

PETITIONER:
DEWAN JOYNAL ABEDIN

Vs.

RESPONDENT:
ABDUL WAZED ALIAS ABDUL WAZAD MIAH AND TWO OTHERS.

DATE OF JUDGMENT 11/12/1987

BENCH:
VENKATARAMIAH, E.S. (J)
BENCH:
VENKATARAMIAH, E.S. (J)
SINGH, K.N. (J)

CITATION:
JT 1987 (4) 642 1987 SCALE (2) 1447

ACT:

Representation of the People Act, 1951: Section 9-A-Election-Disqualification on account of Government contract-Lease of ferry tolls under Sec. 8 of Northern India Ferries Act, 1878-Whether such contract an agreement for execution of works-Whether amounts to office of profit.

Northern India Ferries Act, 1878: Section 8-'Contractor'-Acquiring lease under Act-Nature of contract-Whether a works contract-Whether contractor holds 'office of profit'-Whether disentitled under the Representation of the People Act to stand for and contest an election to the House of People or the State Assembly.

HEADNOTE:

%

The first respondent filed an election petition before the High Court for setting aside the election of the appellant to the State Legislative Assembly under s. 100(1)(c) of the Representation of the People Act, 1951, contending that the rejection of his nomination papers by the Returning officer was erroneous as he had, in fact, completed 25 years of age on the date of his nomination.

The petition was opposed by the appellant contending that as the first respondent had not completed 25 years of age on the date of scrutiny of nominations, the nomination papers had been rightly rejected, that as the first respondent had not subscribed the oath as required by Art. 173(a) of the Constitution, he was not qualified to contest the election, and that the first respondent was also disqualified to be chosen to fill a seat in the Legislature of the State, as on the date of scrutiny of the nominations he had a subsisting contract entered into by him with the Government, under which he had been treated as a lessee of the Ferry for the period between 1.4.85 to 31.3.86.

The High Court framed issues on the basis of pleas raised by parties and, after recording their evidence held that the first respondent had completed the age of 25 years on the date of scrutiny and, therefore, had necessary qualification for being a member of the Legislative

371

Assembly, that the appellant had not proved that the first respondent had not subscribed the oath as required by law, and that as the first respondent had been relieved from the

charge of the Government ferry with effect from 21.11.85, there was no subsisting contract between the first respondent and the Government on the date of scrutiny of nominations and, therefore, he was not disqualified under s. 9-A of the Act. It accordingly came to the conclusion that the rejection of the nomination papers filed on behalf of the first respondent was improper and set aside the election of the appellant.

In the appeal before this Court, a further plea was raised on behalf of the appellant that the first respondent was also disqualified from contesting the elections as he held an office of profit under the State Government by virtue of the contract entered into by him with the State Government, even though the contract in question may not be one of those contracts specified in s. 9-A of the Act.

Dismissing the appeal,

^

HELD: 1. The first respondent was not disqualified for being chosen as a member of the State Legislature. The rejection of his nomination papers was improper. The election of the appellant was, therefore, rightly set aside by the High Court, on the ground mentioned in Section 100(1)(c) of the Representation of the People Act 1951. [387G-H]

2.1 An analysis of s. 9-A of the Representation of the People Act, 1951 shows that only in two cases a person would be disqualified if he has entered into a contract with the appropriate Government in the course of his trade or business which is subsisting on the date of scrutiny of nomination. They are (1) when the contract is one for supply of goods to the appropriate Government and (2) where the contract is for execution of any works undertaken by that Government. Unless the contract in question is one which clearly falls under s. 9-A of the Act it cannot be held that the person who is a party to the contract is disqualified for being chosen as a member of the State Legislature. [382F-G]

In the instant case, the contract is not one for supply of goods to Government. The first respondent had acquired in the public auction the right to collect the toll by paying the amount offered by him under the contract and had not undertaken any contract for execution of any works undertaken by the Government. When a person acquires a right to collect toll at a public ferry under s. 8 of the Ferries Act. it cannot be

372

held that he is performing a contract for execution of works undertaken by the Government. [385D, G-H]

Merely because under one of the conditions of the Form of lease prescribed under the Ferries Act, the lessee is under an obligation during the period of lease to mark buoys or in any other suitable manner all submerged obstructions or dangerous rocks in the rivers within half a mile of the landing ghats, and shall be held responsible for any loss or damage caused to the marboats striking against such submerged obstructions or dangerous rocks it cannot be held that the first respondent had undertaken to execute works undertaken by the Government. [386B-C]

Having regard to the conditions in the lease and the provisions of the Ferries Act and the rules made thereunder the activity undertaken by the lessee under the agreement cannot be considered as an agreement for execution of works undertaken by the State Government and, therefore, the contract, which the first respondent had entered into with the State Government, even though it was subsisting on the

date of the scrutiny of nominations, would not have the effect of disqualifying him for being chosen as a member of the State Legislative Assembly, since s. 9-A of the Representation of the People Act, 1951 is not at all attracted to such a case. [386D-E]

B. Lakshmikantha Rao v. D. Chinna Mallaiah and others, A.I.R. 1979 A.P. 132 approved.

N. Satyanathan v. K. Subramanyan and others, [1955] 2 S.C.R. 83 explained.

Ram Padarath Mahto v. Mishri Singh & Anr., [1961] 2 S.C.R. 470. referred to.

2.2 A lessee of tolls under the Ferries Act is only a contractor who under the lease acquires the right to collect whatever toll is paid by persons who use the ferry against payment to Government in advance whatever amount he has agreed to pay at the time of auction. Whether he makes any profit in that business or not depends ultimately on the amount of toll he is able to realise during the whole period of lease. Such a contract is essentially in the nature of a business. It cannot be termed as an office in any sense. A transaction of lease under the Ferries Act is not a lease of an office. The first respondent was, therefore, not holding an office of profit when he was a lessee under the Ferries Act just like an

373

Excise Contractor or a fair price shop dealer who sells grains supplied by Government is not such a holder of office of profit.[386H; 387A-B, F]

State of Uttar Pradesh v. Satya Narain Prasad, [1970] 3 S.C.R. 198, referred to.

2.3 The High Court was right in upholding, on the basis of the evidence of the three witnesses examined by the first respondent and the electoral roll and the High School Leaving Certificate, that the first respondent was more than 25 years of age on the date of scrutiny and was thus eligible to be a member of a Legislative Assembly. [377D]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4 (NCE) of 1987.

From the Judgment and order dated 2.12.1986 of the High Court of Gauhati in Election Petition No. 2 of 1986.

Govind Mukhoty, Anil Nauriya and Mrs. Rekha Pandey for the Appellant.

Miss Halida Khatoon, Abdul Sattar and R.C. Kaushik for the Respondents.

The Judgment of the Court was delivered by

VENKATARAMIAH, J. This appeal is filed by the appellant Dewan Joyal Abedin against the judgment dated December 2, 1986 of the High Court at Gauhati setting aside his election to the Legislative Assembly of Assam at the election held on the 16th December, 1985 from the 22-Salmara South Legislative Assembly Constituency on an election petition filed by respondent No. 1 Abdul Wazed alias Abdul Wazed Miah in Election Petition No. 2 of 1986.

The last date for making nominations for election from the aforesaid constituency was 22nd November, 1985 and the date for the scrutiny of nominations was November 23, 1985. The appellant, the 1st respondent and the second respondent Bazlul Basit were the three candidates on whose behalf nomination papers had been filed before the expiry of the time fixed for making nominations. Respondent No. 3, M. Bhattacharjee, was the Returning officer. At the time of the

scrutirly respondent no. 2 raised objection to the nomination of respondent No. 1 on the ground that respondent No. 1 had not comp-

374

leted 25 years of age on the date of scrutiny as required by Article 173(b) of the Constitution which provided that a person was not qualified to be chosen to fill a seat in the Legislature of a State unless he was in the case of a seat in the Legislative Assembly not less than twenty-five years of age and in the case of seat in the Legislative Council not less than thirty years of age. The proposer of one of the nomination papers filed on behalf of the respondent No. 1 prayed for some time to refute the objection. The Returning officer, however, proceeded to reject the nomination papers filed on behalf of the Ist respondent on 23.11.1985 holding that the Ist respondent had not completed 25 years of age and therefore was not qualified to be a member of the Legislative Assembly. The election process continued with only the appellant and the second respondent as the candidates and after the poll the appellant was declared as having been elected on the basis of the larger number of votes secured by him. Thereupon the Ist respondent filed the election petition before the High Court out of which this appeal arises contending that he had infact completed 25 years of age on the date of his nomination and that the rejection of his nomination papers was erroneous. The Ist respondent further contended that on account of the rejection of his nomination papers the election of the appellant was liable to be set aside under section 100(1)(c) of the Representation of the People Act, 1951 (hereinafter referred to as 'the Act') which provided that the election of a successful candidate was liable to be set aside on the ground that any nomination had been improperly rejected. In the course of his written statement the appellant raised several pleas, and of them three were material for purposes of this case. First he pleaded that the Ist respondent had not completed 25 years of age on the date of scrutiny of nominations and therefore the nomination papers had been rightly rejected, secondly he pleaded that the Ist respondent had not subscribed an oath as required by Article 173(a) of the Constitution and therefore the Ist respondent was not qualified to contest the election and thirdly he pleaded that the Ist respondent was also disqualified to be chosen to fill a seat in the Legislature of the State as on the date of scrutiny of the nominations the Ist respondent had a subsisting contract entered into by him with the Government on Assam under which he had been treated as a lessee of the Phulbari Ghat Ferry for the period between 1.4.1985 and 31.3.1986. The Ist respondent pleaded that he had completed the age of twenty-five years on the date of scrutiny of nomination that he had subscribed an oath as required by Article 173(a) of the Constitution and that while it was true that he had entered into such a contract he had been released from the said contract on 21.11.1985 by the Executive Engineer concerned and therefore there was no subsisting

375

contract between him and the Government of Assam on the date of A scrutiny. On the basis of these pleas Issue No. 5 and Issue No. 6 were framed by the High Court which read as follows:

5. Whether the nomination paper of the petitioner has been improperly rejected? If so, whether the election of the respondent is void?
- or,

Whether the nomination paper of the petitioner was liable to be rejected as alleged in para 7 of the written statement?

6. Whether the petitioner had incurred disqualification under section 9A of the Representation of the People Act?

After recording the evidence produced by the parties the learned Judge of the High Court who tried the election petition held that the Ist respondent had completed the age of 25 years on the date of scrutiny and therefore he had the necessary qualification for being a member of the Legislative Assembly. He accordingly held on the first part of issue No. 5 in favour of the Ist respondent. On the second part of issue No. 5 the learned Judge held that the appellant had not proved that the Ist Respondent had not subscribed on oath as required by law. On issue No. 6 the learned Judge held that the Ist respondent had been relieved from the charge of Phulbari Ghat Ferry with effect from 21. 11. 1985 and therefore there was no subsisting contract between the Ist respondent and the Government of Assam on the date of scrutiny of nominations and therefore the Ist respondent was not disqualified under section 9-A of the act. In view of his findings recorded on Issues Nos. 5 and 6 the learned Judge came to the conclusion that the rejection of the nomination papers filed on behalf of the Ist respondent was improper and therefore the election was liable to be set aside. He accordingly set aside the election of the appellant. Aggrieved by the judgment of the learned Judge the appellant has filed this appeal under section 116-A of the Act.

When this appeal was taken up for hearing on the first date it was noticed that the High Court had not considered the question whether section 9-A of the Act was attracted at all to the contract in question as it appeared to be not one of those contracts which had the effect of disqualifying a candidate under section 9-A of the Act. The case thereafter was adjourned to a subsequent date for hearing to enable the learned counsel to make their submissions on the above question also. By the next date of hearing the appellant filed a petition before the

376

Court seeking an amendment of the written statement raising the plea that the Ist respondent was also disqualified from contesting the election as he held an office of profit under the State Government by virtue of the contract that had been entered into by him with the State Government even though the contract in question may not be one of those contracts specified in section 9-A of the Act. In other words it was contended that the Ist respondent was disqualified under Article 191(1)(a) of the Constitution which provided that a person would be disqualified for being chosen as, and for being, a member of the Legislative Assembly of a State if he held any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder.

It is necessary to refer to one aspect of the case. Although before the High Court it was urged by the appellant that the Ist respondent had not subscribed on oath in compliance with the provisions of Article 173 of the Constitution and thus he was not eligible to contest the election and that the High Court had negatived the said contention, no arguments were addressed before us by the learned counsel for the appellant questioning the finding of the High Court on the above question. We do not, therefore,

find it necessary to discuss the evidence relating to the above issue.

Three questions arise for consideration in this appeal: (i) whether the 1st respondent had not completed the age of 25 years on the last date for filing nomination?; (ii) whether the contract in question said to have been entered into by the 1st respondent with the Government of Assam to collect the toll at the ferry was a contract for the execution of any works undertaken by the Government of Assam attracting section 9-A of the Act and if so whether the said contract was subsisting on the date of scrutiny of nomination?; and (iii) whether the 1st respondent held an office of profit under the Government of Assam by virtue of being a lessee of the right to collect the toll at the ferry?

on the question of the age of the 1st respondent there is practically no evidence adduced on behalf of the appellant. The Electoral Roll, which was marked as Exhibit 7, in the case showed that the 1st respondent was aged 29 years. In support of his case 7 the 1st respondent had examined three witnesses, P.W. 2 Aripulla, P.W. 3 Sirajul Islam and P.W. 6 Habibar Rahman. He also produced his High School Leaving Certificate (Exhibit 12) which showed that he was above 25

377

years on the date of the nomination. The High Court has summed up its conclusion of the above question at paragraph 14 of its judgment thus:

"14. As already held that the High School leaving Certificate (Ext-12) and admission register cannot be rejected. The oral evidence of the witnesses relating to the age has not been shaken in the cross-examination. As regards age, the relatives are best witnesses. Considering the High School Leaving Certificate (Ext-12) Electoral Roll (Ext-7) and oral evidence of PW 2 Aripulla, PW 3 Silajul Islam and PW 6 Habibar Rahman, it is concluded on the age of the petitioner on the date for making nomination or scrutiny of nomination that he had completed the age of 25 years.

We have gone through the evidence bearing on the above question. We are of the view that the High Court was right in upholding that the 1st respondent was more than 25 years of age on the date of scrutiny and he was eligible to be a member of the Legislative Assembly. Thus the ground on which the Returning officer had rejected his nomination papers is untenable.

This takes us to the next question, namely, whether the 1st respondent was disqualified for being chosen as a member of the Legislative Assembly on account of the contract entered into by him in the course of his trade or business with the Government of Assam subsisting on the date of scrutiny of nominations as provided by section 9-A of the Act. Section 9-A of the Act reads thus:

"9-A. Disqualification for Government contracts, etc.-A person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by that Government."

There is a public ferry at Phulbari-ghat, which is under the control of the Executive Engineer, Public Works department, Goalpara (Roads) Division. It is admitted by the 1st respondent that he was the lessee of the tolls of the

said public ferry for the period between 1.4.1985 and 31.3.1986 but his case, however, was that he had been relieved from the said contract on 21.11.1985. But the appellant

378

pleaded in the course of his written statement that only on 25.11.1985, that is on the date of scrutiny of the nomination papers, the Executive Engineer had at the request of the appellant, allegedly made on 18.11.1985 released the petitioner from the contract and that the order of release had been made after the scrutiny was over. The High Court had, therefore, to consider the question whether the order of release had been made on the 21.11.1985 or on 25.11.1985 after the scrutiny of nomination papers. On a consideration of the evidence led by the parties, the High Court held that the Ist respondent had been relieved of the charge of the ferry on 21.11.1985 and that he was not disqualified under section 9-A of the Act. As stated earlier when the matter was argued before us on the first date of hearing the learned counsel for the parties were asked to make their submission on the question whether a lease of the ferry tolls attracted the provisions of section 9-A of the Act and the learned counsel have made their submissions in that behalf. The management of a public ferry is governed by the provisions of the Northern India Ferries Act, 1878 (hereinafter referred to as 'the Ferries Act') which has been extended to the State of Assam. section 8 of the Ferries Act reads thus:

"8. Letting ferry tolls by auction-The tolls of any public ferry may, from time to time, be let by public auction for a term not exceeding five years with the approval of the Commissioner, or by public auction, or otherwise than by public auction, for any term with the previous sanction of the State Government.

The lessee shall conform to the rules made under this Act for the management and control of the ferry, and may be called upon by the officer in whom the immediate superintendence of the ferry is vested, or, if the ferry is managed by a municipal or other public body under section 7 or section 7-A, then by that body, to give such security for his good conduct and for the punctual payment of the rent as the officer or body, as the case may be, thinks fit.

When the tolls are put up to public auction, the said officer or body, as the case may be, or the officer conducting the sale on his or its behalf may, for reasons recorded in writing, refuse to accept the offer of the highest bidder, and may accept any other bid, or may withdraw the tolls from auction.

379

Section 9 of the Ferries Act provides for the recovery of arrears from the lessee. Section 10 of the Ferries Act provides for the cancellation of the lease by the Government. Section 11 of the Ferries Act provides for the surrender of the lease by the lessee. Section 12 of the Ferries Act makes provision for the promulgation of rules which inter alia may provide for the control and the management of all public ferries within a division and for regulating the traffic at such ferries; for regulating the time and manner at and in which, and the terms on which, the tolls of such ferries may be let by auction, and prescribing the persons by whom auctions may be conducted and when the

tolls of a ferry have been let under section 8 of the Ferries Act for collecting the rents payable for the tolls of such ferries. Section 13 of the Ferries Act prohibits plying of any ferry within two miles of a public ferry without sanction from the appropriate authority. Section 14 of the Ferries Act provides that whoever uses the approach to, or landing place of, a public ferry is liable to pay the toll payable for crossing such ferry. Under section 15 of the Ferries Act provision is made for fixing the rates of tolls. It says that the tolls, according to such rates as are, from time to time, fixed by the State Government? shall be levied on all persons, animals, vehicles and other things crossing any river by a public ferry and not employed or transmitted on the public service. The State Government is, however, given power to declare that any persons, animals vehicles or other things shall be exempt from payment of such tolls. Where tolls of a ferry have been let under section 8 of the Ferries Act any such declaration, if made after the date of the lease, shall entitle the lessee to such abatement of the rent payable in respect of the tolls as may be fixed by the Commissioner of the Division or such other officer as the State Government may, from time to time, appoint in this behalf by name or in virtue of his office. The Rules have been framed by the Chief Engineer, Assam under section 12 of the Ferries Act for purposes of the control and management of and for regulating the traffic at all Government ferries. Under the said Rules, for Government ferries suitable ferry boats, engines or mars are supplied at the expense of the Public Works Department. The lessee shall be responsible as a bailee for these boats, engines and mars and he shall, on the expiry or earlier termination of his lease, return them to the Executive Engineer in good condition, allowance being made for fair wear and tear. The lessee who acquires the right to collect toll is bound to cross over on tender of payment in cash of the authorised toll or on production of a season ticket or pass, all persons desiring to cross within the hours for which the ferry according to the terms of the lease is open. He is precluded from carrying persons whom he may know or suspect to be fugitives from justice or to be bent upon an unlawful

380

purpose. He cannot carry over at any one time in his ferry boat or mar more than the number of persons, animals, vehicles or other things specified in his lease as permitted to be so ferried. He has to provide a shed 15 feet long by 15 feet broad, on each side of the ferry for the temporary accommodation of persons wishing to cross. The lessee has to furnish monthly a return in the prescribed form supplied to him by the Executive Engineer giving particulars which are required to be furnished through it. The approach roads to all Government ferries and low level bridges are constructed and maintained by the Public Works Department. The lessee is responsible for conveying immediate information of damage to approaches to the concerned authorities. The Public Works Department has to provide sufficient means for embarking and disembarking all persons, animals, vehicles and things which a lessee is bound to cross over at his ferry with the exception of ropes and tying posts for securing the mar. All Government ferries shall generally be let by public auction; provided that, for special reasons to be recorded in writing, the Executive Engineer or Sub-Divisional officer, Public Works Department, may reserve any ferry from lease and may work it direct. Collection of tolls by departmental agency will only be resorted to when absolutely unavoidable.

The auction sale of the right to carry passengers at the ferry is held by the Deputy Commissioner/Civil Sub-Divisional officer or some officer deputed by him for the purpose. The person whose bid is accepted has to pay the purchase money in accordance with the Rules. If there is any default on the part of the lessee in paying the amount payable by him, the lease is liable to be cancelled. These are broadly the features of the contract between a lessee of a ferry and the Government. The question for consideration is whether a person who takes on lease a ferry under section 8 of the Ferries Act becomes disqualified for contesting the election to the State Legislature under section 9-A of the Act. At this stage it is necessary to set out the history of the provisions contained in section 9-A of the Act. When the Act was enacted originally there was section 7 of the Act the relevant part of which reads as follows:

"7. A person shall be disqualified for being chosen as and for being a member of the either House of Parliament or of the Legislative Assembly or Legislative Council of a State-

(d) If, whether by himself or by any person or body of persons in trust for him or for his benefit or on his

381

account he has any share or interest in a contract for the supply of goods to, or for the execution of any works or the performance of any services undertaken by the appropriate Government . "

In 1958 this provision was amended. In the Statement of objects and Reasons of the Representation of the People (Amendment) Bill, 1958. which was enacted as the Representation of the People (Amendment) Act, 1958 it was stated as follows:

"The language of section 7(d) of the 1951 Act which provides for disqualification in case of contracts with the Government is wide and vague enough to bring any kind or category of contract within its scope and it has been a fruitful source of election disputes in the past. Persons who only occasionally broadcast any talk from the radio station or contribute article to any Government publication may come within the mischief of this section."

The Bill was referred to a Select Committee of Parliament. The said Select Committee reported on December 15, 1958 with regard to the proposed redrafting of Section 7(d). The Select Committee suggested as follows:

"The Committee have carefully considered the proposed substituted clause (d) of section 7 of the Representation of the People Act, 1951. The Committee feel that in view of the expanding activities of the Central and State Governments as the biggest purchasers and suppliers of goods including food grains and other essential commodities, a large number of persons in the country will have some contractual relationship with the Governments in these matters. Under the circumstances it will not be proper to disqualify all such persons who are having contractual dealings with the Governments from standing for election or being elected as members of Parliament or State Legislatures. The Committee, therefore feel that the better course would be altogether to omit the existing clause (d) of section 7 of the

Act."

This suggestion was not, of course accepted. After the amendment in 1958 section 7(d) of the Act read thus: H
382

"7. A person shall be disqualified for being chosen as, and for being a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State-

.....
(d) If there subsists a contract entered into in the course of his trade or business by him with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by that Government."

By the Representation of the People (Amendment) Act, 1966 some of the provisions of the Representation of the People Act were amended. On that occasion sections 7, 8, 9 and some other provisions of the Act, which provided for the disqualification of persons for being chosen as members of Parliament or of the State Legislature were substituted by new sections 7, 8, 8A, 9, 9A, 10 etc. The present section 9-A was enacted in the place of the former section 7(d). Section 9-A of the Act was enacted in the same pattern in which section 7(d), stood after the amendment in 1958. An explanation was, however, added to it which provided that only by reason of the fact that the Government had not performed its part of the contract either wholly or in part, it could not be said that the contract which attracted section 9-A was subsisting where a contract had been fully performed by the person by whom it had been entered into with the appropriate Government.

An analysis of section 9-A of the Act shows that only in two cases a person would be disqualified if he has entered into a contract with the appropriate Government in the course of his trade or business which is subsisting on the date of scrutiny of nomination. They are (i) when the contract is one for supply of goods to the appropriate Government and (ii) where the contract is for the execution of any works undertaken by that Government. If a contract belonging to either of the two categories is subsisting on the date of the nomination, the person will be disqualified for being chosen as a member. In the present case the contract is not one for supply of goods to the Government. It does not, therefore, fall under the first class of contracts which create the disqualification. The question for determination is whether the contract to collect toll at a Government ferry entered into in accordance with the Ferries Act amounts to a contract for the execution of any works undertaken by the Government. At this stage we should remember that the words 'or the performance of any services'
383

were omitted from section 7(d) by the amendment made in the year 1958. In *N. Satyanathan v. K. Subramanyan and others*, [1955] 2 S.C.R. 83 this Court had occasion to construe section 7(d) of the Act before its amendment in 1958. In that case the appellant was a contractor who had entered into an agreement with the Central Government whereby he had contracted with the Governor-General for the provision of a Motor Vehicle Service for the conveyance of postal articles and mail bags. Under the contract the Governor-General had agreed to pay to the contractor 200 per month during the subsistence of the agreement as his remuneration for service to be rendered by him. The appellant therein was held to be disqualified under section 7(d) of the Act, as it stood then, as he had undertaken to carry out a service which the

Government had undertaken to do. The Court said that "it cannot be gainsaid that the Government in the Postal Department is rendering a very useful service and that the appellant has by his contract with the Government undertaken to render that kind of service on a specified route. The present case is a straightforward illustration of the kind of contract contemplated by section 7(d) of the Act." The Court took the above view in view of the presence of words 'the performance of any service' under section 7(d) of the Act, as it stood then. Those words were omitted from section 7(d) on its amendment in the year 1958 and section 9-A of the Act as it stands today also does not contain those words. In *Ram Padarath Mahto v. Mishri Singh & Anr.*, [1961] 2 S.C.R. 470 a similar question arose for consideration. The appellant in that appeal was a member of a joint Hindu family which carried on the business of Government stockists of grain under a contract with the Government of Bihar. His nomination for election to the Bihar Legislative Assembly was rejected on the ground that he was disqualified under section 7(d) of the Act, as he had an interest in a contract for the performance of services undertaken by the Bihar Government. The appellant contended that the service undertaken by the Government was the sale of foodgrains under the Grain Supply Scheme and the contract was not for the sale of such foodgrains and did not attract the provisions of section 7(d) of the Act. This Court held that the contract was not one for the purpose of any service undertaken by the Government and the appellant therein was not disqualified under section 7(d) of the Act. The Court held that a contract of bailment which imposed on the bailee the obligation to stock and store the foodgrains in his godowns was not a contract for the purpose of the service of sale of grain which the Government had undertaken. The Government had undertaken the work of supplying grain but the contract was not one for the supply of grain. The Court distinguished the decision in *N. Satyanathan v. K. Subramanyam*, 384

(supra) while reaching the conclusion that the appellant was not disqualified for being chosen as a member of the Bihar Legislature. So even at a time prior to the amendment of section 7(d) of the Act in the year 1958 it was possible to take the view that certain types of contracts entered into with the appropriate Government, even though they were subsisting on the date of scrutiny of nomination did not disqualify a person from being chosen as a member of the State Legislature. It is pertinent to refer to the observation made by Gajendragadkar, J. in *Ram Padarath Mahto's case* (supra) which runs as under:

"It may sound technical, but in dealing with a statutory provision which imposes a disqualification on a citizen it would be unreasonable to take merely a broad and general view and ignore the essential points of distinction on the ground that they are technical. The narrow question is: if the State Government undertook the work of supplying the grain, is the contract one for the supply of grain?; In our opinion, the answer to this question must be in the negative; that is why we think the High Court did not correctly appreciate the effect of the contract when it held that the said contract brought the appellant's case within the mischief of s. 7(d)."

Unless the contract in question is one which clearly

falls under section 9-A of the Act, it would not be proper to hold that the person who is a party to the contract is disqualified for being chosen as a member to the State Legislature. In *B. Lakshmikantha Rao v. D. Chinna Mallaiah and others* A.I.R. 1979 A.P. 132 the question that arose for consideration was whether a person who was carrying on the business in arrack and toddy under a contract with the Government under the provisions of the Andhra Pradesh Excise Act, 1968 was disqualified for being chosen as a member of the Legislature. The facts of that case briefly stated were thus. There was an agreement between the highest bidder, i.e., the returned candidate and the Government in respect of the carrying on the business in arrack and toddy. A perusal of the relevant provisions i.e., sections 15 and 17 of the Andhra Pradesh Excise Act and rule 21 of the Rules framed under that Act as well as the agreements signed by the returned candidate, showed that the highest bidder had to deposit the monthly rentals and purchase the arrack from the Government at the issue price and sell the same to the public. If there were any arrears in the monthly rentals the same could be recovered as arrears of land revenue. Similarly with regard to the toddy shop he had to tap the toddy from the trees allotted to him by

385
the Government by paying the tree-tax and sell the toddy to the public. For the toddy shop also he had to pay monthly rentals and if he fell in arrears the same could be recovered as arrears of land revenue. There were other incidental conditions in the agreements. The Andhra Pradesh High Court held that since the contracts entered into by the successful candidate with the State Government to sell arrack and toddy did not come within the mischief of section 9-A of the Act as they were neither for supply of goods to the Government nor for the execution of any works undertaken he did not suffer from any disqualification for being chosen as a member of the Legislative Assembly. We have gone through the above decision carefully. We are of the view that the High Court was right in the said case in holding that the returned candidate had not suffered from any disqualification by reason the fact that he was an excise contractor.

In the present case the position of the Ist respondent is more or less similar to the position of the returned candidate in the decision of the Andhra Pradesh High Court. The Ist respondent had acquired in the public auction the right to collect the toll by paying the amount which he had offered to pay under the contract. He had not undertaken thereby any contract for execution of any works undertaken by the Government. The word 'works' in the expression in 'execution of any works' appearing in section 9-A of the Act is used in the sense of 'projects', 'schemes', 'plants', such as building works, irrigation works, defence works etc. The Ist respondent in this case had not undertaken to carry on any such work. According to the Shorter oxford English Dictionary the expression 'work' means a structure or apparatus of some kind; an architectural or engineering structure, a building edifice. When it is used in plural, i.e., as 'works' it means 'architectural or engineering operations; a fortified building; a defensive structure, fortification; any of the several parts of such structure'. The word 'works' used in Entry 35 of List II of the Seventh Schedule of the Constitution of India which reads as "works, lands and building vested in or in the possession of the State" is used in the same sense. The running of boats across inland waterways in a topic which falls under Entry

32 of List III of the Seventh Schedule which reads thus: "Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List I with respect to national waterways." It is, therefore, difficult to hold that when a person acquires the right to collect toll at a public ferry under section 8 of the Ferries Act he is performing a contract of execution of works undertaken by the Government. It

386

may have been perhaps different if the words 'in performance of any services' which were present in section 7(d) of the Act, as it stood prior to its amendment in 1958 had been there is section 9-A of the Act.

We do not find any substance in the argument urged on behalf of the appellant that because under Condition No. 10 of the form of lease prescribed under the Ferries Act the lessee is under an obligation during the period of lease to mark buoys or in any other suitable manner, all submerged obstruction or dangerous rocks in the rivers within half a mile of the landing ghats and shall be held responsible for any loss of damage caused to the boats striking against such submerged obstructions or dangerous rocks it should be held that the Ist respondent had undertaken to execute works undertaken by the Government. The above condition only requires the lessee to mark buoys or in any other suitable manner the places where there were any submerged obstruction or dangerous rocks within half a mile of the landing ghats. Having regard to the conditions of the lease and the provisions of the Act and the Rules made thereunder we are clearly of the view that the activity undertaken by the lessee under the agreement cannot be considered as an agreement for execution of works undertaken by the State Government.

We are, therefore, of the view that the contract which the Ist respondent had entered into with the State Government even though it was subsisting on the date of scrutiny of nominations would not have the effect of disqualifying him for being chosen as a member of the State Legislative Assembly since section 9-A of the Act is not at all attracted to such a case.

The learned counsel for the appellant however tried to justify the rejection of the nomination papers of the Ist respondent on the ground that the appellant was holding an office of profit under the State Government when the contract to ply the boats at the ferry was subsisting. We find it difficult to agree with the learned counsel that under the contract in question the Ist respondent had been inducted into any office under the State Government. An 'office' means a public or private employment with certain duties to be performed. The words 'office' and 'officer' are used sometimes in a wide sense and sometimes in a narrow sense. A lawyer is sometimes called an officer of the Court. But still he is not holding any office of profit as such for purposes of the law of elections. A lessee of tolls under the Ferries Act is only a contractor who under the lease acquires the right to collect whatever toll is paid by persons who use the ferry against payment to Government in

387

advance whatever amount he had agreed to pay at the time of auction. Whether he makes any profit in that business or not depends ultimately on the amount of toll he is able to realise during the whole period of lease. Such a contract is essentially in the nature of a business. It cannot be termed

as an office in any sense. A transaction of lease under the Ferries Act is not a lease of an office. In State of Uttar Pradesh v. Satya Narain Prasad, [1970] 3 S.C.R. 198 this Court dealing with a case in which the question involved related to the termination of lease under section 10 of the Ferries Act has referred to the right of a lease as one having the character of a business in the following passage at page 200:

"In construing section 10 of the Act it has to be borne in mind that it deals with the cancellation of a lease of tolls of a public ferry. In other words, once the notice in effective valuable rights of a lessee came to an end. This is recognised by the Legislature by providing a six month's notice. This period is given so that he can wind up this particular business. " (underlining by us)

It is urged that since the Ist respondent had the right to secure the services of the police whenever needed the Ist respondent should be deemed a person holding an office of profit. The right to requisition the services of the police again did not make the Ist respondent a person holding an office of profit. In fact for that matter anybody may complain to the police and seek their assistance when there is threat to public property or to the person or property of any person. We hold that the Ist respondent was not holding an office of profit when he was a lessee under the Ferries Act just like an Excise contractor or a fair price shop dealer who sells grains supplied by Government is not such a holder of office of profit.

In view of the above findings it is not necessary to decide the question whether the lease was subsisting on the date of scrutiny of nomination or not

Thus in any view of the matter it cannot be held that the Ist respondent was disqualified for being chosen as a member of the State Legislature. The rejection of his nomination papers was, therefore, improper. The election of the appellant was, therefore, rightly set aside by the High Court on the ground mentioned in section 100 1)(c) of the Act.

388

The appeal, therefore, fails and it is dismissed. Having regard to the peculiar features of the case we direct the parties to bear their own costs both in this Court and in the High Court.

N.P.V.

Appeal dismissed.

389