BOMBAY HIGH COURT

Dattatraya Motiram

Vs.

State of Bombay

Special Civil Applns. Nos. 1653, 1855 and 1917 of 1952

(Chagla, C.J. and Dixit, J.)

18.11.1952

JUDGMENT

Chagla, C.J.

1.This is a petition by a resident of Jalgaon who is a tax payer of the Jalgaon Municipality and a voter in one of the wards, challenging certain provisions of the Bombay Municipal Boroughs Act, 1925, which reserves seats for women in the election to the Jalgaon Municipality. The relevant provision of the Act is Section 10(1)(c), which provides that the State Government shall, from time to time, generally or specially for each Municipality, make rules consistent with this Act (and we are quoting the relevant part of the sub-section) prescribing the number and extent of the wards to be constituted in each municipal borough, the number of councilors to be elected by each ward and the number of seats, if any, to be reserved for the representation of women; and pursuant to this sub-section Government have made rules reserving four seats for women out of the 35 elected seats for the Jalgaon Municipality, and the contention of the petitioner is that this reservation offends against ArtS.14, 15 and 16 of the Constitution, and, therefore, the provision with regard to reservation of seats for women is 'ultra vires'.

2. Before we look to the articles of the Constitution, it will be perhaps better if we look to the scheme of the Bombay Municipal Boroughs Act with regard to the election of councilors. Section 8 provides that in every municipal borough there shall be a Municipality, and every such Municipality shall be, a body corporate and shall have perpetual. succession and a common seal, and may sue and be sued in its corporate name through its Chief officer. Section 9 provides that every such Municipality shall consist of elected councilors and nominated councilors. Section 30 provides that the municipal government of a municipal borough vests in the Municipality.

3. Now, the provision with regard to reservation of seats for women is challenged principally on the ground that it offends against Article 16(1) of the Constitution. That article provides that

there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State, and the contention of the petitioner is that a councilor holds an office, and equality of opportunity is denied to men in the election to that office. It is said that by reserving four seats for women, men have not equal opportunity with women in contesting those seats and being elected for these seats. It is pointed out that Article 16(1) advisedly does not refer to an office of profit as some of the other articles in the Constitution do, for instance, Articles 58(2), 59(2), 64, 66(4), 102(1), 191(1)(a) and 158(2). Therefore, it is urged that the fact that a councilor does not hold an office of profit should make no difference to the Court applying Article 16(1) to that office. The question that we have to consider is, what are the offices to which Article 16(1) was intended to apply. The marginal note of Article 16 is "Equality of opportunity in matters of public employment", and although a marginal note of a section cannot be permitted to cut down or extend the scope and ambit of a section, the marginal note may be looked at in order to understand the drift of the section and to help the Court in construing the section. Therefore, if the marginal note is of any assistance at all, it is clear that Article 16 was intended to apply to offices which were filled by public employment. The expression "office" by itself is rather a colorless expression. When a person holds office, he is given certain rights; he has to discharge certain duties and obligations and responsibilities; but from the mere fact that he holds office it is not clear whether the office is a paid office, whether he stands in any relationship of subordination to any higher person, or whether there is a relationship of master and servant between him and someone else. The language used in Article 16(1) is "employment or appointment to any office, under the State," and in our opinion "appointment" must be read 'ejusdem generis' with "employment". Further, the expression "under the State" makes it clear that the person holding office to which Article 16(1) applies is a person who stands to the State as a subordinate would to a higher officer, or, in other words, there must be a relationship of employer and. employee between the person holding office and the State or at least there must be an element of subordination to the State in the office contemplated by Article 16(1). We are dealing here with councilors of a borough Municipality, and the question is, can it be said of a councilor of a borough municipality that he is employed or appointed to an office under the State? The State here, in view of Article 12, must mean a local authority. Would it be true to say of a councilor of a borough municipality that he is subordinate to the local authority, or that there is the relationship of employer and employee between him and the local authority? The sections of the Bombay Municipal Boroughs Act, to which attention has just been drawn, make it clear that a councilor is a part of the Municipality in which the government of the municipal borough has been vested. Therefore, far from being a person who holds office under the local authority, a councilor is part of the local authority itself and therefore, it is clear that the equality of opportunity which is required under Article 15(1) is not in relation to an election to a local authority.

4. Reliance is then placed upon Article 16(2) and that provides :

> "No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth,

> residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State." What is emphasized is that whereas in Article 16(1) the language used by the Constitution makers was "employment or appointment to any office", in Article 16(2) the language used is "employment or office under the State", and therefore we are asked to give a wider connotation to the expression "office" used in Article 16(2) than the expression "employment or appointment", used in Article 16(1). In our opinion, the expression "office" occurring after "employment" must also be construed 'ejusdem generis', and the office contemplated under Article 16(2) is also an office which would be subordinate to the local authority and over which the" local authority would have powers of control and supervision. In Article 16(2) also the expression used is not merely "office" but "office under the State", and as pointed out when we were dealing with Article 16(1), it is impossible to suggest that a municipal councilor holds an office under the local authority. Therefore, in our opinion, neither Article 16(1) nor Article 16(2) has any application to the particular provision of the law we are, dealing with.

5. A general argument which was advanced by Mr. Kotwal may be looked at. Mr. Kotwal says that the Constitution makers with the bitter experience of the past political history of our country wanted to do away with separate representation, separate electorates and all those political institutions which resulted in differentiating one citizen from another and which ended in the calamity of partition, and Mr. Kotwal says that the only two exceptions that the Constitution makers were in favour of were the scheduled castes and tribes and Anglo-Indians and even those provisions were for a limited duration. According to Mr. Kotwal, apart from this distinction, all citizens in India were to be looked upon as equal, having equal rights of franchise, equal rights to be elected, and no discrimination or distinction was to be permitted. The argument so presented is undoubtedly very attractive, but it must be borne in mind that our Constitution has only dealt with the constitution of Parliament and the State Legislatures, it has not dealt with local authorities, and under List II Sch.7 under entry 5 the subject of "local government" has been left exclusively to the State Legislature and no restriction has been put by the Constitution on the manner in which the State Legislature may decide to constitute the municipal corporation and other local authorities. Therefore, unless there is soma provision in the Constitution itself which prohibits the State Legislature from providing for separate representation for women, the mere fact that the Constitution has not provided for any reservation for women in Parliament or in State Legislatures cannot be used as an argument against the competency of the State Legislature.

6. A further argument which was advanced by the Advocate General may also be noticed. Article 16(3) gives power to Parliament to prescribe, in regard to a class or classes of employment or appointment to an office under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within that State prior to such employment or appointment, and the Advocate General rightly contends that if the wide meaning were to be given to the expression "office" as contended for by the petitioner, then it would mean

that Parliament would have the right to prescribe qualifications for election of councilors, qualifications which may be restricted to requirements of residence. But even so it is impossible to accept that as the correct position in view of the fact as just pointed out that in the State List "local government" has been made exclusively the subject of legislation for the State Legislature. Therefore, the Advocate General contends that what Article 16(3) does is to empower Parliament to fix special qualifications with regard to persons who are employed by the State or local authorities and Article 16 does not deal with elections to municipalities or local authorities at all.

7. Reliance is then placed on Article 15(1). That article is intended to prevent the State from discriminating against any citizens on grounds only of religion, race, caste, sex, place of birth or any of them, and the contention) put forward is that in reserving seats for women the State has discriminated in favor of women on the ground of sex. It must always be borne in mind that the discrimination which is not permissible under Article 15(1) is a discrimination which is only on one of the grounds mentioned in Article 15(1). If there is a discrimination in favor of a particular sex, that discrimination would be permissible provided it is not only on the ground of sex, or, in other words, the classification on the ground of sex is permissible provided that classification is the result of other considerations besides the fact that the persons belonging to that class are of a particular sex, and there is force in the Advocate General's argument that if Government have discriminated in favor of women in reserving seats for them, it is not only on the ground that they are women, but there are various other considerations which have come into play. It is said that even today women are more backward than men. It is the duty of the State to raise the position of women to that of men. It is rightly urged that it would be very difficult for women to be elected if there was no reservation in their favor, and Government may well take the view that women are very necessary in local authorities because the point of view of women must be placed before the councilors before they decide any question affecting the Municipality. But the clear answer to Article 15(1) is Art 15(3) and that provides that nothing in this article shall prevent the State from making any special provision for women and children. Mr. Kotwal says that Article 15(3) must not be read as a proviso to Article 15(1), because if it is read as a proviso, then it would completely nullify one of the important ingredients of Article 15(1). It is said that discrimination on the ground of sex is not permissible under Article 15(1) and the object of enacting Article 15(3) could not possibly be to make that discrimination possible by permitting special provision for women. It is, therefore, argued that Article 15(3) must be read to mean that only those special provisions for women are permissible which do not result in discrimination against men. It is said that there can be certain facilities which can be given to women without those facilities resulting in discrimination against men. It is said that there are certain facilities which only women can enjoy, and to the extent that those facilities can only be enjoyed by women, provision can be made for those facilities, and with regard to this provision it could not possibly be said that this provision discriminated against men. An illustration is given with regard to maternity homes. It is said that (if?) this is a facility given to women.; special provision can be made for that right or privilege, and it could never be urged that if the State did so the State was discriminating against men. In our opinion, if that was the object of enacting Article 15(3), then Article 15(3) need not

have been enacted at all, because if the special provisions for women contemplated by Article 15(3) were only those provisions which did not discriminate against men, then no proviso to Article 15(1) was necessary. Article 15(3) is obviously a proviso to art. 15(1) and proper effect must be given to the proviso. It is true that in construing a proviso one must not nullify the section itself. A proviso merely carves out something from the section itself, but it does not and cannot destroy the whole section. The proper way to construe Article 15(3), in our opinion, is that whereas under Article 15(1) discrimination in favor of men only on the ground of sex is not permissible, by reason of Article 15(3) discrimination in favor of women is permissible, and when the State does discriminate in favor of women, it does not offend against Article 15(1). Therefore, as a result of the joint operation of Article 15(1) and Article 15(3) the State may discriminate in favor of women against men, but it may not discriminate in favor of men against women. In this particular case, even if in making special provision for women by giving them reserved seats the State has discriminated against men, by reason of Article 15(3) the Constitution has permitted the State to do so even though the provision may result in discrimination only on the ground of sex. Therefore, in our opinion, the legislation we are considering does not offend against Art 15(1) by reason of Article 15(3).

8. An argument was advanced by Mr. Patel that Article 15(3) only applies to future legislation, and that as far as all laws in force before the commencement of the Constitution were concerned, those laws can only be tested by Article 15(1) and not by Article 15(1) read with Article 15(3). Mr. Patel contends that Article 15 (3) permits the State in future to make a special provision for women and children, but to the extent the laws in force are concerned Article 15(1) applies, and if the laws in force are inconsistent with Article 15(1), those laws must be held to be void. Turning to Article 13(1), it provides:

> "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

Therefore, before a law in force can be declared to be void it must be found to be inconsistent with one of the provisions of Part III which deals with Fundamental Rights, and the fundamental right which is secured to the citizen under Article 15 is not the unlimited right under Article 15(1) but the right under Article 15 (1) qualified by Article 15(3). It is impossible to argue that the Constitution did not permit laws to have special provision for women if the laws were passed before the Constitution came into force, but permitted the Legislature to pass laws in favor of women after the Constitution Was enacted. If a law discriminating in favor of women is opposed to the fundamental rights of citizens, there is no reason why such law should continue to remain on the statute book. The whole scheme of Article 13 is to make laws, which are inconsistent with Part III, void, not only if they were in force before the commencement of the Constitution, but also if they were enacted after the Constitution came into force. Mr. Patel relies on the various provisos to Article 19 and he says that in all those provisos special mention is made to existing

laws and also to the State making laws in future. Nov/, the scheme of Article 19 is different from the scheme of Article 15. Provisos to Article 19 in terms deal with law whether existing or to be made in future by the State, whereas Article 15(3) does not merely deal with laws but deals generally with any special provision for women and children, and therefore it was not necessary in Article 15(3) to mention both existing laws and laws to be made in future. But the exception made to Article 15(1) by Article 15(3) is an exception which applies both to existing laws and to laws which the State may make in future.

9. Finally, reliance is also placed on Article 14. It is difficult to understand how Article 14 has any application to the question that we are considering. Article 14 requires that all laws should be equally applied and every citizen is entitled to equal protection of the law. The Municipal Boroughs Act is applied equally to all citizens and whatever protection that law gives is given equally to all citizens, and therefore Article 14 really has no application whatever to the question that we are considering.

10. There is one final argument which has been forcefully advanced by Mr. Kotwal to which attention might be drawn. It is urged by Mr. Kotwal that if we were to give this interpretation to Article 16(1) and 16(2) and if we were to hold that these two sub-clauses of Article 16 only apply to offices to which persons are appointed or in which they are employed, it would result in the State Legislature being given a 'carte blanche' to legislate with regard to elections of local authorities and to make reservations in favour of various sections of the community. If our interpretation of Article 16 were to lead to that result, we must undoubtedly pause and consider whether we are right in giving that construction to Article 16, but the answer to the question posed by Mr. Kotwal is in our opinion simple. If Article 16 deals only with matters of public employment, it does not mean that the State Legislature has the right to discriminate between one citizen and another in matters of election. What would prevent the State Legislature would not be Article 16 but Article 15, because apart from the special provision which the Legislature can make for women and children, the State Legislature would have no authority to discriminate as between one citizen and another on grounds of religion, race, sex, caste or place of birth. From this point of view the scheme of Article 16 and Article 15 becomes clear. Article 16 deals with a limited subject, the subject of employment or appointment by the State, "the State" used in the wide sense in which Article 12 defines that expression, and art. 16 emphasizes that the State in appointing or in employing persons shall give equal opportunity to all citizens and will not make any person ineligible to hold an office or discriminate against him in respect of that office on ground of religion, race, caste, sex or place of birth. Article 15 is more general in its application and it deals with all cases of discrimination which do not fall expressly under Article 16. Our Constitution does not permit any discrimination at all, subject to, as has been pointed out, what is provided for women and children, and therefore although a case of discrimination may not fall under Article 18, it may still fall under Article 15(1) if it is not saved under Article 15(3).

11. In our opinion, therefore, the provision made in the Municipal Boroughs Act for reservation

of seats and the rules made by Government with regard to the reservation of seats for election to the Jalgaon Municipality are 'intra vires' and they do not offend against any provision of the Constitution.

12. The other two petitions before us, C.A. 1855 and C. A. 1917 of 1952, raise the same question with regard to the Islampur Municipality and the Anand Municipality. Both these Municipalities are governed by the District Municipal Act and the provisions of that Act are identical with the provisions of the Municipal Boroughs Act, and the petitioners in these two petitions have also challenged the provisions of law with regard to reservation of seats for women on the same grounds on which the petitioner in the petition we have just disposed of has challenged similar provisions.

13. The result, therefore, is that all the three petitions fail and they are dismissed. No order as to costs.
Petitions dismissed.