

# ALLAHABAD HIGH COURT

Joti Prasad Upadhya

Vs.

Kalka Prasad

Election First Appeal No. 408 of 1960. , against judgment,

(D.S. Mathur and Kailash Prasad, JJ.)

17.11.1960. 07.09.1961

## JUDGMENT

**D.S. Mathur, J.**

1. This is an appeal by Joti Prasad Upadyaya under Section 116-A of the Representation of the People Act against the order of the Tribunal dismissing the election petition moved by him under Section 81 of the Act calling in question the election of Kalka Prasad Bhatnagar, respondent No.1, as member of the U.P. Legislative Council from the U.P. (West) Graduates Constituency. The election was held in the year 1960 to fill in two vacancies. The appellant and respondent No.1 along with three others were candidates for election to the vacancies; and Kalka Prasad Bhatnagar, respondent No.1, and Shyamanarayana, respondent No.2, were duly elected having secured the maximum number of votes.

2. The election of Kalka Prasad Bhatnagar alone is challenged on the ground that he was holding an office of profit under the Government of the State of Uttar Pradesh (to be referred hereinafter as the State Government), and under Article 191 of the Constitution of India was disqualified to be chosen to fill in the seat.

3. The facts of the case are not in dispute, and the only controversy that exists is whether respondent No.1 suffered from the disqualification and could not be chosen as a member of the U.P. Legislative Council.

4. Kalka Prasad Bhatnagar, respondent No.1, was appointed by the Chancellor under Section 9 of the Agra University Act 1926, as the Vice-Chancellor of the University of Agra and he held this office on the date of nomination and also on the date of election to the U.P. Legislative Council. The office of the Vice-Chancellor was and is a whole time job carrying a salary of Rs. 2,000/- of Rs. 200/- per month as house allowance Under Legislature has the power to make Section 8 of

the Agra University Act, the Governor of Uttar Pradesh is the Chancellor of the University. As the appointment was made by the Governor of Uttar Pradesh, though in his capacity as the Chancellor of the University, it is contended on behalf of the appellant that respondent No.1 held the office of profit under the State Government. Respondent No.1, on the other hand, contends that he held the office under the University of Agra, and not under the State Government.

5. The only point for consideration is whether, in the eye of law, respondent No.1 held the office of profit under the State Government. An opinion on this point can be recorded on appreciation of the provisions of the Agra University Act and also of the Constitution of India.

6. Before the Tribunal the appellant had placed reliance upon the U.P. State Legislature Members (Prevention of Disqualification) (Supplementary) (Amendment) Act, 1960 (U.P. Act No.5 of 1960), whereby Clause (b) of Section 2 of the U.P. State Legislature Members (Prevention of Disqualification) (Supplementary) Act, 1956 was deleted; and it was contended that the intention of the U.P. Legislature was to disqualify the holders of the offices of Vice-Chancellors of Universities established by law in India from being chosen as members of the U.P. Legislature. This point was raised half-heartedly before us. The object and reasons of an enactment and also the report of the legislative proceeding can be used for a restricted purpose, and not to lay down the scope of an enactment duly passed by the Legislature. The intention of the Legislature is invariably determined from the wording of the enactment itself, and not from the speeches made at the floor of the House, or the opinion that the Legislature may have otherwise expressed. The Amendment Act of 1960 does not contain any clause which may suggest why Clause (b) of Section 2 of the Act of 1956 was being deleted. Whatever may have been in the mind of the Legislature, the enactment merely shows that the office of Vice-Chancellor of an University was not considered to be an office about which the Legislature may specifically remove the disqualification, if any. When the U.P. Legislature made no provision for the removal of disqualification, if any, the provisions of the Constitution shall have their effect: the Vice-Chancellors shall stand disqualified if under the Constitution they are barred from being chosen as members of the State Legislature.

7. In this connection, it may be observed that Article 191 of the Constitution of India has been worded generally and persons disqualified for being, chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State, are detailed in Clauses (a) to (d) of Article 191(1) of the Constitution. Clause (e) of the Article gives power to the Parliament to lay down which other persons shall be so disqualified. Such power has not been conferred on the State Legislature. The only power conferred on the State Legislature is under Clause (a) to declare by law that the disqualification laid down in Clause (a) shall not apply to and shall not disqualify the holders of certain offices of profit. When the State Legislature has the power to make a law to remove the disqualification of the holders of any office of profit, it cannot pass a law directly laying down which holders of the office shall also stand disqualified. The deletion of Clause (b) of Section 2 of the U.P. Act of 1956 cannot, therefore, by implication or directly, lay

down the additional offices of profit, the holders of which cannot be chosen as, and for being members of the State Legislature.

8. The U.P. Amendment Act of 1960 was passed on the lines of the Parliament (Prevention of Disqualification) Act, 1959, wherein no provision was made for the removal of disqualification in respect of a person holding the office of a Vice-Chancellor of a University, in so far as the election of a member of the Parliament was concerned. The Central Act was also for the removal of the disqualification, and not for disqualifying persons not already covered by the other clauses of Article 102(1) of the Constitution, a provision similar to Article 191(1). The non-removal of the disqualification by not including the office of a Vice-Chancellor of a University in the Central Act will also merely show that a Vice-Chancellor shall stand disqualified only if he holds an office of profit under the Government of India or the Government of any State, and not otherwise. To put it differently, a Vice-Chancellor of an University can be chosen and can function as a member of the State Legislature if he does not hold an office of profit under the Government of India or the State Government, and is not otherwise disqualified under the Constitution or under a law validly passed. There is no other provision in the Constitution nor in any enactment which can disqualify a Vice-Chancellor from being chosen as such. Consequently, the election of respondent No. 1 can be set aside only if, in the eye of law, he was holding an office of profit, in the present case, under the State Government. The Vice-Chancellor of the Agra University is appointed by the Chancellor of the University under the provisions of the Agra University Act, 1926, as in force, and it will be but proper that we may in the first instance consider the provisions of this Act to lay down whether the Vice-Chancellor shall be deemed to have been appointed by the State Government.

9. Under Section 3 of the Agra University Act, the first Chancellor and Vice-Chancellor of the University, and the first members of the Senate, of the Executive Council and of the Academic Council of the University, and all persons who later become such officers or members, so long as they continue to hold such office or membership, constitute a body corporate by the name of the Agra University, and the University has perpetual succession and a common seal. It can sue and be sued by the said name. Though the University is an autonomous body, it is subject to certain control by and supervision of the State Government. Under Section 1-A the State Government can do anything necessary generally for giving effect to the provisions of the Agra University Act, 1926, as amended by U.P. Act No. XXVII of 1956, including the constitution of the University Authorities, the making of any new Statute or the amending of any Statute and fixing of dates for the coming into force of such Statutes or amendments. This power could be exercised as often as occasion required, but not later than 24 months from the time the amending Act was first published in the official gazette. Under Sec.6 the State Government has the right to cause an inspection to be made by such person or persons as it may direct, of the University and its buildings, and of any affiliated college or hostel, and also of the examinations, teaching and other work conducted or done by the University. The State Government can also cause an inquiry to be made in like manner in respect of any matter connected with the University or an affiliated

college. Under sub-Sec.(2) the State Government can after such inspection or inquiry require the University or College to take such action as it may direct. Under sub-section (3) the Executive Council of the management of the College has to comply with the directions given by, the State Government. Under Section 14, the Minister for Education in the Government of Uttar Pradesh and the Directors of five departments of the Government are ex-officio members of the Senate and under Section 17, the Director of Education of Uttar Pradesh is an ex-officio member of the Executive Council.

Under Section 20 the State Government has the power to nominate two members of the Committee of Reference, also known as Finance Committee. The State Government can also issue certain directions under the Proviso to Section 24(2) of the Act. The State Government has also retained its control over the budget of the University (vide the second Proviso to Section 27-A(3) and Section 33) and the recognition of degrees conferred by other Universities (vide Section 30(2)). Under Section 38 the State Government can declare that the provisions of the Provident Funds Act, 1925, shall apply to the pension or provident fund constituted by the University for the benefit of its officers, as if it were a Government Provident Fund.

The Agra University Act was amended in 1953 and also in 1958. At both the occasions power was conferred on the State Government to remove any difficulty that may arise during a transitional period, in one case of 18 months and in the other of 24 months (vide section 40-A of the main Act and Section 13 of the Agra University Amendment Act, 1958). Under Section 12-A of the Amendment Act, 1958, the term of the members elected or nominated to any authority or body of the University and any officer of the University etc. was to be determined in accordance with the orders or notifications issued by the State Government.

10. Powers were also conferred on the State Government under Section 41 of the Act to appoint a Special Officer for the University till such time as the authorities of the University were duly constituted or until such further time as the Executive Council so desired. The powers of the Special Officer so appointed are contained in sub-section (2) and (S) of Section 41. There appear to be only a few restrictions on the exercise of powers by the Special Officer as detailed in these sub-sections.

11. It will thus appear that the State Government has been conferred with the power to make only one appointment, namely a Special Officer for the University under Section 41 of the Act, and the other appointments are to be made by the Chancellor or other officers or authorities of the University. It will also be clear that the Legislature has made a differentiation between the various appointments: the appointment of the Vice-Chancellor is to be made by the Chancellor, who is ex-officio the Governor of Uttar Pradesh, and the appointment of the Special Officer for the University by the State Government. In addition, the State Government has the power to order inspection or inquiry and to issue directions to be complied with by the University and the affiliated colleges. It is nowhere laid down that the State Government shall pass an order for inspection or inquiry or issue directions in consultation with or with the concurrence of the Chancellor. The Act clearly envisages two distinct authorities, namely, the Chancellor and the

State Government. When the Legislature intentionally made a differentiation between Chancellor and the State Government, no other opinion can be formed except that it was the intention of the Legislature not to regard the Chancellor to be a part of the State Government, and while exercising his powers the Chancellor was not exercising the executive powers of the State.

12. This finds corroboration from the other provisions of the Agra University Act. Section 7 clearly lays down that the Chancellor is an officer of the University. The State Government is admittedly not an officer of, nor is it subordinate to the University. Consequently, the Chancellor and the State Government cannot be placed on the same footing. The other provisions of the Act also clearly indicate that the powers of the Chancellor are different to those of the State Government. This will be an additional ground to hold that the exercise of the power by the Chancellor is not the exercise of powers by the State Government and an appointment made by the Chancellor cannot be deemed to be an appointment made by the State Government.

13. The power conferred on the State Government to exercise control and supervision over the working of the University will not make the University, or its officers subordinate to the State-Government in the sense that they would be disqualified to be chosen for, and being members of, the State Legislature. It will be found that the disqualification under Article 191 extends only to holders of an office of profit under the Government of India or the Government of a State other than an office declared by the Legislature of the State by law not to disqualify its holder; while the disqualification under Article 58 for election as President and under Article 66 as Vice-President extend, to holders of other offices of profit. Arts.58(2) and 66(4) clearly lay down that: a person shall not be eligible for election as President or Vice-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. When the three Articles are read together, it must be held that the holder of an office of profit under an authority subject to the control of the Government is not disqualified to be chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State (also see *Abdul Shakur v. Rikhab Chand*<sup>1</sup>). In other words, the officers of the University shall not stand disqualified for being chosen as members of the U.P. Legislative Council simply because the State Government has, under the Agra University Act, been given the power to exercise control and supervision over its working. We shall therefore have to exclude from consideration the effect of the powers of control and supervision conferred on the State Government under the provisions of the Agra University Act; and with regard to the alleged disqualification Under Article 191 we shall have to confine ourselves, in the circumstances of the present case, to the mode of appointment. If the appointment of the Vice-Chancellor by the Chancellor of the University is not deemed to be an appointment made by the State Government, the Vice-Chancellor of the Agra University shall not be disqualified and can be chosen as a member of the U.P. Legislative Council. As already mentioned above, the Chancellor cannot be equated with the State Government and the two cannot be placed on the same footing, and consequently an appointment made by the Chancellor cannot be deemed to have been made by the State Government.

14. To get over this difficulty, reliance was placed upon Section 3(60) of the General Clauses Act, 1897, where under the State Government is defined to mean, in the State of Uttar Pradesh, the Governor. It is thus suggested that in each and every case the State Government shall mean the Governor and when the appointment is made by the Governor, though in another capacity, the appointment shall, in the eye of law, be that made by the State Government. It is true that the Governor is an important component part of the State Government, but the two cannot be placed on the same footing in each and every case; for example, immunity from suits is given to the Governor, but not to the State Government. Article 300 of the Constitution of India clearly lays down that the State Government may sue or be sued by the name of the State, though

<sup>1</sup> AIR 1958 SC 52

under Article 361 the Governor enjoys protection against civil or criminal proceeding.

In other words, in spite of the definition of the term "State Government" as contained in the General Clauses Act, the Governor cannot in each and every case be equated with the State Government. Also see *Province of Bombay v. Khushaldas S. Advani*<sup>2</sup>, and 246. Further, immunity against suits is enjoyed by the Governor, and not by the Chancellor of the University, even though under the Act the Chancellor is the Governor himself. The immunity under Article 361 is with regard to the exercise and performance of the powers and duties of the office as Governor, and for any act done or purporting to be done by him in the exercise and performance of those duties and powers. When the same person performs the duties of the Chancellor, he does not exercise the powers, nor does he perform the duties of the office of the Governor. Suits against Chancellors of Universities have been entertained, but not against the Governor.

15. In this connection a reference may also be made to Article 154 of the Constitution of India, which lays down that the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. When the Governor exercises the executive power of the State, we may equate him with the State Government; but not when he exercises other powers. As already discussed above, while exercising the powers as Chancellor of the Agra University, the Governor exercises the power of the Chancellor, and not of the State Government, and while functioning as Chancellor he cannot be deemed to be exercising the executive power of the State, whether as Governor or the State Government. In other words, when the Governor, as Chancellor of the University, appoints a Vice-Chancellor, he does not exercise the executive power of the State and the appointment made by him cannot be deemed to have been made by the State Government. The office of the Vice-Chancellor may be said to be under the Chancellor, but not under the Governor or the State Government.

16. The provisions of the Constitution also indicate that the Governor functions in two different capacities, which cannot be confused with each other. The powers exercised by him are executive and legislative. While exercising the executive power of the State, he can be deemed to be

functioning as or to be the State Government, but not while exercising power as a member of the State Legislature.

17. Part VI of the Constitution of India applies to States. This Part has been divided into six chapters. Chapter I is general and lays down the meaning of the expression "State". Chapter II has been headed as "The Executive", and Ch.III "The State Legislature". Chapter IV enumerates the legislative power of the Governor. We are at present not concerned with the other Chapters. The Governor can be equated with the State Government only when he exercises the executive power of the State. This power is exercised in two manners, with the assistance of the Council of Ministers or in his own discretion. Article 163 provides that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under the Constitution to exercise his functions or any of them in his discretion.

<sup>2</sup> AIR 1950 SC 222 at pp.236

Under Article 164 the Chief Minister is appointed by the Governor and the other Ministers are also appointed by him on the advice of the Chief Minister, and the Ministers hold office during the pleasure of the Governor. Under Article 166, all executive action of the Government of a State shall be expressed to be taken in the name of the Governor. When these Articles are read together, it will mean that the executive power of the State is exercised in the name of the Governor, by the Governor himself in matters coming within his exclusive jurisdiction and through the Ministers or the subordinate officers to the extent powers are delegated to them. Consequently, whenever an executive action is taken in the name of the Governor, it shall be deemed to be an action of the State Government. To put it differently, we can at the most equate the Governor with the State Government with regard to the executive functions of the State. The same rule cannot apply to the State Legislature. Under Article 168 there shall be a Legislature consisting of the Governor and, in the State of Uttar Pradesh, two Houses, namely, the Legislative Assembly and the Legislative Council. The Governor is thus a component part of the State Legislature. The Legislature is not subordinate to the executive. In fact, the two function independently of each other. The Legislature passes the law, while the executive carries out the intention of the Legislature by taking executive action. Consequently, any power exercised by the Governor as member of the State Legislature cannot be deemed to be an exercise of the executive power of the State. Article 178 and onwards have the heading "Officers of the State Legislature". This will also show that the officers of the State Legislature are distinct from the officers of the State Government. Similarly under Ch.IV of Part VI of the Constitution, the Governor can promulgate Ordinances in the exercise of the legislative power. It is true that the Governor shall invariably accept the advice of the Ministers while promulgating an Ordinance, for the simple reason that the Ministers enjoy the confidence of the Legislature and any Ordinance promulgated without the concurrence of the Ministers shall not later become a law. The fact, however, remains that the exercise of legislative power is distinct to the exercise of the executive powers.

18. A consideration of the provisions of the Constitution of India makes it clear that the same person, namely, the Governor, exercises distinct powers with regard to the executive and legislative functions of the State. While he exercises the executive powers, he may be equated with the State Government but not when he is exercising the legislative power. While the Legislature is in session, he is merely a component part thereof and cannot by himself acting alone make a law. But while the Legislature is not in session, he can exercise the legislative power by promulgating such Ordinances as the circumstances may require. In the latter case, he shall have to be equated with the Legislature of the State and not with the State Government. When the same person can exercise power other than as the head of the Executive, there is no reason why the same rule be not applied to the exercise of power by the same person as Chancellor of the University. It is only when the Governor exercises the executive power that he can be equated with the State Government; and consequently when he discharges the functions and duties of the Chancellor, he cannot be deemed to be acting as the head of the executive and to be acting as the State Government. Vice-Chancellor is appointed by the Governor in his capacity as Chancellor of the University, distinct from his office as the head of the Executive, and the appointment cannot be deemed to have been made by, nor can the office of the Vice-Chancellor be said to be under, the State Government by virtue of the appointment having been made by the Governor in another capacity.

19. The learned Advocates for the contesting parties invited our attention to a few reported decisions, but as the facts of those cases are different and the point under consideration was not raised in any of them, we do not consider it necessary to refer to those decisions.

20. To sum up, Kalka Prasad Bhatnagar, respondent No.1, the then Vice-Chancellor of the Agra University, was not holding an office of profit under the State Government, nor under the Government of India, and was not in any manner disqualified to stand for election and be chosen as a member of the U.P. Legislative Council. The election petition preferred by the appellant was thus rightly dismissed by the Election Tribunal.

21. The appeal is hereby dismissed with costs payable to respondent No.1, which we assess at Rs. 300/-.

Appeal dismissed.