
(2010) 03 RAJ CK 0122

In the Rajasthan High Court

Case No : Civil Writ Petition No. 11900 of 2009

Mohd. Kaleem and Another

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 05-03-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 243, 243T
Rajasthan Municipalities (Election) Rules, 1994 — Rule 5, 6, 7
Rajasthan Municipalities Act, 1959 — Section 21A, 6, 7, 7(6)
Rajasthan Municipalities Act, 2009 — Section 21, 21A, 6

Citation : AIR 2010 Raj 91 : (2010) 1 RLW 988 : (2010) 2 WLN 26

Hon'ble Judges : Jagdish Bhalla, C.J;M.N. Bhandari, J

Bench : Division Bench

Judgement

Jagdish Bhalla, C.J.—Since in both the writ petitions similar issues are involved, they are decided by this common judgment.

2. By way of these writ petitions a challenge has been given to the amendment made in the Rajasthan Municipalities Act. Two amendments have been made pursuant to the Rajasthan Municipalities Bill, 2009. First challenge pertains to amendment in Section 6, wherein Sub-sections (6) and (7) have been amended.

The amendment, so made, reads as under:

6. Composition of Municipality. - (1) to (5)...

(6) One half of the seats reserved for the Scheduled Castes or the Scheduled Tribes or the Backward Classes shall be reserved for the women belonging to such Castes, Tribes or, as the case may be, Classes.

(7) One half including the number of seats reserved under Sub-section (6) of the total number of seats shall be reserved for women.

3. As a consequence of the aforesaid amendment in the Act, amendment under the Rajasthan Municipalities (Election) Rules, 1994 has been made. Rules 5 and

6, as amended, read as under:

2. Amendment of Rule 5. - In Rule 5 of the Rajasthan Municipalities (Election) Rules, 1994, hereinafter referred as the Rules,-

(i) in Sub-rule (4) for the existing expression "one-third", the expression "one-half shall be substituted.

(ii) in Sub-rule (7) for the existing expression "one-third", the expression "one-half shall be substituted.

(iii) in Sub-rule (10) for the existing expression ""one-third", the expression "one-half shall be substituted.

(iv) in Sub-rule (11) for the" existing expression "one-third", the expression "one-half shall be substituted.

3. Amendment of Rule 6. - In Rule 6 of the said rules,-

(i) in Sub-rule (2) for the existing expression "one-third", the expression "one-half shall be substituted.

(ii) in Sub-rule (3) for the existing expression "one-third", the expression "one-half shall be substituted.

4. Apart from the aforesaid challenge, a further challenge has been made to the amended provisions of Section 21A (after the existing Clause 21 and before the existing Clause 22) of the Rajasthan Municipalities Act. Section 21A, as added, reads as under:

21 A. Special qualification for election on certain seats.- Notwithstanding anything to the contrary contained in any provision of this Act or of any other law for the time being in force, a person shall not be eligible for election on such seats in a Municipality, as may be determined by the State Government in the prescribed manner, unless he or she is within the age group of twenty-one years to thirty five years and is otherwise eligible for election on such seats:

Provided that:

(i) not more than two seats each from the seats reserved for the Scheduled Castes, Scheduled Tribes, Backward Classes or women in a Municipality shall be determined under this section.

(ii) where number of seats reserved in a Municipality for any of the Scheduled Castes, Scheduled Tribes, Backward Classes or women is three or less than three, only one seat from such Castes, Tribes, Classes or, as the case may be, women shall be determined under this section.

(iii) where number of unreserved seats in a Municipality is five or less than five only one from such seats shall be determined under this section; and

(iv) where the number of unreserved seats in a Municipality is more than five,

one seat out of each block of five such seats shall be determined under this section and any. fraction of less than five seats shall be ignored.

The consequential amendment was made in the Rajasthan Municipalities (Election) Rules, wherein Rule 7A was inserted, which reads as under:

7A. Determination of seats u/s 21A.- The officer, after having determined the seats for Scheduled Castes, Scheduled Tribes, Backward Classes and Women, shall determine the seats for the persons having qualification as specified in Section 21A of the Act, by draw of lots.

5. The challenge to the amendments have been made mainly on the ground that it is hit by Articles 14 and 15 of the Constitution of India. The reservation, as provided by way of amendment, is excessive and goes even contrary to the mandate of Article 243 of the Constitution of India. Women reservation earlier provided was one-third of the total seats which was as per the provisions of Article 243T of the Constitution of India. Reservation of women has been raised from one-third to one-half of the total seats meant for Scheduled Castes, Scheduled Tribes, Backward Classes and even, for open category. It is contended that without ascertaining even proportionate population of women, amendment has been made to provide reservation to women to the extent of 50% of the total seats. Taking note of the aforesaid reservation to women to the Scheduled Castes, Scheduled Tribes, Backward Classes comes out to be more than 50% of the total seats, rather it comes out to be more than 75% of the total seats, thus the same is excessive. On account of excessive reservation, ordinary citizen is deprived to contest election, which cannot be said to be in consonance with the spirit of the Constitution of India. The Government is having no material to justify women reservation in excess to one-third of the total seats earlier reserved. No survey was conducted before the amendment. Referring to the proportionate population ratio between male and female, it was urged that total population of male is more than the population of the female, thus reservation in favour of the women/female to the extent of 50% of seats would be disproportionate to the population of female. Thus, it is a case of excessive reservation. Referring to the provisions of Section 6 of the Act it has been submitted that while providing reservation to the Scheduled Castes and Scheduled Tribes, the seats were reserved in proportion to the population of the Scheduled Castes and Scheduled Tribes in the Municipal area. Same is the position with regard to seat reserved for Backward Classes. Thus, applying the analogy aforesaid, the matter was required to be looked into by the respondents before enhancing reservation in favour of women. It is stated that no such ascertainment has been made before providing excessive reservation to the women.

6. A challenge to the provisions of Section 21A, as added after the existing Clause 21 and before the existing Clause 22 of the Rajasthan Municipalities Act, 2009, has also been made. Section 21 of the Act provides disqualification of a candidate to contest Municipal elections. Referring to the provisions of Section 21

of the Act as well as the provisions of the Constitution of India, it has been canvassed that whenever State legislation has to provide disqualification, it is made applicable in general to all the candidates for being elected as a member of the Municipality. Referring to the provisions of Section 21A of the Act, it is argued that qualifications of particular seat have been provided in an illegal and unconstitutional manner. By virtue of the amendments, adding Section 21A of the Act of 2009 for certain specified seats, a candidate between the age of 21 to 35 years alone would be qualified to contest the election. Such an amendment has been made in violation of Article 14 as well as 243V of the Constitution of India. Qualification and disqualification of the candidate cannot be for a particular seat but it has to be in regard to the candidates in general. By virtue of the amendment pursuant to Section 21A of the Act of 2009, on a particular seat, candidates between the age of 21 to 35 years alone have been made eligible, whereas, Article 14 of the Constitution of India provides equality before law. Qualification/disqualification attached to Section 21A of the Act of 2009 has been challenged on the aforesaid grounds.

7. Referring to the provisions of Article 243-V of the Constitution, it is demonstrated that even while making amendment in the Constitution, a care has been taken to provide qualification of a candidate as otherwise provided for a candidate for Legislative Assembly. To make a candidate eligible at the age of 21 years itself, necessary provision exists in the aforesaid Article of the Constitution. The provisions pertaining to election of Member of Legislative Assembly or Parliament, do not provide any upper age limit for a candidate. Disqualification of a candidate on attaining the age of 35 years is nothing but violation of Article 243V as well as Article 14 of the Constitution. By way of amendment in Section 21 of the Act, the aim of the respondents is nothing but to provide reservation to candidates of a particular age group i.e. between 21 to 35 years. The respondents, knowing it well that the reservation on the ground of age cannot be provided, amended the provisions of Section 21 of the Act pertaining to disqualification of a candidate. The effect of the amendment is nothing but resulting in reservation of certain seats for citizens of a particular age group. No discrimination on the ground of age can otherwise be made.

8. On the other hand, Mr. S. N. Kumawat, Additional Advocate General, appearing on behalf of the State, supported the amendments so made. Referring to the first amendment, it is submitted that no constitutional provision has been violated. Referring to Article 243T of the Constitution of India it has been argued that when the provisions provide for minimum reservation in favour of women, then the Government is not precluded to provide reservation over and above the ceiling given for minimum reservation. The words used under Article 243T of the Constitution of India provide that women reservation should not be less than one-third of the seats. Referring to the words "not less than" it is given out that intention is not to provide upper ceiling for women reservation but to provide minimum reservation ceiling. In view of the aforesaid Constitutional provisions, if 50% seats are reserved for women candidates, it cannot be said to be in

violation of any provision of the Constitution of India. The amendment in the Act was made to advance the cause of women, who are otherwise considered to be socially backward. A reference of Article 15 of the, Constitution of India has also been given to show that aforesaid provision also provides grant of certain additional benefits to the specific sections which include women also.

9. Coming to the issue as to whether on account of providing 50% reservation to the women candidates, total reservation would be 75% or not, at the very outset, it was clarified that women reservation is horizontal, thus such reservation is provided while providing vertical reservation, hence while counting total vertical reservation horizontal reservation is not counted. It is thus submitted that even if reservation provided to the women is taken into consideration, it being horizontal reservation, total reservation does not come to 75% vertically. In view of aforesaid submissions, amendments in Sections 6 and 7 of the Act and consequential amendments in the Rules have been supported.

10. Coming to the challenge to Section 21A as has been inserted under the Municipalities Act, 2009, learned Additional Advocate General urged that as per Article 243V of the Constitution, the State Legislature has been given competence to provide qualifications. In view of aforesaid provisions if the State Legislature has provided qualification then it cannot be held to be unconstitutional. Qualification of age between 21 to 35 years has been provided for certain seats to advance cause of youth generation, thus, may not be struck down. The agreement of the learned Additional Advocate General is that if qualification cannot be attached to particular seats then Section 21A should be read to provide reservation in favour of the candidates between the age of 21 to 35 years.

11. Mr. R. B. Mathur, learned Counsel appearing on behalf of respondent-State Election Commission, has argued only with reference to the constitutional mandate to hold the election in time.

12. We have heard submissions of learned Counsel for the parties and perused the material on record.

13. Firstly, we are dealing with the amendment in Section 6 of the Act and consequential amendment in" the Rules.

14. By virtue of the amendment u/s 6, now reservation in favour of women have been provided to the extent of one-half of the total seats. If the amendments under Sub-sections (6) and (7) of Section 6 of the Act are taken note of, then one-half reservation in favour of women candidates has been made separately in two categories. By amendment in Sub-section (6), women belonging to SC/ST or the Backward Classes would get reservation to the extent of one-half of the total seats meant for those reserved castes and, by virtue of amendment in Sub-section (7) out of total number of seats, one-half seats would be reserved for women which include the number of seats reserved under Sub-section (6).

15. The main argument by learned Counsel for the petitioners, while challenging the aforesaid amendment, is that women have been given excessive reservation. A reference of the judgment of the Hon'ble Apex Court in the case of Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., has been given to show that the Apex Court has categorically held that reservation should not be provided beyond 50% of the total posts. Taking ratio of the aforesaid judgment, it has been submitted that since women itself have been given 50% reservation other than the reservation provided in favour of SC/ST and Backward Classes total reservation now comes to more than 75%. To deal with the aforesaid argument, it is necessary to make a reference of the provisions of Article 243T of the Constitution of India, which reads as under:

243T. 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 Article 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.

16. Perusal of aforesaid provision reveals that not less than one-third of the total seats reserved would be reserved for women. Article 243T further provides that the State Legislature can make provision for reservation for Backward Classes citizens. In the light of aforesaid provision, it becomes clear that the Constitution provides minimum reservation in favour of women candidates i.e. one-third of the seats in the respective category. There is no embargo in providing

reservation in favour of women over and above provided in the Constitution.

17. It is, however, necessary to see as to whether a case is made out to hold that there exist excessive reservation in favour of women. Perusal of Article 243T(1) of the Constitution shows that reservation for Scheduled Castes and Scheduled Tribes is provided in proportion to their population in municipal area. This is to avoid excessive reservation, thus it is based on proportionate population ratio. Even Article 243T(2) of the Constitution provides reservation to Scheduled Castes and Scheduled Tribes women to the extent of one-third of the total seats reserved for such castes and tribes. Since reservation to Scheduled Castes and Scheduled Tribes is in proportion to the population, women reservation to Scheduled Castes and Scheduled Tribes remains on proportionate population ratio. Though in subsequent clauses of Article 243 reference of proportion population ratio has not been given, however we have to keep in mind that while providing reservation to any caste or category, it should not be an excessive reservation. The respondents have not come with any material to justify amendment in Sub-sections (6) and (7) of the Act and consequential amendment in the Rules. They have not even furnished the details of the proportionate population between male and female in the State of Rajasthan. In view of aforesaid, the State has supported the amendment only based on arguments. Since reservation to Scheduled Castes and Scheduled Tribes has been kept limited in proportion to the population, we have to keep in mind the aforesaid legal position to adjudicate the issue raised herein. One-third of the total seats have been reserved for women as per constitutional provision itself. It is no doubt true that over and above one-third of the total seats, women can be given reservation but then it should not be out of proportion. The reservation to any category and caste should be rational and not excessive. The Hon'ble Supreme Court, while considering the matter in the case of Indra Sawhney (supra) put a rider that reservation should not exceed to 50% in ordinary case. The aforesaid judgment was in reference to Article 16 of the Constitution of India thus cannot be applied as such, however the ratio of the aforesaid judgment can be looked into for judging the issue as to whether there exist excessive reservation in favour of women or not. Article 14 of the Constitution guaranteed right of equality among the citizens. If for example, total proportionate population ratio between male and female is 55% and 45% respectively in any State, then reservation of 50% seats for women candidates in proportion to population would be more than 50%. In the present case, respondents have not given proportionate population ratio to justify their action and to show that they have not provided excess reservation to the women. In absence of such figures, we are constrained to give a specific opinion on the aforesaid issue. However, keeping in mind provisions of Article 243T of the Constitution as well as Articles 14 and 15, we are of the view that if proportionate population of the women is less than the male then reservation of 50% seats for women is excessive and, in that case, Article 14 of the Constitution is violated, hence, amended provisions, as challenged, deserve to be struck down being ultra vires.

18. The State of Rajasthan is otherwise having census record as well as elected to ascertain proportionate population ratio of male and female. If women are proportionately less than the population of men then reservation extended in favour of women can be maintained in proportion to the population ratio which otherwise be ascertained in the manner it is provided for Scheduled Castes and Scheduled Tribes. For example, if male and female population ratio is 55% and 45% respectively, based on women proportionate population of 45%, whatever seats are coming out on the aforesaid population ratio, 50% of it can be reserved for the women. In undertaking aforesaid exercise, women reservation would not only be rational but would not be in excess. It would be based on the same theory of reservation as exist for Scheduled Castes and Scheduled Tribes. If the amended provisions are interpreted as indicated above, then the respondents will undertake their exercise accordingly and, in that, even amended (sic) is not struck down, otherwise, it is held to be ultra vires and are accordingly struck down. The judgment would however operate prospectively.

19. Now, we come to the second aspect of the matter where constitutional validity of Section 21A of the Act has been challenged.

20. It has been contended that by virtue of aforesaid provision though qualification to contest the election has been provided but it is literally reservation in favour of candidates between the age of 21 to 35 years. Referring to the provision of Section 21A of the Act, as inserted now by way of amendment, it is submitted that now on certain seats candidates between the age of 21 to 35 years alone would be eligible to contest the election. The effect of the aforesaid provision is that qualification and disqualification otherwise to be provided for a member is now attached to a seat which cannot be said to be constitutionally valid. Reference of the provision of Article 243V is required to be made herein and, for ready reference, aforesaid provision is quoted hereunder:

243V. Disqualification for membership.- (1) A person shall be disqualified for being chosen as, and for being a member of a Municipality:

(a) if he is so disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State concerned:

Provided that no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age, of twenty-one years;

(b) if he is so disqualified by or under any law made by the Legislature of the State.

(2) if any question arises as to whether a member of a Municipality has become subject to any of the disqualifications mentioned in Clause (1), the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide.

21. Perusal of the above provision shows that disqualification as provided for the purpose of election to the Legislature of a State would be applicable for Municipal

election also but proviso to the aforesaid Article makes it clear that a candidate would be eligible to contest election if he has already attained the age of 21 years, thus, the only exception made to the disqualification clause for election to the State Legislature is regarding minimum age provided but no ceiling regarding upper age.

22. Learned Counsel for the respondents tried to develop an argument in reference to Article 243V(i)(b) and submitted that aforesaid provision gives powers to the State Legislature to provide disqualification and, since by virtue of the amendment, disqualification to contest election has been provided within the framework of the powers given by the Constitution, same should not be struck down.

23. We have considered aforesaid argument in the light of the provision of Article 243V of the Constitution and find that Section 21A of the Act does not provide a general disqualification of a member which otherwise is provided for election to the Legislative Assembly or is provided in the Municipalities Act. All disqualifications, so provided, are irrespective of race, sex, caste or age but, by virtue of amended provision, now qualification and disqualification of member is attached to the seat. To illustrate the same; if election of Municipal Corporation is undertaken with the amended provision of Section 21A of the Act, then out of every five seats one seat would be kept for a candidate between the age of 21 to 35 years, thereby particular seat would be having a specific qualification of a member which is the first case of its kind because no such qualification of that nature exist anywhere in law pertaining to elections. In fact, it is by way of reservation only, that certain seats are earmarked for a particular category of persons and, if the intentions are literally taken note of then by virtue of Section 21A of the Act seats have been reserved for candidates of a particular age group. If it is taken to be case of reservation then such a reservation is not in consonance with the provisions of Article 243T of the Constitution or any other provision under the Constitution, rather, in that circumstance, even Article 14 is violated. Article 14 of the Constitution guarantee right of equality, which is infringed herein.

24. It is, no doubt, true that State Legislature can provide disqualification for a candidate by enactment but then disqualification has to be such making it applicable to be all the candidates/members and not to kept for a particular seat. To illustrate further, if disqualification is on account of pendency of the criminal case then such a disqualification applies to all the categories and seats without any discrimination. Same is the result of a disqualification if a candidate is having more than two children. Thus, all the qualifications, so exist for a member of Legislative Assembly or even for the Municipal election, are applicable to all concerned without any discrimination but that discrimination exists u/s 21A of the Act. Primarily, we feel that the aforesaid provision is not only violative of Article 14 of the Constitution but also comes contrary to the very object for which 73rd Amendment was made in the Constitution.

25. In the result of aforesaid discussion, we are of the opinion that insertion of Section 21A of the Act, as brought by way of amendment, is violative of the Constitution and, thus, deserves to be struck down. Accordingly, we hold that Section 21A of the Act, as inserted by the impugned notification, is ultra vires to the Constitution of India and, hence, the same is struck down.

26. The writ petitions stand disposed of accordingly.