APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Dixit.

1952 *Nov.* 18

DATTATRAYA MOTIRAM MORE, PETITIONER *v.* STATE OF BOMBAY AND ANOTHER, RESPONDENTS.*

Bombay Municipal Boroughs Act (XVIII of 1925) s. 10 (1) (c)—Bombay District Municipal Act (III of 1901)—Whether reservation of seats for women ultra vires the Constitution—Constitution of India, arts. 12, 14, 15, and 16.

The provisions made in the Bombay Municipal Boroughs Act, 1925, and the Bombay District Municipal Act, 1901, regarding reservation of seats for women Councillors and the rules made by the Government in that behalf do not offend against the Constitution, and are not *ultra vires.*

Under art. 12 of the Constitution, "the State" includes a local authority; a municipal Councillor being part of the local authority itself, does not hold office under the State within the meaning of art. 16 (2).

The State Legislature is competent to provide for reservation of seats for women in the local authorities as the subject of local Government is left exclusively to the State Legislature and there is nothing in the Constitution which prohibits the State Legislature from providing separate representation for women.

Art. 15 (3) which is only a proviso to art. 15 (1) must be read with it. By virtue of the proviso the State may discriminate in favour of women against men but it cannot discriminate in favour of men against women.

The exception made by art. 15 (3) to art. 15 (1) applies as well to existing laws as those which the State may make in future.

Art. 16 (3) of the Constitution does not deal with elections to Municipalities or local authorities.

The facts are set out in the judgment.

In C. A. No. 1653 of 1952.

R. B. Kotwal, for the petitioner.

M. P. Amin, Advocate General with *Little & Co.* for opponent No. 1.

G. S. Gupte, for opponent No. 2.

In C. A. No. 1855 of 1952.

B. G. Thakor, for the petitioner.

M. P. Amin, Advocate General with *Little and Co.* for opponent No. 1.

K. B. Sukthankar for opponent No. 2.

* Civil Application No. 1653 of 1952 with Civil Application Nos. 1855 of 1952 and 1917 of 1952.

In C. A. No. 1917 of 1952.

Rajani Patel with *V. B.* and *B. B. Patel,* for the petitioner.

K. S. Daundkar, for opponents Nos. 1 and 2.

D. V. Patel, for opponent No. 3.

Chagla C. J. 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 s. 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 councillors 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 petitioners 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.*

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 councillors. 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 councillors and nominated councillors. Section 30 provides that the municipal Government of a municipal borough vests in the municipality.

Now, the provision with regard to reservation of seats for women is challenged principally on the ground that it offends against art. 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

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a councillor 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 art. 16 (*1*) advisedly does not refer to an office of profit as some of the other articles in the Constitution do, for instance, arts. 58 (*2*), 59 (*2*), 64, 66 (*4*), 102 (*1*), 191 (*1*) (*a*) & 158 (*2*). Therefore it is urged that the fact that a councillor does not hold an office of profit should make no difference to the Court applying art. 16 (*1*) to that office. The question that we have to consider is, what are the offices to which art. 16 (*1*) was intended to apply. The marginal note of art. 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 art. 16 was intended to apply to offices which were filled by public employment. The expression "office" by itself is rather a colourless 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 art. 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 art. 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 art. 16 (*1*). We are dealing here with councillors of a borough municipality, and the question is, can it be said of a councillor of a borough municipality that he is employed or appointed to an office under the State? The State here, in view of art. 12, must mean a local authority. Would it be true to say of a councillor 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 councillor 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 councillor is part of the local authority itself, and therefore it is clear that the equality of opportunity which is required under art. 16 (*1*) is not in relation to an election to a local authority.

Reliance is then placed upon art. 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 emphasised is that whereas in art. 16 (*1*) the language used by the Constitution makers was "employment or appointment to any office", in art. 16 (*2*) the language used is "employment or office under the State", and therefore, we are asked to give wider connotation to the expression "office" used in art. (*2*) than the expression "employment or appointment" used in art. 16 (1). In our opinion, the, expression "office" occurring after "employment" must also be construed *ejusdem generis* and the office contemplated under art. 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 art. 16 (*2*) also the expression used is not merely "office" but "office under the State", and as pointed out when we were dealing with art. 16 (*1*), it is impossible to suggest that a municipal councillor holds an office under the local authority. Therefore, in our opinion, neither art. 16 (*1*) nor art. 16 (*2*) has any application to the particular provision of the law we are dealing with.

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 expressions that the Constitution makers were

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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 of the Seventh Schedule 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 some 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.

A further argument which was advanced by the Advocate General may also be noticed. Article 16 (3) gives power to Parliament to prescribe, in regards 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 councillors, qualifications which may be restricted to questions 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 art. 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 art. 16 does not deal with elections to municipalities or local authorities at all.

Reliance is then placed on art. 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 favour of women on the ground of sex. It must always be borne in mind that the discrimination which is not permissible under art. 15 (*1*) is a discrimination which is only on one of the grounds mentioned in art. 15 (*1*). If there is a discrimination in favour 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 favour 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 favour, 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 councillors before they decide any question affecting the municipality. But the clear answer to art. 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 art. 15 (*3*) must not be read as a proviso to art. 15 (*1*) because if it is read as a proviso then it would completely nullify one of the important ingredients of art. 15 (*1*). It is said that discrimination on the ground of sex is not premissible under art. 15 (*1*) and the object of enacting art. 15 (*3*) could not possibly be to make that discrimination possible by permitting special provision for women. It is therefore argued that art. 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

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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 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 art. 15 (*3*), then art. 15 (*3*) need not have been enacted at all because if the special provision for women contemplated by art. 15 (*3*) were only those provisions which did not discriminate against men, then no proviso to art. 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 art. 15 (*3*) in our opinion is that whereas under art. 15 (*1*) discrimination in favour of men only on the ground of sex is not permissible, by reason of art. 15 (*3*) discrimination in favour of women is permissible and when the State does discriminate in favour of women it does not offend against art. 15 (*1*). Therefore as a result of the joint operation of art. 15 (*1*). and art. 15 (*3*) the State may discriminate in favour of women against men, but it may not discriminate in favour 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 art. 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 art. 15 (*3*).

An argument was advanced by Mr. Patel that art. 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 art. 15 (*1*) and not by art. 15 (*1*) read with art. 15 (*3*). Mr. Patel contends that art. 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 art. 15 (*1*) applies and if the laws in force

are inconsistent with art. 15 (*1*) those laws must be held to be void. Turning to art. 15 (*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 art. 15 is not the unlimited right under art. 15 (*1*) but the right under art. 15 (*1*) qualified by art. 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 favour of women after the Constitution was enacted. If a law discriminating in favour of women is opposed to the fundamental rights of citizens, there is no reason why such law should continue to remain on the statute books. The whole scheme of art. 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 art. 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. Now, the scheme of art. 19 is different from the scheme of art. 15. Provisos to art. 19 in terms deal with law whether existing or to be made in future by the State, whereas art. 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 art. 15 (*3*) to mention both existing laws and laws to be made in future. But the exception made to art. 15 (*1*) by art. 15 (*3*) is an exception which applies both to existing laws and to laws which the State may make in future.

Finally, reliance is also placed on art. 14. It is difficult to understand how art. 14 has any application to the question that we are considering. Art. 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 art. 14 really

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has no application whatever to the question that we are considering.

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 art. 16 (*1*) and 16 (*2*) and if we were to hold that these two sub-clauses of art. 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 to local authorities and to make reservations in favour of various sections of the community. If our interpretation of art. 16 were to lead to that result, we must undoubtedly pause and consider whether we are right in giving that construction to art. 16, but the answer to the question posed by Mr. Kotwal is in our opinion simple. If art. 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 art. 16 but art. 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 art. 16 and art. 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 art. 12 defines that expression, and art. 16 emphasises 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 art. 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 art. 16 it may still fall under art. 15 (*1*) if it is not saved under art. 15 (*3*).

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.

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.

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

Rule discharged.

K. B. S.

APPEALS FROM ORIGINAL CIVIL

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Dixit.

BAI NARBADABAI WIDOW OF MULCHAND PURSHOTTAMDAS AND OTHERS, APPELLANTS (ORIGINAL DEFENDANTS TO THE SUIT AND PLAINTIFFS TO THE COUNTERCLAIM) *v.* NATVARLAL CHUNILAL BHALAKIA AND ANOTHER, RESPONDENTS (ORIGINAL PLAINTIFFS AND DEFENDANTS TO THE COUNTER CLAIM).* ...

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Indian Arbitration Act (X of 1940), ss. 17, 32—Whether suit to enforce award of arbitrators maintainable—Award in terms agreed upon by parties to arbitration—Failure of party to carry out terms of award—Remedy of aggrieved party—Issue not raised in trial Court but arising on pleadings and affecting jurisdiction of Court—Whether such issue can be raised and agitated for first time in appeal—Whether Court of appeal could decide on such issue—Whether partner entitled to sue for accounts of partnership for particular period—Whether partner suing for accounts of partnership must sue for all accounts of partnership.

Certain disputes between the plaintiffs and the defendants, including those in relation to their business 'N. C.' were referred to arbitration of certain named persons. The arbitrators made their award in terms agreed upon by the parties who subscribed their signatures to the award in token of their agreement. The consent terms, *inter alia*, provided that the defendants were to make up the accounts of the business 'N. C.' for Samvat years 2002 and 2003 and pay to the plaintiff their respective shares of the amount of income-tax for S. Y. 2001

* O. C. J. Appeal No. 47 of 1952: Suit No. 145 of 1951.