Maulana Abdul Shakur

Vs

Rikhab Chand and Another

Civil Appeal No. 335 of 1957

(CJI S. R. Dass, T. L. Venkatarama Ayyar, B. P. Sinha, A. K. Sarkar, J. L. Kapur JJ)

12.09.1957

JUDGMENT

KAPUR, J. -

This is an appeal from the order of the Election Tribunal dated January 31, 1957, setting aside the election of the appellant, Maulana Abdul Shakoor, who was elected to the Council of States by the Electoral College of Ajmer which consisted of 30 members constituting the State Legislature of Ajmer. He received 19 votes as against 7 polled in favour of the other candidate who is respondent No. 1 in this appeal. The total number of valid votes polled was 26 and there were 3 invalid votes. The result of the election was published in the Official Gazette on March 31, 1957, declaring the election of the appellant. The unsuccessful candidate, the present first respondent, filed his election petition on May 2, 1956. It is not necessary to set out all the allegations in the petition because the main controversy between the parties is whether the successful candidate, the present appellant, held an "office of profit" under the Government. The impugned election was held on March 22, 1956.

By a notification issued on February 17, 1956, the nominations for candidature were to be filed between February 28, 1956, and March 1, 1956. The date for scrutiny was March 5, 1956, and for the polling March 22, 1956. The appellant filed two nomination papers on February 28, 1956, and a third one on March 1, 1956. The respondent Rikhab Chand Jain also filed his nomination papers on March 1, 1956. On March 5, 1956, the respondent Rikhab Chand Jain raised certain objections to the validity of the appellant's nomination, the main ground being that the appellant was holding an office of profit under the Government. The Returning Officer by his order dated March 6, 1956, rejected the two nomination papers of the appellant filed on February 28, 1956, but accepted the third one, i.e., of March 1, 1956, because, according to that officer, under the provisions of Durgah Khwaja Saheb (Emergency Provisions) Act, 1950 (XVII of 1950) which was in force up to February 29, 1956, the appellant was holding an office of profit under the Government but on the coming into force of the Durgah Khwaja Saheb Act (XXXVI of 1955) on March 1, 1956, he no longer held such office under the Government. On May 3, 1956, the respondent filed an election petition under s. 81 of the Representation of the People Act, 1951, in which he submitted that the third nomination paper of the appellant should also have been rejected as even under the provisions of Durgah Khwaja Sahab Act (XXXVI of 1955), the appellant was holding an office of profit under the Government and therefore his case was covered by the provisions of Art. 102(1)(a) of the Constitution. He also prayed that he be declared elected as the votes cast in the appellant's favour were "thrown away" votes and the respondent alone received a majority of valid votes.

A majority of the Election Tribunal by their order dated January 31, 1957, held that on March 1, 1956, the appellant was holding an office of profit under the Government and therefore his

nomination paper was hit by Art. 102(1)(a) of the Constitution. They set aside his election and accepting the contention as to "thrown away" votes declared the respondent elected. Disagreeing with the majority, the Chairman of the Election Tribunal held that on March 1, 1956, the appellant was no longer holding an office of profit under the Government, his nomination paper was rightly accepted and his election was valid and therefore the respondent could not be declared elected. On the question whether the two nomination papers of the appellant dated February 28, 1956, were valid or not the Tribunal unanimously held them to be invalid on the ground that the appellant held an office of profit under the Government on that date.

It is not necessary to go into the question whether the two nomination papers filed by the appellant on February 28, 1956, were valid or not because if the nomination paper filed on March 1, 1956, is valid the question of their validity would not arise. It may here be stated that the argument before us has proceeded on the assumption that the appellant held an office of profit. The controversy between the parties was therefore confined to whether this office of profit was held under the Government of India and therefore the disqualification for membership under Art. 102(1)(a) applies to the appellant. In order to resolve this controversy the important question of construction that arises is : was the appellant holding an office of profit under the Government of India and does Art. 102(1)(a) of the Constitution operate ? This article is as follows :

> 102(1) "A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament -
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> (a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;"

This article occurs under the heading Disqualifications of Members. In the same part of the Constitution, i.e., Part V, are given the disqualifications for election to the offices of President and Vice-President. The relevant part of Art. 58 which lays down the disqualification for the office of the President is :

> Art. 58(1) "No person shall be eligible for election as President unless he -
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> #(a).....
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> (b).....
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> (c).....##
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> (2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments."

There is a similar provision in regard to the Vice-President in Art. 66(4).

Counsel has rightly pointed out the difference in the language between the two articles. Whereas in the case of the President and Vice-President the holding of an office of profit under an authority subject to the control of the Government is a disqualification, it is not so prescribed in the case of members of the legislatures.

The Madarsa Durgah Khwaja Sahab Akbari in which the appellant held the appointment of a manager (mohatmin) is a school for teaching Persian, Arabic and Muslim theology. Before 1951 it was managed and run by the Government of the Nizam of Hyderabad. In 1951 this school was taken over by the Durgah Committee. On February 28, 1955, the appellant was given an honorary appointment of mohatmin (manager) of the school by the Administrator of Durgah Khwaja Saheb. He was to work under the Administrator and was to hold charge of the management of the school. But from May 1955 he was being paid Rs. 100 per month which has been variously described as salary and honorarium.

Counsel for the appellant raised three questions of construction that this appointment as manager of the school amounted neither to an office nor to an office of profit not to an office of profit under the Government. A decision favorable to the appellant on the last question, i.e., office of profit under the Government, would render the decision of the other two questions wholly unnecessary and therefore assuming that the appellant held an office of profit, the question remains : was it an office of profit under the Government and therefore fell within Art. 102(1)(a) of the Constitution. In order to determine this we have to examine the provisions of the Statute under which the appointing authority came into existence and its powers under the Statute. Before and up to 1936 the Durgah Khwaja Sahab Endowment was administered by a committee which was constituted by the Chief Commissioner of Ajmer under s. 7 of Religious Endowments Act (XX of 1863). In 1936 the then Central Legislature enacted the Durgah Khwaja Sahab Act (XXIII of 1936). By the provisions of that Act the management and administration was vested in Durgah Committee constituted under s. 4 of the Act. It was a body corporate with perpetual succession and common seal having the right to sue and be sued in the name of the president of the Committee. Under s. 5 which dealt with the constitution of the Committee it was to consist of 25 members some of whom were elected and some nominated. Section 11(f) of the Act gave to the Committee the power to appoint all its servants.

The Act of 1936 was replaced by the Durgah Khwaja Sahab (Emergency Provisions) Ordinance 3 of 1949, which in turn was replaced by the Durgah Khwaja Saheb (Emergency Provisions) Act (XVII of 1950). By s. 3 of that Act the Durgah Committee constituted under the Act of 1936 was superseded and the management was vested in an Administrator appointed by the Central Government who under s. 7 was to be under the control of the Central Government and had all the powers of the committee constituted under the Act of 1936. That Act continued to be in force up to February 29, 1956, and it was during its continuance that the appellant filed two nomination papers on February 28, 1956, which were rejected by the Returning Officer.

The Act of 1950 was replaced by the Durgah Khwaja Sahab Act (XXXVI of 1955) which received the assent of the President on October 14, 1955, but came into force on March 1, 1956. Under s. 4(1) of this Act the administration, control and management of the Durgah Endowment came to be vested in a Committee, which is a body corporate having perpetual succession and common seal and which can sue and be sued through its President. Under s. 5 the Committee is to consist of not less than 5 and not more than 9 members of the Hanafi Muslim faith all of whom are to be appointed by the Central Government. Section 8 gives power to the Central Government to supersede the Committee. Under s. 9 the Central Government in consultation with the Committee can appoint a Nazim (administrator) of the Durgah who is an ex-officio secretary of the committee. His salary is to be fixed by the Central Government but is to be paid out of the revenues of the Durgah Endowment funds. The Committee exercises its powers of administration, control and management through the Nazim.

The powers and duties of the Committee are given in s. 11 of the Act; clause (i) of this section which is relevant for the purpose of this case when quoted runs as under :

> s. 11 "The powers and duties of the Committee shall be -
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> (i) to appoint, suspend or dismiss servants of the Durgah Endowment."

Under s. 20 the Committee has the power to make bye-laws to carry out the purposes of the Act, and the respondent emphasised clause (i) of sub-s. 2 which provides :

> S. 20(2) "In particular and without prejudice to the generality of the foregoing power such bye-laws may provide for -
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> (i) the duties and powers of the employees of the Durgah."

Sub-section 5 of this section is as follows :

> "(5) The Central Government may, after previous publication of its intention, cancel any bye-law which it has approved and confirmed, and thereupon the bye-law shall cease to have effect."

The respondent contended that because under the Act of 1955, the Committee of Management is to be appointed by the Government who also appoint the Nazim (administrator) through whom the Committee acts and because under s. 6(2) the Government has the power of removal from office of any member of the Committee and because the Committee can make bye-laws prescribing the duties and powers of the employees of the Durgah, the appellant was under the control and supervision of the Central Government and therefore he was holding an office of profit under the Government of India. It is significant to note that in laying down the disqualifications of the President and the Vice-President the Constitution has expressly provided the disqualifications which include not only an office of profit under the Government of India or the Government of any State but also an office of profit under any local or other authority subject to the control of any of the said Governments. This last disqualification the Constitution does not make applicable to the members of the legislatures.

No doubt the Committee of the Durgah Endowment is to be appointed by the Government of India but it is a body corporate with perpetual succession acting within the four corners of the Act. Merely because the Committee or the members of the Committee are removeable by the Government of India or the Committee can make bye-laws prescribing the duties and powers of it employees cannot in our opinion convert the servants of the Committee into holders of office of profit under the Government of India. The appellant is neither appointed by the Government of India nor is removeable by the Government of India nor is he paid out of the revenues of India. The power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of Government revenues are important factors in determining whether that person is holding an office of profit under the Government though payment from a source other than Government revenue is not always a decisive factor. But the appointment of the appellant does not come within this test.

A number of election cases reported in the Election Law Reports were cited before us but they were decided on their own facts and are of little assistance in the decision of the present case. The test of the power of dismissal by the Government or by an officer to whom such power has been delegated which was pressed in support of his case by the respondent is equally inapplicable to the facts of the present case because the appellant cannot be dismissed by the Government or by a person so authorised by the Government. He is a servant of a statutory body which in the matter of its servants acts within the powers conferred upon it by the statute.

The respondent then sought to fortify his submissions by relying on Shivnandan Sharma v. The Punjab National Bank Ltd. [[1955] 1 S.C.R. 1427.]. That was a case under the Industrial Disputes Act and the question for decision was whether a cashier appointed by the Bank's treasurer on behalf of the Bank and paid by the Bank was a servant of the Bank. It was held that he was. The rule of that case is that if the master employs a servant and authorises him to employ a number of persons to do a particular job and to guarantee their fidelity and efficiency for cash consideration, the employees thus appointed by the servant would be, equally with the servant, servants of the master. But that again has no application to the facts of the present case because the appellant has not been employed by a servant of the Government who is authorised to employ servants for doing some service for the Government nor is he paid out of Indian revenues. No doubt the non-payment from out of the revenues of the Union is not always a factor of any consequence but it is of some importance in the circumstances of this case.

A comparison of the different articles of the Constitution 58(2), 66(4), 102(1)(a) and 191(1)(a) dealing with membership of the State Legislatures shows in the case of members of the Legislatures unlike the case of the President and the Vice-President of the Union the disqualification arises on account of holding an office of profit under the Government of India or the Governments of the States but not if such officer is under a local or any other authority under the control of these Governments. As we have said the power of appointment and dismissal by the Government or control exercised by the Government is an important consideration which determines in favour of the person holding an office of profit under the Government, but the fact that he is not paid from out of the State revenues is by itself a neutral factor.

It has not been shown that the appellant's appointment as a mohatmin (manager) of the school satisfies any of the tests which have been discussed above. On the other hand on March 1, 1956, he was holding his appointment under a Committee which is a statutory body and such appointment cannot be called an appointment by or under the control of the Government of India nor is his salary paid out of the revenues of the Government but out of the funds of Durgah Endowment. In the circumstances the majority of the Tribunal has erred in holding that the appellant held an office of profit under the Government and the opinion of the Chairman to the contrary lays down the correct position.

In view of this finding in regard to the office of profit under the Government, it is not necessary to go into the question whether there were any "thrown away" votes or whether the respondent has been rightly declared to have been elected.

We are of the opinion that the election of the appellant has been wrongly set aside and we would allow the appeal and set aside the order of the majority of the Tribunal. The appellant will have his costs in this courts as also before the Tribunal.

Appeal allowed.

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