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Court : Mumbai Nagpur

Decided On : Aug-05-2014

Judge : A.B. Chaudhari

Appeal No. : Writ Petition No. 3553 of 2011

Appellant : Pramila

Respondent : Bandu and Others

Judgement :

1. Petitioner, who is working as a Sarpanch of Gram Panchayat, Ner, Tq. Telhara, Distt. Akola, felt aggrieved by the order dated 7th April, 2011, passed by the Additional Collector, Akola, and confirmed by the Additional Commissioner, Amravati Division, Amravati, in Appeal No.198/BVP Act 16 (2)/2010-11 of Ner, Tq. Telhara, Distt. Akola, by order dated 7th June, 2011, filed the present Writ Petition.

FACTS

2. For Gram Panchayat, Ner, the post of Sarpanch was reserved for Scheduled Castes [Woman] and as such the petitioner was elected on the said post on 10th August, 2010. Respondent No.1 applied under Section 14 (1) (h) of the Maharashtra Village Panchayats Act, 1958, against the petitioner and stated in the said application that the petitioner is residing in undivided Hindu family of her father-in-law Yashwant Tukaram Tayde along-with her husband Punjab Yashwant

Tayde in House No.328, which stands in the name of her father-in-law Yashwant. The House Tax in respect of House No.328, so also water Tax are due against father-in-law of the petitioner, namely Yashwant, and accordingly Demands under Section 129 (1), a Writ of Demand under Section 129 (2) were duly served on Yashwant from time to time; but nothing was paid and, thus, Yashwant remained in arrears of taxes. Therefore, according to respondent no.1, petitioner being the wife of son of Yashwant residing in the joint family of Yashwant, she was disqualified under Section 14 (1) (h) [Explanation 2 for the purposes of clause (h) (i) and (ii)] from the membership of Gram Panchayat, Ner.

3. Petitioner filed her reply to the application before Additional Collector, Akola, and stated that she resides with her husband separately since 19th June, 1997 and has no concern with the house in which Yashwant resides, and not only that Govt., has issued Below-Poverty-Line [BPL] Card to her and her husband accordingly. Therefore, it was factually wrong to say that she was residing in House No.328. During the course of proceedings, the Additional Collector called a report from the Secretary of Gram Panchayat, Ner, dated 4th October, 2010, in which it was stated that petitioner resides at Govt. Site No.320, while Yashwant, her father-in-law, resides in House No.328. Yashwant was served with all the Bills of Taxes, which remained unpaid. The Additional Collector then took up the proceedings and disqualified the petitioner directly in accordance with the Explanation-2 to Section 14 (1) (h) by his order dated 7th April, 2011. The petitioner went in appeal before Additional Commissioner, who confirmed the order passed by the Additional Collector. Hence this Writ Petition.

4. In support of the Writ Petition, learned Adv. Mr. R.L. Khapre for the petitioner, vehemently argued that as a matter of fact, the finding is recorded by the authorities below that petitioner with her husband resides at the site and not in House No.328 of Yashwant, her father-in-law. However, merely because her husband Punjab has a share in House No.328, for want of partition, would be a member of Hindu United Family of Yashwant and consequently as per the provision in question, the petitioner was disqualified. Appellate Authority also recorded the same finding. According to Mr. Khapre, when the petitioner is living separately with her husband and not residing in House No.328 and having

independent BPL Card, merely because her husband has a share in the house property, i.e, House No.328, she could not be disqualified, since she got elected as a member and Sarpanch of the Gram Panchayat by virtue of the constitutional mandate and the provisions of law in her own right as a woman, for whom the seat was reserved. Mr. Khapre then contended that a similar provision fell for consideration before the Punjab and Haryana High Court, which declared the same as ultra vires the Constitution of India. Mr. Khapre, therefore, urged this Court to follow the suit. To strengthen his arguments, Mr. Khapre cited the following decisions:-

[1] Dr. K. Krishna Murthy and others Vs. Union of India and another [2010 AIR SCW 3368],

[2] Chandkhan and others Vs. W.N. Gound and others [AIR 1973) Bombay 1 (V 60 C 1)], and

[3] Smt. Anguri Devi Vs. State of Haryana and others [AIR 1998 Punjab and Haryana 31].

5. Per contra, learned counsel for the respondents squarely relied on the provisions and on the admitted fact that the petitioners husband being the member of Hindu Undivided Family of Yashwant, the petitioner being his wife and a member of the said family, she automatically stood disqualified by virtue of the provision under the Maharashtra Village Panchayats Act. He, therefore, prayed for dismissal of the Writ Petition.

CONSIDERATION :

6. The question raised in the present Writ Petition is of some significance. The Additional Collector recorded a categorical finding of fact in para-7 of his order that it was the father-in-law of the petitioner, namely Yashwant, who was the owner of House No.328 and was defaulter in payment of taxes though he was served with Demand Notices under Section 129 (1) and a Writ of Demand under Section 129 (2) of the Maharashtra Village Panchayats Act, for the last fifteen years. There is a further categorical finding that the petitioner resides with her husband in a different

house altogether and there is evidence to that effect in the form of Voter List and BPL Card. However, Additional Collector found that because the husband of the petitioner did not relinquish his share in House No.328 from the Hindu Undivided Family of his father Yashwant, he continues to be having a share in the said house and, therefore, being a member of the said family, his wife would be disqualified. Similar is the case with the Appellate Authority which recorded the finding accordingly. I quote the following paragraph from Appellate Authorities order:-

It is seen from the record that though the appellant is residing along with her husband independently in separate house still there is nothing on record to show that the husband of appellant has relinquished his right of share from the house property bearing no.328 belonging to his father and therefore, though appellant is not residing with her father-in-law the share of her husband in the house property no.328 is existing. Moreover, there is nothing brought on record by the respondent that they have partitioned their share from her father in law. ...

7. In the light of the above admitted position, now I proceed to deal with the matter.

8. Clause (h) of Sub-section (1) of Section 14 of the Maharashtra Village Panchayats Act, 1958, and Explanation 2 thereto read thus:-

14.(1) No person shall be a member of a Panchayat continue as such, who-

(a) to (g)

(h) fails to pay any tax or fee due to the Panchayat or the Zilla Parishad within three months from the date on which the amount of such tax or fee is demanded, and a bill for the purpose is duly served on him; ...

Explanation-2 For the purposes of clause (h) -

(i) a person shall not be deemed to be disqualified if he has paid the amount of any tax or fee due, prior to the day prescribed for the nomination of candidates;

(ii) failure to pay any tax or fee due to the Panchayat by a member of an undivided Hindu family, or by a person belonging to a group or unit the members of which are by custom joint in estate or residence, shall be deemed to disqualify all

members of such undivided Hindu family or as the case may be all the members of such group or unit.

9. From perusal of the aforesaid Explanation-2 (ii), it is clear that all members of an undivided Hindu family or a group or unit shall be disqualified for non-payment of tax or fee due to Panchayat by even one member of such undivided Hindu family. That means, even if Yashwant, the Karta of the undivided Hindu Family of Punjab, did not pay the taxes despite service of demands on him, all members of his family holding any post under the Act would become disqualified, including the petitioner, the wife of his son.

10. Article 15 (3) of the Constitution of India reads thus:-

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth -

(1) ...

(2) ...

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

The first time reservation for women in political background in Panchayats was provided by Seventy-Third and Seventy-Fourth Amendments to the Constitution.

11. In the case of Govt. of A.P.Vs. P.B. Vijayakumar and another [(1994) 4 SCC 520], Supreme Court stated thus in para 7 of its Judgment in this context:-

7. The insertion of clause (3) of Article-15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15 (3) is placed in Article-15. Its object is to strengthen and improve the status of women. ...

12. A Constitution Bench of the Supreme Court in the case of Dr. K. Krishna Murthy and others Vs. Union of India and another [2010 AIR SCW 3368] was required to deal with the provisions relating to reservations also with reference to the Panchayati Raj institutions and Municipalities. In addition, with reference to the women, the Supreme Court laid down the following propositions in paras 42, 43 and 46:-

42. In the case of urban local bodies, Art. 243-T(4) also enables reservation of chairperson posts in favour of Scheduled Castes, Scheduled Tribes and women. However, there are no further specifications to guide the reservation of chairperson positions in urban areas. While it is not possible for us to ascertain the legislative intent behind the same, one can perhaps theorise that there was an assumption that the intended beneficiaries are in a relatively better-off position to overcome barriers to political participation in urban local bodies, when compared with rural local bodies. _

43. It was also contended that since chairpersons of Panchayats and Municipalities are entrusted with executive powers, reserving these posts could prove to be the precursor for reservations of executive offices at higher levels of Government. It was even suggested that the reservation of chairperson posts was akin to reserving the posts of Chief Minister and Prime Minister at the State and National level, respectively. In our opinion, this analogy with the higher levels of Government is misplaced. The offices of chairpersons in Panchayats and Municipalities are reserved as a measure of protective discrimination, so as to enable the weaker sections to assert their voice against entrenched interests at the local level. The patterns of disadvantage and discrimination faced by persons belonging to the weaker sections are more pervasive at the local level. Unlike elected representatives in the Lok Sabha and the Vidhan Sabha who can fall back on the support of mainstream political parties as well as media scrutiny as a safeguard against marginalization and unjust discrimination; elected representatives from the disadvantaged sections may have no such support-structures at the local level. In this respect, the Union Parliament thought it fit to enable reservations of chairperson positions in order to ensure that not only are the weaker sections adequately represented in the domain of local self-

government, but that they also get a chance to play leadership roles.

46. The petitioners have asked us to reconsider the precedents wherein the rights of political participation have been characterized as statutory rights. It has been argued that in view of the standard of reasonableness, fairness and non-discrimination required of governmental action under Article 21 of the Constitution, there is a case for invalidating the restrictions that have been placed on these rights as a consequence of reservations in local self-government. We do not agree with this contention. In this case, we are dealing with an affirmative action measure and hence the test of proportionality is a far more appropriate standard for exercising judicial review. It cannot be denied that the reservation of chairperson posts in favour of candidates belonging to the Scheduled Castes, Scheduled Tribes and women does restrict the rights of political participation of persons from the unreserved categories to a certain extent. However, we feel that the test of reasonable classification is met in view of the legitimate governmental objective of safeguarding the interest of weaker sections by ensuring their adequate representation as well as empowerment in local self-government institutions. The position has been eloquently explained in the respondents' submissions, wherein it has been stated that the asymmetries of power require that the Chairperson should belong to the disadvantaged community so that the agenda of such Panchayats is not hijacked for majoritarian reasons. [Cited from Submissions on behalf of the State of Bihar, p.49].

13. It is, thus, clear from the above propositions that the Apex Court upheld the provisions providing for reservation for women also while interpreting Panchayati Raj Amendment in the year 1993 for giving effect to the said amendment. Thus, the right of a woman to participate in the democratic setup even by compulsory reservation finds source from the said Panchayati Raj Amendment to the Constitution, which unfortunately is still being not implemented in its letter and spirit, and on the contrary, the obstructions are created by the State Legislature as well as the Government in implementing the same. In my opinion, the aforesaid Explanation 2 (ii) is a glaring example of the legislation clearly cutting the constitutional right given to the women by resorting to the provisions of Hindu Law and the concept of Hindu Undivided Family. The concept of Hindu Law or Hindu

Undivided Family cannot be allowed to take a place above the constitutional provisions and the constitutional amendment regarding Panchayati Raj. The provision of Explanation (ii), thus, clearly is in straight contravention of 1993 Constitutional Amendment regarding Panchayati Raj and reservations for women, and must be held to have lost its complete force, and rather must be deemed to have been removed from the Maharashtra Village Panchayats Act.

14. In the case of Chara Sovinda Waghmare Vs. State of Maharashtra and others [2012 (4) Bom.C.R. 40], this Court made the observations [Per A.B. Chaudhari, J.] in the following paragraphs about the apathy on the part of the Governments in not implementing the Panchayati Raj Amendments effectively. I quote the same as follows:-

47. Panchayati Raj Institutions in India have been in existence for a long time. However, the same could find place only as one of the directive principles of State policy in the form of Article 40 in the Constitution of India. Article 40 reads thus:

Organization of Village Panchayats The State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self- Government.

48. After putting Panchayats in Article-40 as above, it remained in a nebulous state for about four decades. Finally, the Panchati Raj, the 73rd constitutional amendment which was the dream became true and came into effect from 24.4.1993. The main purpose to strengthen Panchayati Raj Institutions was to ensure democratic decentralization which Gandhian philosophy of participatory democracy and not only that it was viewed as a body or institution of governance. By 73rd amendment necessary status and functions with dignity was conferred on the Panchati Raj Institutions. As a matter of fact, after introduction of 73rd amendment, constitutional status has been given to Panchayati Raj Institutions as a result of which it has become a permanent feature in the Indian political system, nay a third Government. ...

49.

.....

The mindset that the role of a Government is to rule over its subjects, has persisted even after half a century of freedom. This mindset has survived despite democracy and decentralization and has subverted the very system that was created to destroy it.

The report suggested what should be done to remove such a behaviour like a King and the Subjects thus:

We intend to make an effective endeavor to get rid of this ruler subject relationship syndrome between the Government and citizens. The change has to be wrecked at the fundamental conceptual level.

15. Similar is the case with apathy on the part of the State Legislature, Government in not implementing Seventy-Third and Seventy-Fourth Constitutional Amendments. Some of the salient features projected in some of the studies on this aspect are being reproduced below:-

The doctrine of equality is recognized as a fundamental right in our Constitution. The Articles that deal with this concept mainly are Articles 14, 15 and 16. These Articles ensure that no discrimination based on sex is perpetrated and further allows for special provisions for women to be made in some cases.

Article 14 of the Constitution guarantees the fundamental right to equality. It states that the state shall not deny to any person equality before the law or equal protection of the laws within the territory of India. Two approaches to equality are recognized under our Constitution the formal equality and the substantive equality. According to the formal equality model, un-equals cannot be treated equally and equals cannot be treated unequally. However the reality is that without preferences such as reservations available to women the presence of too many obstacles makes it next to impossible for them to progress in numbers that can have any impact. ..

Patriarchal culture and social structures dominant in rural India seem to inhibit women's participation in local governance through Panchayats. ...

The question of inadequate representation of women in elected decision-making bodies ranging from gram panchayats to Parliament was first addressed by the Committee on Status of Women in India (CSWI) in 1974 that were followed in the passing of the Seventy-third and Seventy-fourth Constitutional Amendments in 1992. Looking back at the experience of 33 per cent reservation for women in panchayats and municipalities over the last ten years, there is no doubt that it has had not one but several positive effects, among which, the main is that it provided the opportunity to several lakhs of women candidates to experience the hurly-burly of electoral politics.

16. In the light of the above discussion, according to me, the above provision of Explanation 2 (ii) must be held to be violative of the constitutional provisions, arbitrary and in violation of Article-14 of the Constitution of India. It must be held to be otiose and obsolete to the very object sought to be achieved. However, since the State Legislature has not omitted/deleted the said provision, in my opinion, it is for the Govt., and the State Legislature to take steps to bring the said provision in conformity with the mandate of the constitutional provision by deleting/omitting Explanation 2 (ii), at least in so far as the category of Women is concerned.

17. I am also fortified by a Division Bench decision of Punjab and Haryana High Court in the case of Smt. Anguri Devi Vs. State of Haryana and others [cited supra]. A similar provision, namely Explanation 2 (ii) to Section 175 of the Haryana Panchayati Raj Act, 1994, was struck down by the Division Bench of Punjab and Haryana High Court. I quote para 27 from the said Judgment, which reads as under:-

27. A provision like this is fraught with dangerous consequences giving rise to a situation where the right of a person to hold an elected office can be taken away through mischief. The same is arbitrary and an impediment to the free and fair elections, which is an essential feature of the democracy. Fairness has to be seen not only in the conduct of the elections but also in ensuring that the elected candidate holds the office for the term for which he has been elected and is not deprived of the same in an unjust manner. Such a provision is arbitrary in nature and is held to be violative of Art. 14 of the Constitution of India.

18. The Bench of Punjab and Haryana High Court also found that the Explanation 2 (ii) could not supersede the substantive Section. The reason is that the Explanation interferes and changes the enactment in a substantive way and that is not the function of Explanation. An Explanation added to a statutory provision is not a substantive provision in any sense of the term and it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. It ordinarily does not enlarge the scope of the original section which it explains. The proper function of an Explanation is to make plain or elucidate what is enacted in the substantive provision and not to add or subtract from it. The repetitions about Explanation are to be found in para 52 of the Supreme Court Judgment in the case of S. Sundram Pillai, etc. Vs. V.R. Pattabiraman [AIR 1985 SC 582]. In my opinion, Explanation 2 (ii), thus, goes beyond the scope of the main section. It interferes with and changes the enactment enlarging its scope, which could not be the intention of the Legislature. The said provision is, thus, in my opinion, must be held to be otiose, particularly in the light of the Panchayati Raj Constitutional Amendment. In the result, I make the following order:-

ORDER

[i] Writ Petition No.3553 of 2011 is allowed.

[ii] Rule is made absolute in terms of Prayer Clause [1] of the petition.

19. A copy of this Judgment be sent to the Chief Secretary, Govt. of Maharashtra, for necessary action and to report compliance within six months.

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