Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1463 OF 2008

State Election Commissioner, Bihar Patna & others ...Appellant(s)

Versus

Janakdhari Prasad and others ...Respondent(s)

J U D G M E N T

Dipak Misra, CJI

Janakdhari Prasad, the 1st respondent herein, was elected in the year 2001 as a member of Panchayat Samiti, Nagarnausa. On 13th February, 2004, the fifth respondent, Ravindra Nath Sharma, filed a petition before the State Election Commission, Bihar (for short "the Commission") contending, *inter alia*, that the respondent No. 1 was working as an Assistant Government Pleader in Hilsa, sub-division of District Nalanda and, therefore, he was disqualified to hold the

post of member, Panchayat Samiti in view of Section 139(l)(c) of the Bihar Panchayat Raj Act, 1993 (for brevity, 'the Act').

2. The Election Commission, in order to decide the issue whether the 1st respondent was in service of the State Government within the sweep of Section 139(l)(c) of the Act, referred to the appointment letter issued by the Law Department, Government of Bihar, *vide* which the respondent herein was appointed as an Advocate in the panel of Assistant Government Advocates and thereafter observed that the said respondent was holding a post under the State Government and was receiving fees for the cases conducted by him from the Government and hence, he would be deemed to be in service of the State. Being of this view, the Election Commission vide order dated 29.03.2004 disqualified the respondent under Section 139(l)(c) of the Act from the post of Member in the Panchayat Samiti.

3. Aggrieved by this Order of the Commission, the 1st respondent knocked at the doors of the High Court of Judicature at Patna by preferring a Writ Petition (CWJC) No.

4322 of 2004 under Article 226 of the Constitution of India for quashment of the order of the Commission. The learned Single Judge opined that the word “service” has not been defined under the Act and hence, its meaning has to be ascertained in the context it is used and the context in which it is used denotes various classes or category of posts within it. The learned Single Judge further observed that no hard and fast rule can be laid to ascertain as to which category of office shall come within the expression “service”, for host of factors have to be taken into consideration to determine such relationship. He further proceeded to observe that none of the factors may be conclusive and no single factor may be considered absolutely essential. Eventually, he stated:-

> “In my opinion, for bringing an office within the expression 'service' of State Government there has to be a relationship of Master and Servant, age of entering and retirement, scale of pay or fixed remuneration, the Conduct and Discipline Rules and such other factors. The presence of one ingredient or the other may not necessarily bring a particular office within the expression 'service' in the context of disqualification but presence of some or the other is necessary for the purpose"

Thereafter, the learned Single Judge examined the nature of appointment of a Government pleader who is paid a retainer-ship as fee and differentiated between the nature of appointment of an Assistant Government Pleader from that of a Government Pleader and came to hold that so far as the Assistant Government Pleader is concerned, he is appointed to assist the Government Pleader and for the professional work rendered, he is paid remuneration but not paid any retainer fee. He further expressed the view that a Government Pleader is not entitled to appear against the State Government but an Assistant Government Pleader, can appear, against the State Government in a case. The Assistant Government Pleader is basically an Advocate on the roll of the State Bar Council and besides giving professional advice to other litigants by virtue of his/her engagement by the State Government, he/she also advises and represents the State Government in Courts of Law. The appointment of the Government Pleader is governed by the executive instruction which is a tenure appointment and he remains a legal practitioner for all purpose and intent.

That apart, the engagement of an advocate as an Assistant Government Pleader is a professional engagement and the relationship between the State and that of the Assistant Government Pleader is that of a lawyer and client and not of Master and Servant. There is neither minimum or maximum age limit for engagement of a person as an Assistant Government Pleader nor there is any age of retirement. Assistant Government Pleader is paid fees for the professional work done by him and his remuneration is not fixed in a particular time scale. Additionally, no Discipline Rules govern his conduct and he is bound by same Code of Conduct as any other lawyer. Considering all the aspects in a cumulative manner, he arrived at the conclusion that the Assistant Government Pleader cannot be said to be in service of the State Government so as to bring him within the mischief of Section 139(l)(c) of the Act.

4. On the issue of office of profit, the learned Single Judge observed that the expression "in service" of the State Government and the expression "office of profit" in State

Government are not synonymous and, therefore, a person may hold an office of profit under the State but that does not amount to the fact that he is "in service" of the State. With the aforesaid reasoning, he set aside the order of the Commission.

5. Aggrieved by the aforesaid view, the State Election Commissioner filed an appeal, being L.P.A No. 879 of 2004, before a Division Bench of the High Court, which concurred with the view expressed by the Single Judge and dismissed the appeal *vide* impugned judgment and order dated 27.10.2005. The said dismissal has led to filing of the present appeal by special leave.

6. Criticising the impugned judgment and order of the High Court, it is submitted by the learned counsel for the appellants that the 1st respondent was appointed in respect of a sanctioned post and, therefore, he is in service of the Government which would indubitably disqualify him to remain as a member. It is his further submission that the word “service” contextually is of wider import and it has to be conferred a purposive meaning so that the democracy is

sustained at the ground level and the elected representatives remain connected to their electorate.

7. Despite service of notice, none has appeared on behalf of the respondents.

8. To appreciate the controversy at hand, we may refer to Article 243F(1)(b) of the Constitution of India. It reads as follows:-

> "**Article 243F. Disqualifications for membership**.- (1) A person shall be disqualified for being chosen as, and for being, a member of a Panchayat-
>
> xxxx xxxx xxxx
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> (b) if he is so disqualified by or under any law made by the Legislature of the State."

Article 243F(1)(b) makes it quite clear that a member of Panchayat shall stand disqualified by or under any law made by the Legislature of the State. The Constitution of India has left it to the wisdom of the State Legislature.

9. The Legislature of the State of Bihar has enacted the Act and Section 139 of the Act stipulates that the persons

disqualified shall cease to hold the office. The said provision is as under:-

> "**Section 139. *Disqualification*.**- (1) Notwithstanding anything contained in this Act, a person shall be disqualified for election or after election for holding the post as Mukhia, member of the Gram-Panchayat, Sarpanch, Panch of the Gram Katchahri, member of the Panchayat Samiti and member of Zila Parishad, if such person
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> (a) is not citizen of India;
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> (b) is so disqualified by or under any law for the time being in force for the purposes of elections to the legislature of the State:
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> Provided that no person shall be disqualified on the ground that he is less than twenty five years of age, if he has attained the age of twenty one years;
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> (c) is in the service of Central or State Government or any local authority;
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> (d) is in service of any such institution receiving aids from Central or State government or any local authority;
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> (e) has been adjudged by a competent court to be of unsound mind;
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> (f) has been dismissed from the service of Central or State Government or any local authority for misconduct and has been

declared to be disqualified for employment in the public service;

(g) has been sentenced by a criminal court whether within or out of India to imprisonment for an offence, other than a political offence, for a term exceeding six months or has been ordered to furnish security for good behaviour under Section 109 or Section 110 of the Code of Criminal Procedure, 1973 (Act 2, 1974) and such sentence or order not having subsequently been reversed;

(h) has under any law for the time being in force become ineligible to be a member of any local authority;

(i) holds any salaried office or office of profit under the Panchayat;

(j) has been found guilty of corrupt practices.

Provided that on being found guilty of corrupt practices, the disqualification shall cease after six years of general election.

(2) If any question arises as to whether a member of a Panchayat at any level has become subject to any of the disqualifications mentioned in sub-section (1), the question shall be referred for the decision of such authority and in such manner as the Government may by law provide.

(3) If a person, who is chosen as a member of Panchayat, a Mukhia, a

> Sarpanch, is or becomes a member of the Lok Sabha, Rajya Sabha, Legislative Assembly, Legislative Council, or is or becomes a municipal councillor or a councillor of a Municipal Corporation or a member of Sanitary Board or a member of a notified area committee or a member of any other Panchayat, Mukhia, Sarpanch, then within fifteen days from the date of commencement of the term of office of a member of Lok Sabha, Rajya Sabha, Legislative Assembly, Legislative Council or of a councilor of municipality or Municipal Corporation or a member of Sanitary Board or notified area committee or a member of other Panchayat or Mukhia or Sarpanch, his seat in the Panchayat shall become vacant unless he has previously resigned his seat in the Lok Sabha, Rajya Sabha, Legislative Assembly, Legislative Council, Municipality or the Municipal Corporation, Sanitary Board or the notified area committee or of any such Panchayat as the case may be."

Rule 122 of the Bihar Panchayat Election Rules, 1995, as amended in 2002, empowers the State Election Commission to decide disqualification of an elected member of a Panchayat. The said Rule reads as follows:-

> "Rule 122. Under provisions of Section 139(2) of the Bihar Panchayat Raj Act, 1993, the State Election Commission shall be the competent authority to decide whether a member of the Panchayat at any

> level has become subject to any of the disqualifications mentioned in Section 139(1) of the Act. The matter of disqualification may be brought to the notice of the State Election Commission in the form of a complaint, application or information by any person or authority. The State Election Commission may also take suo moto cognizance of such matters and decide such matters expeditiously after allowing sufficient opportunity to the affected parties of being heard."

We have reproduced the relevant Section and the Rule to appreciate the controversy in entirety.

10. In the case at hand, we are concerned with Section 139(1)(c) and (d) of the Act. In Section 139(1)(c), there is a postulate that a person shall be disqualified if such a person is in the service of Central or State Government or any local authority. Section 139(1)(d) lays down a disqualification if the person is in service of such institution receiving aids from Central or State Government or any local authority. As is noticeable, the key word in both the provisions pertains to 'service'.

11. As has been stated earlier, the learned single Judge has drawn a distinction between "office of profit" and "service under the Government". We think it apposite to restate the legal position, the distinction between the two facets as above and thereafter x-ray the provision, the legislative purpose behind the same and the nature of appointment.

12. A three-Judge Bench in ***Ravanna Subanna v. G.S. Kaggeerappa***[1], was dealing with the acceptance of nomination papers of the appellant on the ground that he was holding an office of profit under the Government at the relevant time as he was the Chairman of Taluk Development Committee and was, hence, disqualified for being chosen as a Councillor under Section 14 of the Mysore Town Municipalities Act, 1951 (for short, "1951 Act"). The objection was overruled by the Returning Officer and eventually the appellant was declared elected. Challenging the election, the respondent filed an election petition before the concerned Sub-Judge who dismissed the petition opining that the elected candidate was not holding an office of profit under the Government as

1 AIR 1954 SC 653

contemplated by Section 14 of the 1951 Act. The said judgment was reversed by the Division Bench of the High Court in an appeal and respondent was declared elected. Section 14(1) enumerated various grounds of disqualification and one of such grounds was that of a person holding an office of profit under the Government of India or the Government of any State specified in the First Schedule. It further provided that if any person is elected as a councilor in contravention of the provisions, his seat shall be deemed to be vacant. The Court addressed to the issue of disqualification and posed the question whether the appellant held an office of profit as provided for under Section 14(1)(A)(a)(iii) of the 1951 Act. The three-Judge Bench expressed thus:-

> "12. … The plain meaning of the expression seems to be that an office must be held under Government to which any pay, salary, emoluments or allowance is attached. The word "profit" connotes the idea of pecuniary gain. If there is really a gain, its quantum or amount would not be material; but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carries any profit."

Analysing the facts of the case in detail, the Court ruled:-

> "12. ... From the facts stated above, we think it can reasonably be inferred that the fee of Rs. 6 which the non-official Chairman is entitled to draw for each sitting of the committee, he attends, is not meant to be a payment by way of remuneration or profit, but it is given to him as a consolidated fee for the out-of-pocket expenses which he has to incur for attending the meetings of the committee. We do not think that it was the intention of the Government which created these Taluk Development Committees which were to be manned exclusively by non-officials, that the office of the Chairman or of the members should carry any profit or remuneration."

And, again:-

> "13. ... it cannot be argued that even if a Chairman or a member of a Government committee works in a purely honorary capacity and there is no remuneration attached to the office, he will still be regarded as a person holding office of profit in view of the provisions of the section. ..."

After expressing the aforesaid view, the three-Judge Bench of this Court reversed the judgment of the High Court.

13. In ***Sakhawant Ali v. State of Orissa***[2], the issue arose whether the nomination papers were correctly rejected by the Election Officer on the ground that the appellant therein was employed as a legal practitioner against the Municipality in a case under Section 198 of the Bihar and Orissa Municipal Act. The candidate whose nomination paper was rejected moved the High Court under Article 226 of the Constitution praying for a writ or order of prohibition to the State Government and the Election Officer restraining them from holding the election but the High Court rejected the said prayer. The Court took note of the fact that the Orissa Municipal Act, 1950 was passed by the State Legislature. Section 16 of the said Act prescribed the disqualification of a candidate for election and it provided that no person shall be qualified for election to a seat in a municipality if such person is employed as a paid legal practitioner on behalf of the municipality or as legal practitioner against the municipality. A contention was raised before the High Court that the person sought to contest the election could not be declared to be disqualified as the said Act

2 AIR 1955 SC 166

had come into operation on 15th April, 1951 and consequently, he could not have been disqualified from 15th March, 1951 when he filed the nomination papers. The Constitution Bench analysed Section 1 of the said Act and opined that the disqualification was attracted regard being had to the sub-section (5) of Section 1 of the said Act that had stipulated that the said provision in express terms provided that after the Act had received the assent of the Governor elections could be held under the Act but were only to take effect on the Act coming into force, which meant the coming into force of the Act in such area or areas on such date or dates which the State Government might appoint from time to time under Section 1(3) of the Act. There was thus contemplation under the very provisions of Section 1(5) to the holding of elections under the Act in spite of the fact that the Act had not come into force in a particular area. The Court further observed:-

> "11. The right of the appellant to practice the profession of law guaranteed by Article 19(1)(*g*) cannot be said to have been violated, because in laying down the disqualification in Section 16(1)(*ix*) of the Act the Legislature does not prevent him

> from practising his profession of law but it only lays down that if he wants to stand as a candidate for election he shall not either be employed as a paid legal practitioner on behalf of the municipality or act as a legal practitioner against the municipality. There is no fundamental right in any person to stand as a candidate for election to the municipality. The only fundamental right which is guaranteed is that of practising any profession or carrying on any occupation, trade or business. There is no violation of the latter right in prescribing the disqualification of the type enacted in Section 16(1)(*ix*) of the Act."

14. A Constitution Bench in ***Guru Gobinda Basu* v. *Sankari Prasad Ghosal and others***[3] was dealing with an issue wherein the appellant was a chartered accountant and a partner of firm of auditors carrying on business under the name and style of a company and the said firm acted as the auditor of certain companies and corporations. The appellant carried with it the right to receive fees, remuneration as Director of the West Bengal Financial Corporation. The Court, analyzing Article 102(l)(a) of the Constitution and concurring with the view of the High Court stated thus:-

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3 AIR 1964 SC 254

> "... We agree with the High Court that for holding an office of profit under the Government, one need not be in the service of Government and there need be no relationship of master and servant between them., The Constitution itself makes a distinction between 'the holder of an office of profit under the Government' and 'the holder of a post or service under the Government'; see Arts. 309 and 314. ..."

15. The Court referred to the decision in ***Maulana Abdul Shakur v. Rikhab Chand and another***[4]. In the said case, the question arose before a Constitution Bench whether the returned candidate was holding an office of profit, for he was the manager of a school run by a committee of management formed under the provisions of Durgah Khwaja Saheb Act, 1955. It was contended before the Court that the Government of India had the power of appointment and removal of the members of the committee of management, as also the power to appoint the administrator in consultation with the committee and, therefore, the returned candidate was under the control and supervision of the Government and hence, he was holding an office of profit under the Government of India.

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4 AIR 1958 SC 52

The Court repelled the submission by drawing a distinction between the holder of an office of profit under the Government and the holder of an office of profit under some other authority subject to the control of Government. The Court expressed its opinion thus:-

> "No doubt the Committee of the Durgah Endowment is to be appointed by the Government of India, but it is a body corporate with perpetual succession acting within the four corners of the Act. Merely because the Committee or the members of the Committee are removeable by the Government of India or the Committee can make bye-laws prescribing the duties and powers of its employees cannot in our opinion convert the servants of the Committee into holders of office of profit under the Government of India. The appellant is neither appointed by the Government of India nor is removable by the Government of India nor is he paid out of the revenues of India. The power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of Government revenues are important factors in determining whether that person is holding an office of profit under the Government though payment from a source other than Government revenue is not always a

> decisive factor. But the appointment of the appellant does not come within this test."

The aforesaid passage lucidly states what basically constitutes an office of profit.

16. In ***Mahadeo v. Shantibhai and others***[5], question arose whether a lawyer had incurred disqualification on account of holding an office of profit under the Government. The appellant was kept on the panel of Railway Pleaders for conducting suits filed against the Union of India in the courts of Ujjain on the terms and conditions therein mentioned. One of the terms shows that the appellant was ordinarily to be entrusted with cases up to valuation of rupees three thousand only. Another condition was that he would not accept any brief against any Railway in any court. Clause (13) of the terms of the appointment letter read as follows:-

> "You will be expected to watch cases coming up for hearing against this Railway in the various courts at UJB and give timely intimation of the same to this office. If no instructions regarding any particular case are received by you, you will be expected to appear in the court and obtain an adjournment to save the ex parte

5 (1969) 2 SCR 422

> proceedings against this Railway in the court. You will be paid Rs 5 for every such adjournment if you are not entrusted with the conduct of the suit later on."

17. The Court referred to the observations of House of Lords in ***Mcmillan v. Guest***[6] wherein Lord Wright, delivering the opinion, said:-

> "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."

Eventually, the Court expressed the view:-

> "If by "office" is meant the right and duty to exercise an employment or a position to which certain duties are attached as observed by this Court, it is difficult to see why the engagement of the appellant in this case under the letter of February 6, 1962 would not amount to the appellant's holding an office. By the said letter he accepted certain obligations and was required to discharge certain duties. He was not free to take a brief against the Railway Administration. Whether or not the Railway Administration thought it proper to entrust any particular case or litigation pending in the court to him, it was his duty to watch all cases coming up for hearing against the

6 [1942] AC 561

Railway Administration and to give timely intimation of the same to the office of the Chief Commercial Superintendent. Even if no instructions regarding any particular case were given to him, he was expected to appear in court and obtain an adjournment. In effect this cast a duty on him to appear in court and obtain an adjournment so as to protect the interests of the Railway. The duty or obligation was a continuing one so long as the railway did not think it proper to remove his name from the panel of Railway lawyers or so long as he did not intimate to the Railway Administration that he desired to be free from his obligation to render service to the Railway. In the absence of the above he was bound by the terms of the engagement to watch the interests of the Railway Administration, give them timely intimation of cases in which they were involved and on his own initiative apply for an adjournment in proceedings in which the Railway had made no arrangement for representation. It is true that he would get a sum of money only if he appeared but the possibility that the Railway might not engage him is a matter of no moment. An office of profit really means an office in respect of which a profit may accrue. It is not necessary that it should be possible to predicate of a holder of an office of profit that he was bound to get a certain amount of profit irrespective of the duties discharged by him."

In the aforesaid judgment, as we notice, the Court laid emphasis on the terms of appointment and also on the concept of accrual of profit.

18. In ***Srimati Kanta Kathuria v. Manak Chand Surana***[7], the issue that arose for consideration was whether the appellant was holding an office of profit within the meaning of Article 191 of the Constitution or not. The appellant was appointed to assist the Government Advocate in the absence of any Assistant Counsel. The letter of appointment stipulated that the appellant was appointed as a Special Government Pleader to conduct the particular case on behalf of the State of Rajasthan alongwith Government Advocate. The Government laid down the fees payable to the appellant. In the said case, the High Court opined that the appellant held an office of profit. The majority referred to the decision in ***Great Western Railway Company v. Beater***[8] and ***Mcmillan*** case and referring to ***Mahadeo*** (supra) opined:-

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7 (1969) 3 SCC 268
8 8 Tax Cases 231,235

> "29. That case in no way militates against the view which we have taken in this case. That case is more like the case of a standing Counsel disqualified by the House of Commons. It is stated in *Rogers* (on Elections Vol. II) at p. 10:
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> "However, in the *Cambridge case* (121 Journ. 220), in 1866, the return of Mr Forsyth was avoided on the ground that he held a new office of profit under the Crown, within the 24th section. In the scheme submitted to and approved by Her Majesty in Council was inserted the office of standing counsel with a certain yearly payment (in the scheme called 'salary') affixed to it, which Mr Forsyth received, in addition to the usual fees of counsel. The Committee avoided the return."

The majority also referred to the decision in ***Sakhawant Ali*** (supra) which dealt with an instance where the legislature had provided that the paid legal practitioner could not stand in the municipal elections. Elucidating further, it has been expressed thus:-

> "36. In view of the above reasons, we must hold that the appellant was not disqualified for election under Article 191 of the Constitution. But assuming that she held an office of profit, this disqualification has been removed retrospectively by the Rajasthan Legislative Assembly by enacting the impugned Act."

19. A two-Judge Bench *in* ***Madhukar G.E. Pankakar v. Jaswant Chobbildas Rajani and others***[9] was dealing with the election of the President of a Municipal Council under the Maharashtra Municipalities Act, 1965. An unsuccessful candidate challenged the election of the returned candidate singularly on the ground that the candidate was disqualified under Section 16(1)(g) of the said Municipal Act inasmuch as on the date of nomination he was holding an office of profit under the Government, as he was then, admittedly working as a panel doctor appointed under the Employees' State Insurance Scheme (ESI Scheme), a beneficial project contemplated by the Employees' State Insurance Act, 1948. The returned candidate, a doctor, was admittedly on the date of filing of nomination, functioning as such but had resigned before actual polling took place. The Election Tribunal accepted the stand of the election petitioner and declared the election of the returned candidate void. It further proceeded to hold that the election petitioner, being the sole surviving candidate, was the President. Commenting on the election

9 (1977) 1 SCC 70

petition in the backdrop of facts, Krishna Iyer, J., who penned the judgment, wrote:-

> "6. It is plain democratic sense that the electoral process should ordinarily receive no judicial jolt except where pollution of purity or contravention of legal mandates invite the court's jurisdiction to review the result and restore legality, legitimacy and respect for norms. The frequency of forensic overturning of poll verdicts injects instability into the electoral system, kindles hopes in worsted candidates and induces post-mortem discoveries of "disqualifications" as a desperate gamble in the system of fluctuating litigative fortunes. This is a caveat against overuse of the court as an antidote for a poll defeat. Of course, where a clear breach is made out, the guns of law shall go into action, and not retreat from the rule of law."

20. In the said case, Section 16(1)(g) which provided for office of profit, read thus:-

> "16(l)(g): No person shall be qualified to become a Councillor whether by election, co-option or nomination, who is a subordinate officer or servant of Government or any local authority or holds an office of profit under Government or any local authority;"

It was contended before the Election Tribunal that the elected candidate was not entitled to become a councilor as he

held an office of profit under the Government. To appreciate the concept of office of profit, this Court referred to Section 58 of the ESI Act, 1948, ESI Scheme and opined that the elected candidate although was a private doctor and running a private clinic was also an insurance medical practitioner subject to the discipline, directions, obligations and control of the relevant officers appointed by the State Government in implementing the medical benefit scheme. His letter of appointment read that being a medical practitioner 'appointed as such to provide medical benefit under the Act and to perform such other functions as may be assigned to him'.

21. We may note with profit that in the said case, Krishna Iyer, J. clarified the conflict between ***Mahadeo*** (supra) and ***Srimati Kanta Kathuria*** (supra) by stating thus:-

> "41. ... Judicial technology sometimes distinguishes, sometimes demolishes earlier decisions; the art is fine and its use skilful. Both the cases dealt with advocates and we have referred to them in the earlier resume of precedents. Even so, a closer look will disclose why we follow the larger Bench (as we are bound to, even if there is a plain conflict between the two cases). Justice Rowlatt's *locus classicus* in *Great Western Rly. Co.* (followed by this Court in many

cases) helps us steer clear of logomachy about "office" especially since the *New English Dictionary* fills four columns. Rowlatt, J. rivetted attention on a subsisting, permanent, substantive position, which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders'. So, the first step is to enquire whether "a permanent, substantive position, which had an existence independent from the person who filled it" can be postulated in the case of an insurance medical practitioner. By contrast, is the post an ephemeral, ad hoc, provisional incumbency created, not independently but as a list or panel elastic and expiring or expanding, distinguished from a thing that survives even when no person had been appointed for the time being? "Thin partitions do their bounds divide", we agree, but the distinction, though delicate, is real. An office of insurance medical practitioner can be conjured up if it exists even where no doctor sits in the saddle and has duties attached to it qua office. We cannot equate it with the post of a peon or security gunman who too has duties to perform or a workshop where government vehicles are repaired, or a milk vendor from an approved list who supplies milk to government hospitals. A panel of lawyers for legal aid to the poor or a body of doctors enlisted for emergency service in an epidemic outbreak charged with responsibilities and paid by the Government cannot be a pile of offices of profit. If this perspective be correct, *Kanta* and *Mahadeo*

> fit into a legal scheme. In the former, an ad hoc Assistant Government Pleader with duties and remuneration was held to fall outside "office of profit". It was a casual engagement, not exalted to a permanent position, occupied *pro tempore* by *A* or *B*. In *Mahadeo*, a permanent panel of lawyers "maintained by the Railway Administration" with special duties of a lasting nature constituted the offices of profit — more like standing counsel. …"
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> [Emphasis supplied]

We may hasten to say that we concur with the said harmonization as we find that it is founded on apposite reasoning and also in accord with the precedents holding the view as regards 'office of profit'. Be it noted, eventually, the Court ruled that the appellant therein a doctor functioning under the ESI Scheme was not holding an office of profit.

22. In ***Ashok Kumar Bhattacharyya v. Ajoy Biswas and others***[10], a three-Judge Bench while dealing with the issue whether the respondent No. 1 was disqualified for being elected as a member of the House of People as he held an office of profit under the Government of Tripura within the meaning of Article 102(1)(a) of the Constitution, for on the

10 (1985) 1 SCC 151

relevant date he was an Accountant- in-charge of the Agartala Municipality. After referring to many an authority, the Court ruled that for determination of the question whether a person holds an office of profit under the Government, each case must be measured and judged in the light of the relevant provisions. The Court further opined:-

> "21. ... Local Authority as such or any other authority does not cease to become independent entity separate from Government. Whether in a particular case it is so or not must depend upon the facts and circumstances of the relevant provisions. To make in all cases employees of Local Authorities subject to the control of Government, holders of office of profit under the Government would be to obliterate the specific differentiation made under Article 58(2) of the Constitution and to extend disqualification under Article 102(1)(*a*) to an extent not warranted by the language of the article."

On the basis of the aforesaid, ultimately the three-Judge Bench recorded its finding that the first respondent did not hold an office of profit under the Government of Tripura on the date of filing of the nomination.

23. In ***Shibu Soren v. Dayanand Sahay and others***[11], a three-Judge Bench, while dealing with the office of profit, opined that the expression "office of profit" has not been defined either in the Constitution or in the Representation of People Act. Anaylsing further, the Court proceeded to state that in common parlance, the expression 'profit' connotes an idea of some pecuniary gain. If there is really some gain, its label - 'honorarium' - 'remuneration' - 'salary' is not material. It is the substance and not the form which matters and even the quantum or amount of "pecuniary gain" is not relevant. What needs to be found out is whether the amount of money receivable by the concerned person in connection with the office he holds, gives to him some "pecuniary gain", other than as 'compensation' to defray his out of pocket expenses, which may have the possibility to bring that person under the influence of the executive, which is conferring that benefit on him. Eventually, the Court held that:-

> "The question whether a person holds an office of profit, as already noticed, is required to be interpreted in a realistic

11 (2001) 7 SCC 425

> manner having regard to the facts and circumstances of each case and relevant statutory provisions. While 'a strict and narrow construction' may not be adopted which may have the effect of 'shutting off many prominent and other eligible persons to contest the elections' but at the same time "in dealing with a statutory provision which imposes a disqualification on a citizen it would be unreasonable to take merely a broad and general view and ignore the essential points". The approach which appeals to us to interpret the expression "office of profit" is that it should be interpreted with the flavour of reality bearing in mind the object for enactment of Article 102(1)(a) namely to eliminate or in any event to reduce the risk of conflict between the duty and interest amongst members of the legislature by ensuring that the legislature does not have persons who receive benefits from the Executive and may thus be amenable to its influence."

The aforesaid passage emphasizes on the purpose of disqualification, the approach of the Court while appreciating the expression and to reduce the risk of conflict of interest between the duties and interest.

24. In ***Jaya Bachchan v. Union of India and others***[12], the issue arose whether the petitioner was holding an office of profit. She was appointed as Chairman of the Uttar Pradesh

12 (2006) 5 SCC 266

Film Development Council and was entitled to certain benefits. The Court analyzing the law enunciated in ***Ravanna Subanna*** (supra) and ***Shibu Soren*** (supra) opined that it is well settled that where the office carries with it certain emoluments or the order of appointment states that the person appointed is entitled to certain emoluments, then it will be an office of profit, even if the holder of the office chooses not to receive/draw such emoluments. What is relevant is whether pecuniary gain is "receivable" in regard to the office and not whether pecuniary gain is, in fact, received or received negligibly.

25. In the case at hand, the first respondent was treated as disqualified on the foundation that he was in service of the Government. In this context, we may usefully refer to the letter of appointment issued by the Government of Bihar, Legal (Justice) Department to the District Magistrate, Nalanda. It reads as follows:-

> "Letter No.-C/A(S) 40-01/98/3049/B
> Government of Bihar Legal (Justice)
> Department

From
Sri Birendra Singh,
Joint Secretary to the Government, Bihar

To
District Magistrate,
Nalanda, Biharsharif

Patna, Dated 18th August, 2000

Sub.: In relation to appointment of Assistant Government Advocate for the Court at Nalanda and Hilsa

Sir,

In reference to your letter No. 6224 dated 20.7.99 on above mentioned subject and law Department Letter No. 2413 dated 6.7.2000 as per direction I have to inform that the State Government has been kind to appoint Sri Janakdhari Prasad, Advocate on the post of Assistant Government Advocate in the panel of Assistant Government Advocates constituted for the Court at Nalanda and Hilsa.

After this appointment the total number of Assistant Government Advocates in the Court of Nalanda would be 19 (Nineteen) and the total number of Assistant Government Advocates in the Court of Hilsa would be 4 (four).

Faithfully yours,
Sd/-

Joint Secretary to the Govt., Bihar"

Analyzing the letter, the Election Commission has held that the elected candidate was holding a post under the State Government and, therefore, he was disqualified under sub-section (l)(c) of Section 139 of the Act.

26. On a careful scrutiny of the communication, it is quite vivid that the respondent No. l was appointed to the post of Assistant Government Advocate in the panel of Assistant Government Advocates constituted for the courts at Nalanda and Hilsa. There is no mention of any fixed remuneration.

27. In the obtaining factual score, would it be appropriate to accept the submission of the appellants that the elected candidate was in the service of the government. The legislature has, in exercise of its legislative power and wisdom, not used the words “office of profit”. Therefore, whether such a letter of appointment can be construed to determine if the person is holding an office of profit is not necessary to be addressed although we have referred to certain authorities to appreciate the context and its fundamental purpose. In the instant case, the election pertains to a Panchayat Samiti which basically

relates to the concept at the grass root level. The legislature, as it seems to us, has not thought of office of profit because had it thought so it would have provided in that manner. In ***Sakhawant Ali*** (supra), the legislature had provided a disqualification keeping in view the conflict of interest. The absence of such a provision possibly is to include persons from different fields as long as they are not in service under the government or a service in an institution receiving aids from the Central or State Government or any local authority. The legislature, as the postulate stands today, has confined to categories of service mentioned hereinbefore. It depends on the legislative wisdom. It further needs to be stated that the nature of disqualification has to be strictly construed keeping in mind that right to contest an election is not a fundamental right but the said right may be curtailed under valid statutory provision.

28. The aforesaid being the position, we may presently focus on what constitutes a service. In ***State of Assam and others***

v. Kanak Chandra Dutta[13] , Bachawat, J., speaking for the Constitution Bench, held that a person holding a post under a State is a person serving or employed under the State. There is a relationship of master and servant between the State and a person holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post.

29. In this regard, reference to another Constitution Bench decision in ***Roshan Lal Tandon v. Union of India***[14] would be apposite. In the said case, it has been opined that the legal position of a Government servant is more one of status than a

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13 AIR 1967 SC 884
14 AIR 1967 SC 1889

contract. The hall-mark of status is the attachment to legal relationship of rights and duties imposed by the public law and not by mere agreement by the parties. The duties of status are fixed by the law and status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned. As is evincible, emphasis was given on the status in contradistinction to contractual service.

30. Learned counsel appearing for the Commission, has placed heavy reliance on ***Kumari Shrilekha Vidyarthi and others v. State of U.P. and others***[15]. In the said case, the Government of the State of U.P. had terminated by a general order the appointments of all Government Counsel (Civil, Criminal, Revenue) in all the districts of the State of U.P. The High Court had upheld the circular by which the order was passed. In appeal, by special leave, the Court dealt with two contentions, namely, the nature of appointments and the minimum basis of status attached to those appointments. For

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15 (1991) 1 SCC 212

the purpose of examination whether the ground of arbitrariness was available to vitiate the circular, the Court referred to the Legal Remembrancer's Manual and especially paragraphs 7.06 to 7.09 which deals with appointment and renewal of local practitioners finally selected by the government. The said paragraph deals with the term, tenure, bar on political activity, renewal of term and character roll.

31. Relying on the same and other aspects, the Court held:-

> "The above provisions in the L.R. Manual clearly show that the Government Counsel in the districts are treated as Law Officers of the State who are holders of an 'office' or 'post'. The aforesaid provisions in Chapter VII relating to appointment and conditions of engagement of District Government Counsel show that the appointments are to be made and ordinarily renewed on objective assessment of suitability of the person based on the opinion of the District Officer and the District Judge; and character roll is maintained for keeping a record of the suitability of the appointee to enable an objective assessment for the purpose of his continuance as a Law Officer in the district. There are provisions to bar private practice and participation in political activity by D.G.Cs. Apart from clause 3 of para 7.06 to which we shall advert a little later, these provisions clearly indicate that the

> appointment and engagement of District Government Counsel is not the same as that by a private litigant of his counsel and there is obviously an element of continuity of the appointment unless the appointee is found to be unsuitable either by his own work, conduct or age or in comparison to any more suitable candidate available at the place of appointment. Suitability of the appointee being the prime criterion for any such appointment, it is obvious that appointment of the best amongst those available, is the object sought to be achieved by these provisions, which, even otherwise, should be the paramount consideration in discharge of this governmental function aimed at promoting public interest. All Govt. Counsel are paid remuneration out of the public exchequer and there is a clear public element attaching to the 'office' or 'post'."

After so stating, the Court referred to Sections 24 and 321 of the Code of Criminal Procedure and further analyzed the ratio in ***Mundrika Prasad Singh v. State of Bihar***[16] and ***Mukul Dalal and others v. Union of India and others***[17] and came to hold that the office of the Public Prosecutor is a public one and the primacy given to the Public Prosecutor under the scheme of Code has a social purpose.

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16 (1979) 4 SCC 701
17 (1988) 3 SCC 144

32. In this regard, we may reproduce a passage from the said authority which is as follows:-

> "We are, therefore, unable to accept the argument of the learned Additional Advocate General that the appointment of District Government Counsel by the State Government is only a professional engagement like that between a private client and his lawyer, or that it is purely contractual with no public element attaching to it, which may be terminated at any time at the sweet will of the Government excluding judicial review. We have already indicated the presence of public element attached to the `office' or `post' of District Government Counsel of every category covered by the impugned circular. This is sufficient to attract Article 14 of the Constitution and bring the question of validity of the impugned circular within the scope of judicial review."

33. Eventually, the Court analyzing the test of Article 14, opined:-

> "In our opinion, the wide sweep of Article 14 undoubtedly takes within its fold the impugned circular issued by the State of U.P. in exercise of its executive power, irrespective of the precise nature of appointment of the Government Counsel in the districts and the other rights, contractual or statutory, which the appointees may have. It is for this reason that we base our decision on the ground

> that independent of any statutory right, available to the appointees, and assuming for the purpose of this case that the rights flow only from the contract of appointment, the impugned circular, issued in exercise of the executive power of the State, must satisfy Article 14 of the Constitution and if it is shown to be arbitrary, it must be struck down. However, we have referred to certain provisions relating to initial appointment, termination or renewal of tenure to indicate that the action is controlled at least by settled guidelines, followed by the State of U.P., for a long time. This too is relevant for deciding the question of arbitrariness alleged in the present case."

The aforesaid passages clearly show that the Court went by the concept of public element attached to the office or post of Government Pleader. It has not expressed the opinion that they are under the Government service. Be that as it may, as has been held by the learned Single Judge and rightly so, there is no master-servant relationship and the respondent was not amenable to any disciplinary proceeding. He has correctly expressed the view that the conduct of the advocate is subject to the discipline of the Bar Council. As we notice, there is nothing on record to show that he was getting any remuneration. Even if some remuneration is attached to the

office, he cannot be treated to be under the service of the State Government. The aspects which are essential for establishing a relationship of master and servant are absent. Therefore, the returned candidate could not have been treated to be in service under the State Government.

34. In view of the premised reasons, we do not find any substance in the appeal and the same is, accordingly, dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

.....CJI.
(Dipak Misra)

.....J.
(A.M. Khanwilkar)

.....J.
(Dr. D.Y. Chandrachud)

New Delhi;
03 July, 2018