

CASE NO.:
Appeal (civil) 1001 2000

PETITIONER:
PRADYUT BORDOLOI

Vs.

RESPONDENT:
SWAPAN ROY

DATE OF JUDGMENT: 02/12/2000

BENCH:
R.G.Lahoti, S.V.Paati

JUDGMENT:

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J U D G M E N T

R.C. Lahoti, J.

This is an appeal under Section 116 A of the Representation of the People Act, 1951 (hereinafter, RPA for Short) from an order of the Guwahati High Court made under Clause (b) of Section 98 of the Act declaring the election of the appellant as Member of Legislative Assembly to be void.

Pursuant to a notification dated 22.4.1998 issued by the Election Commission of India by-election in Margherita Legislative Assembly Constituency No.124 was held in the months of May and June, 1998. Nine persons, including the appellant and the respondent filed nomination papers. One Ananda Ram Arandhara, the working President of the Margherita Block Congress Committee, filed a complaint against the candidature of the respondent submitting that the respondent was an employee of Coal India Ltd. and as such was disqualified from contesting election under Article 191 of the Constitution of India and Section 10 of the Representation of the People Act, 1951 in as much as he was holding an office of profit under the Government of India and also performing managerial functions in a company wherein the Government of India have not less than 25% shares. The complaint so filed was supported by the appellant at the scrutiny of the nomination papers held on 18.5.1998. The Returning Officer upheld the objection recording a finding that the respondent was holding an office of profit in a government company which office was not included in the exemptions from disqualifications under the Assam Legislative Members (Removal and Disqualifications) Act, 1950. The nomination paper of the respondent was rejected. The constituency went to polls on 3.6.1998. The appellant was declared elected on 6.6.1998. The respondent filed an election petition under Sections 80/81 of the Act laying challenge to the appellants election. On trial the High Court has found that the

appellant was neither holding an office of profit under the Government of India within the meaning of Article 191(1)(a) of the Constitution nor was a managing agent, manager or secretary of any company or corporation in the capital of which the Government of India has not less than 25% shares. The High Court has further held that the nomination paper of the respondent could not have been rejected on the ground of disqualification and as the same was improperly rejected, the election of the appellant was void.

are : The questions arising for decision in this appeal (i) whether the respondent was holding an office of profit under the Government of India on the date of his nomination? and,

(ii) whether the respondent was disqualified being a manager of any company in the capital of which the Government of India has not less than 25% shares?

The basic facts are not in controversy. It is not disputed that the respondent was an employee of Tirap Colliery, North Eastern Coal Fields under the Coal India Ltd. holding the post of Clerk Grade-I. The gross salary attached with the office was around Rs.6,000/- per month. The Coal India Ltd. is a Government company within the meaning of Section 617 of the Indian Companies Act, 1956 having come into existence consequent upon the nationalisation of the coal mines under the Coal Mines (Nationalisation) Act, 1973. Under Section 3 of the said Act the right, title and interest of the owners in relation to the coal mines came to vest absolutely in the Central Government initially and then came to vest in the Government company under Section 5 of the said Act. Memorandum of Association and Articles of Association of Coal India Ltd. framed in the year 1973 have been brought on record. These documents, read in the light of the oral evidence adduced, go to show that the Coal India Ltd. is a Private Limited Company incorporated under the Companies Act, 1956 with 100% share capital owned by the Central Government. The Company has not more than 15 members. The business of the Company is entrusted to a Board of Directors consisting of not less than 3 and not more than 15 directors. The Chairman of the Board is to be appointed by the President of India and other members of the Board including the Vice-Chairman shall be appointed by the President in consultation with the Chairman. The President may also from time to time appoint Functional Directors who shall be whole-time employees of the Company. Chairman, Vice-Chairman or any whole-time or part-time Director is liable to be removed from office, subject to certain conditions, by the President. Certain important matters including winding up of the Company must be reserved for the decision of the President. The President is empowered to issue directions and instructions, as may be considered necessary, in regard to conduct of business and affairs of the Company. However, power to create posts in the scales of pay not equivalent to or higher than the post at the Board level or to appoint, remove or suspend managers including the General Managers, Secretaries, officers, clerks, agents and all other categories of employees are the powers vested in the Board of Directors. It is clear that so far as the conduct of the business of the Company and management of day-to-day affairs is concerned, it is the Board of Directors of Coal India Ltd. in whom vests the power. The President of India does not have power or control in the matter of creation of posts

below the Board level and in the matters relating to appointment, removal and disciplinary control over the incumbents holding the posts below the Board level. The salaries, emoluments and perks of such employees are payable from the funds of the Company. The Central Government does not remunerate or augment the funds for such payments. These findings of fact have not been disputed by the learned respondent counsel for the appellant.

The first issue arising for decision is whether the respondent was holding any office of profit under the Government of India within the meaning of Article 191(1)(a) of the Constitution which provides that a person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State if he holds 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. The other parts of this Article are not relevant for our purpose and hence are not being referred to.

The phrase office of profit is not defined in the Constitution. By a series of decisions (see *Maulana Abdul Shakur Vs. Rikhab Chand & Anr.*, 1958 SCR 387; *M. Ramappa Vs. Sangappa & Ors.*, 1959 SCR 1167; *Guru Govinda Basu Vs. Sankari Prasad Ghosal & Ors.*, (1964) 4 SCR 311 and *Shivamurthy Swami Inamdar & Anr. Vs. Agadi Sanganna Andanappa & Anr.*, (1971) 3 SCC 870, this court has laid down the tests for finding out whether the office in question is an office of profit under a Government. These tests are (1) Whether the Government makes the appointment; (2) Whether the Government has the right to remove or dismiss the holder; (3) Whether the Government pays the remuneration; (4) What are the functions of the holder? Does he perform them for the Government; and (5) Does the Government exercise any control over the performance of those functions?

In *Guru Gobinda Basu Vs. Sankari Prasad Ghosal & Ors.*, (1964) 4 SCR 311, the Constitution Bench emphasised the distinction between the holder of an office of profit under the Government and the holder of a post or service under the Government and held that for holding an office of profit under the Government, one need not be in the service of Government and there need be no relationship of master and servant between them. Several factors entering into the determination of question are : (i) the appointing authority (ii) the authority vested with power to terminate the appointment, (iii) the authority which determines the remuneration, (iv) the source from which the remuneration is paid, and (v) the authority vested with power to control the manner in which the duties of the office are discharged and to give directions in that behalf. But all these factors need not co-exist. Mere absence of one of the factors may not negate the over-all test. The decisive test for determining whether a person holds any office of profit under the Government, the Constitution Bench holds, is the test of appointment; stress on other tests will depend on facts of each case. The source from which the remuneration is paid is not by itself decisive or material.

The available case law was reviewed by this Court in *Madhuker G.E. Pankakar Vs. Jaswant Chobbildas Rajani & Ors.* - (1976) 3 SCR 832. The Court described certain

aspects as elementary : (i) for holding an office of profit under Government one need not be in the service of Government and there need be no relationship of master and servant, (ii) we have to look at the substance and not the form; and (iii) all the several factors stressed by this Court (in Guru Gobindas case) as determinative of the holding of an office under Government, need not be conjointly present. The critical circumstances, not the total factors, prove decisive. A practical view, not pedantic basket of tests, should act as guide.

In *Satrucharla Chandrasekhar Raju Vs. Vyricherla Pradeep Kumar Dev & Anr.*, (1992) 4 SCC 404, this Court has articulated the object underlying Articles 102 (1)(a) and 191 (1)(a) of the Constitution in the following words:

in order to eliminate or reduce the risk of conflict between the duty and interest amongst the members of the Legislature and to ensure that the Legislature does not contain persons who have received benefits from the Executive and who consequently being under an obligation might be amenable to its influence. Thus the object is to see that such an elected member can carry on freely and fearlessly his duties without being subjected to any kind of governmental pressure, thereby implying that if such an elected person is holding an office which brings him remunerations and if the Government has a voice in his functions in that office, there is every likelihood of such person succumbing to the wishes of the Government. Therefore this object must be borne in mind in interpreting these Articles. Under these provisions the right to contest is being taken away on the ground of the said disqualification. Such a ban on candidature must have a substantial and reasonable nexus to the object that is to be achieved namely the elimination of possibility of misuse of the position. It is from this point of view that the right to appoint and right to remove the holder of the office in many cases becomes an important and decisive test.

A variety of situations have come up for the consideration of this Court wherein the Court was called upon to apply the determinative tests so as to find out whether a case of holding an office of profit under the Government was made out or not. It will be advantageous to have a brief resume of such cases. In *D.R. Gurushanthappa Vs. Abdul Khuddus Anwar & Ors.*, (1969) 3 SCR 425, a Government undertaking was taken over by a Company incorporated under the Indian Companies Act, 1956 as a going concern and the employees working in the undertaking were also taken over. As a result of the transfer of the undertaking, the employees of the Government became the employees of the Company and were covered by the definition of workman under the Industrial Disputes Act, 1947. It was held that such a workman ceases to be Government servant and is not disqualified to be a candidate for election to State Legislative Assembly under Article 191 (1)(a) of the Constitution. The Court refused to accept the proposition that the mere fact that the Government had control over the Managing Director or other Directors as well as the power of issuing directions relating to the working of the company can lead to the inference that every employee of the company is under the control of the Government.

In *Ashok Kumar Bhattacharyya Vs. Ajoy Biswas & Ors.* - (1985) 2 SCR 50 a 3-judge Bench of this Court has held that whether a person holds an office of profit under the

Government must be measured and judged in each case in the light of the relevant provisions of the Act. The measure and nature of control exercised by the Government over the employee must be judged in the light of facts and circumstances of each case so as to avoid any possible conflict between his personal interests and duties and of the Government. An Account-in-charge of Municipality was held not to be holder of office under the Government merely because his appointment was subject to confirmation by the Government and he could be removed subject to sanction by Government.

Pradeep and he could In Satrucharla Chandrasekhar Raju Vs. Vyricherla Pradeep Kumar Dev & Anr., (1992) 4 SCC 404, the appellant was appointed as a single teacher in a primary school run by an Integrated Tribal Development Agency (ITDA) which is a registered society by its Project Officer. The Project Officer of the ITDA is also the District Collector and alone appoints teachers and has also power to remove them same. This Court held that the ITDA being a registered society, having its own Constitution, the Project Officer though a District Collector, acted as a different entity and while exercising the power to appoint or to remove teachers, he was acting as the Project Officer. The power was not being exercised by the Government. The Government may have control over the appointing authority but has no direct control over the teachers. The question of any conflict between his duties and interest as an elected member did not arise. It could not be said that the appellant as a teacher can be subjected to any kind of pressure by the Government which had neither power to appoint him nor to remove him from service. The appellant could not be held to be holding an office of profit under the Government within the meaning of Article 191 (1)(a) of the Constitution.

Aklu Ram Mahto Vs. Rajendra Mahto, 1999 (3) SCC 541, is a case very near to the case in hand. A Khalashi and a Meter Reader of Bokaro Steel Plant contested elections for Members of Bihar Legislative Assembly. This Court held -

The Bokaro Steel Plant is under the management and control of Steel Authority of India Ltd. This is a company incorporated under the Companies Act. Its shares are owned by the Central Government. The Chairman and the Board of Directors are appointed by the President of India. However, the appointment and removal of workers in the Bokaro Steel Plant is under the control of Steel Authority of India Ltd. Their remuneration is also determined by Steel Authority of India Ltd. The functions discharged by Steel Authority of India Ltd. or by the Bokaro Steel Plant cannot be considered as essential functions of the Government. In this context a worker holding the post of a Khalashi or a Meter Reader is not subject to the control of the Central Government nor is the power of his appointment or removal exercised by the Central Government. Control over his work is exercised not by the Government, but by the Steel Authority of India Ltd..

The Court held that the two could not be considered as holding an office of profit under the Central Government. The Court also tested the case on the touch stone of Section 10 of the RPA and held that the posts of Khalashi and Meter Reader are non-executive posts. Neither of them is either Secretary or Manager or a managing agent. None of them attracted disqualification even under Section 10 of the RPA.

Posed with the perplexed problem - whether a person holds an office under the Government, the first and foremost question to be asked is : whether the Government has power to appoint and remove the person on and from the office? If the answer is in the negative, no further enquiry is called for, the basic determinative test having failed. If the answer be a positive one, further probe has to go on finding answers to questions framed in Shivamurthys case (supra) and searching for how many of the factors pointed out in Guru Gobinda Basus case (supra) do exist? The totality of the facts and circumstances reviewed in the light of the provisions of relevant Act, if any, would lead to an inference being drawn if the office held is under the Government. The inquisitive over-view-eye would finally query: on account of holding of such office would the Government be in a position to so influence him as to interfere with his independence in functioning as a member of Legislative Assembly and/or would his holding of the two offices-one under the Government and the other being a member of Legislative Assembly, involve a conflict of interests inter se? This is how the issue has to be approached and resolved.

That being the position of law, no fault can be found with the finding arrived at by the High Court that the respondent was not holding an office of profit under the Government of India and therefore no disqualification attached to him under Article 191 (1)(a) of the Constitution. The Government of India do not exercise any control on appointment, removal, service conditions and functioning of the respondent. The respondent does hold an office and there is profit attaching with the office but such office of profit is not under the Government of India, His being a clerk in Coal India Ltd. does not and cannot bring any influence or pressure on him in his independent functioning as member of Legislative Assembly. The finding that the respondent was neither a managing agent nor a manager nor a secretary under Coal India Ltd. though the Company has 100% share holding of the Government, was not seriously disputed by the learned senior counsel for the appellant and in all fairness, rather, he did not pursue this submission. Even otherwise, we find that the respondent was merely a Clerk Grade-I. Occasionally in the absence of his senior officer on account of leave or absence, he exercised some supervisory function over his subordinates but this would not make him a manager of the Company. We agree with the High Court that the respondent did not incur a disqualification under Section 10 of the RPA also. As the respondents nomination was improperly rejected, the appellants election was liable to be declared void without proof of the result of the election, in so far as it concerns the returned candidate, having been materially affected.

The appeal is devoid of any merit and is liable to be dismissed. It is dismissed accordingly. The order of the High Court is affirmed. The interim order dated 25.2.2000 passed by this Court stands vacated. No order as to the costs.