

Satrucharla Chandrasekhar Raju

Vs

Vyricherla Pradeep Kumar Dev and Another

Civil Appeal No. 4184 of 1991

(K. Jayachandra Reddy, G. N. Ray JJ)

04.09.1992

JUDGEMENT

K. JAYACHANDRA REDDY, J.:-

1. This is an appeal under Section 116-A of the Representation of the People Act, 1951 preferred against the order of the High Court setting aside the election of the appellant who was elected as a member of the Andhra Pradesh Legislative Assembly from No. 8 Naguru (ST) constituency on the ground that he was holding an office of profit under the State Government at the relevant time and was thus disqualified under Article 191(1)(a) of the Constitution of India for being chosen as a member of the Assembly.

2. The appellant was appointed as a single Teacher in a primary school run by the Integrated Tribal Development Agency ('ITDA' for short) by its Project Officer. He joined duty in January, 1988 and was working in a school in Jiyammavalasa Mandal in Vizianagaram district. On 2-8-88 the Tribal Welfare Officer inspected the said school and is alleged to have noticed some irregularities and he kept the appellant under suspension pending enquiry by an order dated 23-8-88. The appellant questioned the same before the Andhra Pradesh Administrative Tribunal by filing a petition but the same was rejected. Thereafter by a letter dated 6-10-189 the appellant submitted his resignation to the Project Officer who was the appointing authority. However, the Project Officer made an endorsement on the said letter that his resignation cannot be accepted in view of the pending enquiry. Subsequently the election programme for the Legislative Assembly was announced and the appellant filed his nomination and contested election from the above-mentioned constituency on 22-11-89. Counting took place on 26-11-89 and on 27-11-89 the appellant was declared duly elected. The respondent No. 1, who was one of the contesting candidates and who lost the election, filed an election petition challenging the election of the appellant on the ground that the appellant was disqualified as he was holding an office of profit not only on the date of filing the nomination but also subsequently in view of the fact that his resignation was not accepted in view of the pending enquiry and therefore he shall be deemed to be holding an office of profit under the Government. The respondent also stated in his election petition that he was not aware of the appellant's disqualification at the time of the scrutiny of the nomination papers. The appellant filed a written submission contesting the election petition inter alia contending that the ITDA under which he is deemed to be holding an office as a teacher was only a registered society under the Societies Registration Act and the said society cannot be said to be the Government nor is a part of the Government and that it is an independent body. It is also stated that since he has tendered his resignation on 26-10-89 it shall be deemed to have come into effect from that date.

3. The only issue that came up for consideration before the High Court in the election petition was whether the first respondent i.e. appellant herein was holding an office of profit under the Government of Andhra Pradesh on the date of his nomination and was disqualified to contest for the same.

4. Evidence was led in by both the sides. The main contention of the appellant was that ITDA was only a registered society and even assuming that the Government has some control over the sanction of posts and composition of the governing body of the ITDA it cannot be said to be the Government or part of it or to be an instrumentality of the Government. Therefore the appellant cannot be said to have been holding an office of profit and the mere fact that he was appointed as a teacher by the Project Officer of the Society he cannot be deemed to have been appointed by the Government. The learned Judge after referring to the relevant clauses of memorandum of association of the Society held that i) Although the Society appears to be independent of the State Government but in substance its activities are controlled by the officers of the Government who are ex officio members of the governing body. The Chairman as well as the Project Officer are the officers of the State Government. A majority of the members of the governing body are the officers holding posts in the Government by virtue of which they became the ex officio members of the governing body. Thus for all practical purposes it is the officers of the Government who control the activities of the society; ii) though the Project Officer is the appointing authority of the appellant but he is only a Secretary of the Society by virtue of his being an officer in the Government; iii) the Government sanctions the number of posts of teacher, fixes their scales of pay; iv) although the rules provide to have funds of its own by way of recurring and non-recurring grants made by the Government of India but it is the Government who sanctions the funds; v) since the Civil Services (Classification, Control and Appeal) Rules of the State Government are being applied to the teachers of the Society, they must be deemed to have been treated as the employees of the Government. The State has to provide free and compulsory education to all the children and primary education is also the responsibility of the State Government and it is meeting expenditures out of its funds. Therefore the function of appointment of the teachers in the Society by the Project Officer is one of the Governmental functions and thus the State Government exercises almost full control. For the aforesaid reasons the High Court held that the appellant was holding an office of profit and thus incurred the disqualification.

5. Learned counsel for the appellant before us contended that the reasons given by the High Court by themselves, even if accepted to be correct, are not enough to conclude that the appellant was holding an office of profit and that one of the main tests is whether the Government has got power to appoint and to dismiss the appellant from service and that admittedly the Government has not the authority to dismiss him and this coupled with the fact that the Society is a registered society would clinch that the society is not the Government or a part of the Government and that the appellant was not holding an office of profit under the Government. The learned counsel also submitted that some of the reasons given by the High Court are not conclusive for holding that the Society is the Government or a part of the Government.

6. Before we proceed further one aspect namely that the appellant ceased to be a teacher before he filed his nomination to contest the assembly election by virtue of the fact that he sent a letter of resignation to the post has to be considered. Admittedly the resignation was not accepted by the day of his election and he was kept under suspension pending enquiry w.e.f. 23-8-88 and he was being paid the subsistence allowance in accordance with the Andhra Pradesh Civil Services (Classification, Control and Appeal) Rules. The learned Judge of the High Court has also mentioned in the judgment that the appellant did not persist on framing an issue in this regard and hence

no specific issue was framed as to whether the resignation of the appellant was effective from the date he submitted his resignation and therefore he ceased to be a teacher. It appears that the said plea was not pressed at the time of hearing of the election petition. Therefore it follows that the appellant was holding the said post at the time of his nomination and election. The only question therefore to be considered is whether the first respondent was holding an office of profit under the State Government.

7. Article 191 (1)(a) of the Constitution of India which imposes the disqualifications is as follows:

"191. Disqualifications for membership(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State-

(a) 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;

xx xxx xx xxx"

The scope and the meaning of the words "holds any office of profit under the Government..... have been considered in a number of cases. In *Ravanna Subana v. G. S. Kageerappa*, AIR 1954 SC 653, it was held that an office of profit must be held under the Government to which any pay, salary, emoluments are attached. In *Maulana Abdul Shakur v. Rikhab Chand*, 1958 SCR 387 : (AIR 1958 SC 52), the appellant held the post of Manager of a school run by a committee constituted under the provisions of Durgah Khawaja Saheb Act (36 of 1955) under the Central Government. Under the provisions of the said Act, all the Committee members are to be appointed by the Central Government which is also empowered to supersede the Committee and the appellant was appointed as Manager by the said Committee. When the appellant was elected to the Council of States, -the unsuccessful candidate questioned the election on the ground that the appellant was appointed by a committee of management which in turn was appointed by the Central Government and that the Committee of the Management could be removed by the Central Government, therefore the appellant was holding an office under the Central Government. The Election Tribunal accepted the said contention and set aside the election of the appellant. On appeal this Court reversed the decision of the Tribunal holding that "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 removable by the Government of India or the Committee can make by-laws prescribing the duties and powers of its employees, cannot convert the servants of the committee into the holders of profit under the Government of India. The appellant is neither appointed by the Government of India nor is removable by the Government of India nor paid out of the revenues of Government of India". It was further held that "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 a person is holding an office of profit under the Government though payment from a source other than the Government revenues

is not always a decisive factor. But the appointment of the appellant does not come within this test".

(Emphasis supplied)

8. In *Dr. Deorao Laxman Anande v. Keshav Laxman Borkar*, AIR 1958 Born 314, it was observed that (para 4):

"Before a person can be held to be disqualified under Article 19 1 (1)(a), three things must be proved that (1) he held an office; (2) that it was an office of profit; and (3) that it was an office under the Government of India or the State Government."

This Court further observed that (para 12 of AIR):

"In our opinion, the principal tests for deciding whether an office is under the Government, are (1) what authority has the power to make an appointment to the office concerned, (2) what authority can take disciplinary action and remove or dismiss the holder of the office and (3) By whom and from what source is his remuneration paid? Of these, the first two are, in our opinion, more important than the third one".

Applying the aforesaid tests, it was held that an Insurance Medical Practitioner functioning under the Employees' State Insurance Act, 1948 is holder of an office under the State Government. In *M. Ramappa v. Sangappa*, 1959 SCR 1167 : (AIR 1958 SC 937), this Court observed that "Patels and Shanbhoo who are the holders of hereditary village offices governed by the Mysore Village Offices Act, 1908 are officers who are appointed to their offices by the Government though it may be that the Government has no option in certain cases but to appoint an heir of the last holder; that they hold their office by reason of such appointment only; that they work under the control and supervision of the Government; that their remuneration is paid by the Government out of Government funds and assets; and that they are removable by the Government, and that there is no one else under whom their offices could be held". In *Gopala Kurup v. S. A. Paul*, AIR 1961 Ker 242, the contention was that the appellant, a teacher in aided school, was disqualified to stand for the election as he is a person holding an office of profit under the Government. after the Kerala Education Act and the exemption from disqualification granted earlier in favour of persons holding an office in any educational institution other than the Government institution has no application after the Kerala Education Act. Repelling the contention, it was held that even after the Kerala Education Act, "The aided schools with their own properties, their own funds and their separate personalities, cannot be treated as Government institutions and in absence of such merger, the employees of such institutions would still enjoy the benefits allowed to any other educational institution other than a Government Institution" and that therefore, they are entitled for exemption. In *Joti Prasad v. Kalka Prasad*, AIR 1962 All 128, it was held that "Vice-Chancellor of the Agra University, holding an office which is a whole time job carrying a salary, is appointed by the Government of Uttar Pradesh in his capacity as the Chancellor of the University under the provisions of the Agra University Act, 1926. Even so, the Vice-Chancellor is not disqualified to stand as a Member of the U. P. Legislative Council from the U. P. Graduates Constituency on the ground that he holds the office of profit under the State Government. The provisions of the Agra University Act reveal the intention of the Legislature not to regard the Chancellor to be a part of the State Government. While exercising his powers under the said Act, the Chancellor does not exercise the executive powers of the State and the office of the Vice-Chancellor cannot be said to be under the

state Government by virtue of the appointment having been made by the Governor in another capacity". In *Kona Prabhakar Rao v. M. Seshagiri Rao*, (1982) 1 SCC 442: (AIR 1981 SC 658), this Court after referring to *Gurugobinda Basu v. Sankari Prasad Ghosal*, (1964) 4 SCR 311 : (AIR 1964 SC 254) and *Maulana Abdul Shakur's case*, (AIR 1958 SC R2), accepted the ratio therein that the factors which are held to be decisive were (a) the power of the Government to appoint a person to an office of profit or to continue him in that office or to revoke his appointment at their discretion, and (b) payment from out of Government revenues, though it was pointed that payment from a source other than Government revenues was not always a decisive factor.

9. Learned Judge of the High Court after referring to these and other decisions formulated tests or principles to be applied ' for determining whether the person holds an office of profit under the Government or not. On a consideration of the several G.Os. and some clauses from the memorandum of association of the ITDA Vizianagram (Parvti,puram) and its rules and regulations, the learned Judge concluded thus:

"From the aforesaid circumstances, it is seen that the State Government exercises almost full control over the sanctioning of the posts and the composition of the Governing Body of the society predominantly consists of the officers of the Government who are ex officio members by virtue of their office in the Government. It is also evident that the entire expenditure is met by the Government and in fact the Government has sanctioned the posts and fixed their pay-scales. It is also clear that with regard to the disciplinary action, the CCA Rules are being applied and there are no rules framed by the Society with regard to the same.

From all the aforesaid circumstances, it is evident that the Government is discharging its function of providing primary education from out of its own funds through the instrumentality of the Project Officer in I.T.D.A. areas. Although the appointment is made by the Project Officer, but it is the Government that is in control of the creation of posts, the fixation of scales of pay and the salaries of the teachers are being paid out of the amounts sanctioned by the Government from its funds. In fact, the society has no budget of its own, and for all purposes, the society is treated as a limb of the Government.

For all the aforesaid reasons, I hold that the Ist respondent was holding an office of profit under the State Government and is disqualified for being chosen as and from being a member, of the Legislative Assembly of the State of Andhra Pradesh."

10. Learned counsel for the appellant submitted that even assuming that the Government has control over the ITDA because of several factors like sanctioning of posts and funds, the appellant was only appointed by the Project Officer and he alone has the power to revoke his appointment. According to the learned counsel, in a case of this nature, the decisive test is whether the Government has power to appoint a person or to revoke his appointment and that learned Judge of the High Court has not kept the same in view while holding that the appellant was holding an office of profit "under the Government". Learned counsel further submitted that the office held by the appellant under ITDA does not in any manner come into conflict with his duties as a legislator as he does not have any, direct obligations with the Government. Therefore, it cannot be said that he was holding an office of profit under the Government since he is neither appointed by the Government nor his appointment can be revoked by the Government.

11. On a careful examination of the ratio laid down in the above mentioned cases some of the tests or principles that emerge for determining a person holds an office of profit under the Government, may be summarised thus :

"(1) The power of the Government to appoint a person in office or to revoke his appointment at the discretion. 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.

(2) The payment from out of the government revenues; are important factors in determining whether a person is holding an office of profit or not of the Government. Though payment from a source other than the government revenue is not always a decisive factor.

(3) The incorporation of a body corporate and entrusting the functions to it by the Government may suggest that the statute intended it to be a statutory corporation independent of the Government. But it is not conclusive on the question whether it is really so independent. Sometimes, the form may be that of a body corporate independent of the Government, but in substance, it may be the just alter ego of the Government itself.

(4) The true test of determination of the said question depends upon the degree of control, the Government has over it, the extent of control exercised by very other bodies or committees, and its composition, the degree of its dependence on the Government for its financial needs and the functional aspect, namely, whether the body is discharging any important Governmental function or just some function which is merely optional from the point of view of the Government."

12. It can be seen that one of the main tests of determination of the question is the degree and extent of control i.e. direct or remote over the ITDA by the Government particularly with reference to making the appointment of the persons in office or to revoke the same at its discretion. In this context it is necessary to refer to some later decisions of this Court which are directly on this point and some of which have not been cited before the High Court. Before doing so we may, however, usefully refer to the object underlying Articles 102(1)(a) and 191(1)(a) of the Constitution. These two Articles deal with disqualifications of a person being chosen as a member of the Parliament or the State Legislatures respectively on the ground of holding of office of profit under the Government. Generally it is understood that an office means a position to which certain duties are attached. An office of profit involves two elements namely that there should be such an office and that it should carry some remunerations. It is not the same as holding a post under the Government, and therefore for holding an office of profit under the Government, a person need not be in the service of the Government. It is well-settled now that the object of enacting Articles 102(1)(a) and 191(1)(a) is that there should not be any conflict between the duties and interests of an elected member and 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 very likelihood of such person succumbing to the wishes of the Government. These Articles are intended to eliminate the possibility of such a conflict between duty and interest so that the purity of legislature is unaffected. In *Bihari Lal Dobray v. Roshan Lal*

Dobray, (1984) 1 SCC 551 : (AIR 1984 SC 385 at p. 387), this Court observed thus:

"The object of enacting Article 19 1 (1)(a) is plain. A person who is elected to a Legislature should be free to carry on his duties fearlessly without being subjected to any kind of governmental pressure. If such a person is holding an office which brings him remuneration and the Government has a voice in his continuance in that office, there is every likelihood of such person succumbing to the wishes of Government. Article 191(1)(a) is intended to eliminate the possibility of a conflict between duty and interest and to maintain the purity of the Legislatures."

In Ashok Kumar Bhattacharyya v. Ajoy Biswas, (1985) 2 SCR 50: (AIR 1985 SC 21 1 at p. 215), this Court observed as under:

"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."

13. In this background, we shall examine the ratio laid down in some of the cases with respect to other general tests to be applied. As already noticed that in order to determine whether a person holds an office of profit under the Government, several tests are ordinarily applied such as whether the Government makes the appointment, whether the Government has the right to remove or dismiss the holder of the office, whether the Government pays the remuneration, whether the functions performed by the holder are carried on by him for the Government and whether the Government has control over the duties and functions of the holder. In Maulana Abdul Shakur's case, (AIR 1958 SC 52), as noted above one of the main tests laid down is that the power of the Government to appoint a person to an office or 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 and that in determining whether a person is holding an office of profit under the Government the source of payment is not always a decisive factor. In Gurugobinda Basu's case, (AIR 1964 SC 254), 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. While upholding the disqualification the Court held that (at p. 258 of AIR):

'It is clear from the aforesaid observations that in Maulana Abdul Shakur's case, 1958 SCR 387: (AIR 1958 SC 52) the factors which were held to be decisive were (a) 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 (b) payment from out of Government revenues, though it was pointed out that payment from a source other than Government revenues was not always a decisive factor. In the case before us the appointment of the appellant as also his continuance in office rests solely with the Government of India in respect of the two companies."

In D. R. Gurushantappa v. Abdul Khaddus Anwar, (1969) 3 SCR 425 : (AIR 1969 SC 744), once again these tests are reiterated. After referring to the above-mentioned cases and while rejecting the contention that the amount of control which the Government exercises could be the main test, it was held thus (para 10 of AIR):

"We are unable to accept the proposition 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 can lead to the inference

that every employee of the Company is under the control of the Government. The power of appointment and dismissal of respondent No. 1 vested in the Managing Director of the Company and not in the Government. Even the directions for the day-to-day work to be performed by the respondent No. 1 could only be issued by the Managing Director of the Company and not by the Government. The indirect control of the Government which might arise because of the power of the Government to appoint the Managing Director and to issue directions to the Company in its general working does not bring respondent No. 1 directly under the control of the Government. In Gurugobinda Basu's case, (1964) 4 SCR 311 : (AIR 1964 SC 254), the position was quite different. In that case, the appellant was appointed by the Government and was liable to be dismissed by the Government. His day-to-day working was controlled by the Comptroller and Auditor General who was a servant of the Government and was not in any way an office-bearer of the two Companies concerned. In fact, the Court had no hesitation in holding that the appellant in that case was holding an office of profit under the Government, because the Court found that the several elements which existed were the power to appoint, the power to dismiss, the power to control and give directions as to the manner in which the duties of the office are to be performed, and the power to determine the question of remuneration. All these elements being present, the Court did not find any difficulty in finding that the appellant was holding an office of profit under the Government. In the case before us, the position is quite different. The power to appoint and dismiss respondent No. 1 does not vest in the Government or in any government servant. The power to control and give directions as to the manner in which the duties of the office are to be performed by respondent No. 1 also does not vest in the Government, but in an officer of the Company. Even the power to determine the question of remuneration payable to respondent No. 1 is not vested in the Government which can only lay down rules relating to the conditions of service of the employees of the Company. We are unable to agree that in these circumstances, the indirect control exercisable by the Government because of its powers to appoint the Directors and to give general directions to the Company can be held to make the post of Superintendent, Safety Engineering Department, an office of profit under the Government".

It was further observed that (para 11 of AIR):

"In this connection, a comparison between Arts. 58(2) and 66(4), and Arts. 102(1) and 191(1)(a) of the Constitution is of significant help. In Arts. 58(2) and 66(4) dealing with eligibility for election as President or Vice-President of India, the Constitution lays down that a person shall not be eligible for election 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. In Articles 102(1)(a) and 191(1)(a) dealing with membership of either House of Parliament or State Legislature, the disqualification arises only if the person holds any office of profit under the Government of India or the Government of any State other than an office declared by Parliament or State Legislature by law not to disqualify its holder. 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 Governments and not directly under any of the Governments. This clearly indicates that in the case 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 does not bring about disqualification even if that 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 No. 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 Art. 191(1)(a) of the Constitution was not intended to apply to the holder of such an office of profit".

(Emphasis supplied)

In *Madhuker G. E. Pankakar v. Jaswant Chobbildas Rajani*, (1976) 3 SCR 832: (AIR 1976 SC 2283), the question arose whether the appellant, a Doctor in a municipality in Maharashtra was holding an office of profit under the Government. After referring to some of the above mentioned cases, this Court held as under (at p. 2296 of AIR):

"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 qualification for candidature for municipal or like elections. The holding of an office denotes an office and connotes 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 the Government one need not be in the service of Government and there need be no relationship 'of master and servant (*Gurugobinda supra*) (AIR 1964 SC 254). 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 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.

In the present case, can we say that the post (forgetting the finer issue of office, as distinguished from post) is under the State Government? The capitation fee is the remuneration the doctor is paid and this comes not from Government direct but from a complex of sources. But *Gurugobinda* (AIR 1964 SC 254) and *Gurushantappa*, (1969) 3 SCR 425: (AIR 1969 SC 744), took the view that payment of remuneration not from public revenue is a neutral factor. Is the degree of control by Government decisive? The power to appoint, direct and remove, to regulate and discipline, may be good indicia but not decisive, as pointed out in *Gurushantappa*. In our case,

Government does have, partly direct and partly indirect, control but the conclusion is not inevitable because the doctor is put in the List not by Government directly but through a prescribed process where the Surgeon General has a presiding place. How proximate or remote is the subjection of the doctor to the control of Government to bring him under Government'. is the true issue." (Emphasis supplied)

Now we shall refer to Ashok Kumar Bhattacharyya's case, (AIR 1985 SC 21 1), on which considerable reliance is placed by the appellant. The question therein was whether respondent No. 1 who was elected, was disqualified under Article 102(1)(a). He was employed by the Agartala Municipality. He was appointed by Commissioners, though sanction of the Government was obtained and he could be removed by the Commissioners again subject to the sanction of the Government. He was paid out of municipal funds which the municipality was and is competent to raise. It was also accepted that from the analysis of the provisions of the Act the Government exercises certain amount of control and supervision over the municipality, but the High Court however held that in spite of these conditions being there, the elected candidate was only holding an office of profit under the local municipality and not under the Government. The Supreme Court, while upholding the same, observed that one of the tests to be emphasised was the power to appoint and power to remove. After referring to almost all the above-mentioned cases this Court held as under (para 16):

"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 the Government become Government employees -or not or holders of office of profit under the Government the measure and nature of control exercised by the Government over the employee must be judged in the light of the facts and circumstances in each case so as to avoid any possible conflict between his personal interests and duties and of the Government".

(Emphasis supplied)

14. To the same effect is the ratio in this context laid down in Bihari Lal. Dobray's case, (AIR 1984 SC 385), wherein it was observed as under (para 5):

"In order to determine whether a person holds an office of profit under the Government several tests are ordinarily applied such as whether the Government makes the appointment, whether the Government has the right to remove or dismiss the holder of the office....."

15. Articles 102(1)(a) and 191(1)(a) are incorporated 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. Therefore this object must be borne in mind in interpreting these Articles. It is in this context the words under the Government" so far as the present case is concerned, become more relevant and should be examined from that perspective keeping in view the necessary power to appoint or remove.

16. In Maulana Abdul Shakur's case, (AIR 1958 SC 52), it was held thus (para 15):

"A comparison of the different Articles of the Constitution, 58(2), 66(4), 102(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 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."

(Emphasis supplied)

In *Shivamurthy Swami, Inamdar v. Agadi Sanganna Andanappa*, (1971) 3 SCC 870, after referring to some of the above mentioned decisions this Court held thus:

"The tests for finding out whether an office in question is an office under a Government and whether it is an office of profit, 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 these functions?"

(Emphasis supplied)

In *Gurugobinda Basu's case*, (AIR 1964 SC 254), it was observed that the question has to be examined from the point of view of substance rather than of form and on the facts of that case and the power of the Government of India to remove the office holder from office is noted as one of the tests.

17. In the case before us, the appellant was holding an office of profit but the matter does not end there. As already noted the next and most important requirement is whether that office was under the Government. In appreciating this aspect, we have to bear in mind, in interpreting these Articles, the object namely to avoid conflict between duty and interest and to eliminate the misuse of official position to advance private benefit and to avoid likelihood of influence of the Government to promote personal advantage. It must also be borne in mind that 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. The source of payment for the office may also be taken into consideration but is not always a decisive factor. Likewise the control exercised by the Government may be one of the tests but as mentioned above that by itself is not a decisive test.

18. Now we shall refer to some of the relevant factors which have been taken into consideration by the learned Judge of the High Court in holding that the appellant held an office of profit "under the Government". No doubt the several G.Os referred to by the learned Judge indicated that all the educational institutions in the ITDA shall be brought under the unified control of the Education Department but at the same time we find that ITDA will have administrative control and

supervision. From some of the G.Os. it is clear that the Government accorded sanction for the creation of the posts and funds for meeting the expenditure. The evidence of the Project Officer, however, shows that he alone appoints teachers and has also the power to remove them but that is in the capacity of Project Officer but's not in the capacity of District Collector. No doubt at the time of appointment of Project Officer, he was a Government employee but once he is appointed as a Project Officer he became all officer of the ITDA exercising administrative control particularly in the matter of appointment of teachers and the removal. The Articles of Memorandum of Association of the ITDA which is a registered society and some of the rules and regulations are as follows:

"II. The Office of the Society shall be located at the office of the Secretary/ Treasurer of the Society designated as Project Officer, Integrated Tribal Development Agency, Vizianagaram.

III.(A) The main objectives of the Society shall be;

(1) To identify the problems of the tribals in the area;

(2) To investigate into problems with a view to formulate firm measures for the development of the area improving the economic and educational standards; and to maintain social and cultural heritage of the tribals and

(3) To formulate and to devise ways and means of implementing suitable programmes for the benefit of the tribals and the development of the area like:

(a) Land Reclamation

(b) Provision of irrigation facilities byharassing the available minor irrigation sources and digging new wells, apart from carrying repairs to minor irrigation sources.

.....

(4) To execute these plans for the benefit of the small tribals either directly or through others in coordination with the existing agencies engaged in this direction in the field, where private, public or co-operative such as Zilla Parishad, the Agro-Industries Corporation, Co-operative Banks, Girijen Corporation, Commercial Banks, Departments of th State and Central Government etc.

(5) To review the progress of execution of these activities as well as the effectiveness of the benefits directed towards the tribals.

B. To attain the main objectives cited above, the Society may:

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p) to undertake generally such other activities as conducive to the promotion of the economic interests and social and educational welfare of the Tribals for the attainment of the above objects;

(IV) The Governing Body of the Society shall be the body constituted as such under the regulations of the Society.

The relevant rules and regulations are also extracted hereunder:

"(2) Location: Office of the Secretary/ Treasurer designated as Project Officer, I.T.D.A. Vizianagaram.

IV(a) The Society shall maintain a roll of member at its registered office and every members shall sign the roll and state therein, his occupation and address.

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(g) the Agency shall in consultation with the State Government appoint a memberSecretary in whom the Executive Authority of the Agency, will vest.

(h) The Government of Andhra Pradesh State shall be entitled to obtain information, advice and assistance of the Society on all matters connected with all programmes undertaken or to be undertaken by the Society.

V) Powers of the Governing Body.

(i) Save as herein expressly provided, as having to be passed the Society in a general meeting, all the duties, powers, functions and rights whatsoever or consequential or incidental to the carry out of the objectives of the Society shall only be exercised or performed by the Governing Body_ subject to uch llimitation as the Government of Andhra Pradesh may from time to time impose in respect of the expenditure of its grant.

IX) Funds of the Society:

i) The funds of the society shall consist of the following:

a) Recurring and non-recurring grants made by the Government of India for the furtherance of the objectives of the Society ;

b) Income from investments

c) Income from other sources.

ii) The bankers of the Society shall be appointed by the Governing Body. All funds of the Society should be paid into Society's account with the said bankers and shall not be withdrawn except on cheques signed by the Secretary duly empowered in this behalf.

X) Accounts and Audit:

a) The Accounts of the Society shall be audited by a chartered accountant to be appointed by the Government of Andhra Pradesh. The nature of audit to be applied and the detail arrangements to be made in regard to the form of accounts and their

maintenance and prescribed by the Bye-laws to be framed by the Governing Body and approved by the Government of Andhra Pradesh.

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XI) Duties of the Office Bearers;

b) Project Officer will be in over all charge of the schemes and will take up the entire correspondence and will be in over all charge of the schemes.

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XII) Property of the Society:

All property.belong to the Society shall be deemed to be vested in the Governing Body of the Society but shall be referred as "the property of the Society".

XIII) Suits and Proceedings by and against the Society:

a) The Society may sue or may be sued in the name of the Chairman or Secretary or any office bearer authorised by the Governing Body in this behalf."

XIV) Constitution of the Body:

1) Distt. Collector Chairman

Vizianagram.

xxxxx xxxxx xxxxx

xxxxx xxxxx xxxxx

18) Special Deputy Collector, Member

(Tribal Welfare)

Kluiapota.

19) M.L.A. representing Member

the Parvatipuram tribes

Constituency

20) Tribal M.L.A. Member

S. Kota Assembly

Constituency.

21) Tribal M.L.A. Member

Naguru Assembly

Constituency.

22) Tribal M. L. A. Member

Satur Assembly

Constituency.

(Sr. Nos. 19 to 22 M.L.As. of the four local constituencies.)"

No doubt these rules go to show that the Governing Body of the Society consists of 19 members who were officers of various Departments of Government of Andhra Pradesh. They are ex-officio Chairman, Members, Secretary or Treasurer by virtue of their being in Government service. The remaining four are local legislators. At the most from this what all that can be said is that the Government sanctions the funds and sanctions the costs and exercises some control over the ITDA. The learned Judge also took into consideration yet another aspect namely that it is the responsibility of the State Government to provide compulsory education and the ITDA under the supervision and control of the Government particularly the Education Department in carrying out the governmental activities namely to provide education through the instrumentality of the Project Officer in ITDA areas. The learned Judge in this context held thus :

"Moreover, under the provisions of Art. 45 of the Constitution, the State has to provide free and compulsory education to all children until they complete the age of 14 years. Primary education is also the responsibility of the State Government. S. 7 of the A.P. Education Act, 1982 provides that the State Government shall endeavour to provide compulsory education for all children until they complete the age of 14 years and promote school education in the State by securing and maintaining the universal education hereafter for such children. With that objectives, as it is responsibility of the State Government, it sanctioned the number of posts of teachers in I.T.D.A. areas, also and is meeting the expenditure out of its funds. Thus, the function of appointment of teachers in I.T.D.A. by the Project Officer is one of the important governmental function."

No doubt, this is also one of the tests that has to be taken into consideration as pointed out by this Court in *Biharilal Dobray*'s case (AIR 1984 SC 385) but this aspect again forms part of one of the main tests namely the nature of control that the Government has over the ITDA. The learned Judge also has taken into account that for the purpose of disciplinary action the ITDA has adopted the Civil Services (Classification, Control and Appeal) Rules. But here again these Rules are meant to be enforced by ITDA through the Project Officer or any other concerned officer of ITDA. It is only for the benefit of the internal administration of the ITDA that these rules are adopted. Therefore mere adoption of these Rules does not in any manner vest the power in the Government to appoint or remove the teachers. The whole scheme is a project set up by the Government meant for the welfare of the tribals. But it is entrusted to ITDA, an authority by itself, subject to the control of the Government in certain respects just like any other local authority.

19. We must point out that the learned Judge has no doubt taken certain relevant tests to be applied into consideration and has dealt with them in a clear and able manner but with great respect we are unable to agree with him that the appellant held an office of profit "under the Government". We

reiterate that he was holding an office of profit in ITDA over which the Government has control. But we are concerned with the disqualification of the appellant and in appreciating the same it becomes necessary to determine whether holding such an office comes in any manner into conflict with his duties as a legislator and with his obligations with the Government because of the office he holds. It is in this context the test whether the Government has power to appoint or dismiss him assumes great importance. (vide Ashok Kumar Bhattacharyya's case (AIR 1985 SC 21 1)).

20. At this stage we may usefully refer to observations made by this Court in Karbhar' Bhimaji Rohamare v. Shanker Rao Gen " 1 nil Kolhe, AIR 1975 SC 575 which are as under (Para 10):

"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."

21. Now, we may refer to Biharilal Dobray's case (AIR 1984 SC 385) on which the learned counsel for the respondents placed considerable reliance. That was a case where the elected candidate was originally employed as an Assistant Teacher in a Basic Primary School run by the Zila Parishad in U.P. On coming into force of the U.P. Basic Education Act, 1972 he became an employee of the Board of Basic Education under S. 9(1) of the Act. While holding the post of the Assistant Teacher he filed his nomination. He was elected and his election was questioned by the unsuccessful candidate. The High Court dismissed the election petition and in appeal before this Court, it was contended that the elected candidate at the time of filing his nomination was holding an office of profit. The rules framed under the Act lay down that the appellate authorities in case of disciplinary proceedings are the State Government or the officers of the Government depending upon the nature of the posts. This Court after referring to the provisions of the Act and the rules held thus (Para 18 of AIR) :

"It is seen that all officers mentioned in column 3 and column 4 of the above Schedule are either the State Government or officers appointed by the State Government. The said officers are all officers of the Government Department who hold the posts in the Board ex officio, that is, by virtue of the corresponding post held by them under the Government. The rules provide for the procedure to be followed in disciplinary proceedings and the punishments that may be imposed when an employee is found guilty of any act of misconduct. R. 5 of the said rules provides for an appeal against any order imposing punishment to the prescribed authority. The procedure laid down in Civil Services (Classification, Control and Appeal) Rules as applicable to, servants of the Uttar Pradesh Government is required to be followed as far as possible in the case of the employees of the U. P ' Board of Basic Education. The funds of the Board mainly come from the contribution made by the State Government. The school in question is not a privately sponsored 'institution which is recognised by the Board. The Statement of Objects and Reasons attached to the Bill which was passed as the Act clearly says that the Act was passed in order to enable the State Government to take over the administration of schools imparting primary education which were being run by the local authorities into its own hands. Even though the representatives of local authorities are associated in the administration of such schools after the Act was passed, the final control of the schools is vested in the Government and such control is exercised by it through the Director and Deputy Director of Basic Education (Member Secretary) and other District Basic Education

Officers appointed by the Government."

On the basis of these findings this Court held that the Government had direct control and that subordination of the Board and its employees to the Government is writ large on the face of the Act and the rules made thereunder. Learned counsel for the respondents submitted that the facts in the instant case also are similar. We do not agree. The facts in Biharilal Dobray's case (AIR 1984 SC 385) are distinguishable. There, the appointing authority of the teachers is the District Education Officer and the State Government frames rules prescribing the conditions of service, tenure of service, remuneration and other terms including disciplinary action and removal of teachers and other employees who are thus appointed. This Court, however, taking these aspects into consideration held that under the Act, the Government took over ' all the Basic Schools with the object of providing compulsory education to the children and that every employee of the Board is in fact holding the office under the Government. As a matter of fact in a later decision i.e. in Ashok Kumar Bhattacharyya's case (AIR 1985 SC 21 1) this Court distinguished Biharilal Dobray's case (AIR 1984 SC 385) and held thus (at p. 217, Para 20 of AIR):

"The measure of control by the Government over a local authority should be judged in order to eliminate the possibility of conflict of 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 S. 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 of Objects and Reasons of the U.P. Basic Education Act, 1972 and Ss. 4, 6, 7, 13, and 19 all of which have been set out in extenso in that decision make that conclusion irresistible."

(Emphasis supplied)

Therefore Biharilal Dobray's case is not of much assistance to the respondents. As a matter of fact, as already observed in Biharilal Dobray's case as well as Ashok Kumar Bhattacharyya's case the emphasis was also on the nature of the post held and the possibility of conflict between duty and interest of an elected member and to appreciate the same the test is whether the Government has power to appoint or dismiss the employee who is being chosen as a legislator.

22. It is also necessary to bear in mind that the Government is undertaking several projects and activities including commercial activities through the corporations and local bodies exercising some control over such corporations or bodies. In that view of the matter they may come within the meaning of the "State" as envisaged in Art. 12 but that may not be a decisive factor in deciding the issue. As a matter of fact S. 10 of the Representation of the People Act as well as Art. 58(2) of the Constitution of India do not indicate that all persons employed in such undertakings, corporations or local bodies cannot be deemed to suffer disqualification for contesting the elections except to the extent indicated therein. This aspect also has been considered in some of the abovementioned decisions. If a strict and narrow construction is to be applied that amounts to shutting off many prominent and other eligible persons to contest the elections which forms the fundamental basis for the democratic set-up. Therefore several factors as indicated above depending upon the facts of each case have to be taken into consideration in deciding whether a particular person is disqualified by virtue of his holding an office of profit before concluding that such an office is under the Government. In Mudhuker G. E. Pankakar's case (AIR 1976 SC 2283) as to what should be the

approach, it was observed thus (Para 22):

"After all, all law, is a means to an end. What is the legislative end here in disqualifying holders of 'offices of profit under Government'? Obviously, to avoid a conflict between duty and interest, to cut out the misuse of official position to advance private benefit and to avert the likelihood of influencing Government to promote personal advantage. So this is the mischief to be suppressed. At the same time we have to bear in mind that our Constitution mandates the State to undertake multifarious public welfare and socioeconomic activities involving technical persons, welfare workers, and lay people on a massive scale so that participatory Government may prove a progressive reality. In such an expanding situation, can we keep out from elective posts at various levels many doctors, lawyers, engineers and scientists, not to speak of an army of other non-officials who are wanted in various fields, not as full-time Government servants but as part-time participants in people's projects sponsored by Government? For instance, if a National Legal Services Authority funded largely by the State comes into being, a large segment of the legal profession may be employed part time in the ennobling occupation of legal aid to the poor. Doctors, lawyers, engineers, scientists and other experts may have to be invited into local bodies, legislatures and like political and administrative organs based on election if these vital limbs of representative Government are not to be the monopoly of populist politicians or lay members but sprinkled with technicians in an age which belongs to technology. So, an interpretation of 'office of profit' to cast the net so wide that all our citizens with specialities and know-how are inhibited from entering elected organs of public administration and offering semivoluntary services in para-official, statutory or like projects run or directed by Government or Corporation controlled by the State may be detrimental to democracy itself. Even athletes may hesitate to come into Sports Councils if some fee for services is paid and that proves their funeral if elected to a panchayat. A balanced view even if it involves 'judicious irreverence' to vintage precedents, is the wiser desideratum."

23. What emerges from the above discussion is that the Government has some control over the ITDA which is set up as a project, since it provides funds and sanctions the posts; the District Collector is appointed as Project Officer and some officers are ex officio members of the TTDA which carries out the object of providing the compulsory education in tribal areas. But the ITDA is a registered society having its own constitution. Though the Project Officer is the District Collector, he acts as a different entity. The power to appoint or to remove teachers is not with the Government but with the Project Officer. The Government may have control over the appointing authority but has no direct control over the teachers. The small post that appellant holds in ITDA is only that of a Teacher who is directly under the control of the Project Officer. In such a situation the question of any conflict between his duties and interests as an elected member does not arise since it cannot be said that he, as a teacher, can be subjected to any kind of pressure by the Government which has neither the power to appoint him nor to remove him from service. Taking a practical view of the substance of these factors into consideration, we are of the view that the appellant cannot be held to be holding an office of profit under the Government. Accordingly the order of the High Court is set aside and the appeal is allowed. Parties are directed to bear their own costs throughout. Appeal allowed.

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