

Ashok Kumar Bhattacharyya

Vs

Ajoy Biswas and Others

Civil Appeal No. 1724 (NCE) of 1982

(Syed M. Fazal Ali, Sabyasachi Mukharji, A. Varadarajan JJ)

15.11.1984

JUDGMENT

SABYASACHI MUKHARJI, J. -

1. This appeal arises out of the judgment and an order of the Gauhati High Court in an election petition. The petitioner-appellant was a voter in the West Tripura Parliamentary Constituency from No. 7 Ramnagar Assembly Segment. He contested the mid-term Lok Sabha election held in 1980 from the West Tripura Parliamentary Constituency as a nominee of Congress (I). There were six candidates including the petitioner contesting the said election. Respondent 1 was a CPI (M) candidate. December 8, 1979 was the date of filing of the nominations. Nominations were scrutinized on December 11, 1979 and the withdrawal date was December 13, 1979. On January 6, 1980 the polling was held and the result of the election was declared on January 8, 1980. The main contest was between the petitioner/appellant and respondent 1, Ajoy Biswas. Respondent 1 had secured 1,98,335 votes as against the appellant who had secured 1,42,990 votes. Respondent 1 was declared elected.

2. The only point on which the election petition by the appellant/petitioner was pressed before the High Court and the only urged before us in this appeal, is whether respondent 1 was disqualified for being elected as a member of the House of people as he held an office of profit under the Government of Tripura within the meaning of Article 102(1)(a) of the Constitution. On the relevant date, respondent 1 was the Accountant-in-charge of the Agartala Municipality. Therefore, the question involved in this appeal, is, whether an Accountant-in-charge of the Agartala Municipality holds an officer of profit within the meaning of Article 102(1)(a) of the Constitution. In order to determine this question, it will be necessary to refer to certain facts.

3. Respondent 1 was employed in Agartala Municipality and held the post carrying the scale of pay of Rs. 80-180 per month. The Commissioners of the Agartala Municipality were superseded by an order of the State Government under Section 553 of the Bengal Municipal Act, 1932 as extended to the State of Tripura in 1975. The effect of Section 554 of the said Act is that during the period of supersession the powers and duties of the Commissioners and Chairman shall be exercised and performed by the Administrator appointed by the States Government under that section. Respondent 1 who was under suspension at the times of supersession was dismissed from service in the disciplinary proceedings against him by the Administrator of the Agartala Municipality on December 20, 1975. The State Government thereafter had confirmed the order of dismissal. When the Left Front Government came in power in the State of Tripura, respondent 1 was reinstated to the post of Accountant-in-charge of Agartala Municipality on May 6, 1978 with immediate effect by the Administrator. So at the relevant time he was an Assistant Accountant and was Accountant-in-

charge under the Agartala Municipality drawing a monthly salary of Rs. 200.

4. It is necessary to briefly note some of the relevant provisions of the said Act in view of the contentions urged in this appeal. Proviso (ii) to Section 66(2) of the said Municipal Act provides that no appointment carrying a monthly salary of more than two hundred rupees or a salary rising by periodical increments to more than two hundred rupees shall be created without the sanction of the State Government, and every nomination to, and dismissal from, any such nomination shall be subject to confirmation by the state Government. It appears that the Deputy Secretary to the Government of Tripura by his letter dated May 6, 1978 had conveyed to the Administrator, Agartala Municipality, decision of the Government for cancellation of the order of confirmation of the dismissal communicated to him on December 19, 1975. As a result, the cancellation order ceased to be effective and respondent 1 was reinstated and it was further provided that the period between the date of dismissal and the date of reinstatement would be treated as period spent on duty for all purposes.

5. The Act further provides that there shall be established for each municipality a body of Commissioners consisting of such members or Commissioners, not being more than twenty nor less than six as the State Government may specify in the notification constituting the municipality. Such Commissioners shall be a body corporate by the name of the Municipal Commissioners of the place by reference to which the municipality is known, having perpetual succession and a common seal, and by that name shall sue and be sued. The municipality consists of the elected Commissioners. A Chairman is elected by the Commissioners within 30 days from the date of publication of the result of the general election of the Commissioner in the municipality failing which the State Government has power to appoint one of the Commissioners to be Chairman. A Vice-Chairman is also to be elected from amongst themselves. The Chairman is empowered within certain limitations to transact the business connected with the Act and exercise all the powers vested in the Commissioners under the Act, except as otherwise provided. The Commissioners are to hold office for four years commencing from the date of the first meeting of the newly formed body of Commissioners after a general election of Commissioners in the municipality at which a quorum is present. An elected Chairman or Vice-Chairman may at any time be removed from his Office by a resolution of the Commissioners as laid down in Section 61(2) and (3) of the said Act. The Act also empowers the State Government to remove an elected Commissioner on certain grounds set out in Section 62 of the said Act.

6. In view of the contentions raised in this appeal, it would be relevant to refer and set out Section 66 of said Act which is as follows :

66. Appointment of Subordinate Officers. - (1) The Commissioners at a meeting may, subject to the provisions of this Act and the rules made thereunder from time to time, determine what officers and what servants of the Commissioners are necessary for the municipality and may fix the salaries and allowances to be paid and granted to such officers and servants.

(2) Subject to the scale of establishment approved by the Commissioners under sub-section (1), the Chairman shall have power to appoint such persons as he may think fit, and from time to time to remove such persons and appoint others in their places :

Provided as follows :

(i) a person shall not be appointed to an office carrying a monthly salary of more than fifty rupees or a salary rising by periodical increments to more than fifty rupees without the sanction of the Commissioners at a meeting, and an officer or servant whose post carries a monthly salary of more than twenty rupees shall not be dismissed without such sanction;

(ii) no appointment carrying a monthly salary of more than two hundred rupees or a salary rising by periodical increments to more than two hundred rupees shall be created without the sanction of the State Government, and every nomination to, and dismissal from, any such appointment shall be subject to confirmation by the State Government;

(iii) no person holding an office carrying a monthly salary of one hundred rupees or more shall be dismissed unless such dismissal is sanctioned by a resolution of the Commissioners passed at a special meeting called for the purpose and, except with the consent of the State Government unless such resolution has been supported by the votes of not less than two-thirds of the total number of Commissioners holding office for the time being.

(3) Notwithstanding anything contained in sub-section (2), the creation of and nomination to or suspension, removal or dismissal from, the post of Executive Officer shall, irrespective of the salary assigned to the post, be subject to confirmation by the State Government.

7. The Act further provides that besides the officers and the servants mentioned above, all or any of the officers mentioned in Section 67 may be appointed by the Commissioners. In certain circumstances, the Act provides, that the State Government may have an Executive Officer for such period as may be specified in the notification. Section 93 provides that as soon as may be after the first day of April in every year not later than such date as may be fixed by the State Government, the Commissioners shall submit to the State Government a report on the administration of the municipality during the preceding year in such form and with such details as the State Government may direct, and a copy of the report shall also be submitted by the Commissioners to the District Magistrate. The Commissioners of a municipality may acquire and hold property within or without the limits of the municipality, and all property within the municipality of the nature specified in Section 95, other than property maintained by the Central Government or any other Local Authority, are vested in and belong to the Commissioners, and are under their direct management and control. By Section 102 of the said Act, the Commissioners are empowered to purchase, take on lease or otherwise acquire any land for the purposes of the said Act, and may sell, lease, exchange or otherwise dispose of any land not required for such purposes. They are also empowered to enter into and perform any contract necessary for the purposes of the Act. A fund called the municipal fund is constituted for each municipality and all sums received by or on behalf of the Commissioners under the said Act or otherwise, and the balance, if any, standing at the credit of the municipal fund of the municipality at the commencement of the said Act, are credited to the said fund. The purposes to which the municipal fund is applicable are enumerated in Section 108 of the Act. If any work is estimated to cost above ten thousand rupees, the State Government may require the plans and estimates of such works to be submitted for its approval or for the approval of any servant of the Government before such work, in such form as it might prescribe.

8. There are provisions for imposing taxes, tolls and fees under Section 123 of the said Act and to

make assessment of the rates on the annual value of the holdings under Section 128 of the said Act. Powers are conferred to impose taxes. There are other provisions for raising fund for the municipality by way of charging fee for registration etc. The Act empowers raising of funds for the municipality for carrying out the purposes of the said Act.

9. In this connection it may be relevant to refer to clause (31) of Section 3 of the General Clauses Act, 1897, and in view of the provisions of the Act it was held by the High Court that Agartala Municipality is a 'Local Authority' within the meaning of that expression as defined in clause (31) of Section 3 of the General Clauses Act, 1897. We are of the opinion that the High Court was right.

10. In view of the facts narrated before, it was found by the High court and in our opinion rightly that respondent 1 was at the relevant time holding an office of profit under a local municipality. Section 66 which we have set out hereinbefore indicates that the appointment of persons to the category of post held by respondent 1 was to be made by the Commissioners of Municipality, but the appointment was subject to the confirmation by the State Government. The High Court held and we are of the opinion rightly that respondent 1 was an officer of the Commissioners. Section 63 of the said Act provides that such officers and servants of the Commissioners shall be subordinate to the Execute officers appointed by the Commissioners. Respondent 1 was appointed by Commissioners though sanction of the Government was obtained. He could be removed by the Commissioners again subject to the sanction of the Government. He was paid out of the municipal funds which the Municipality was and is competent to raise. From the analysis of the provisions of the Act it is clear that though the Government exercises certain amount of control and supervision, respondent 1 was not an employee of the Government nor was he required to perform governmental functions for the Government.

11. Municipalities are separately mentioned in contradistinction of the State Government as it will be clear from reference to Item 5 in List II of the VII Schedule of the Constitution. Therefore, a Local Authority as such is separate and distinct. This will become further clear from Article 58(2) of the Constitution.

12. The question involved in this appeal is whether respondent 1 held an office of profit under sub-clause (a) of clause (1) of Article 102 of the Constitution. Sub-clause (a) of Article 102(1) provides as follows :

#102(1) * * *##

(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;

13. In contradistinction, clause (2) of Article 58 which mentions disqualifications for election as President provides as follows :

58. Qualifications for election as President. - (1) * * *

(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.

14. In fact a person who is holding an office of profit either under the Government of India or the

Government of the State or any other local or other authority subject to the control of the said Governments is disqualified from becoming a President but if a person holds an office of profit under the Government of India or the Government of any state, he only is disqualified from being a Member of Parliament. A holder of the office of profit under any authority or Local Authority subject to the control of the State or Central Government is as such not disqualified from becoming a Member of Parliament. Keeping in view these provisions, it is necessary to consider the question whether respondent 1 was holding an office of profit under the State Government.

15. In the case of *D. R. Gurushantappa v. Abdul Khuddus Anwar* ((1969) 3 SCR 425 : (1969) 1 SCC 466 : AIR 1969 SC 744 : 41 ELR 153), this Court had to consider whether a candidate employed in a company owned by the Government was disqualified under Articles 102(1)(a) and 191(1)(a) of the Constitution and in this connection considered the relevant provisions of Articles 102(1)(a) and 191(1)(a) of the Constitution. After discussing the case of *Gurugobinda Basu v. Sankari Prasad Ghosal* ((1964) 4 SCR 311 : AIR 1964 SC 254 : (1964) 1 SCJ 259 : 25 ELR 77) and the decision in the case of *Maulana Abdul Shakur v. Rikhab Chand* (1958 SCR 387 : AIR 1958 SC 52 : 1958 SCJ 329 : 13 ELR 149), this Court came to the conclusion that the mere fact that the Government had control over the Managing Director and other Directors as well as the power of issuing directions relating to the working of the company could not lead to the inference that every employee of the company was under the control of the Government.

16. The true principle behind this provision in Article 102 (1)(a) is that there should not be any conflict between the duties and the interest of an elected member. Government controls various activities in various spheres and in various measures. But to judge whether employees of any authority or local authorities under the control of Government become Government employees or not or holders of office of profit under the Government, measure and nature of control must be judged in the light of the facts and circumstances in each case so as to avoid any possible conflict between personal interests and duties. This position was further examined in cases of *Surya Kant Roy v. Imamul Hai Khan* ((1975) 3 SCR 909 : (1975) 1 SCC 531 : AIR 1975 SC 1053). There under Bihar and Orissa Mining Settlement Act, 1920, a Board called the Mines Board of Health may be established to provide for the control and sanitation of any area within which the persons employed in a mine reside and for the prevention therein of the outbreak and spreads of epidemic diseases. After analysing the facts of that case, this Court held that the mere fact that the candidate was appointed Chairman of the Board by State Government would not make him a person holding an office of profit under the State Government. There the Supreme Court referred to the decision in the case of *Shivamurthy Swami Inamdar v. Agadi Sanganna Andanappa* ((1971) 3 SCC 870). This Court in *Surya Kant Roy v. Imamul Hai Khan* ((1975) 3 SCR 909 : (1975) 1 SCC 531 : AIR 1975 SC 1053) observed at page 911 as follows : (SCC p. 533, para 6)

Here again it is to be pointed out that the Government does not pay the remuneration nor does the holder perform his functions for the Government. To hold otherwise would be to hold that local bodies like Municipal Councils perform their functions for the Government though in one sense the functions they perform are governmental functions.

17. In the case of *D. R. Gurushantappa v. Abdul Khuddus Anwar* ((1969) 3 SCR 425 : (1969) 1 SCC 466 : AIR 1969 SC 744 : 41 ELR 153) mentioned hereinbefore, at page 434 this Court observed as follows : (SCC p. 473, Para 11)

Thus, in the case of election as President or Vice-President, the disqualification arises even if the candidate is holding an office of profit under a local or any other authority under the control of the

Central Government or the State Government, whereas, in the case of a candidate for election as a Member of any of the Legislatures, no such disqualification is laid down by the Constitution if the Office of profit is held under a local or any other authority under the Control of the Government and not directly under any of the Governments. This clearly indicates that in the cases of eligibility for election as a member of a Legislature, the holding of an office of profit under a corporate body like a local authority be under the control of the Government. The mere control of the Government over the authority having the power to appoint, dismiss, or control the working of the officer employed by such authority does not disqualify that officer from being a candidate for election as a member of the Legislature in the manner in which such disqualification comes into existence for being elected as the President or the Vice-President. The Company, in the present case, no doubt did come under the control of the Government and respondent 1 was holding an office of profit under the Company; but, in view of the distinction indicated above, it is clear that the disqualification laid down under Article 191(1)(a) of the Constitution was not intended to apply to the holder of such an office of profit.

18. This view was again reiterated by this Court in the case of *Madhukar G. E. Pankakar v. Jaswant Chobbidas Rajani* ((1976) 3 SCR 832, 851 : (1977) 1 SCC 70, 87 : AIR 1976 SC 2283) where this Court observed as follows : (SCC p. 87, paras 38, 39)

The core question that comes to the fore from the survey of the panorama of case-law is as to when we can designate a person gainfully engaged in some work having a nexus with Government as the holder of an 'office of profit' under Government in the setting of disqualification for candidature for municipal or like elections. The holding of an office denotes an office and cannotes its holder and this duality implies the existence of the office as an independent continuity and an incumbent thereof for the nonce.

Certain aspects appear to be elementary. 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 (*Gurugobinda* ((1964) 4 SCR 311 : AIR 1964 SC 254 : (1964) 1 SCJ 259 : 25 ELR 77)). Similarly, we have to look at the substance, not the form. Thirdly, all the several factors stressed by this Court, 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 guide in arriving at a sensible conclusion.

19. In a recent decision of this Court in the case of *Biharilal Dobray v. Roshan Lal Dobray* ((1984) 1 SCC 551), this Court was concerned with the question whether an office of profit was held directly under the Government in the facts of that case. There was an assistant teacher of a Basic Primary School run by U.P. Board of Basic Education under U.P. Basic Education Act, and it was held that it was held that it was an office of profit under the State Government within the meaning of Article 191(1)(a) of the Constitution and therefore he was disqualified from election. There the respondent was originally employed as an assistant teacher in a Basic Primary School which was being run and managed by the Zila Parishad. On coming into force of the U.P. Basic Education Act, 1972, he became an employee of the Board of Basic Education under Section 9(1) of the Act. While holding the post of an assistant teacher as such he filed his nomination for his election to the State Legislative Assembly. But the Returning Officer rejected his nomination paper on the ground that he was holding an office of profit under the State Government and hence he was disqualified under Article 191 (1)(a) for being elected as an MLA. Article 191(1)(a) is in terms *pari materia* with Article 102(1)(a) of the Constitution regarding the election to the State Assembly. The respondents therein filed an election petition and the High Court allowed the same declaring that the election of

the appellant by rejecting the nomination of the respondent was void. The appellant therefore preferred the appeal to this Court. This Court allowed the appeal and it was held that the respondent was holding an office of profit under the State Government.

20. As we have mentioned before, the object of enacting provisions like Article 102(1)(a) and Article 191(1)(a) is that a person who is elected to a Legislatures or Parliament should be free to carry on his duties fearlessly without being subjected to any kind of governmental pressure. The term "office of profit under the Government" used in clause (a) is an expression of wider import than a post held under the Government which is dealt with in Part XIV of the Constitution. The measure of control by the Government over a Local Authority should be judged in order to eliminate the possibility of a conflict between duty and interest and to maintain the purity of the elected bodies. After reviewing various cases, and the provisions of the various sections of the U.P. Basic Education Act, 1972 especially in view of Section 13 of the Act, this Court held in the last mentioned case that the measure of control was such that U. P. Education Board was an authority which was not truly independent of the Government and every employee of the Board was in fact holding an office of profit under the State Government. The Statement and object of the U.P. Basic Education Act, 1972 and Sections 4, 6, 7, 13 and 19 all of which have been set out in extenso in that decision make that conclusion irresistible.

21. For determination of the question whether a person holds an office under the Government each case must be measured and judged in the light of the relevant provisions and the sections and having regard to the provisions of the Bengal Municipal Act, 1932 as extended to Tripura, the provisions of which have been set out hereinbefore, we are of the opinion that the Government does not control officers like respondent 1 and that he continues to be an employee of the Municipality though his appointment is subject to the confirmation by the Government. He does not cease to be an employee of the Municipality. Local Authority as such or any other authority does not cease to become independent entity separate from Government. Whether in a particular case it is so or not must depend upon the facts and circumstances of the relevant provisions. To make in all cases employees of Local Authorities subject to the control of Government, holders of office of profit under under the Government would be to obliterate the specific differentiation made under Article 58(2) of the Constitution and to extend disqualification under Article 102(1)(a) to an extent not warranted by the language of the article.

22. Having noted the relevant provisions, we are of the opinion that respondent 1 was not at the relevant time a holder of office of profit under the Government. Some amount of control is recognised even in a Local Authority which is taken account of under Article 58. The High Court held that respondent 1 did not hold office of profit under the Government of Tripura on the date of filing of the nomination on an analysis of relevant provisions of the Act which we have set out hereinbefore. We are in agreement with this view of the High Court.

23. In the premises, respondent 1 was not disqualified from filing his nomination. The appeal, therefore, fails and is accordingly dismissed with costs.

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