

SCA/17901/2011 16/16 JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 17901 of 2011
For Approval and Signature:

HONOURABLE MR.JUSTICE V. M. SAHAI
HONOURABLE MR.JUSTICE A.J. DESAI

- =====
- 01.Whether Reporters of Local Papers may be allowed to see the judgment ?YES
 - 02.To be referred to the Reporter or not ?YES
 - 03.Whether their Lordships wish to see the fair copy of the judgment ?NO
 - 04.Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?NO
 - 05.Whether it is to be circulated to the civil judge ?NO

=====

NATHABHAI DEVABHAI ZALA & 1 - Petitioner(s)
Versus
STATE OF GUJARAT & 2 - Respondent(s)

=====

Appearance :
MR JV BHAIKAVIA for Petitioner(s) : 1 - 2.
MR NJ SHAH AGP for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 1 - 3.

=====

CORAM : HONOURABLE MR.JUSTICE V. M. SAHAI
and
HONOURABLE MR.JUSTICE A.J. DESAI

Date : 16/12/2011
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE V. M. SAHAI)

1. Rule. Mr.N.J. Shah, learned Assistant Government Pleader, wavier service of Rule on behalf of the respondents.

2. By way of the present petition, the petitioners have prayed for quashing and setting aside the impugned order dated 28.09.2011 at Annexure-A issued by respondent no.2 as well as restraining respondent no.2 from allotting a seat reserved for scheduled caste in village Shree Thoriyali for the Village Panchayat Election, 2011.

3. Before referring to the question involved in the petition, it is necessary to mention an important fact that the last election of the panchayats were held in the year 2006, and one seat was reserved for scheduled caste candidates. In the present election, which is scheduled to be held on 29.12.2011 of Village Panchayat of Thoriyali, Tal: Padadhari, District: Rajkot, no seat has been reserved for the scheduled caste or scheduled tribe candidates. In this petition, the petitioners have prayed that the respondents be directed to reserve one seat for scheduled caste candidates, as the last date of filing the nomination papers was 15.12.2011. The writ petition was filed and on 09.12.2011, notice to the respondents was issued which was returnable on 13.12.2011. The respondents filed an affidavit in reply. The affidavit-in-reply did not controvert the facts stated in the writ petition, therefore, the learned AGP was permitted to file additional affidavit-in-reply by 14.12.2011 which has been filed but the writ petition could be taken up for hearing.

4. The learned counsel for the petitioner has urged that the entire process of filing of nomination papers is vitiated, as one seat has not been reserved for scheduled caste and scheduled tribe candidates.

5. It has been stated in the affidavit-in-reply filed by the respondents that they rely on Section 9(4) of the Gujarat

Panchayat Act, whereby it is provided that a village panchayat of a village having population not exceeding three thousand shall consist of seven members and in case of a village panchayat, where the population of village is more than three thousand, then for every one thousand or part thereof in excess of three thousand the said number of seven seats shall be increased by two.

6. The respondents have also relied upon Rule 4(1) and Rule 11 of the Gujarat Village Panchayats Election (Manner of Allotment of Served Seats by Rotation) Rules, 1994. ("Rules" for short).

7. It has been stated in the affidavit-in-reply that the reservation of a seat of scheduled caste can only be made on the basis of percentage of voters in the Village Panchayat, as provided under Section 9(4) of the Act. It has further been stated in the affidavit-in-reply that in the Village Panchayat Thoriyali, the total number of voters is 2741 out of which 184 persons belong to Scheduled Caste.

8. We have heard Mr.J.V. Bhairavia, learned counsel for the petitioners and Mr.N.J. Shah, learned Assistant Government Pleader for the respondents.

9. The learned counsel for the petitioners has urged that in every Village Panchayat, one seat has to be reserved for scheduled caste candidates irrespective of the population of scheduled caste in that Village Panchayat.

10. On the other hand, Mr.N.J. Shah, learned AGP has urged that the provisions of sub-section (5)(a)(i) and Section 9 of the Act have to be read together for deciding the number of seats reserved for scheduled caste candidates.

11. It is submitted by the learned AGP Mr.Shah that Part-IX of the Constitution of India deals with the Panchayats and Article 243-B stipulates that in every State, in every District Village Panchayats shall be constituted. Mr. Shah further argues that under Article 243-O there is a bar of

interference by the Court in electoral matters. He therefore submitted that in view of bar imposed by the Constitution of India under Article 243-O, the Court may not interfere with the elections of the panchayats.

12. Article 243-D of the Constitution, provides reservation of seats in the panchayats. Article 243-D(1) reads as under:

- (1) Seats shall be reserved for
 - (a) The Scheduled Castes; and
 - (b) The Scheduled Tribes,

in every Panchayat 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 Panchayat as the population of the Scheduled Castes in that Panchayat area or of the Scheduled Tribes in that Panchayat area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a panchayat.

- (2)
- (3)
- (4)"

The arguments advanced by Mr. Shah is not acceptable to us since Article 243-D itself provides that seats shall be reserved for the Scheduled castes and the Scheduled Tribes in every panchayat. The provisions of Section 9(5)(a)(i) of the Panchayat Act, 1993 and Article 243-D are para-materia. When Constitution itself provides that seats are required to be reserved for the Scheduled Castes and the Scheduled Tribes in every panchayat, the Court would certainly interfere with the election, if, the authority does not follow or obey the mandate of the Constitution of India.

13. In the case of K. Krishna Murthy (Dr.) and others Vs. Union of India and another reported in (2010) 7 SCC 202, the Apex Court has held as under:

“11. The petitioners did not object to the proportionate reservation of seats in favour of Scheduled Castes and Scheduled Tribes, as contemplated by Articles 243-D(1) and 243-T(1) respectively. It was stated that reservations in favour of Scs/STs were consistent with the intent of the framers of the Constitution, since reservations in favour of these groups had been provided in respect of the composition of the Lok Sabha and the State Legislative Assemblies (under Article 330 and 332).”

“51. Before addressing the contentions issues, it is necessary to examine the overreaching considerations behind the provisions for reservations in elected local bodies. At the outset, we are in agreement with Shri Rajeev Dhavan's suggestion that the principles that have been evolved for conferring the reservation benefits contemplated by Article 15(4) and 16(4) cannot be mechanically applied in the context of reservations enabled by Articles 243-D and 243-T. In this respect, we endorse the proposition that Articles 243-D and 243-T form a distinct and independent constitutional basis for reservations in local self-government institutions, the nature and purpose of which is different from the reservation policies designed to improve access to higher education and public employment, as contemplated under Articles 15(4) and 16(4) respectively.”

“82(i) The nature and purpose of reservations in the context of local self-government is considerably different from that of higher education and public employment. In this sense, Article 243-D and Article 243-T form a distinct and independent constitutional basis for affirmative action and the principles that have been evolved in relation to the reservation policies enabled by Article 15(4) and 16(4) cannot be readily applied in the context of local self-government. Even when made, they need not be for a period corresponding to the period of reservation for the purposes of Articles 15(4) and 16(4), but can be much shorter.”

14. The constitutional scheme of reservation has been succinctly explained by the Apex Court in *Bihari Lal Rada v. Anil Jain (Tinu) and others*, (2009) 4 SCC 1. Paragraphs 9 to 12 are extracted below :-

“9. Ever since the adoption of the Constitution, there have been efforts at democratic decentralization of power. A reference may be made to Article 40 of the Constitution which obligates the State to take steps to re-organise village Panchayats and endow them with such powers and functions as may be necessary to enable them to function as units of self-government.

10. How far the local self-government institutions at the gross roots have attained the objectives of democratic decentralization always remained a matter of serious and sustained debate. It was felt that the monopoly of leadership by certain groups was deeply disturbing. The poorer and weaker sections of the Society were prevented from providing effective leadership. Roles in implementing the community development plans, electoral politics at the gross root level led to patronage. It was perceived that dominant sections in both Panchayati Raj Institutions and as well as Nagarpalikas / Municipalities etc. captured power and used the same for their own ends. All this has contributed to a loss of faith in the gross root democratic institutions.

11. The Constitution of India specifically provides for reservation of seats in elective legislative bodies to the Scheduled Castes and the Scheduled Tribes in proportion to their numbers. Be it noted that these reservations do not involve 'separate electorates' - i.e. the representation of a particular group by legislators chosen by an electorate composed solely of members of that group. The seats are reserved in the sense that candidates who stand for them must belong to the specified groups, in which the entire electorate of the Constituency participates in choosing among the reserved candidates. Such provisions were obviously made to enhance political participation by the Scheduled Castes and Scheduled Tribes. No such provision was made providing for any reservation of seats in elective bodies at the gross root level either in Panchayats or in Municipalities.

12. It was realized that Local Bodies have become weak and ineffective on account of variety of reasons, including the failure to hold regular elections, prolonged supersessions and

inadequate devolution of powers and functions. It was felt that the Urban Local Bodies and as well as Panchayati Raj Institutions have not been able to acquire status and dignity of viable and responsive bodies. One of the reasons noticed as to why these grass root institutions were unable to perform effectively as vibrant democratic units of self- government was on account of inadequate representation of weaker sections such as Scheduled Castes, Scheduled tribes and Women etc."

15. From the aforesaid, it is clear that the constitution initially did not grant reservation at the grass root level of Village Panchayat or in Municipalities. However, when it was realized that the local bodies have become weak and ineffective for various reasons, the Constitution was amended by the Constitution (73rd Amendment) Act 1992 and the reservation with regard to Panchayats came into force w.e.f. 24.04.1993. There is a mark difference between Article 243 D and Article 330 of the Constitution. Article 243 D uses the expression that "seat shall be reserved for the Schedule Caste and the Schedule Tribes in every Panchayat". We do not find any such expression having been used in Article 330 of the Constitution of India. The Constitution of India provide for reservation of seats in Parliament as well as Legislative Assemblies, but and states that seat shall be reserved to the proportion of the total number of seats allotted to the State whereas in the village Panchayats, the seats are to be reserved for Schedule Caste and Schedule Tribes in 'every Panchayat' which means that one seat has to be reserved for Schedule Caste and Schedule Tribe in every Panchayat. The expression 'every' under Article 243-D has been intentionally used by the Constitution with an object to give reservation to the scheduled caste/scheduled tribe. The language embodied in Section 243 D of the Constitution was lifted from the Constitution and was incorporated in Section 9 (5) (a) (i) of the Gujarat Panchayats Act. We find that in this case, no seat has been reserved for Schedule Caste candidate which is contrary to the Constitutional mandate under Article 243 D of the Constitution. Therefore, the bar of Article 243 D of the Constitution would not apply to the facts of the instant case as the Court would be fully justified in interfering in the election matter where the scheme of elections provided under the Constitution is being flagrantly violated.

16. It is necessary to extract Sections 9(4) and (5)(a)(i) of the Act as well as Rule-4 and Rule 11 of the Rules as under:

“9. Constitution of Village Panchayats.

(1)

(2)

(3)

(4) A village panchayat of a village having population not exceeding three thousand shall consist of seven members and in case of village panchayat where the population of the village exceeds three thousand, then for every one thousand or part thereof in excess of three thousand, the said number of seven shall be increased by two.”

“(5)(a)(i) Seats shall be reserved by the State Government for the Scheduled Castes and the Scheduled Tribes in every village panchayat in the State and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats in that panchayat as the population of the Scheduled Castes in the village or as the case may be of the Scheduled Tribes in that village bears to the total population of that village, and such seats shall be allotted by the State Election Commission by rotation to different wards in that village in the prescribed manner.”

“Rule-4 Allotment of seats reserved for Scheduled Castes. (1) For the purpose of allotment of the number of seats determined by the State Government as reserved for the Scheduled Castes under sub-clause(i) of clause (a) of sub-section (5) of section 9 of the Act, the election commission shall determine the wards in a village which consist a population of the Scheduled Castes, and such ward of village shall be serially arranged in accordance with the percentage of population of the Scheduled Castes in each ward beginning with the ward consisting of the highest percentage of the population of the scheduled Castes and shall be assigned serial numbers as SC 1 SC 2 and as on.

(2) The serial numbers as so assigned shall be known as

special serial numbers for the Scheduled Castes.

(3) the Election Commission shall first allot the number of seats reserved for the Scheduled Castes (including one third of such seats reserved for women belonging to the Scheduled Castes), serially to the wards bearing special serial number or scheduled castes by rotation, so however that preference shall be given to allotment of seats reserved for the women.”

”Rule-11 Computation of seats to be reserved under the rules.- While deriving the number of seats to be reserved under these rules, fraction which is one half or greater than one half in value shall be counted as one and a fraction less than one half in value shall be ignored.”

17. Sub-section (5)(a)(i) of Section 9 of the Act provides that one seat in every Village Panchayat in the State of Gujarat must be reserved for the scheduled caste and scheduled tribe. On perusal of the said provision, the intention of legislature is absolutely clear. The legislature further says that after keeping one seat reserved for scheduled caste/scheduled tribe, more seats of scheduled caste/scheduled tribe shall be kept reserved in proportion to the total number of seats in the said panchayat as per the total number of scheduled caste/scheduled tribe voters, and thereafter, it talks about rotation of different wards in the village. Sub-section (4) of Section 9 would come into play only where more than one seat is required to be reserved as per the population of the Village Panchayat and if it exceeds 3000, then for every 1000 or part thereof in excess of 3000, the said number of seven shall be increased by two.

18. Rule-4 of the Rules stipulates that the Election Commission shall determine the wards in a village which consist a population of the Scheduled Castes, and such ward of village shall be serially arranged in accordance with the percentage of population of the Scheduled Castes in each ward beginning with the ward consisting of the highest percentage of the population of the scheduled Castes and shall be assigned serial numbers as SC 1, SC 2 and as on depending upon the population. Therefore, the argument of Mr.Shah, learned AGP that since in the present case, the population of the

scheduled caste in the Village Panchayat of Thoriyali is only 184, out of total population of village which is 2741. Hence, no such seat is required to be reserved for scheduled caste. The mandate under sub-section (5)(a)(i) of Section 9 is unambiguous and clear that one seat in every Village Panchayat has to be reserved for scheduled caste/scheduled tribe. Population does not play its any role in that matter. However, population will play role only if more than one seat is required to be reserved for scheduled caste and scheduled tribe.

19. If the argument of Mr.Shah, learned AGP is accepted, it would be rewriting sub-section (5)(a)(i) of Section 9 of the Act. The statutory provisions have to be interpreted by applying the rule of literal construction. Where the words of a statute are clear, plain and unambiguous and they are reasonably susceptible to only one meaning it has to be given effect. The legislative intent is clear that the legislature intended to reserve one seat for scheduled caste/scheduled tribe. The Court cannot words to the statutory language. The Court can only expound the law but it cannot legislate. If the interpretation put forward by Mr.Shah, learned AGP is accepted, then there will be no representation of the scheduled caste and scheduled tribe candidates in the Village Panchayat, if the population is not as per sub-section (4) of Section 9 of the Act and Rule 11 of the Rules.

20. Mr.Shah, learned AGP, further urged that reading of sub-section (5)(a)(i) of Section 9 of the the Act, one seat must be reserved for scheduled caste and scheduled tribe candidates, amounts to rewriting sub section (5)(a)(i) of Section 9 of the Act which is not permissible, as the Courts cannot legislate. Mr.Shah, learned AGP, has failed to explain the meaning of the expression used by the legislature sub-section (5)(a)(i) of Section 9 of the Act, "Seats shall be reserved by the State Government for scheduled caste and scheduled tribe in every village panchayat in the State."

21. According to Mr.Shah, learned AGP, the use of the expression 'and' in sub-section (5)(a)(i) of Section 9 of the Act that in every village, there shall be a seat for scheduled caste candidates and the expression conjointly means that reservation has to be with regard to number of population of

scheduled caste in the village. It will be governed by sub-section (4) and sub-section (5)(a) (i) of Section 9 of the Act.

22. The argument of Mr. Shah, learned AGP is misconceived and sub-section (4) of Section 9 of the Act would apply only in case, where the population is more than 3000. So far as sub-section (5)(a)(i) of Section 9 of the Act is concerned, the seat shall be reserved by the State Government for the scheduled caste and scheduled tribe and in every Village Panchayat in the State means that the Government is under a legal obligation to reserve in a Village Panchayat a seat for scheduled caste and scheduled tribe and thereafter, the population comes into play. If we accept the arguments advanced by Mr. Shah, learned AGP that even to keep one seat reserved for scheduled caste/scheduled tribe, minimum number of voters from scheduled caste/scheduled tribe is necessary than there would no representation from scheduled caste/scheduled tribe population in small village in which there is less voters of scheduled caste/scheduled tribe which is not the intention of legislature. We are of the opinion that even in small village like in the present case, there must be one seat kept reserved for scheduled caste/scheduled tribe in Village Panchayat so that they may participate in the day to day administration of the Panchayat. The intention of the legislature provided in Section 9(4) and Section 9(5)(a)(i) of the Act, is to confer benefit of participation to scheduled caste/scheduled tribe so that downtrodden section of the society may be part of every Village Panchayat of the State and may join the main stream. We cannot frustrate the legislative intent. Thus, argument of the AGP cannot be accepted. Population would have correlation with the first part of the said sub-section (5)(a)(i) of Section 9 of the Act and where the population scheduled caste/scheduled tribe is less, then the State Government is not required to reserve a seat for scheduled caste and scheduled tribe candidates. Thus, construing the statutes harmoniously, we are of the considered opinion that the respondents have committed illegality by misinterpreting in sub-section (5)(a)(i) of Section 9 of the Act, and not reserved a seat for scheduled caste candidate which has vitiated the entire process of panchayat election is illegal, arbitrary and against the provisions of the Act and a direction is liable to be issued to correct the mistake in the panchayat elections and one seat be reserved for scheduled caste/scheduled tribe candidate prior to holding elections on

29.12.2011.

23. For the foregoing reasons, the petition is allowed, the notification/order dated 28.09.2011 is hereby quashed so far as it relates to Thoriyali Village. The respondents are directed to immediately issue notification reserving one seat in Thoriyali Village Panchayat for scheduled caste. Such the notification shall be issued by the State Government forthwith. The nomination papers be invited and scrutiny of nomination papers be fixed; and election program shall be published and widely circulated so that the elections are held on time on 29.12.2011. If, for any reason, the State Government faces any difficulty in publication of the notification and holding the elections on 29.12.2011 as per directions in the present judgment, then in that case, the elections shall be held on or before 18.01.2012 or the earliest convenient date which the Government may decide and necessary notification and election program be issued well in time. It shall be open to the State Government that if similar illegality has been committed in other village panchayats, to rectify the illegality committed in the matter of reservation of seats for scheduled caste/scheduled tribe, and appropriate order may be passed by the State Government. Rule is made absolute.

Direct Service is permitted.

(V.M. Sahai, J.)

(A.J. Desai, J.)

rakesh/

Top