

Karbhari Bhimaji Rohamare

Vs

Shanker Rao Genuji Kolhe and Others

Civil Appeal No. 2365 of 1972

(Alagiriswami, J.)

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

JUDGMENT

ALAGIRISWAMI, J. -

1. In the election to the Maharashtra State Legislative Assembly held on March 7, 1972 the first respondent was declared elected from Shirdi Constituency. The appellant, a voter from that constituency filed an election petition questioning election of the first respondent on two grounds : one was that the successful candidate had committed several corrupt practices, the other that the election was liable to be set aside because he was disqualified for election as he was holding an office of profit under the State Government as a member of the Wage Board for the Sugar Industry constituted by the Government of Maharashtra under Section 86-B of the Bombay Industrial Relations Act, 1946. The only question argued before this Court was the second one.

2. February 8, 1972 was the last date of filing nominations and February 11, 1972, the last date for withdrawal of candidature. The first respondent resigned as a member of the Wage Board on February 20, 1972 and the letter of resignation was received by the concerned authorities on February 22, 1972.

3. The Wage Board to which the first respondent was nominated as a member on April 13, 1971 was constituted under the provisions of Chapter 12A of that Act introduced by the Amending Act No. 43 of 1948. Under Section 86C the State Government may make reference to the Wage Boards for decision of any industrial matter or industrial dispute. Under Section 86G the order or decision of the Wage Board is made appealable to the Industrial Court. The parties on whom the order or decision of the Wage Board is binding are enumerated in Section 86H. Section 86I provides for review of the order or decision, by the Wage Board. Section 86J confers certain powers of superintendence on the Industrial Court over all Wage Boards.

4. The first question to be decided is whether the membership of the Wage Board is an office under the State Government. In *Maulana Abdul Shakur v. Rikhabchand* (1958 SCR 387, 394 : AIR 1958 SC 52 : 13 ELR 149) this Court held :

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.

Leaving aside for the present the question of payment, as the first respondent was appointed by the

Government the Government could either continue him in that office or revoke his appointment at their discretion. In *Ramappa v. Sangappa* (1959 SCR 1167 : AIR 1958 SC 937 : 15 ELR 475) this Court pointed out that :

An office has to be held under someone for it is impossible to conceive of an office held under no one. The appointment being by the Government, the office to which it is made must be held under it, for there is no one else under whom it can be held.

There is no doubt that in this case the office of the membership of the Wage Board should be deemed to have been held by the first respondent under the Government of Maharashtra. In *Gurugobinda Basu v. Sankari Prasad Ghosal* ((1964) 4 SCR 311 : AIR 1964 SC 254 : 25 ELR 77) it was held that :

For holding an office of profit under the Government a person need not be in the service of the Government and there need not be any relationship of master and servant between them.

In that view even the Comptroller and Auditor General, being appointed by the President and his administrative powers being such as may be prescribed by rules made by the President subject to the provisions of the Constitution and of any law made by Parliament, was held to be a holder of an office of profit under the Government of India. In *Shivamurthy Swami v. Agadi Sanganna Andanappa* ((1971) 3 SCC 870) the indicia of an office held under the Government were put thus :

. . . the office in question must have been held under a Government and to that some pay, salary, emoluments or allowance is attached This Court in several decisions had laid down the tests for finding out whether an office in question is an office under a Government and whether it is an office of profit. Those 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 ?

Again, leaving aside for the present the question of payment of remuneration, the office of the membership of the Wage Board satisfies all the tests here laid down. The power exercised by the Wage Board is essentially a part of the judicial power of the State and the Wage Board is appointed to exercise that power. There can, therefore, be no doubt that the first respondent did hold an office under the Government. This proposition was not seriously disputed by the first respondent. The only serious dispute is whether that office was an office of profit.

5. The first Wage Board for Sugar Industry was constituted in the year 1956 by a Government notification Development Department No. BIR. 2355 dated March 20, 1956. The Wage Board consisted of three members. By a notification dated May 16, 1967, a new Wage Board for the Sugar Industry was constituted consisting of five members. By a notification dated April 13, 1971 the first respondent was nominated as a member of the Wage Board to represent the employers on the Wage Board in place of E. V. Wikhe who resigned his membership. That notification itself does not mention the terms of appointment. To the notification constituting the Wage Board in the year 1956 a resolution was also appended directing that the non-official members of the Wage Board should be paid honorarium at the rate of Rs. 25 per day of the meeting of the Wage Board and that they should also be allowed to draw travelling allowance and daily allowance at the rate prescribed in Scale 1 in Rule 1 (1)(b) in Section 1 of Appendix XLII-A of the Bombay Civil Services Rules (Vol. II). Such a

resolution regarding honorarium and allowances payable to the members was not part of the 1967 notification creating a new Wage Board, but apparently the members are paid only on the basis of the 1956 resolution. There is no dispute that the daily allowance and travelling allowance payable to the members would not make the membership of the Wage Board an office of profit. That comes within the definition of the words "compensatory allowance" found in Item 11, Schedule I read with Section 2 of the Bombay Legislature Members (Removal of Disqualifications) Act, 1956. Item 11 in Schedule I reads as follows :

11. The office of the Chairman or member of any committee or body appointed by the Central or State Government :

Provided that the Chairman or any member of such committee or body does not receive any remuneration other than the compensatory allowance. Explanation : For the purpose of this entry, compensatory allowance shall mean the travelling allowance, the daily allowance or such other allowance which is paid to the holder of the office for the purpose of meeting the personal expenditure in attending the meeting of the committee or body or in performing any other functions as the holder of the said office.

6. The whole controversy centres around the honorarium payable to the members of the Wage Board. It is contended on behalf of the appellant that Item 11 specifically lays down that the compensatory allowance shall mean the travelling allowance, the daily allowance or such other allowance which is paid to the holder of the office for the purpose of meeting the personal expenditure in attending the meeting of the committee or body or in performing any other function as the holder of the said office, and honorarium which is not mentioned there cannot be brought within the meaning of the words "such other allowance" found in that item as it is not an allowance. Reference is made to the dictionary meaning of the word 'honorarium' and it is said that while the daily allowance is expected to meet the expenses of the member concerned while attending the meeting of the Board, the honorarium is in the form of a fee for performing his duties on those days. The Shorter Oxford Dictionary gives the meaning of the word 'honorarium' as an honorary reward, a fee for professional service rendered, while on the meanings of the word 'salary' is, fixed payment made periodically to a person as compensation for regular work, remuneration for services rendered, fee, honorarium. Thus, in one aspect honorarium and fee are used almost as though they are interchangeable terms. Even so, what was paid to the first respondent cannot be said to be a salary. It was not a fixed payment made periodically as compensation for regular work. We do not think that the dictionary meaning is of much help here. We are of opinion that the matter must be considered as a matter of substance rather than of form, of the essence of payment rather than its nomenclature. Even so, it is urged on behalf of the appellant that the payment of honorarium in this case could not have been for any purpose other than payment for services rendered on particular days on which the meetings of the Wage Board were held. We are not able to accept this contention.

7. In this connection various decisions relied upon by the appellant are themselves of interest. In *Ravanna Subanna v. G. S. Kaggeerappa* (AIR 1954 SC 653 : ILR 1955 Mys 109) a person holding office of Chairman of Taluk Development Committee was entitled to a fee of Rs. 6 for each sitting he attended. This Court held that it could reasonably be inferred that the fee of Rs. 6 was not meant to be a payment by way of remuneration but it was given for the out-of-pocket expenses which the Chairman had to incur for attending the meetings of the committee. The point to be noted is that though it was termed a fee it was considered to be given for meeting the out-of-pocket expenses of the member. It was observed in that decision that :

This word "profit" connotes the idea of pecuniary gain. If there is really a gain, its quantum or amount would not be material; but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carried any profit.

The stress here is on the pecuniary gain.

8. The decision in *Umrao Singh v. Darbara Singh* ((1969) 1 SCR 421 : AIR 1969 SC 262) is a very important one. In that case the successful candidate was the Chairman of a Panchayat Samiti. He was paid Rs. 100 a month as 'a consolidated allowance for performing all official duties and journeys concerning the Panchayat Samitis within the district including attending of meeting, supervision of plans, projects, schemes and other works and also for the discharge of all lawful obligations and implementation of Government directives'. He was also granted mileage and daily allowance for journeys performed for any official work outside the district. The daily allowance was payable at the rate of Rs. 6 per day of official work performed outside the district. The rules, however, made provision as to the circumstances under which he was entitled to full daily allowance or half daily allowance as the case may be. This Court referred to the consolidated allowance and pointed out that it was not salary, remuneration or honorarium but was clearly an allowance paid for the purpose of ensuring that the Chairman of a Panchayat Samiti did not have to spend money out of his own pocket for the discharge of his duties. This Court further held that the burden lay on the appellant to give evidence on the basis of which a definite finding could have been arrived at that the amount of Rs. 100 per month was excessive and was not required to compensate the Chairman for the expenses to be incurred by him in the discharge of his official duties. Even with regard to the daily allowance and travelling allowance payable when the Chairman had to perform his duties outside the district, this Court pointed out there was no evidence from which an inference may be drawn that the amount received by a Chairman for travelling allowance or daily allowance was in excess of the amount of expenditure which he would have to incur for the purpose of performing the journeys in order to discharge his official duties. It was urged before this Court that the payment of travelling allowance and daily allowance was in addition to the payment of the consolidated monthly allowance and the payment of two sets of allowances must necessarily result in profit to the payee. After pointing out the different purposes for which these two sets of allowances were meant this Court finally held that the appellant had failed to establish that the allowances payable resulted in a pecuniary gain to the Chairman. The whole purport of the decision is thus whether what was received by the member was in excess of the expenditure which he would have to incur for the purpose of performing the journeys in order to discharge his official duties, the burden being on those who allege it.

9. In *Shivamurthy Swami v. Agadi Sanganna Andanappa* (supra) the only relevant instance was that of membership of Khadi & Village Industries Board. In that capacity he was entitled to a sitting fee of Rs. 16 per day on the days he attended the meetings of the Board or any of its committees. But he could not draw the sitting fee as well as the daily allowance and had to draw only one of the two. The sitting fee was held by this Court to be a compensatory allowance. The decision is not, therefore, of much relevance to the facts of this case.

10. Reference has already been made to the various payments to which the first respondent was entitled to as a member of the Wage Board. It is not necessary to refer to the number of meetings he attended or the places at which he attended the meetings because the question has to be decided not on whether a particular member made a profit out of the payments made to him but on what was the effect of the payments in general. The daily allowance is not payable for a halt upto six hours, and for halt exceeding six hours but less than 12 hours only half the daily allowance was payable. The

daily allowance was Rs. 18 whether the meeting was held at Bombay, Poona, Aurangabad or Kopergaon. The learned Judge of the High Court has pointed out that for attending the meeting in Bombay a member coming from outside was expected to come by the latest available train and to leave by the first available train and the charging of daily allowance depended upon the arrival and departure of the trains. The first respondent's evidence was that when he came to Bombay for attending the meetings of the Wage Board, he had to spend Rs. 20 as taxi fare, Rs. 25 for breakfast, lunch and dinner and Rs. 40 for lodging, that if he had a single room for the stay in a hotel he used to pay Rs. 30 per day. He seems to have been staying a modest hotel which charged Rs. 15 to Rs. 16 for a common room and Rs. 28 to Rs. 30 for a single room including lodging and boarding charges. As pointed out by the learned Judge, it should not be forgotten that if for the purpose of his lunch a member was expected to return to his hotel from the place where the meeting was held, he will have to incur double the taxi fare, both before and after the lunch, and if he does not return back to the hotel he has to arrange for the lunch at a place in the vicinity of the office where the Board meetings are held and pay for it. After an elaborate discussion of all the evidence, the learned Judge accepted the evidence of the first respondent that he had to spend Rs. 20 for taxi fare, that in the hotel where the first respondent stayed the charges for a common room were Rs. 15 to Rs. 16 and for a single room Rs. 28 to Rs. 30 per day including lodging and boarding and that if regard he had to these figures then the aggregate of the honorarium and the daily allowance payable to the first respondent was hardly sufficient to meet the personal expenditure incurred for the purpose of attending the meeting in Bombay, and simply because he was paid both honorarium and daily allowance it could not be said that he was making any pecuniary gain thereby. We agree with the learned Judge's conclusion. The question has to be looked at in a realistic way. Merely because part of the payment made to the first respondent is called honorarium and part of the payment daily allowance, we cannot come to the conclusion that the daily allowance is sufficient to meet his daily expenses and the honorarium is a source of profit. A member of the Wage Board cannot expect to stay in Taj Hotel and have a few drinks and claim the expenditure incurred, which may come perhaps to Rs. 150 to Rs. 200 a day, for his personal expenses. In such a case it may well be held to give him a pecuniary gain. On the other hand he is not expected to live like a sanyasi and stay in a dharmshala and depend upon the hospitality of his friends and relatives or force himself upon them. Nobody with a knowledge of the expenditure likely to be incurred by a person staying at a place away from his home could fail to realise how correct the assessment of the learned Judge is. We are satisfied that the payments made to the first respondent cannot be a source of profit unless he stays with some friends or relatives or stays in dharmshala. The appellant has not satisfied the test or discharged the burden pointed out by this Court in Umrao Singh's case. The law regarding the question whether a person holds an office of profit should be interpreted reasonably having regard to the circumstances of the case and the times with which one is concerned, as also the class of person whose case we are dealing with and not divorced from reality. We are thus satisfied that the first respondent did not hold an office of profit.

11. We do not consider that the decision of this Court in *Mahadeo v. Shantibhai* ((1969) 2 SCR 422 : (1970) 2 SCJ 407) is at all helpful to the appellant. There the successful candidate was appointed by the Railway to watch cases coming up for hearing against Railway in various courts and give timely intimation of the same and if no instructions regarding any particular case were received by him he was expected to appear in the court and obtain an adjournment. He was to be paid Rs. 5 for every such adjournment. There was no question there of his incurring any expenditure. A lawyer would in the normal course be attending the courts and if he discharges some duties while so attending and gets paid for it clearly he derives a profit thereby and the decision holding that he was holder of an office of profit is clearly distinguishable from the facts of this case.

12. In the result the appeal is dismissed with costs. The S.L.P. (Civil) No. 2605 of 1972 is also dismissed.

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