Karnataka High Court A.K. Subbaiah vs Sri Ramakrishna Hegde And Others on 20 August, 1993 Equivalent citations: AIR 1994 Kant 35, ILR 1993 KAR 2528, 1993 (4) KarLJ 205 Author: C S. Majmudar Bench: S Majmudar, S Venkataraman ORDER S. B. Majmudar, C. J. 1. This writ appeal is directed against the judgment and order rendered by the learned single Judge, in Writ Petition No. 18188 of 1991 on 17th Sept. 1992, by which the writ petition was allowed. The writ petition was moved by respondent No. 1 herein, challenging the order of the Governor of Karnataka passed under Art. 192(1) of the Constitution of India, holding that the respondent No. 1 (the writ petition) had become disqualified from being a Member of the Karnataka Legislative Assembly. The said decision was rendered by the Governor on the basis of the opinion of the Election Commission to that effect. The learned single Judge took the view that the said decision of the Governor was erroneous and was liable to be set aside by issuance of a writ under Art. 226 of the Constitution. That has brought the original respondent 3, who was the complainant before the Governor and at whose instance the controversy saw the light of the day, to the appellate Court, under Sections 4 and 10 of the Karnataka High Court Act, 1961. 2. A few introductory facts deserve to be noted at the outset, to highlight the controversy between the contesting parties. Respondent No. 1 (the writ petitioner) was elected on 27th Nov. 1989 as a Member of the Karnataka Legislative Assembly from Basavanagudi Conslitutency. Almost simulataneously, he was appointed as Deputy Chairman of the Planning Commission, a post which is equivalent to the rank of a Cabinet Minister. This post of Deputy Chairman has been in existence as an independent post or office answering the description of a cadre post entitling the incumbent of the office several benefits including salary, perquisites etc. 3. The Karnataka Legislature enacted Act No. 4 of 1957 known as the Karnataka Legislature (Prevention of Disqualification) Act, 1956 [hereinafter referred to as the 'Act'], which came into force on and from 24th January 1957. Section 3 of the Act, provides for removal of certain disqualifications adding a proviso regarding non-application of the removal of disqualifications to certain offices. On 30th December 1989, the present appellant submitted a Memorandum to the Governor of Karnataka urging him to exercise his power under Art. 192 of the Constitution of India to disqualify the first respondent as a Member of the Legislative Assembly. His contention was that the first respondent was a holder of an office of profit under the Central Government as he was appointed as Deputy Chairman of the Planning Commission, which post carried remuneration by way of salary, perquisites etc. The Governor, before taking a decision, naturally referred the complaint under Art. 192(2) of the Constitution, for opinion of the Election Commission. The Election Commission, after hearing the concerned parties, on 5th December 1989 came to the conclusion that the first respondent was disqualified to act as a Member of the Legislative Assembly, as from the day he had assumed office of the Deputy Chairman of the Planning Commission. On the basis of the said opinion, the Governor of Karnataka, on 6th August, 1991, issued an order in exercise of his power under Art. 191(1) of the Constitution, disqualifying the first respondent to function as Member of the Legislative Assembly. That action of the Governor, brought the first respondent

to this Court in Writ Petition No. 18188 of 1991 dated 6-8-1991 seeking a writ in the nature of certiorari for quashing the said order of the Governor of Karnataka. On 17th Sept. 1992, after hearing the contesting parties, the learned single Judge quashed the order of the Governor by issuing a writ of certiorari. It is this order, as noted earlier, which has resulted in the present writ appeal. 4. We may also briefly refer at this stage to certain developments which took place prior to the passing of the order by the Governor on 6th August, 1991. During the pendency of the proceedings before the Election Commission, on the complaint of the present appellant being Reference No. 1/90, the appellant had earlier filed Writ Petition No. 17666 of 1990 seeking direction to the Election Commission to proceed with the reference expeditiously. But, that petition was dismissed by the learned single Judge. However, in the said decision, it was observed by the learned single Judge that respondent No. 1 had not incurred any such disqualification as alleged. That order was challenged by the present appellant in Writ Appeal No. 1963 of 1990. In the said writ appeal, after hearing both the sides, the Division Bench set aside the aforesaid finding of the learned single Judge and directed the Election Commission to dispose of the reference at an early date, and that is how the Election Commission decided the reference, as indicated earlier, and has resulted in the impugned order passed by the Governor. 5. The learned counsel for the appellant vehemently contended at the outset that the learned single Judge, with respect to him has approached the matter as if it was a regular appeal against the order of the Governor based on the opinion of the Election Commission and such a jurisdiction is not vested in the High Court. That the judicial review in such a case is extremely limited and the present case does not fall within the limited scope of judicial review. He sought to support this contention in the light of various decisions to which we will make a reference hereafter. His submission was that the finality attached to the decision of the Governor under Art. 192(1) especially read with Art. 361 of the Constitution of India would take this case out of the purview of limited scope of judicial review and hence the learned single Judge ought not to have gone on merits of the matter and equally the appellate Court's jurisdiction will also be circumscribed as aforesaid. Therefore on this preliminary point the writ petition should be dismissed by allowing this appeal. It was next contended that once the elections to the Legislative Assembly were held and respondent No. 1 was declared elected and thereafter he is said to have incurred disqualification for being a Member of the Legislative Assembly as per Article 191(1)(a) of the Constitution., there would be a vacancy so far as his Membership from his Constituency is concerned and therefore in the light of the relevant provisions of Representation of the People Act especially Section 100 read with Section 146, it could be said that the present question would squarely be covered by Art. 329 of the Constitution and that would also bar the jurisdiction of the High Court in entertaining the Writ Petition relating to election dispute. It was next contended that the order of the Governor passed under Art. 192(1), of course after obtaining the opinion of the Election Commission, cannot be said to be an executive decision wherein the Governor would be aided and advised by Council of Ministers. Such an order read with Art. 361 would remain immune from the

process of the Court and when the Governor is not a party to these proceedings, the legality or validity of the order cannot be gone into. So far as the merits are concerned, it was submitted that the learned single Judge was not justified in taking the view that respondent No. 1 was not holding any 'office of profit' when he was appointed as Deputy Chairman of the Planning Commission by the Notification dated 5-12-1989. In his submission even though respondent No. 1 might have voluntarily agreed not to take any salary, it would not mean that he was not holding any office of profit as the post of Deputy Chairman of the Planning Commission carried remuneration. It was further contended that reliance placed by respondent No. 1 on the Karnataka Legislature (Prevention of Disqualification) Act, 1956 (Act No. 4 of 1957) is misplaced as Section 3 which seeks to remove certain disqualification mentioned in clause (d) cannot apply to the office of the Chairman or Member of the Planning Commission. If that provision is read with definition of "Committee" as found in Section 2(a) of the Act, it should be Committee or Commission set up by the Government of India or the Government of any State in exercise of executive powers and the Planning Commission would not be covered by the sweep of Section 2(a) as it is not a municipal body but it is a body having Constitutional outfit flowing from the powers vested in the Union of India under the Constitution and it continues to exist uniterruptedly all throughout. It was next submitted that even independently of this submission the relevant provision of the Act would not be of any assistance to respondent 1 as the proviso to Section 3(d) of the Act clearly provides that the holder of any such office should not be in receipt of or entitled to, any remuneration other than the compensatory allowance. Even if it is accepted that respondent 1 was not receiving any remuneration, he had voluntarily decided not to draw any remuneration attached to his office. Therefore, if he wanted, he could have drawn it. Hence he was entitled to remuneration. Consequently because of the proviso to Section 3(d) the office of the Deputy Chairman of Planning Commission which respondent-1 held at the relevant time took his case outside the sweep of exemption granted by Section 3 of the Act. For Art. 329(b) of the Constitution, it was submitted that Representation of the People Act is a complete Code and when an elected member incurs some disqualification during the currency of his membership of the Legislative Assembly, he could be said to have incurred a post-election disqualification which can also be processed according to the Representation of the People Act and would not be a subject matter of writ petition. 6. The learned counsel for respondent-1, on the other hand, refuted these contentions and submitted that the view taken by the learned single Judge is the only view which can be taken on the facts of this case and it requires no interference. 7. Before we deal with the rival contentions canvased by the learned counsel for the appellant and respondent-1, it would be necessary to have a look at the relevant provisions of the Constitution and statutory scheme having a bearing on the questions posed for our consideration. Article 102(1)(a) deals with disqualification for membership so far as member of either House of Parliament is concerned. It lays down that a person shall be disqualified for being a member of either House of Parliament if he holds any office of profit under the Govern-

ment of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder. Article 102(2) lays down that a person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule. Article 103(1) provides that if any question arises as to whether a Member of either House of Parliament has become subject to any disqualification mentioned in clause (1) of Art. 102, the question shall be referred for the decision of the President and his" decision shall be final. Article 103(2) provides that before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion. There is a parallel scheme in Arts. 191 and 192 so far as disqualifications for membership of Legislative Assembly or Legislative Council is concerned. Article 191(1) provides 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, 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. Article 191(2) lays down that a person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule. Article 192(1) provides that if any question arises as to whether a member of a House of the Legislative of a State has become subject to any of the disqualifications mentioned in Art. 191, the question shall be referred for the decision of the Governor and his decision shall be final. Article 192(2) provides that before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion. 8. Thus it becomes at once clear that the scheme regarding disqualification for membership of either House of Parliament is parallel to the scheme regarding disqualification from membership of Legislative Assembly or Legislative Council and in one case it is the President who on the opinion of the Election Commission can take decision which shall be final. In another case it is the Governor who after obtaining the opinion of the Election Commission has to decide which decision also shall be final. We may now turn to Art. 217(1) which deals with appointment and conditions of the Office of Judge of a High Court. Article 217(3) provides that if a question arises as to the age of Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final. It is pertinent to note that the decisions rendered by the President under Art. 103(1) and Art. 217(3) are treated to be final by the Constitution and they are the decisions which the President arrives at by himself and not on the aid and advice of the Council of Minister. We may then turn to the Tenth Schedule of the Constitution which is framed in the light of Arts. 102(2) and 191(2), to which we have made a reference earlier. This schedule deals with provisions as to disqualification on the ground of defection. Clause (6) of the Tenth Schedule deals with the decision on question as to disqualification on the ground of defection. Sub-clause (1) thereof, provides that if any question arises as to whether a Member of a House has become subject to disqualification under this Schedule, the question

shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final. Then follows clause (7) which deals with bar of jurisdiction of courts and provides that notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule. Article 329 provides bar to interference by courts in electoral matters. It reads as follows: "329. Bar to interference by courts in electoral matters: Notwithstanding anything in this Constitution - (a).... (b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature." 9. We may now turn to the relevant statutory provisions which shall also have a bearing on the present question. As noted earlier, Art. 191(1)(a) itself provides that the Legislature of the State by law may declare a particular office the holding of which may not disqualify its holder, meaning thereby the holder of such an office may get excluded from the sweep of Art. 191(1)(a). The State of Karnataka has enacted the Act i.e. Act No. 4/1957. That is an Act to declare certain offices of profit not to disqualify their holders for being chosen as, or for being, members of the Karnataka Legislative Assembly and the Karnataka Legislative Council. Section 2 of the Act is a Definitions Section. Clause (a) thereof provides that unless the context otherwise requires, 'Committee' means any Committee, Commission, Counsil, Board or any other body of one or more persons whether statutory or not, set up by the Government of India or the Government of any State. Then follows Section 3 which deals with Removal of certain disqualifications pertaining to the listed offices. Clause (d) covers the office of the Chairman, and it reads: "(d) the office of the Chairman or Member of a Committee: Provided that the holder of any such office is not in receipt of, or entitled to, any remuneration other than the compensatory allowance." Part VI of the Representation of the People Act, 1951, deals with disputes regarding elections. Section 80 thereof lays down that no election shall be called in question except by an election petition presented in accordance with the provisions of this Part. Section 80A deals with the High Court to try election petitions. Section 100 deals with the Grounds for declaring election to be void. Sub-section (1) is subject to the provisions of sub-section (2). In Chapter IV of Part VIII of the Act is found Section 146 which deals with the Powers of Election Commission and lays down the procedure to be followed by the Election Commission in connection with tendering of any opinion to the President under Art. 103 or, to the Governor under Art. 102 amongst others. It is in the light of these relevant Constitutional and Statutory provisions that the present controversy will have to be dealt with. We shall first deal with the preliminary objections to the maintainability of the writ petition moved by respon-dent-1, as canvassed by the learned counsel for the appellant. 10. Scope of judicial review:– It was submitted that as per the relevant Constitutional scheme flowing from Art. 192(1) there is finality attached to the decision of the Governor regarding the disqualification of a Member of Legislative Assembly like respon-dent-1 and once that decision is rendered, the scope of judicial review

of that decision is extremely limited and the High Court cannot sit as a Court of appeal against such a decision. This contention will have to be examined in the light of the settled legal position. 11. In the case of Union of India v. Jyoti Prakash Mitter, , the Supreme Court considered the scope of and ambit of the proceedings under Art. 217(3) and the scope of judicial review against the decision of the President under the said provisions. It is easy to visualise that the finality attached to the decision of the President under Article 217(3) is of a similar nature as the finality attached to the decision of the President under Art. 103(2) on the one hand and the Governor under Art. 192(1) on the other. The Constitutional Bench of the Supreme Court, in Union of India's case (supra), has laid down the scope of judicial review despite the finality attached to the decision of the President under Art. 217(3). It will be profitable to extract the ratio of the decision of the Supreme Court on this aspect as found in para 31 of the report, which reads:– "It is necessary to observe that the President in whose name all executive functions of the Union are performed is by Art. 217(3) invested with judicial power of great significance which has bearing on the independence of the Judges of the higher Courts. The President is by Art. 74 of the Constitution the constitutional head who acts on the advice of the Council of Ministers in the exercise of his functions. Having regard to the very grave consequences resulting from even the initiation of an enquiry relating to the age of a Judge, our Constitution-makers have thought it necessary to invest the power in the President. In the exercise of this power if democratic institutions are to take root in our country, even the slightest suspicion or a appearance of misuse of that power should be avoided. Otherwise independence of the judiciary is likely to be gravely imperilled. We recommend that even in the matter of serving notice and asking for representation from a Judge of the High Court where a question as to his age is raised, the President's secretariat should ordinarily be the channel, that the President should have consultation with the Chief Justice of India as required by the Constitution and that there must be no interposition of any other body or authority, in the consultation between the President and the Chief Justice of India. Again we are of the view that normally an opportunity for an oral hearing should be given to the Judge whose age is in question, and the question should be decided by the President on consideration of such materials as may be placed by the Judge concerned and the evidence against him after the same is disclosed to him. The President acting under Art. 217(3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral consideration's or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence. But this Court will not sit in appeal over the judgment of the President, nor will the Courts determine the weight which should be attached to the evidence. Appreciation of evidence is entirely left to the President and it is not for the Courts to hold that on the evidence placed before the President on which the conclusion is founded, if

they were called upon to decide the case they would have reached some other conclusion". The aforesaid decision of the Constitution Bench of the Supreme Court clearly lays down that despite the finality attached to the decision of the President under Art. 217(3) a judicial review of such decision can be held on the grounds indicated by the Supreme Court in the aforesaid decision. Amongst others if it is found that the President's Judgment was based on no evidence the Court can interfere but the Court cannot sit as the Court of appeal or determine the weight which should be attached to the evidence. Appreciation of evidence is entirely left to the President and not to the Court. It is also pertainent to note that the decision of the President in the aforesaid case was held to be in the discharge of judicial function. Therefore it would be amenable to a writ of certiorari which can be issued by a Court in an appropriate case if it is found that the decision of the President under Art. 217(3) was based On no evidence.
12. We may next turn to the decision of another Constitutional Bench of the Supreme Court in Shri Kihota Hollohon v. Mr. Zachilhu . In that case, the question regarding the limits of judicial review of the decision of the Speaker of Assembly arrived at under Schedule 10 of the Constitution was on the anvil of the Supreme Court. In this connection it was observed that the scope of judicial review under Arts. 226 and 227 of the Constitution in respect of an order passed by the Speaker/Chairman under para-6 would be confined to jurisdictional errors only viz., infirmities based on violation of Constitutional mandates, mala fides, non-compliance with rules of natural justice and perversity. It is pertinent to note that despite the mandate of clause (7) of the Tenth Schedule, that notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule and despite finality of the decision of the Speaker of each House, as per Clause 6(1), the aforesaid scope of judicial review was clearly laid down by the Constitutional Bench of the Supreme Court. We may also usefully refer to a decision of the Full Bench of Madras High Court in K.S. Haja Shareff v. His Excellency The Governor of Tamil Nadu, Madrs . In this case the High Court which had the occasion to consider the scope of judicial review under Art. 192(1) observed as follows (Paras 14 and 20):– "As against a decision pronounced under Art. 192(1), a writ petition could be entertained under Art. 226 by a High Court. It cannot be held that merely because a decision had been arrived at under Art. 192(1), no writ petition be filed. But to what extent in such proceeding, on being initiated, a petitioner could secure relief, would depend upon himself establishing about the existence of the vitiating factors namely if it appears that order was passed by the Governor (i) on collateral considerations or (ii) the rules of natural justice were not observed or (iii) that the Governor's judgment was coloured by the advice or representation made by the Executive, or (iv) it was founded on no evidence. Further, if a Constitutional functionary, whom power had been conferred to take a decision which has the seal of finality, wrongly interprets the Constitutional provisions, then, the decision so arrived at will have to be set aside by issue of a writ of certiorari, because it would not be a valid order in the eye of law. Hence, there can be a judicial review of an order passed under Art. 192(1) on this ground also."

The aforesaid decision of the Full Bench is on the same lines as the decisions of the Supreme Court to which we have made reference. Therefore, it cannot be said that only because it is provided under Art. 192(1) that the decision of the Governor shall be final, it cannot be reviewed in judicial proceedings before the High Court under Art. 226. On the contrary, a conjoint reading of the aforesaid decisions of the Supreme Court and the Full Bench of the Madras High Court which has expressed the view with which we respectfully concur, it becomes clear that if it is shown to the High Court under Art. 226 that the decision of the Governor based on opinion of the Election Commission was based on no evidence whatsoever regarding the alleged disqualification of the Member or the decision was perverse, it could be reviewed in judicial proceedings. It is of course well settled that reappreciataion of such evidence is out-side the purview of such proceedings. In the light of the aforesaid limited scope of judicial review, we will have to see whether the learned single Judge was justified in granting relief under Art. 226 to respondent-1. We shall now deal with second preliminary objection of the learned counsel for the appellant as to the maintainability of the writ petition moved by respondent-1. 13. Applicability of Art. 329(b):– It was submitted by the learned counsel for the appellant that respondent-1 was elected as a Member of the Karnataka Legislative Assembly from Basavanagudi Constituency, Bangalore on 27th November, 1989 and on 5th December, 1989 he was appointed as the Deputy Chairman of the Planning Commission which was a post of Cabinet rank and it is of course true that his terms of appointment were decided on 13-12-1989 but on 5th December, 1989 when he was appointed as Deputy Chairman of the Planning Commission, disqualification laid down under Art. 191(1) immediately got attracted as he became a holder of office of profit as the office of Deputy Chairman of the Planning Commission was an office to which remuneration was attached. Under these circumstances, it can be said that respondent No. 1 has incurred a post election disqualification because under Art. 191(1), a person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State once he holds an office of profit. Thus, he incurred disqualification to continue as a Member of Legislative Assembly after he was chosen to hold an office of profit, a vacancy therefore arose qua his membership. How the vacancy arising in such a case can be filled in, is provided by the Representation of the People Act, which is a complete code. The provisions of Section 146 thereof, lay down powers of Election Commission while tendering opinion under Art. 192 read with Art, 191 and hence the Representation of the People Act, being a complete code in itself, respondent No. 1 had a remedy only under that Act of contesting fresh elections. It is difficult to appreciate this contention. If, under Art. 192(1), the Governor decides that a particular Member has become disqualified from being a Member of the Legislative Assembly or Legislative Council, as the case may be, and if that decision holds the field, then only the question of what next would arise meaning thereby how the vacancy caused by existing disqualified Member is to be filled up. That is a stage subsequent to the decision of the Governor under Art. 192(1) once it fully operates. It therefore cannot be said that once the matter is referred to the decision of the Governor under Art. 192(1) and is

followed by a decision, the concerned Member cannot challenge the same before a competent Court. That challenge cannot get frustrated, even in the licht of the limited judicial review available against such decision, nor can be concerned Member the compelled to willy nilly offer himself as a candidate in the fresh election on the basis that his seat has admittedly fallen vacant. The learned counsel for the appellant next submitted that this post election disqualification which a Member has incurred has to be challenged as an election dispute under the Representation of the People Act only. It is difficult to appreciate how it can be said to be a post election offence committed by the Member for which an election petition can be filed. Election of respondent No. 1 as a Member is not challenged on any ground by any one. The complaint is only limited that even though respondent No. 1 was validity elected as a Member of the Karnataka Legislative Assembly, he has incurred disqualification subsequently. Even if that is so, Section 100 of the Representation of the People Act, cannot be pressed into service by either side. Therefore, it is not possible to agree with the contention of the learned Counsel that as Representation of the People Act, is a complete code, a writ petition would not lie against the order passed by the Governor under Art. 192(1). 14. So far as bar of Art. 329(b) is concerned, it is difficult to appreciate how it gets attracted on the facts of the present case. As provided by the said Article, any dispute regarding election can be brought in challenge only by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. Representation of the People Act, 1951 is such law enacted by the Parliament. As discussed earlier, it is difficult to appreciate, how the question of disqualification of a Member who was validly elected to the Legislative Assembly and on which question, the Governor has decided under Art. 192(1) could be made subject matter of an election petition. Therefore, on the express language of Art. 329(b), the present dispute would not get covered by the sweep of the said provisions. This is not a dispute which can be said to be election dispute. It is well settled by a series of decisions of the Supreme Court that election would begin with notification laying down the time schedule and would end by declaration of results. Any dispute pertaining to a stage between the aforesaid two points i.e., the starting point and the end point may get covered by the sweep of the term 'election' as contemplated by Art. 329(b). This is not such a case. 15. The learned counsel for the appellant invited our attention to the decision of the Supreme Court in Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi . In that case, it was held that election covers the entire process from the issue of the notification under Section 14 of he Representation of the People Act, to the declaration of the result under Section 66 of that Act. When a poll that has already taken place has been cancelled and a fresh poll has been ordered, the order therefor, with the amended date, is passed as an integral part of the electoral process. When the Election Commission amended its notification and extended the time for completion of the election by ordering afresh poll, it is an order during the course of the process of election. We fail to appreciate how this decision can be of any assistance to the learned counsel for the appellant. On the contrary, it clearly suggests the two

points i.e., the starting point and the end point and the nature of the disputes which can be treated as election disputes falling within these two termini. The present case does not fall within these two points as seen earlier. The election to the Legislative Assembly was already over on 27th November, 1989 when respondent No. 1 was declared elected as a Member of the State Legislative Assembly. His alleged subsequent disqualification has nothing to do with the process of election. Hence, Art. 329(b) was out of picture in the present case. This preliminary objection therefore also is devoid of any substance and hence has to be rejected. 16. Non-joinder of Governor as a party:– The third preliminary objection which was raised by the learned Counsel for the appellant to the maintainability of the writ petition was that when respondent No. 1 filed a writ petition under Art. 226 seeking a writ of certiorari for quashing the decision of the Governor rendered under Art. 192(1), he should have joined the Governor as a party. It is difficult to accept the contention that in his absence the writ petition was not maintainable. It is well settled by a catena of decisions of the Supreme Court that such Constitutional functionaries whose judicial or quasi judicial orders are challenged in writ petitions are not required to be joined as parties to such proceedings. Nothing personal is alleged against them. On the contrary, nothing personal can be alleged against them as the learned counsel for the appellant invited our attention to Art. 361 of the Constitution. Article 361(1) provides that the President or the Governor of a State, shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. The thrust of this Article is that such Constitutional functionaries cannot be called upon to justify their orders or acts. In our view reliance placed on Art, 361 by the learned counsel for the appellant in support of his contention is of no avail as Article 361 nowhere lays down that the decision of the Constitutional functionaries like President and Governor cannot be challenged in any Court. In fact Art. 361 contra indicates the submission of the learned counsel for the appellant that Governor would be a necessary party in such proceedings. We may in this connection usefully refer to the decision of the Supreme Court on the point. In Brundaban Nayak v. Election Commission of India, , the Constitutional Bench of the Supreme Court presided over by Chief Justice Gajendragadkar had the occasion to deal with the orders passed by the Governor under Art. 192(1). The following pertinent observations are made in this connection:– (Paras 15 and 16) "The scheme of Art. 192(1) and (2) is absolutely plain. The decision on the question raised under Art. 192(1) has no doubt to be pronounced by the Governor, but that it must be in accordance with the opinion of the Election Commission. It is the opinion of the Election Commission which is in substance decisive. When the Governor receives the complaint, and he forwards the same to the Election Commission, it can be assumed that the Election Commission should proceed to try the complaint before giving its opinion. It would not therefore be correct to say that it is the Governor who should hold the enquiry and then forward to the Election Commission all the material collected in such an enquiry to enable it to form its opinion and communicate the same to the Governor." 17. In

the case of the Election Commission of India v. N.G. Ranga, , the Supreme Court had the occasion to consider the scope and ambit of the proceedings under Arts. 102 and 103 of the Constitution in the light of the Represenlation of the People Act. Dealing with the powers of the appellant-Election Commission under Cl. (1) of Art. 103, in para 5 of the report at page 1611, we find the following observations: "5. Upon the presentation of a petition by respondent 2 to the President of India, alleging that respondent 1 had become subject to the disqualifications mentioned in Art. 102(1) of the Constitution, a question clearly arose as to whether respondent 1 had truly become subject to any of the disqualifications mentioned in that article. By Cl. (2) of Article 103, the President was bound to obtain the opinion of the appellant before giving his decision on the question. Not only that, but the President was further bound to act according to the opinion given by the appellant. The President therefore acted both in the exercise of constitutional authority and in the discharge of his constitutional obligation in referring the question raised by respondent 2's petition for the opinion of the appellant." It is obvious that if the President is bound to follow the opinion of the Election Commission, there would remain no occasion to join the President as a party in proceedings challenging his order under Art. 103(2) based on such opinion. It is also required to be noted that the Election Commission, the real author of the order is already a party to these proceedings.

18. We have already seen earlier that this scheme of Arts. 102 and 103 is almost parallel to the Scheme of Arts. 192 and 193 of the Constitution.

19. `For all these reasons, therefore, it`

becomes difficult to uphold the contention of the learned counsel for the appellant that in the absence of the Governor, the Court cannot examine the merits of the decision in the light of the limited judicial review available to the Court. The third preliminary objection therefore also stands overruled.

20. Now, the stage is reached for us to deal with the merits of the case. As we have noted earlier in a proceeding under An. 226 of the Constitution of India against the decision of the Governor under Art. 192(1), the Court has a limited jurisdiction viz., to find out whether the decision is based on the opinion of the Election Commission, which is rendered in the absence of any evidence regarding the alleged disqualification of the concerned Member or whether the decision was such that no reasonable person could have arrived at meaning thereby that the decision was perverse. We are not concerned in the present case with the other types of infirmities, namely, violation of the principles of natural justice or that it is based on collateral considerations. The only ground on which respondent No. 1 has challenged the decision of the Governor under Art. 192(1) before this Court, was that it was based on no evidence. So far as this

question is concerned, we will have to see as to what was the evidence before the Election Commission which weighed with it when it gave its opinion and which has to be automatically converted into a decision by the Governor under Art. 192 as he was bound by such opinion. As we have noted earlier by a resolution dated 5-12-1989, respondent-1 was appointed as the Deputy Chairman of the Planning Commission which post was of a Cabinet rank. There is no dispute on this aspect. The terms of his appointment were laid down by an order dated 13-12-1989 as per Annexure-A which was produced before this Court as well as before the Election Commission. The said order reads as under:– "The appointment of Sri R.K. Hegde as Deputy Chairman, Planning Commission notified by the Cabinet Secretariat's Notification No. A-12031/2/89/Adm. I, dated 5th December, 1989 will be governed by the following terms and conditions:

21. Sri Hegde will draw no salary;
22. He would be entitled only to the following:

(a) Travelling allowance/daily allowance;
(b) Conveyance allowance of a chauffeur driven car; and
(c) House rent allowance or rent free furnished accommodation, including free supply of electricity and water. Sd/-
Under Secretary to the Govt. of India". It is the contention of the learned counsel for the appellant that the appointment was by the Notification of the Cabinet Secretariat, dated 5-12-1989. That may be so, but the terms and conditions of the appointment are clearly laid down by the order dated 13-12-1989. The said order clearly shows that respondent No. 1 is not entitled to draw any salary but he is entitled to draw some of the allowances as mentioned in clause (2)(a)(b) and (c) of the order. Therefore, even assuming that the office which he occupied pursuant to the order dated 13-12-1989 was the office to which remuneration is attached, so far as respondent No. 1 is concerned he was to draw no salary for working as such. It is also not the case of the appellant that while working as Deputy Chairman of the Planning Commission, respondent-1 has ever taken any salary. The contention of the appellant is that he has voluntarily foregone the salary. Even for that, there is no evidence whatsoever as the appointment order itself prohibits him from drawing any salary. In this connection, it is pertinent to note what the Election Commission had to state in its opinion. It would be profitable to extract paragraphs 18, 19, 20 and 21 in this opinion, Annexure-H, because that is the only basis on which the opinion is rendered against respondent No. 1. The said paragraphs reads as under:–"18. In order to ascertain as to what was the intention of the Governor at the time of appointment of the opposite party as Deputy Chairman of the Planning Commission in so far as his terms and conditions relating to salary and other allowances were concerned the Commission considered it appropriate to peruse the original file/documents of the Government of India dealing with the said appoint-

ment. In pursuance of a notice issued by the Commission on 11-7-1991, the relevant file was made available to the Commission on 17-7-1991 by the Cabinet Secretariat.

19. A perusal of the file shows that at the time the decision was taken to appoint the opposite party to the said office, it was agreed that he would draw no salary and would be entitled only to the following:

(1) Travelling Allowance/Dearness Allowance.
(2) Conveyance allowance of a chauffeur driven car.
(3) House Rent Allowance or free furnished accommodation including free supply of electricity and water.

20. The above mentioned agreement that the opposite party would draw no salary obvious shows that the office of the Deputy Chairman of the Planning Commission was entitled to salary but that the opposite party would not draw such salary. This amounts to voluntarily giving up of the salary by the opposite party. Had the opposite party demanded the salary, he would have drawn the same as a definite salary is attached to that office and has been paid in the past. What is to be seen for determining whether an office is office of profit is whether such office is capable of profit being derived and not whether a person is actually deriving that benefit or not. It cannot be gainsaid that the office of the Deputy Chairman of the Planning Commission is capable of 'profit' being derived as a definite salary is attached to that office. The fact that the opposite party did not draw any salary does not materially after the status of that office being office of profit.
21. The next question that arises is whether such office of profit as was held by the opposite party is declared by the Karnataka Legislature by law not to disqualify its holder within the meaning of Art. 191(1)(a) of the Constitution. The law on the subject is the Karnataka Legislature (Prevention of Disqualification) Act, 1956 and the- relevant provision is contained in Section 3(d) of that Act. Under the said Section 3(d), the office of the Planning Commission of India by virtue of the definition in Section 2(a) of that Act, shall not be deemed to be an office of profit if the holder is not in receipt of or entitled to any remuneration other than the compensatory allowances. It is true that the opposite party is not in receipt of any remuneration as it has not been shown to the Commission that he has received any such remuneration. But it cannot be said that he was not entitled to any remuneration As has been discussed in the forgoing paragraphs it was only by his own voluntary act that he gave up the remuneration, i.e. salary, which the office of the Deputy Chairman of Planning Commission carried. Such voluntary act of not to draw the salary would not mean that the holder of the office under reference would not be entitled to any salary. Therefore, the provisions of Section 3(d) of the Karnataka Legislature (Prevention of Disqualification) Act, 1956 would be of no avail to the

opposite party and would not save him from incurring the disqualification under Art. 191(1)(a) of the Constitution arising on account of holding an office of profit under the Government of India." A conjoint reading of these relevant paragraphs shows that according to the Election Commission respondent-1 could be said to be holding an office of profit only because he had voluntarily given up salary. It must be observed that there is no evidence whatsoever before him which would entile him to come to this opinion. It was agreed between the parties, that is respondent-1 on the one hand and the appointing authority Government on the other, that respondent-1 even though appointed as the Deputy Chairman of the Planning Commission, will not draw any salary; that was the main condition of appointment. So far as the appointment order is concerned, we have already seen that it does not entitle respondent-1 to draw any salary. From this material the Election Commission opines that respondent-1 has voluntarily given up the salary attached to the post which he held pursuant to the appointment order, Annexure-A,. It is difficult to countenance the reasoning in para 20 of the opinion of the Election Commission that had the opposite party i.e. respondent-1 demanded the salary he would have drawn the same. It would be impossible for respondent-1 to get any salary in the face of the clear terms and conditions of the appointment order, Annexure-A, prohibiting him from drawing any salary. Therefore, it must be held that the opinion of the Election Commission is not based on any evidence whatsoever for holding that respondent-1 was entitled to salary or was to get any profit out of his appointment as the Deputy Chairman of the Planning Commission. It must accordingly be held that respondent-1 was not holding any office of profit when he was appointed pursuant to the appointment order as the Deputy Chairman of the Planning Commission. It is this conclusion which the learned single Judge has reached. He has clearly found that the opinion of the Commission which had to be accepted by the Governor almost automatically was based on no evidence. In our view, no other conclusion is possible on the facts of the present case. It is also easy to visualise that even if under the terms and conditions of the appointment order respondent-1 would be entitled to travelling allowance, conveyance allowance or house rent allowance including free supply of electricity and water, it could not be said that he was profiting thereby because this would be only compensatory allowance which would compensate him for the loss which he otherwise would suffer while acting as Deputy Chairman of the Planning Commission undertaking travelling or staying in a house on account of the requirement of his presence in the office or using electricity or water while staying in such a house. No profit would ensue from getting this compensatory allowance. It is also pertinent to note that the opinion of the Election Commission is also not based on these allowances but the opinion is formed solely on the basis that respondent-1 could have drawn the salary if he wanted and on that ground it is held that he is a holder of an office of profit. We may now look at the settled legal position on the point. In the case of Ravanna

Subanna v. G.S. Kaggeerappa, , the Supreme Court was concerned with the question as to when a person can be said to be holding an office of profit. In para 12 of the judgment it has been laid down as under:– "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." In the light of this legal position the Supreme Court in that case examined the further question whether a non-official Chairman who attended the meetings which was convened by the Secretary in consultation with him and who was paid sitting fees could be said to be holding any post of profit. Negativing this contention it was held that it can reasonably be interfered that the fee of Rs. 6/-which the non-official Chairman is entitled to draw for each sitting of the Committee is not remuneration but it is given to him as a consolidated fee for the out-of-pocket expenses which he had incurred for attending the meetings of the Committee.

22. In the case of S. Umrao Singh v. Darbara Singh, , a Division Bench of the Supreme Court examined this very question in the setting of Art. 191(1)(a) itself. In that case allowance was paid under Rules 3 to 7 of the Punjab Panchayat Samities and Zilla Parishad Non-official Members (Payment of Allowances) Rules to the Chairman of the Panchayat Samiti. The question was whether by receiving such allowance the Chairman is said to be occupying an office of profit so as to disqualify him from continuing as a Member under Article 191(1)(a) of the Constitution. Negativing his contention it was held by the Supreme Court that such allowance does not convert the office of the Chairman Panchayat Samities into an office of profit-such a person is not disqualified for being elected to the Legislative Assembly. The allowance paid under R. 3 is clearly an allowance paid for the purpose of ensuring that the Chairman of Panchayat Samiti does not have to spend money out of his own pocket for the discharge of his duties. It envisages that in performing the duties, the Chairman must undertake journeys within the district and must be incurring expenditure when attending meetings, supervising plans, projects, schemes and other works and also in connection with the discharge of other lawful obligations and implementation of Government directives. It is a consolidated amount in lieu of the travelling allowance, daily allowance or any other allowances to which he might have been entitled in order to compensate him for expenses incurred in connection with the discharge of his official duties. So far as Rules 4 to 7 are concerned, they only provide for payment of travelling allowance and daily allowance when a Chairman performs a journey in connection with his official duties outside the district. Clearly, these allowances are also meant to ensure that he does not have to incur expenditure from his own pocket for the purpose of discharging his official duties. In Karbhari Bhimaji Rohamare v. Shanker Rao Genuji Kolhe, this

question was once again examined by the Supreme Court. In that case a Member of the Wage Board for Sugar Industry constituted by the Government of Maharashtra under S. 86B of the Bombay Industrial Relations Act, 1946 was said to be disqualified for being a Member of the Legislative Assembly on the ground that he was holding an office of profit. Negativing this contention it was held that even though the office can be said to be under the State Government it cannot be said that the incumbent was a holder of an office of profit under Article 191(1)(a) so as to disqualify him from standing for election as a Member of the State Legislative Assembly. The Supreme Court made the following observations in this connection (Paras 6 and 10): "The law regarding the question whether a person holds an office of profit should be interpreted reasonably, having regard to the circumstances of the case and the times with which one is concerned, as also the class of person whose case the court is dealing with and not divorced from reality. The question has to be looked at in a realistic way. Merely because part of the payment made to the member is called honorarium and part of the payment daily allowance, the Court cannot come to the conclusion that the daily allowance is sufficient to meet his daily expenses and the honorarium is a source of profit. The petitioner who alleges that the honorarium paid to the member is a source of profit has to discharge that burden". In para 7 of the Judgment the earlier decision of the Supreme Court in Ravanna Subanna's case is reiterated.

23. We may also refer to another decision of the Supreme Court in Divya Prakash v. Kultar Chand Rana, . In that case the Chairman of Himachal Pradesh Board of School Education appointed in the year 1969 was alleged to be holding an office of profit. In para 2 of the report the following observations are made which can be usefully extracted: "..... There can be very little dispute and indeed it is not disputed that the office of the Chairman of the Board is an office under the State Government. The only question is whether it is an office of profit. Admittedly, the 1st respondent was not in receipt of a salary. The order appointing him to the post of Chairman makes it clear that he was appointed only in an honorary capacity. The fact that he was entitled to receive travelling and daily allowance in the course of the discharge of his duties as Chairman would not be a disqualification because of the provisions of Section 3(m) of the Himachal Pradesh Legislative Assembly Members (Removal of Disqualifications) Act, 1971, and this is not disputed. What is, however, contended on behalf of the appellant is that though the 1st respondent might not have been in receipt of a salary, the post itself carried a scale of pay and therefore it is an office of profit which the 1st respondent was holding. We are unable to agree. The question is whether the holding of the office has resulted in any profit to the holder of that office, however small that profit may be ..... In the absence of any profit accruing to the 1st respondent as a result of the holding of the office of Chairman it cannot be said that he was holding an office of profit. This is not even a case where the Chairman was appointed to an office and a salary was provided for him by

the order of appointment or he was entitled to a salary as a result of the appointment and he gave up his right to the salary. The order of appointment itself was one made in an honorary capacity". This decision squarely applies to the facts of the present case. On the facts of the present case it is to be held that respondent-1 was not entitled to any salary when he was appointed as the Deputy Chairman of the Planning Commission. No profit had accrued to him during his tenure as such. Hence it could not be said that he was holding any office of profit even though the office of the Deputy Chairman of the Planning Commission, for earlier incumbents might have carried remuneration. The two decisions, Biharilal Dobray v. Roshan Lal Dobray, , and Guru Gobinda Basu v. Sankari Prasad Ghosal, pressed into service by the learned counsel for the appellant do not apply as they proceeded on a different ground whether the concerned posts were under the Government. That question does not arise in the present case. The only question is whether the post of Deputy Chairman of the Planning Commission which was under the Central Government and which was held by respondent-1 was an office of profit or not. On this aspect, there was no evidence before the Commission which could even remotely indicate that respondent-1 was a holder of an office of profit. Hence the opinion of the Election Commission must be held to be based on no evidence and is such which no reasonable man could have arrived at on this state of evidence. The automatic confirmation of this opinion by the Governor under Article 192(2) is equally based on no evidence.

24. This takes us to the second aspect of the matter. As we have, seen earlier, Art. 191(1)(a) provides 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 if he hold 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. Now strictly speaking, the question whether the State Government has passed such an Act which covers the field of controversy in question, would not be much relevant on our finding on the main aspect of Art. 191(1)(a) that respondent-1 cannot be said to have held any office of profit under the Government of India: However, as that aspect was also highlighted by both the sides we will refer to it.

25. As we have noted earlier, the Act has in terms provided by Section 3 thereof that the offices mentioned in that section shall be deemed never to have disqualified the holders thereof for being chosen as, or for being, members of the Karnataka Legislative Assembly or the Legislative Council. In that list is found at clause (d) the office of the Chairman or Member of a Committee. The question now is whether respondent-1 was Chairman or Member of a Committee. We have seen the definition of the term 'committee' in Section 2(a) of the Act which includes a 'Commission' whether statutory or not set up by the Government of India or the Government of any State. Now it cannot be disputed that the Planning Commission was set up by the Government of India. The contention is that of the

purpose of Section 3(d) the Committee would include only that Commission which is set up by a Government whether the Government of India or State Government, which is of a municipal type and would not include Commission like Planning Commission which flows from the scheme of Constitution of India or in other words, its having a Constitutional outfit. It is difficult to appreciate this contention for the simple reason that before a person can be said to be a Constitutional functionary, the Committee of which he is a member should derive its existence from any of the provisions of the Constitution. The Constitution of India itself contemplates various Commissions to be established like Public Service Commission, Finance Commission, language Commission, Backward Classes Commission etc. No provision of the Constitution could be pointed out by the learned counsel for the appellant which permits setting up of Planning Commission. It must therefore be held that Planning Commission which is set up by the Government of India is set up not under any Constitutional obligation imposed on the Government of India but in exercise of its executive powers. Therefore the submission of the learned counsel for the appellant that Planning Commission would not be covered under Section 2(a) of the Act cannot be accepted. The further question then to be considered is whether the proviso to Section 3(d) takes away the benefit available under sub-clause (d) of Section 3. A mere reading of the proviso to Section 3(d) shows that the holder of such office should not be in receipt of or entitled to any remuneration. In other words, it provides that if the holder of the office of Chairman or Member of a Committee is in receipt of, or if he is entitled to, remuneration other than the compensatory allowance, then the office held by him would not be covered by the sweep of Section 3(d) and would not remain excluded from the main sweep of Art. 191(1)(a). As we have noted earlier, respondent-1 was not in receipt of any remuneration other than the compensatory allowance. Even if we read the proviso as suggested by the learned counsel for the appellant, in our view the result would not be changed. Even if the proviso is said to have mandated that the holder of the office should not be in receipt of or be entitled to any remuneration for being covered by the exemption under Section 3, there should be evidence to show that the holder of such office was in receipt of, or entitled to receive, any remuneration other than the compensatory allowance. As we have discussed earlier there was no evidence to show that respondent-1 was entitled to such remuneration. On the contrary the very terms and conditions of the appointment order, Annexure-A, put the controversy beyond any doubt that he was not so entitled, as the conditions of the appointment order show that he was not entitled to draw any salary except the allowances mentioned therein. Therefore, it is not possible to agree with the contention of the learned counsel for the appellant that respondent-1 was entitled to draw salary as Deputy Chairman of the Planning Commission if he wanted to. It was next submitted that the appointment order itself shows that the resolution appointing respondent-1 was passed on 5-12-1989 and the terms of

appointment were defined only on 13-12-1989, and in between these dates the disqualification was incurred by respondent-1. It is difficult to agree with this contention because the resolution to appoint respondent-1 only earmarked respondent-1 for being the Deputy Chairman of the Planning Commission but the terms and conditions of his appointment are found in the appointment order dated 13-12-1989. It is nobody's case that this was post held on daily wage basis. Therefore the salary if any would necessarily have been paid at the end of the month. Even though the terms of appointment were defined on 13-12-1989, the salary for the month of December from the day he assumed charge of his office would have been paid after 31st of December 1989 i.e. on 1st January, 1990. Consequently it could not be said that respondent-1 held an office which would entitle him to any salary between 5-1-1989 and 13-12-1989. On the contrary, on a conjoint reading of the appointment order with the earlier resolution, it must be held that respondent-1 was not entitled to draw any salary for the post of Deputy Chairman of the Planning Commission. The issue whether respondent-1 actually started work as Deputy Chairman of the Planning Commission by assuming charge of his office between 5-12-1989 and 13-12-1989 pales into insignificance so far as the question whether he was holding any office of profit is concerned. It is also pertinent to note that if the main provisions of Art. 191(1)(a) do not apply to a given case, as we have found in the present case, the next question whether the State Legislature had lifted the disqualification in such a case would become of academic interest. It has also to be kept in mind that the enactments contemplated under Art. 191(1)(a) seek to remove the disqualification incurred on account of the operation of Art. 191(1)(a) and they do not incorporate new disqualifications or promote disqualifications which are otherwise not incurred. It is the Constitutional provisions of Art, 191(1)(a) which creates the disqualification if any and which is sought to be removed by Section 3 of the Act. For all these reasons, the submission of the learned counsel for the appellant even on the merits is found to be without any substance. These were the only contentions canvassed in support of the appeal. As we have found that there is no substance in any of the contentions, the appeal fails and is dismissed. There will be no order as to costs.

26. Appeal dismissed.