

Divya Prakash

Vs

Kultar Chand Rana and Another

Civil Appeal No. 1325 of 1973

(A. lagiriswmi, A. S. Sarkaria JJ)

18.11.1974

JUDGMENT

ALAGIRISWAMI, J. -

1. Elections were held in March, 1972, to the Himachal Pradesh State Legislative Assembly. The first respondent was elected to that Assembly from the Shahpur Constituency in Kangra District. An election petition was filed by the appellant, a voter in that constituency, on the ground, among others, that at the time of filing of nominations the first respondent was holding an office of profit under the Government of Himachal Pradesh and as such was disqualified for election under Article 191(1)(a) of the Constitution. The petition having been dismissed by the High Court of Himachal Pradesh this appeal has been filed against the order of dismissal.
2. The only ground which is relevant for the purpose of decision of this appeal and which was urged before this Court, was that as the first respondent was holding an office of profit under the State Government he was disqualified under Article 191(1)(a) of the Constitution to be elected as a member of the State Legislative Assembly. The first respondent was nominated Chairman of the Board of School Education of Himachal Pradesh in the year 1969 by the Himachal Pradesh Government under the provisions of the Himachal Pradesh Board of School Education Act, 1969. At all relevant times he was holding that post. Under Section 18 of the Act the Chairman is nominated by the Government. The Board is constituted by the Government under Section 3 of the Act. Though there is nothing said in the Act about the authority competent to remove the Chairman from his office it may be assumed for the purposes of this case that the Government was competent to do so. There can be very little dispute and indeed it is not disputed that the office of the Chairman of the Board is an office under the State Government. The only question is whether it is an office of profit. Admittedly, the first respondent was not in receipt of a salary. The order appointing him to the post of Chairman makes it clear that he was appointed only in an honorary capacity. The fact that he was entitled to receive travelling and daily allowance in the course of the discharge of his duties as Chairman would not be a disqualification because of the provisions of Section 3(m) of the Himachal Pradesh Legislative Assembly Members (Removal of Disqualifications) Act, 1971, and this is not disputed. What is, however, contended on behalf of the appellant is that though the first respondent might not have been in receipt of a salary, the post itself carried a scale of pay and therefore it is an office of profit which the first respondent was holding. We are unable to agree. The question is whether the office has resulted in any profit to holder of that office, however small that profit may be. We have discussed this question at great length in the judgment delivered by us today in C.A. No. 2365 of 1972 (K. B. Rohamare v. Shankar Rao, (1975) 1 SCC 252). In the absence of any profit accruing to the first respondent as a result of the holding of the office of Chairman it cannot be said that he was holding an office of profit. This is not even a case where the Chairman

was appointed to an office and a salary was provided for him by the order of appointment or he was entitled to a salary as a result of the appointment and he gave up his right to the salary. The order of appointment itself was one made in an honorary capacity.

3. There is a further fact which shows that the contention of the appellant that the post carried a scale of pay is not correct. This contention that the post carried a scale of pay is based on Resolution No. 12 passed by the Board on January 17, 1970 fixing a salary of Rs. 1,600-1,800 per month for the Chairman. We are satisfied that the Board was not competent to fix a scale of pay for the Chairman by a resolution. We are unable to accept the contention on behalf of the appellant that Section 10, clause (18) of the Himachal Pradesh Board of School Education Act, 1968 enables the Board to fix the scale of pay of the Chairman. The fixing of the scale of pay of the Chairman cannot be said to be an act ancillary to any of the purposes mentioned in Clauses 1 to 17 of the section or to be one of the purpose of carrying into effect the provisions of the Act. Though under Section 17 the Chairman is also called an office of the Board, he is under Section 19 the administrative head of the Board. He is to call the meeting of the Board and preside over it and is entitled in any emergency that requires an immediate action to take such action as he deems necessary. The Secretary to the Board is also appointed by the Government upon such conditions and for such period as the Government may deem fit under Section 22. We presume that this section enables the Government to fix his scale of pay also. Under Section 23 the Government is entitled to appoint Deputy Secretaries and Assistant Secretaries to the Board on such conditions and for such periods as the Government may deem fit, which as in the case of the Secretary would include the power to fix their scale of pay. This is clear from the fact that sub-section (4) of Section 23 lays down that the qualifications, conditions of service and the scale of pay of officers and servants of the Board, other than Deputy Secretary, Assistant Secretary and Secretary would be determined by the Regulations. This sub-section when it enables the Board to make regulations regarding qualifications, conditions of service and scale of pay of officers and servants of the Board other than the Deputy Secretary and Assistant Secretary, applies only to the cases of officers lower in rank than these officers, mentioned. The presence of the word 'officer' in that sub-section cannot be held to refer to the Chairman also merely because he is also called an officer of the Board under Section 17. It would be curious if the Act while conferring on the Government the power to specify the conditions of service including the scales of pay of Deputy Secretary, Assistant Secretary and Secretary, it had left to the Board to determine the scale of pay of the Chairman by clubbing him along with officers and servants of the Board lower in rank than even the Assistant Secretary. We are clearly of opinion that Section 23(4) does not enable the Board to determine the scale of pay of the Chairman. Even in the case of other officers and servants the scale of pay is to be determined by Regulations. The first Regulations were made by the Government under Section 27 and in the Regulations so made there is no provision for the scale of pay of the Chairman of the Board. Nor have we been shown any regulation made by the Board fixing the scale of pay of the Chairman. A mere resolution of the Board, which is concerned with the carrying on of the day-to-day administration of the Board, cannot have the effect of fixing the scale of pay of the Chairman. We do not think that Section 26(2)(i), which relates to the power of the Board to make Regulations for the appointment of officers, clerks and other servants of the Board and the conditions of their service can cover the Chairman because there is no question of the Board being competent to deal with the appointment or conditions of service of the Chairman. Clause (p) of sub-section (2) of Section 26 speaks of the emoluments and allowances of the members of the Board and all its Committees. This clause when it refers to members of the Board cannot refer to the Chairman. The distinction between the Chairman and the members is brought out in Section 4 which says that the "Board shall consist of the Chairman nominated in accordance with Section 18 and of the following members" and then

goes on to enumerate the members. Though generally speaking that pay of a person can be said to be his emoluments, the emoluments and allowances referred to in clause (p) cannot refer to the scale of pay. The Act does not contemplate any scale of pay for members. On a close reading of the provisions of the Act we are satisfied that there is no provision in the Act enabling the Board to fix a scale of pay for the Chairman by a resolution. Therefore, it cannot be said that the resolution has validly fixed a scale of pay for the Chairman and, therefore, it cannot be said that the post of the Chairman carries with it a scale of pay.

4. In any case as far as the first respondent is concerned the test for deciding whether he holds an office of profit is very simple. It is whether he can sue for or otherwise claim the scale of pay fixed by the resolution of the Board. In the face of his order of appointment such a claim would not be upheld.

5. We hold, therefore, in agreement with the High Court that the first respondent was not holding an office of profit at the time when he filed his nomination or when he was elected. The appeal is, therefore, dismissed with costs.

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