

# **BOMBAY HIGH COURT**

Dr. Deorao Laxman Anande

Vs.

Keshav Laxman Borkar

A.F.O.D. No. 737 of 1957 and Civil Appln. No. 2738 of 1957 in Election Petn. No. 190 of 1957

(Chainani and Shelat, JJ.)

14.11.1957

## **JUDGMENT**

### **Chainani, J.**

1. This is an appeal against the order passed by the Election Tribunal, Surat, by which the election of the appellant as a member of the Legislative Assembly of the State of Bombay from the Mazagaon constituency, Greater Bombay, has been set aside. The election was held on 11-3-1957. There were two candidates contesting at this election; the appellant and the respondent. We have been informed at the Bar that four candidates had been duly nominated, but that after the nomination papers of the appellant and the respondent were held to be in order, the other candidates withdrew from the election. The appellant polled 22,914 votes, while the respondent obtained 14,885 votes. The appellant was, therefore, declared duly elected. The respondent thereafter submitted a petition challenging the election of the appellant, on the ground that the appellant, who is an Ayurvedic Medical Practitioner, held an office of profit under the State of Bombay, by reason of his being an Insurance Medical Practitioner and that he was, therefore, disqualified to be a member of the Legislative Assembly under Article 191 of the Constitution. He, therefore, asked for two reliefs. He prayed that the election of the appellant should be declared void. The other relief sought by him was for a declaration that he was duly elected as a member of the Legislative Assembly in place of the appellant. The appellant denied that he held any office of profit under the State of Bombay or that he was disqualified to be a member of the Legislative Assembly under Article 191 of the Constitution. The Election Tribunal accepted the contentions of the respondent and accordingly passed an order declaring the election of the appellant to be void. The Election Tribunal also granted a declaration declaring the respondent duly elected to the Legislative Assembly of the State of Bombay from the Mazagaon Constituency in Greater Bombay. Against these orders passed by the Election Tribunal, the present appeal has been filed.

2. Paragraph (1) of Article 191 of the Constitution states that 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.

The object of this provision is to secure independence of the members of the Legislature and to ensure that the Legislature does not contain persons, who have received favours or benefits from the executive and who, consequently, being under an obligation to the executive, might be amenable to its influence. Putting it differently, the provision appears to have been made in order to eliminate or reduce the risk of conflict between duty and self-interest amongst the members of the Legislature. This object must always be borne in mind in interpreting Article 191.

3. Mr. Chari has suggested that this provision should be construed strictly, as a disqualification affects the right of franchise, which includes the right to stand for an election and be voted for. The provision has been inserted in the Constitution with a deliberate purpose and in cases of doubt or where two interpretations are possible we are of the opinion that that interpretation should be preferred, which will further and effectually carry out the object of the makers of the Constitution.

4. The expression "office of profit" is not defined in the Constitution or in the Representation of the People Act, 1951. This is evidently because it is not easy to frame a definition, which will cover all the different kinds of posts, which now exist under Government or those which might hereafter be created. We have also not been able to find any case, in which an attempt has been made to give an exhaustive meaning of this expression. It is, however, clear that before a person can be held to be disqualified under Article 191 (1) (a), three things must be proved : (1) that 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. In the present case, it is not alleged that the appellant holds an office under the Government of India. We have, therefore, to determine whether he holds an office under the Government of Bombay.

5. There has been considerable argument with regard to the meaning of the word "office." We have been referred to various meanings of this word given in the dictionaries, the Law books, such as the Stroud's Judicial Dictionary, Burrows on Words and Phrases and Wharton's Law Lexicon and the Law Reports. In Webster's Dictionary, several meanings are given of this word, some of which are:

- (1) That which a person does for, or with reference to, another or others; a service.
- (2) That which one ought to do or must do;
  - (a) duty connected with an occupation, position, etc.
  - (b) Position of trust or ministration.
- (5) (a) A Special duty, trust, charge or position conferred by an exercise of Governmental authority and for a public purpose, a position of trust or authority conferred by an act of governmental power; a right to exercise a public function or employment and receive the emoluments thereto belonging.

In its fullest sense an office embraces the elements of tenure, duration, duties and emoluments but the element of emoluments is not essential to the existence of an office.

(b) In a wider sense, any position or place in the employment of the Government, especially one of trust or authority; also that of an employee of a Corporation invested with a part of the executive authority.

In *McMillan v. Guest*<sup>1</sup>, at p. 566 Lord Wright observed:

"The word 'office' is of indefinite content. Its various meanings cover four columns of The New English Dictionary, but I take as the most relevant for purposes of this case the following :

"A position or place to which certain duties are attached, especially one of a more or less public character.' "

Reference to Stroud's Judicial Dictionary, Burrows on Words and Phrases and other similar law books shows that this word has been judicially construed in several different senses and that in each case a meaning has been assigned to it, having regard to the language used in the enactment and its object.

6. Mr. Chari, on behalf of the appellant, has contended that in order to constitute an office, there must be a post or position, the existence of which is independent of the person, who fills it. The appellant is an Insurance Medical Practitioner. A post like the one held by him comes into existence when his name is entered in the medical list, as provided in the rules, to which I will refer later on. It ceases to exist when his name is removed from the list. Mr. Chari has, therefore, urged that the appellant cannot be said to hold any office. He has relied on the following observations of Rowlatt J., which have been quoted with approval in the Judgment of Lord Atkinson in *Great Western Rly. Co. v. Bater*<sup>2</sup>, at p. 15 (B):

"It is argued, and to my mind argued most forcibly, that that shows that what those who used the language of the Act of 1842 meant when they spoke of an office or an employment of profit, was an office or employment which was a subsisting, permanent substantive position, which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders, and that if a man was engaged to do any duties, which might be assigned to him, whatever the terms on which he was engaged his employment to do those duties did not create an office to which those duties were attached; he was merely employed to do certain tilings, and the so-called office or employment was merely the aggregate of the activities of the particular man for the time being. My own view is that Parliament in using this language in 1842 meant by an office a substantive thing that existed apart from the holder of the office."

A portion of this passage has also been cited in 1942 A. C. 561 at p. 564, in Burrows on Words and Phrases and in certain other books. Mr. Chari has also relied on the following observations in *Yograj Singh v. Sitaram Hirachand Birla*<sup>3</sup>, at p. 442.

"On a perusal of this reference, the Tribunal is of tire opinion that "office" means a position or place to which certain duties are attached more or less of a public

<sup>1</sup>1942 A. C. 561

<sup>3</sup>3 Election LR 439

<sup>2</sup>(1922) 2 A. C. 1

character, and that it is a sort of a permanent position held by successive incumbents.....It is a right to exercise a public or private employment or to hold a position which has certain duties attached to it".

There are similar observations in *Kishenlal Lamror v Madan Singh*<sup>4</sup>, p. 54,

"Reliance was also placed upon Burrows on Words and Phrases, where it is pointed out that in order to constitute an office the post should possess existence independent of the incumbent."

These remarks by the two Election Tribunals, however, appear to be based on the observations of Rowlatt J., which I have quoted above. It is, therefore, necessary to consider the facts of the case, in which these observations came to be made by Rowlatt J. It was a case under the Income Tax Acts of 1842 and 1860. Rule 1 in Schedule (E) provided that

"the duties (i. e. the tax) shall be annually charged upon the persons respectively having, using or exercising the offices or employments of profit mentioned in Schedule E or to whom the annuities, pensions or stipends mentioned in the same schedule shall be payable for all salaries, fees, wages, perquisites or profits whatsoever accruing by reason of such offices, employments or pensions after making the deduction named".

This was followed by a provision which ran thus:

"Each assessment, in respect of such offices or employments shall be in force for one year, and shall be levied for such year without any new assessment, notwithstanding a change may have taken place in any such office or employment, on the person for the time being having or exercising the same".

There was a proviso to this provision and this was as follows:

"Provided that the person quitting such office or employment, or dying within the year, or his executors or administrators, shall be liable for the arrears due before or at the time of his so quitting such office or employment, or dying and for such further portion of time as shall then have elapsed, to be settled by the respective Commissioners, and his successor shall be repaid such sum as he shall have paid on account of such portion of the year as aforesaid".

In the words of Lord Atkinson, the effect of these provisions was that the tax for the year was assessed upon the person holding the office or exercising the employment at the time the assessment was made, but an adjustment was to be made later on between the persons, who had filed the office or employment or exercised the same during the entire year of assessment. After referring to these provisions, Lord Atkinson stated:

"Thus the entire year of assessment seems to be treated as a unit of service, and the salary as a unit of recompense, not an aggregate of a number of smaller sums

<sup>4</sup>(1954-5) 10 Election L Reports 49

payable at different times, and each recompensing the service rendered during an independent fraction of the year. Again the word "successor" is very significant. It seems to indicate continuity of the office or employment, and also to indicate the existence of something external to the person who may hold the one or exercise the other". It will, therefore, be seen that the word "office" as used in the Income-tax Acts was held to mean "an office which had an existence independent of the person who filled it, which went on and was filled in succession by successive holder", having regard to the special language used in these Acts, to the facts that the tax for the entire year was to be assessed on the person, who held office at the time the assessment was made, and that the Act contained provisions for his being repaid the amount of the tax due in respect of the period for which the post was held by other persons and also to the use of the word "successor" in the proviso. This is also made clear by the last sentence in the observations of Rowlatt J., which I have cited above, that Parliament in using the particular language in 1842 meant by an "office" a substantive thing that existed apart from the holder of the office. (1942) AC 561, in which the observations of Rowlatt J. have been cited with approval, was also a case under the Income-tax Act.

7. A special meaning was, therefore, given to the word "office" as used in the Income-tax Acts having regard to the language used in these Acts. Different meanings have been given to this word as used in different enactments, see for instance the *King v. The Mayor and Co. of Bridgewater*<sup>5</sup>, In that case, one Trevor, who was a common clerk of the borough of Bridgewater, also acted as a clerk to the justices of the borough. The latter post was not mentioned in the Charters or muniments, but Trevor held it "as incident and appurtenant to the office of town clerk" and received the emoluments for it. By reason of a subsequent enactment, he ceased to be a clerk to the justices of the borough. By section 66 of the Act, every officer of any borough, who was in any office of profit at the time of the passing of the Act, but of which he was deprived by the operation of this Act, was declared entitled to compensation, (p. 342). Trevor then claimed compensation and a question arose whether he held "any office of profit" as clerk to the Justices of peace. This point was decided in Trevor's favour. At page 348 Coleridge J. observed :

"Looking at the words of Section 102, where the words are "office of clerk to the justices", it is clear that the word is not used in the strict sense in which we find it employed in our law books, but in the general and liberal sense of a place to which duties and profits are attached".

Stroud in note No. 16 under the heading "Office" refers to a case in which a person, who was appointed as a chemist to a Town Council, was held to hold an office or place of profit in the gift of the Council.

8. Mr. Chari asked us to consider in particular the definitions of the word "office" given by the

Election Commission *in Re : Vindhya Pradesh Leg. Assem. Members*<sup>6</sup>, at p. 433 (F). The definition quoted by the Commission is firstly from Tomilin's Law Dictionary, which is given as

<sup>5</sup>(1837) 6 A. and E 339

<sup>64</sup> Election L. R. 422

"a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging, whether public as those of magistrates, or private as of bailiffs, receivers and the like". The Commission then cites the following passage from the same dictionary:

"Officers are public or private, and it is said that every man is a public officer who hath any duty concerning the public; and he is not the less a public officer where his authority is confined to narrow limits; because it is the duty of his office, and the nature of that duty, which makes him a public officer, and not the extent of his authority". The Commission then observes:

"On behalf of some of the members, reference was made to Burrow's Words and Phrases where it is pointed out that, in order to constitute an 'office', the post should possess existence independent of the incumbent. Even if this be held to apply, there appears to be no difficulty in the matter inasmuch as, even if X, a member of the Legislative Assembly, resigns or is unseated, his : successor-member would, under the terms of the Government order, become ex-officio member of the particular District Advisory Council". It will, therefore, be seen that the Commission has not itself expressed any opinion on the question whether the word "office" means a post, which exists independently of its incumbent.

9. The word "office" does not, therefore, necessarily imply that it must have an existence apart from the person, who may hold it. Cases are known, in which, in order to make use of the Special Knowledge, talent, skill or experience of certain persons, posts are created, which exist only for so long as they hold them. It will be difficult to hold that such persons are not holders of offices. We are, therefore, unable to accept Mr. Chari's contention that the appellant does not hold an office, because the post of an Insurance Medical Practitioner, which he holds, will cease to exist as soon as he gives it up or because other persons cannot be appointed to it.

10. The next question to be considered is what is the import of the words "office of profit".

In some cases it has been held to mean office, to which profit or remuneration is attached. In *Delane v. Hillcoat*<sup>7</sup>, at p. 116 Bayley J. observed that in order to be an office of profit it was not necessary that its holder should make a profit out of it and that it was sufficient if it was shown that the office was one, which enabled him to make a profit. In *Cowan v. Seymour*<sup>8</sup>, at p. 511 Atkin L. J. stated that if a profit does accrue to the holder of an office or employment by reason of his office or employment, such office or employment is an office or employment of profit. Having regard to the object with which the provision has been made in the Constitution, we are of the opinion that the expression "office of profit" means an office capable of yielding a profit or from which, in the words of Bayley J. in (1829) 109 ER 115, a man might reasonably be expected to make a profit. The actual making of profit is not necessary. Profit means gain or any

material benefit. The amount of such profit is also immaterial. See *Ravanna Subanna v. G. S. Kaggeerappa*<sup>7</sup>, at p. 656, where the Supreme Court has observed that the word "profit" connotes the idea of pecuniary gain and that if there is really a gain, its quantum of amount would not be material.

<sup>7</sup>(1829) B. and C. 310 : 109 E. R. 115

<sup>9</sup> AIR 1954 SC 653

<sup>8</sup>(1920) 1 K. B. page 500

11. Another question to be determined is whether in order to be an office of profit under Government, the profit, or remuneration of the post must come from the revenues of the State. Mr. Gupte, who appears for the respondent, has urged that if the office held under Government is one, which yields profit, the source from which this profit is derived is immaterial. He has relied on *Hansa Jivraj Mehta v. Indubhai B. Amin*<sup>10</sup>, in which a candidate, who had been appointed to a post by Government and was liable to be removed from that office by Government, was held to be disqualified, even though her remuneration was not paid by Government, but by another institution, the University of Baroda. The reasons given for the decision were that if a person is appointed by Government and is liable to be removed by Government, he would be under an obligation to Government irrespective of the fact that his remuneration is drawn from another source, that this would affect his independence in the Legislature vis-a-vis the Government and that this is exactly what was "sought to be prevented by Article 102 (1) (a)", which is practically in the same terms as Article 191 (p. 179). There is considerable force in this argument and on the principle that that construction must be adopted, which would suppress the mischief and advance the remedy, we are inclined to agree with the view taken by the Election Tribunal in the above case. It is, however, not necessary to decide this question in this appeal, because, as I will point out subsequently, part of the remuneration, received by the appellant by virtue of his holding the post of an Insurance Medical Practitioner, comes from the general revenues of the State.

12. 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.

13. In the light of the position of law as stated above, I will proceed to consider the facts of the present case. The appellant has been appointed as an Insurance Medical Practitioner under the rules framed under the Employees' State Insurance Act, 1948. It is, therefore, necessary to consider the provisions of the Act and the relevant rules. The Act was passed in 1948. Different provisions of the Act were brought into force at different times, but all the provisions were in force in the State of Bombay before the appellant came to hold the post of an Insurance Medical Practitioner. The object of the Act, as stated in the preamble, is to provide certain benefits to employees in case of sickness, injury, etc., and to make provision for certain other matters in relation thereto. Section 3 of the Act provides for the establishment of a corporation to be known as the Employees' State Insurance Corporation. (I will hereafter refer to it as the Corporation). The Corporation is to be established by the Central Government. Sub-sec. 2 of section 3 states that the Corporation shall be a body corporate having perpetual succession and a common seal and shall sue and be sued by the name of the Employees' State Insurance Corporation. Section 4 lays down the manner in which the Corporation is to be constituted. It is to consist of representatives of the Central Government and the State Government, representatives of employers and employees, two representatives of the medical profession and two members of

Parliament to be nominated by the Central Government. The two principal bodies of the Corporation are the Standing Committee constituted under section 8 and the Medical Benefits Council constituted under Section

<sup>101</sup> Election L. R. 171

10. Both these bodies consist of representatives of Government, of the employers and employees and of the Medical profession. There are several provisions in the Act, which show that Government exercises considerable control over the Corporation. Its principal officers are appointed by Government (See Section 16.) Its budget estimates are to be submitted to the Central Government for approval under Section 32. The audited accounts are also to be submitted to Government at such times and in such manner as may be prescribed (see Section 34). It is, therefore, clear that the Corporation has to work under the control and supervision of the Central Government. This will not, however, make it a servant or agent of the Government or justify an inference that it is a Government department. In the eye of law, it is a separate statutory body and its employees cannot be regarded as the employees of Government, See *Tamlin v. Hannaford*<sup>11</sup> *Chaturbhuj v. Bihar State Co-operative Bank Ltd*<sup>12</sup>, and *Subhod Ranjan v. Fertilisers and Chemicals Ltd*<sup>13</sup>,

14. Section 46 of the Act specifies the benefits to which the insured persons and their dependants are entitled. There are two kinds of benefits : Sickness, maternity and other cash benefits, which consist of periodical payments to an insured person in case of his sickness, etc., and medical treatment for and attendance on insured persons, referred to in the Act as medical benefits. Section 56 provides that an insured person or (where such medical benefit is extended to his family) a member of his family, whose condition requires medical treatment and attention, shall be entitled to receive medical benefit and that such medical benefit may be given either in the form of out-patient treatment and attendance in a hospital or dispensary, clinic or other institution or by visits to the home of the insured person or treatment as inpatient in a hospital or other institution. Sub-sec. (1) of Section 57 states that an insured person and (where such medical benefit is extended to his family) his family shall be entitled to receive medical benefit only of such kind and on such scale as may be provided by the Provincial Government or by the Corporation. Sub-section (1) of Section 58 states that the State Government shall provide for insured persons and (where such benefit is extended to their families) their families in the State, reasonable, medical, surgical and obstetric treatment. There is a proviso to this sub-section which states that State Government may with the approval of the Corporation, arrange for medical treatment at clinics of medical practitioners on such scale and subject to such terms and conditions as may be agreed upon. Section 58, therefore, imposes a liability on the State Government to provide medical treatment to the insured persons and their families. Sub-section (1) of Section 59 states that the Corporation may with the approval of the State Government establish and maintain in a State such hospitals, dispensaries and other medical and surgical services as it may think fit for the benefit of the insured persons and (where such medical benefit is extended to their families), their families. The word used in Section 59 is "may", while that used in Sub-sec. (1) of Section 58 is "shall". It is, therefore, clear that the primary responsibility for providing medical benefits to insured persons and their families is imposed by the Legislature on the State Government. The proviso to Sub-sec. (1) of Section 58 empowers the State Government to make alternative arrangements by arranging for medical treatment at the clinics of the medical practitioners. These arrangements cannot be made except with the approval of the Corporation, but if the Corporation agrees, the responsibility for making appropriate arrangements will be that of the State Government and not of the Corporation. There has

been some argument as to whether the words "as may be agreed upon" in the proviso contemplate an agreement between the State Government and the Corporation or an agreement between the State Government and the Medical Practitioners, at whose clinics medical treatment is to be provided. Mr. Chari has contended for the first interpretation, while according to Mr. Gupte, who appears for the respondent, the agreement contemplated by the proviso is between the State Government and the Medical Practitioners. It is not necessary for us to decide this point in this appeal. For the purposes of this appeal, we will assume that Mr. Chari's contention that the scale of medical benefits and the terms and conditions on which they are to be provided at clinics of medical practitioners, have to be agreed upon between the State Government and the Corporation, is correct. That it is the State Government, which is primarily liable for seeming medical benefits to insured persons and their families is also made clear by the rules made by the State Government under Section 96 of the Act. Rule 3 lays down the scale of medical benefits, one of which is "general medical services, which shall include treatment at the clinic of an Insurance Medical Practitioner". Sub-rule (1) of rule 4 states that the State Government shall arrange to provide general medical services to insured persons at clinics of the Insurance Medical Practitioners, who have undertaken to provide general medical services, under these rules and in accordance with their terms of service. Rule 14 states that the State Government may establish separate hospitals or medical institutions for the examination and treatment of insured person; or may arrange to reserve on such scale and terms as may be agreed between the Corporation and the State Government separate beds for the exclusive use of insured persons in the hospitals or other medical institutions under its control or under the control of a local authority, private institution or individual. Sub-rule (1) of rule 15 states that the State Government shall make the necessary arrangements to enable insured persons receiving general medical service to obtain from the Insurance Medical Practitioners or from any other person or institution with whom arrangements have been made with 4 such proper and sufficient drugs, medicines and dressings free of charge, as may be required for their treatment. It is, therefore, clear that the arrangements with the Medical Practitioners for providing medical treatment for insured persons at their clinics are to be made by the State Government and not by the Corporation, though before making such arrangements, the State Government has to obtain the approval of the Corporation.

15. Sub-section (3) of section 56 provides that the Corporation may enter into an agreement with the State Government in regard to the nature and scale of the medical treatment that should be provided to insured persons and their families and for the sharing of the cost thereof and of any excess in the incidence of sickness benefit to insured persons between the Corporation and the State Government. Sub-sec. (4) states that in default of an agreement between the State Government and the Corporation as aforesaid the nature and extent of the medical treatment to be provided by the State Government and the proportion in which the cost thereof and of the excess in the incidence of sickness benefit shall be shared between the Corporation and the State Government, shall be determined by an arbitrator appointed by the Chief Justice of India and the award of the arbitrator shall be binding on the Corporation and the State Government. This subsection also shows that the medical treatment is to be provided by the State Government. The cost of this treatment is to be shared between the Corporation and the State Government in accordance with an agreement between them. If there is no agreement between them, the question as to the proportion in which the cost is to be shared is to be referred to an arbitrator, whose decision is binding on both the parties. We were also informed by the learned Counsel that

in accordance with the provisions of Section 58", it is proposed to enter into an agreement between the Corporation and the State Government, by which the Corporation ' will bear 3/4 ths of the cost of providing medical benefits to insured persons, while the remaining 1/4th will be borne by the State Government.

16. Section 96 of the Act empowers the State Government to make rules. In exercise of this power, the State Government has made rules, called "'The Bombay Employees' State Insurance (Medical Benefit) Rides, 1954". Under the proviso to Section 58, the State Government has also laid down the terms of service for the Insurance Medical Practitioners. These are published at page 415, in part IV-A of the Bombay Government Gazette dated 9th September 1954 Ex. A. For the sake of convenience, I will refer to these terms of service as "Service Rules". It is necessary to read both the sets of rules together in order to ascertain what exactly is the position of an Insurance Medical Practitioner and what relationship exists between him and the State Government and between him and the Corporation.

17. Clause (6) in Rule 2 defines "Insurance Medical Practitioner" to mean any medical practitioner appointed as such to provide medical aid under the Act and to perform such other functions as may be assigned to him. Rule 5 provides for the maintenance of a medical list, in which the names of practitioners, who have undertaken to provide general medical services under these rules and in accordance with the terms of service, and whose applications have been approved by the Allocation Committee, are to be entered. Service Rule No. 2 states that applications in prescribed form from the local medical practitioners shall be invited by advertisement for inclusion in the Medical List. At the end of the form, in which the applications are to be made, the applicant has to state as follows:

"I have read and understood the terms of service and agree to abide by them, if included in the Medical List." Rule 6 states that such applications are to be made to the Administrative Medical Officer. Clause 2 in Rule 2 states that the Administrative Medical Officer means the principal medical officer appointed by the State Government to administer medical benefit in the State. The Administrative Medical Officer is, therefore, the principal officer appointed by the State Government for administering medical benefits under the scheme and it is to this Officer that applications have to be made for inclusion in the Medical List,

18. Service Rule 3 provides for these applications being referred to an Allocation Committee. This Committee consists of representatives of the State Government, the Corporation and the medical profession. Sub-rule (3) of Service Rule 3 states that the Committee shall consider each application and then submit its recommendations to the Surgeon-General. Sub-rule (3) of Service Rule 2 provides that applications for inclusion in the Medical List shall be granted by the Surgeon General on the recommendation of the Allocation Committee. No application for inclusion in the Medical List can, therefore, be granted by the Surgeon-General, unless there is a recommendation in regard thereto by the Allocation Committee; but the order for inclusion in the Medical List is to be made by the Surgeon-General is also defined in Clause (12) of Rule 2 as meaning the Surgeon-General with the Government of Bombay. Surgeon-General is also defined in Clause (12) of Rule 2 as Mr. Gupte has argued, and we think there is force in his argument that while the Surgeon-General cannot include any person's name in the Medical List without the

recommendation of the Allocation Committee, he is not bound to accept the recommendation of the Allocation Committee in every case and that it is open to him to reject any application, even though it had been recommended by the Allocation Committee. In any case, there is no provision in the Rules, which makes it obligatory on the Surgeon-General to accept every recommendation of the Allocation Committee.

19. Sub-rule (1) of rule 7 states that application by an insured person for acceptance by an Insurance Medical Practitioner for inclusion in his list shall be made by delivering to the practitioner a signed medical acceptance card in such form as the Corporation or the State Government may specify. Sub-rule (2) provides that the Insurance Medical Practitioner may accept or refuse to include such insured person in his list. Rule 9 provides that an insured person, who has not been accepted by an Insurance Medical Practitioner in accordance with Rule 7, shall be assigned to any other Insurance Medical Practitioner by the Allocation Committee. It is doubtful whether having regard to Sub-rule (2) of Rule 7, the Allocation Committee can under this rule compel an Insurance Medical Practitioner to accept an insured person, whom he is not willing to include in his list. The discretion in the choice and selection of insured persons, therefore, appears to vest in the Insurance Medical Practitioner himself. I may here also refer to Service Rule 5, which states that an Insurance Medical Practitioner is responsible for treating all persons, whom he has accepted for inclusion in his list and all persons, who have been assigned to him presumably under Rule 7. Sub-rule (3) of Service Rule 5 states that the acceptance of an insured person shall be signified by the signing of the Medical Acceptance Card by the Insurance Medical Practitioner and the sending of the Card to the Administrative Medical Officer.

20. Service Rule 8 lays down the kinds of treatment, which an Insurance Medical Practitioner is required to render to the insured persons. Service Rule 9 prescribes his duties. Sub-rule (3) of this rule states that subject to the approval of the Administrative Medical Officer, the Insurance Medical Practitioner shall fix the time during which his clinic shall remain open for treatment of the insured persons. The selection of time, during which he should keep the clinic open, is therefore, not left entirely to the Insurance Medical Practitioner himself. He has to obtain the approval of the Administrative Medical Officer in regard to it. Sub-rule (5) Rule 9 states that an Insurance Medical Practitioner, on receipt of a written request, shall at all reasonable times admit any officer of the Corporation duly authorized in this behalf Or any person authorized for the purpose by the State Government to any clinic or waiting-room for the purposes of inspecting the said clinic or waiting room. Under Sub-rule (7) of Rule 9 an Insurance Medical Practitioner is required to issue to his patients free of charge any certificates reasonably required in respect of sickness, maternity, employment injury and death under the Employees' State Insurance Regulations or as may be required from time to time by the Corporation or the State Government. Sub-rule (9) requires an Insurance Medical Practitioner to keep such records as the State Government may, from time to time specify after consultations with the Corporation; to maintain a medical record in respect of each insured person on his list on the form laid down and supplied by The State Government or the Corporation for the purpose and in accordance with the instructions issued by the State Government or the Corporation in this behalf from time to time and to furnish return in such terms as may be laid down by the Corporation or the State Government. Service Rule 10 states that an Insurance Medical Practitioner shall not carry on any Insurance Medical Practice elsewhere than at his place of residence, or at the clinic stated in his application, except upon conditions which appear to the State Government, to be such as to enable his obligations under these terms of service, and in particular his obligation to visit his

patients, to be adequately carried out.

21. Sub-rule (1) of Service Rule 12 states that the State Government may, after consultation with the Corporation, alter the terms of service from such date as may be approved by the Corporation by giving notice of the proposed alteration to each Insurance Medical Practitioner. The State Government can, therefore, alter the terms of service only after consultation with the Corporation, but notice of the alterations is to be given to the Insurance Medical Practitioners by the State Government. The approval of the Corporation is necessary, because a change might involve additional expenditure, part of which is to be borne by the Corporation. Sub-rule (1) of Service Rule 13 empowers the State Government to suspend after consultation with the Corporation the panel system of medical benefit as a whole if it is found that it is not working properly or efficiently by giving three months' notice to each Insurance Medical Practitioner.

22. Sub-rule (2) of Service Rule 13 states that the State Government may have the name of any individual Insurance Medical Practitioner removed from the medical list after giving due notice of not less than three months to the Insurance Medical Practitioner, except in case of gross negligence and misconduct, when the period of notice need be only one month. This provision, therefore, empowers the State Government to remove the name of an Insurance Medical Practitioner from the Medical list, without any prior consultation with the Corporation.

23. Service Rule 14 provides that an Insurance Medical Practitioner is entitled at any time to give notice to the Surgeon General that he desires to cease to be an Insurance Medical Practitioner and that his name shall be removed from the medical list at the expiration of three months from the date of such notice or of such shorter period as the Surgeon General may agree. Under this provision an Insurance Medical Practitioner can resign his post by giving three months' notice to the Surgeon General.

24. Service Rule 15 states that an Insurance Medical Practitioner shall make all necessary arrangements for seeing the treatment of his patients, when he is unable for any cause to give treatment personally and shall inform the Administrative Medical Officer, the Regional officer of the Corporation, etc., of any standing arrangements for that purpose and that he shall not absent himself from his practice for more than one week without first informing the Administrative Medical Officer of his proposed absence and of the person or persons responsible for conducting his practice during his absence. This rule, therefore, enables the Insurance Medical Practitioner to take casual leave, provided he makes adequate arrangements for securing the treatment of his patients during his absence.

25. Rule 18 provides for the constitution of a Medical Service Committee. Rule 19 provides for the constitution of a similar Committee for Ayurvedic practitioners. This Committee consists of the representatives of the State Government, the Corporation, the employees and of the Insurance Medical Practitioners. Sub-rule (1) of Rule 20 states that any question regarding the alleged failure of an Insurance Medical Practitioner to render treatment or any other breach by him of his duties under the terms of service, shall be investigated by the Medical Service Committee. Sub-rule (4) of Rule 21 provides that the Medical Service Committee shall submit its report to the Surgeon-General, who shall accept as conclusive any finding of fact contained in the report. The Surgeon-General is, therefore, bound by the findings of the Medical Service Committee on all questions of fact. Sub-rule (1) of Rule 22 states that after investigation into any question relating

to the conduct of an insured person by the Medical Service Committee, the case is to be referred by the Surgeon-General to the Regional Officer of the Corporation for action under Regulation 99. Sub-rule (2) of Rule 22 empowers the Surgeon-General to take action of the kinds specified in clauses (a) to (d) of the Sub-rule, after consideration of the report of the Medical Service Committee. Under Clause (b) the Surgeon-General may deduct from the remuneration payable to an Insurance Medical Practitioner the expenses, which may have been incurred by the Surgeon-General or by any insured person owing to the Insurance Medical Practitioner's failure or negligence in complying with his terms of service. Under Clause (c) the Surgeon-General may withhold such amount, as he deems fit, from the money payable as remuneration to the Insurance Medical Practitioner, if he is satisfied on consideration of the report of the Medical Service Committee that the Insurance Medical Practitioner has failed to comply with the terms of service applicable to him. Clause (d) empowers the Surgeon-General to remove the name of the Insurance Medical Practitioner from the medical list, if he is satisfied on consideration of the Committee's report that his continuance will be prejudicial to the efficiency of the service. Rule 23 provides for an appeal against the decision of the Surgeon-General to the State Government. It also provides that the decision of the State Government shall be final. Rule 24 provides for investigation of other complaints against an Insurance Medical Practitioner. These are also to be investigated by the Medical Service Committee, which has to submit its report to the Surgeon-General. Sub-rule (6) of rule 24 states that after the consideration of the Medical Service Committees' report, the Surgeon-General shall after consultation with the Corporation, where the findings relate to investigation of certification, take action in accordance with Sub-rule (2) of rule 22. It is clear from these provisions that while the Corporation can take action against an insured person, it has no similar powers in respect of Insurance Medical Practitioners.

26. Service Rule 20 contains provisions regarding the remuneration of Insurance Medical Practitioners. Sub-rule (1) states that the rate of payment for an Insurance Medical Practitioner shall be fixed by the State Government after consultation with the Corporation and that payment shall be made according to the number of insured persons on his list. The evidence shows that the payment is at present made at the rate of Rs. 6/8/- per person.

27. The other rule, to which a reference is necessary, is clause (b) of Service Rule 1, which states that the Employees' State Insurance (General) Regulations, 1950, which are made by the Corporation under Section 97 of the Act, shall apply to Insurance Medical Practitioners, as if they are Insurance Medical Officers appointed under these Regulations.

28. I will now refer to the evidence of the appellant. In his evidence he has stated that he has about 1800 insured persons on his list, that he was paid Rs. 6-8-0 per patient per year, that his remuneration was paid to him by the Board, by which he presumably meant, the Regional Board constituted under Regulation 10, and not by the Government of Bombay, that he used to receive the amounts by cheques, that the cheques were sent by the Corporation, but that he did not know who used to sign those cheques. He has further stated that he received circulars from the Corporation and the State Government and also from the Surgeon-General and the Administrative Medical Officer and that he had to comply with them. He has also stated that the Administrative Medical Officer is the head of the Administration, so far as the Insurance Medical Practitioners are concerned, that he had to send monthly returns to him and that he was allowed private practice.

29. The statement of the appellant that he used to receive cheques from the Corporation is not quite clear. There was no proper cross-examination of the appellant, nor has any other evidence been led on the question as to who makes payment of the remuneration payable to the Insurance Medical Practitioners. From sub-rule (2) of Service Rule 9, which provides for the reimbursement of the expenses incurred by an Insurance Medical Practitioner by the Administrative Medical Officer, it would appear that the payments are made by the Administrative Medical Officer. The same inference is suggested by Rule 22, which empowers the Surgeon-General to make deductions from the remuneration, or to withhold amounts, payable to an Insurance Medical Practitioner. It is, therefore, likely that the payments were in fact made by the Administrative Medical Officer, and as according to the appellant this Officer was an employee or agent of the Corporation, the appellant stated that he used to receive cheques from the Corporation.

30. In the light of the rules, which I have referred to above and the evidence of the appellant, we have now to determine his exact position vis-a-vis the State Government and Corporation. Mr. Chari has contended that if one looks at the whole picture as disclosed by the rules, the only conclusion one can reach is that an Insurance Medical Practitioner does not hold any post or office, but that he receives remuneration for the services rendered by him, and that his position is similar to that of any expert, who charges fees for consultation with him. He has relied on rules 5 and 6, Service Rule 2 and the form of application, in which the word "appointment" is not used with reference to an Insurance Medical Practitioner, but which refer to his inclusion in the medical list. He has, therefore, urged that an Insurance Medical Practitioner cannot be said to have been appointed to or to hold any post. It is difficult to accept this argument, having regard to the other rules, which use the word "appointment" with reference to an Insurance Medical Practitioner. The expression "Insurance Medical Practitioner" is defined in Sub-rule (6) of Rule 2 as meaning any medical practitioner appointed as such to provide medical benefit under the Act and to perform such other functions as may be assigned to him. The definition also states that he shall be deemed to be a duly appointed medical practitioner for the purposes of Chapter V of the Act. Sub-rule (2) of Rule 4 also states that an Insurance Medical Practitioner shall be deemed to have been appointed as an Insurance Medical Officer for the purposes of the Regulations. The definition, therefore, refers to the selection of a private medical practitioner for the purpose of rendering medical aid as an appointment. Chapter V of the Act deals with the benefits to which the insured persons are entitled. Section 54 provides that all medical examination and treatment referred to in the Workmen's Compensation Act, 1923, shall for the purposes of this Act, be carried out by duly appointed medical practitioners. An Insurance Medical practitioner is deemed to be a duly appointed medical practitioner for the purposes of this section under the definition given in Clause (6) of Rule 2. In the form of application, a medical practitioner, who desires his name to be included in the medical list, has also to state that he agrees to abide by the terms of service. In other words, he agrees to join a service, see also Rule 22 (d), which uses the words "prejudicial to the efficiency of the Service". He is also subject to disciplinary action and control. He cannot also resign or give up his post except by giving three months' notice under Service Rule 14. He is also required to maintain records and to submit returns. His employment has, therefore, all the attributes of a service. He must, therefore, be held to be a holder of an office. The fact that he is allowed private practice will not alter the character of his appointment.

31. The next question to be considered is whether he holds an office under the Government or under the Corporation, As I have already pointed out, under the proviso to Section 58,

arrangements for providing medical aid at the clinics of private practitioners are to be made by the State Government. This position is also made clear by the rules, to which I have referred above. The appellant has admitted in his evidence that the Head of the Department, so far as Insurance Medical Practitioners are concerned, is the Administrative Medical Officer. This is, in fact, what Rule 2 (2) shows. According to this provision, the principal medical officer to administer medical benefits in the State under the Act is the Administrative Medical Officer. He is appointed by the State Government and not by the Corporation. There is no provision in the Act or in the rules, which requires the State Government to obtain the approval of the Corporation or even to consult the Corporation before making this appointment. The authority, which passes final orders on the applications of medical practitioners for inclusion in the medical list is the Surgeon-General. It is true that the Surgeon-General has to act on the recommendations of the Allocation Committee, which includes a representative of the Corporation, but the power to include a name in the medical list or to make an appointment to the post of an Insurance Medical Practitioner vests in the Surgeon-General and not in the Corporation. It has been urged by Mr. Chari that the Surgeon-General and the Administrative Medical Officer must be deemed to act as agents of the Corporation, when they perform their duties under the various provisions of the Rules. He has urged that in order to facilitate the administration of the scheme of providing medical aid by the Corporation, Government has lent the services of these qualified and experienced doctors to the Corporation. There is no substance in this argument of Mr. Chari. Clause (2) of Rule 2 defines the words "Surgeon-General" as meaning the Surgeon-General with the Government of Bombay. There is no provision in the Act or in the Rules, which enables the Corporation to issue any directions or orders to these two officers. An appeal against the order of the Surgeon-General removing the name of an Insurance Medical Practitioner from the medical list lies to the State Government and not to the Corporation. A conclusive answer to Mr. Chari's argument is, however, furnished by Sub-rule (6) of Rule 24, which states that in some matters referred to in that sub-rule, the Surgeon-General shall take action after consultation with the Corporation. It does not require the Surgeon-General to act in accordance with the recommendation of the Corporation or even to obtain the approval of the Corporation to the action, which he proposes to take. The Rule does not say that action in the matter shall be taken by the Corporation after consultation with the Surgeon-General. Rule 22 contains separate provisions for action to be taken against an insured person and against an Insurance Medical Practitioner, after consideration of the report of the Medical Service Committee. In the former case it is to be taken by the Corporation under Sub-rule (1) and in the latter by the Surgeon-General under Sub-rule (2). The Surgeon-General and the Administrative Medical Officer, therefore, act as Officers or agents of the State Government, on whom the primary responsibility rests for providing medical aid to insured persons. Mr. Chari laid considerable stress on the fact that no Insurance Medical Practitioner can be removed for misconduct unless there had been an investigation by the Medical Service Committee. The power to take action on the report of the Medical Service Committee, however, vests in the Surgeon-General. It is true that the Surgeon-General is bound by the findings of the Committee on questions of fact, but the final decision in the matter as to the nature of the action to be taken against an Insurance Medical Practitioner rests with the Surgeon-General. The Surgeon-General is not required to consult the Corporation, except in one case and that is where a charge relates to failure to exercise proper care in the issue of medical certificates, referred to in Sub-rules, (2) and (6) of Rule 24. An appeal against the order of the Surgeon-General also lies, as I have pointed out, to the State Government and not to the Corporation.

32. Sub-rule (2) of Service Rule 13 empowers the State Government to remove the name of any Insurance Medical Practitioner from the medical list by giving him three months' notice. It does not require the State Government to consult the Corporation or even Medical Service Committee before taking action under this Rule. This rule, therefore, clearly shows that the contract or agreement of service of an Insurance Medical Practitioner is with the State Government and not with the Corporation. In fact, there is no provision in the Rules empowering the Corporation to take any kind of disciplinary action against an Insurance Medical Practitioner.

33. The terms of service of an Insurance Medical Practitioner can also be revised only by the State Government under Service Rule No. 12. No doubt, the State Government has to consult the Corporation, but it is the State Government, which has to give notice of the proposed alterations to each Insurance Medical Practitioner. This also shows that the contract of service is with the State Government and not with the Corporation.

34. Mr. Chari has laid considerable stress on Clause (b) in Service Rule 1, which states that the Regulations framed by the Corporation shall apply to Insurance Medical Practitioners as if they were Insurance Medical Officers appointed under these Regulations. The words "as if" show that they are in fact not appointed under the Regulations. The expression "Insurance Medical Officer" is defined in Clause (n) of Regulation 2 as follows:

" 'Insurance Medical Officer' means a medical practitioner appointed as such to provide medical benefit and to perform such other functions as may be assigned to him and shall be deemed to be a duly appointed medical practitioner for the purposes of Chapter V of the Act".

The medical practitioner appointed to provide medical benefit is the Insurance Medical Practitioner, whose appointment is made by the Surgeon-General and not by the Corporation. Apart from the above provision in the definition clause, there is no other provision in the Regulations relating to the appointment or the termination of the Services of Insurance Medical Officers. There is no provision empowering the Corporation to take disciplinary action against or to remove an Insurance Medical Officer from service. This is evidently because Insurance Medical Practitioners are appointed by the Surgeon-General and by virtue of the above Service Rule are deemed to have been appointed as Insurance Medical Officers under the Regulations.

35. It also appears from the Service Rules that the Insurance Medical Practitioners have to furnish certain reports to the Corporation and that their clinics are liable to be inspected by the Officers of the Corporation. They have also to comply with the directions issued by the Corporation in certain matters. These obligations are imposed on the Insurance Medical Practitioners by their Service Rules. Part of their remuneration is also paid by the Corporation. But these facts will not show that they are the servants of the Corporation, having regard to the other facts that their appointments are made by the Surgeon-General, that the Corporation can take no disciplinary action against them and that they can only be removed either by the Surgeon-General or by the State Government.

36. There is also no dispute that at least part of the remuneration payable to the Insurance Medical Practitioners comes out of the revenues of the State. The only conclusion, which, in our opinion, can be drawn, after a consideration of all the facts and circumstances referred to above,

is that an Insurance Medical Practitioner holds a post or an office under the Government of Bombay.

37. Mr. Chari has also contended that the post or office of an Insurance Medical Practitioner cannot be said to be office of profit, because no specific remuneration is attached to it and because the remuneration that an Insurance Medical Practitioner might earn or become entitled to depends upon the number of insured persons, whom he has agreed to provide medical treatment. He has, therefore, urged that as to remuneration is attached to the post itself, it cannot be said to be an office of profit. For the reasons, which I have already given, we are unable to accept this argument. It is by virtue of his office as an insurance Medical Practitioner that he receives the remuneration payable under Service Rule 20, which at present is Rs. 6/8/- per person. As, therefore, profit is in fact earned from this office, it must be held to be an office of profit.

38. We are accordingly of the opinion that the Election Tribunal was right in finding that the appellant held an office of profit under the State of Bombay. The appellant was, therefore, disqualified for being chosen as, and for being, a member of the Legislative Assembly of the State of Bombay. The order passed by the Election Tribunal declaring the electing of the appellant to be void is, therefore, correct and is confirmed.

39. The second point, which has been urged by Mr. Chari, is that the Tribunal was wrong in declaring the respondent to be elected, as the respondent had not secured a majority of valid votes, which were given at the election. From the judgment of the Tribunal, it appears that this point was not urged before the Tribunal. On the other hand, the Tribunal has observed that it was not disputed that the respondent would be entitled to be declared to be duly elected, in case the Tribunal came to the conclusion that the appellant was disqualified for standing as a candidate at the election. The question is, however, a question of law and even if a concession was made on behalf of the appellant before the Election Tribunal, that would not debar him from raising this point in this appeal, for it affects not only the appellant and the respondent, but also the electorate in the constituency, from which the appellant was elected. The position in England is, as stated in paragraph 556 in Halsbury's Laws of England, Vol. 12, 2nd Edn. p. 285:

"If a candidate, who does not withdraw, is for any reason disqualified to be a candidate, and the other candidate desires that all votes given for the candidate so disqualified should be treated as having been thrown away, i.e., treated as null and void as though they had never been given, a notice of the disqualification must be published to the electors. In the absence of such a notice, a new election ought to be had unless either the persons whose votes it is sought to treat as having been thrown away can be shown in fact to have been aware of the disqualification, or the disqualification is of a sort whereof notice is to be presumed". (See also *Hobbs v. Morey*<sup>15</sup>.)

In that case two candidates had been nominated in proper form for election to the office of councillor for a ward in a borough. The respondent obtained a majority of the votes and was declared elected. Both at the time of his nomination and of the election, however, he was disqualified by reason of his interest in a contract with the council. The petitioner claimed the seat on the ground that his being the only valid nomination he should be declared elected. His prayer was not granted on tire ground that the disqualification not being apparent on the face of

the nomination paper, the nomination of the respondent was valid and that as the petitioner did not allege any notice to the electorate of the disqualification of the respondent, the votes given for him could not be treated as having been thrown away, and the petitioner was not entitled to claim the seat.

40. In India, however, we are governed by the provisions of the Representation of the People Act, 1951. Section 100 specifies the orders, which an Election Tribunal may pass. Under Sub-sec. (1) of Section 100, the Tribunal shall declare the election of the declared candidate to be void, if the Tribunal is of opinion that he was not qualified or was disqualified to be chosen to fill the seat under the Constitution. Section 101 provides that if any person, who has lodged a petition, has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself has been duly elected and the Tribunal is of opinion –

(a) That in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner would have obtained a majority of the valid votes, the Tribunal shall after declaring the election of the returned candidate to be void declare the petitioner to have duly elected. In this case, there is no allegation that the appellant had obtained any votes by corrupt practices. Clause (b) has, therefore, no application. The respondent can, therefore, be granted a declaration about his having been duly elected, only if he could show that in fact he had received a majority of the valid votes. The expression "valid votes" is not defined in the Act or in the rules made thereunder. Mr. Gupte has contended that the effect of the declaration of the appellant's election to be void is that the whole process of election in regard to him was illegal and void and that consequently, the votes, which were given for the appellant, must be regarded as thrown away or as invalid votes. He has relied on the observations of one of the members of the Tribunal in 10 Election L. R. 49 (D). It however, appears from the decision in this case that the majority of the members of the Tribunal did not agree with his view. The reply

<sup>15</sup>(1904) 1 KB 74

to Mr. Gupte's argument is, however, furnished by Section 36. Sub-sec. (8) of this section states that immediately after all the nomination papers have been scrutinised and decisions accepting or rejecting the same have been recorded the returning officer shall prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid, and affix it to his notice board. All nominations, which have not been rejected by the returning officer after scrutiny of nomination papers are, therefore, to be deemed valid. The appellant was consequently a validly nominated candidate within the meaning of the Act. We are, therefore, unable to accept Mr. Gupte's argument that as a result of the appellant's election having been declared void, the nomination of the appellant also became invalid. The same view was taken in (1904) 1 KB 74 at p. 77, where the following observations of Lord Watson in *John Pritchard v. Mayor andc of Bangor*<sup>16</sup>, at p. 252 were cited with approval:

"If no objection is made, or if objections are stated and repelled by the mayor, then the

nomination becomes a valid nomination. I do not mean to suggest that it is final and conclusive upon questions of disqualification or other similar objections which may be taken to it, but I think it was intended to be conclusive to this effect, that the nomination paper so sustained as valid should form the basis of the election, and that the nominee in that paper should be treated as a person for whom votes could be given before the returning officer".

41. In this case no objection was taken to the nomination of the appellant on the ground that he was disqualified to be chosen as a member of the Legislative Assembly, at the time when he filed his nomination paper. His nomination paper was also accepted by the returning officer. The election took place on the basis that his nomination was valid. The votes given to the appellant cannot, therefore, be deemed to have been thrown away or regarded as invalid votes. Any other construction will also be unfair to the electorate, which voted on the assumption, which it was entitled to make, that as he was included in the list of validly nominated candidates, votes could properly be given for him.

42. Rule 57 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956 provides for scrutiny and rejection of ballot papers. Sub-rules (2) and (3) specify the land of ballot papers, which are to be rejected. Sub-rule (1) of rule 58 states that every ballot paper, which is not rejected under Rule 57, shall be deemed to be valid and shall be counted. All votes, except those represented by ballot papers rejected under Rule 57, are therefore to be deemed to be valid votes. The appellant received at the election 22,914 such votes, while the respondent received 14,885 votes. The respondent did, therefore, not receive a majority of valid votes given at the election. Consequently, no declaration can be granted to the respondent declaring him to be a duly elected candidate.

43. The appeal is, therefore, allowed in part. The order passed by the Tribunal declaring the election of the appellant to be void is confirmed, but the other order passed by the Tribunal declaring the respondent to be a duly elected member of the State Legislative Assembly is set aside. There will be no order as to costs throughout.

44. The rule issued in Civil Application No. 2738 of 1957 will be discharged. There will  
<sup>16</sup>(1888) 13 AC 241

be no order as to costs in this application.

Order accordingly.