into account its strength must be determined on the

available data on or about the time of election and not on the basis of data supplied by the last preceding census, however, attractive it may be.

The D.B. in this connection observed as under (at page No. 196 of 1980(2) GLR):

The hazardous probability which may result from omission to take into account authentic figures supplied by the census has been fully dealt with by

this Court in that decision by referring to the evil of ghost-cards. Then, in that context, this Court had referred in that decision to Articles 81 and

170 of the Constitution and to certain provisions of the Gujarat Panchayats Act and the Gujarat Municipalities Act. We shall be shortly referring to

all those provisions. Statutory scheme which emerges out of certain provisions of the Gujarat Municipalities Act and the Gujarat Panchayat Act has

thereafter been discussed by this Court in that decision. It has further been observed by this Court that in such a matter, the State Government

must act fairly, bona fide and reasonably in performing this function and it must be guided by the overriding consideration of "one man-one vote

rule, subject to the reservation of seats for women and SCs and STs for which

specific provisions have been made in the statute. Therefore, population of each ward as determined by the last preceding census will have to be taken into account while allocating seats amongst different wards to ensure that as far as practicable, the various seats are distributed proportionately on the basis of strength of inhabitants in each ward. this Court has thereafter struck a note of caution and stated that, in the matter of application of this rule, the ordinary or casual increase or decrease of population in different wards will have to be disregarded at the mid-census election. The most significant observation which this Court has made thereafter is that there is nothing in the provisions of the Gujarat Municipalities Act which either expressly or by necessary implication permits the adoption of another course. Paragraph 37 of the report tries to render flexible the rigidity of the rule which it has laid down in the preceding paragraph. Therefore the observations made in para 37 show that this Court should not be understood as laying down that, under no circumstances while delimiting wards and allocating seats amongst different wards, it will be open to the State Government to take into account any obvious or apparent change or shift in population due to special circumstances. These observations clear the cloud and soften the rigidity of the rule. If there are special circumstances such as an obvious and apparent change or shift in population, the last preceding census figures may be ignored. What may be such special circumstances have been illustrated by this Court in that decision. It is not necessary to refer to those illustrations. What are special circumstances depend upon the facts of each case. In paragraph 21 of the judgment, the D.B. further observed as under (at page No. 200 of GLR):

What then is the rationale principle which must be applied to a Municipal Corporation in such situation? Statute provides for no fetters. Bounds of rationality upon which we can draw are unlimited. We are, therefore, of the opinion that so far as the basis for delimitation of constituencies in this case is concerned inhabitant population is the best criterion. However, it does not necessarily mean that it must be population in case of a Municipal Corporation, as determined at the last preceding census particularly when those figures have become stale, unreal and out of date.

25. Based on these observations Mr. Raval submits that inhabitant population is

the best criterion to be taken as basis for delimitation of constituency and when census of 1991 is already in progress it would be unrealistic to direct the Bhuj Municipality to hold its election based on the population of 1981 census. In fact, it would be an exercise based on the figures which were stale, unreal and out of date. Mr. Raval states at the Bar that on the information received by him on the second count of census suggest the population of Bhuj Municipality to be over 98,000/- and he therefore submits that there are obvious and discernible indication to determine what the population of Bhuj Municipality is, and therefore, it would be unreal both or Bhuj Municipality as well as for the State Govt, to ignore the said figures and the population. He further submits that it would be irrational and unrealistic to compel the respondents to hold the election of Bhuj Municipality for the term of five years at this moment when census of 1991 is already in progress. Situation like this can be met with by the Government by exercising powers u/s 263(A). I do not think that it is necessary to refer to Section 263(A) at this stage because I am of the opinion that when the Census of 1991 has already commenced and when it is likely to be over by 31st March, 1991 it will not be realistic and rational to permit the Bhuj Municipality to hold election based on the Census of 1981. In fact, it would violate the principle one-man-one vote. Thus, on the second submission of Mr. Udhwani also this petition requires to be allowed.

26. Before I part with this judgment and pass final operative order, I must note the serious grievances made by Mr. J.R. Nanavati, learned Advocate for respondents Nos. 4 to 22. He adversely commented upon the conduct of the petitioner. The petitioner was party to the earlier proceedings. At that time, he did not challenge the notification nor did he bring to the notice of the Court the illegality in the reservation of seats. He, in fact, acquiesced in such illegality by inviting the Division Bench of this Court to pass order, dated 11th October, 1990. Mr. Nanavati, therefore, submits that such a petitioner should not be entrusted with the writ of this Court. It is true that this petitioner was party-respondent to the earlier proceedings. However, in the earlier proceedings before this Court, this illegality in the notification arising from not rotating the reserved seats for Scheduled Caste candidates was not noticed by anyone. Neither the

Bhuj Municipality nor the State Government also was alive to such an illegality. Mr. Nanavati has special grievance to make against the conduct of the State Government and the Bhuj Municipality. He submits that both the State Government and the Bhuj Municipality were parties to the earlier proceedings. The State Government even objected to the grant of any relief to the petitioner in the earlier proceedings. The State Government, in fact, defended the notification of the Collector. Even the Bhuj Municipality fought tooth and nail and wanted the election of the Municipality to be held based on the notification of the Collector, dated 31st May, 1990. According to Mr. Nanavati, even the Division Bench of this Court was called upon to fix the election programme and the exercise which the Court rarely undertakes the Division Bench of this Court undertook at the request, consultation and concurrence of both the Municipality and the State Government and none at that time raised serious doubts about the legality and validity of notification, dated 31st May, 1990. He submits that the judiciary process taken on ride to eliminate and destroy the democratic election process, both by the State Government and by the Bhuj Municipality. I am of the opinion that the grievance of Mr. Nanavati is not absolutely unfounded. Any right thinking and right spirited individual would make the same grievance which Mr. Nanavati makes. However, in this case, it is not possible to attribute any motive to the State Government. In fact, it appears that in the earlier proceedings the State Government was represented more or less by default. It was not active participation. None appears to have noticed the illegality that has crept in.

27. I am, therefore, of the opinion that Bhuj Municipality and the Collector of Bhuj ought to have been more vigilant and they ought to have brought to the notice of the Court the illegality in the notification. Their conduct, undoubtedly, deserves denunciation. It was their duty to bring to the notice of the Court the fact that there was failure to rotate the reserved seats for Scheduled Caste when the question of failure to rotate the seats for women candidates was, in fact, being agitated before the Courts. It is hoped that in future it will be careful and will not reduce itself to such a state where it has to take inconsistent stand before the Court of law.

28. In the result, petition succeeds, respondents Nos. 1 to 3 are directed not to hold the election of Ward Nos. 5, 6, 9 & 10 of the Bhuj

Municipality based on notification, dated 31st May, 1990 and based on further notification, dated 16th October, 1990. It is further directed that

the respondent shall reserve seats for women in Ward Nos. 6, 9 & 13 and for Scheduled Caste candidates in Ward Nos. 5 & 10. The

respondents Nos. 1 to 3 are also directed to hold the election of the Bhuj Municipality keeping in mind the principle of inhabitant population as the

basis for delimitation of constituencies and such election shall be held at the earliest. It is also declared that it shall be open to the State Government

to refix the total seats and to reallocate the seats to various wards and to reserve seats for women and Scheduled Caste candidates thereafter on

the basis of principle I have laid down in the judgment. Rule is made absolute accordingly with no order as to costs.