

## **Rabindra Kumar Nayak vs Collector, Mayurbhanj, Orissa & Ors on 19 February, 1999**

**Equivalent citations: AIR 1999 SUPREME COURT 1120, 1999 (2) SCC 627, 1999 AIR SCW 774, (1999) 1 JT 591 (SC), 1999 (1) SCALE 564, 1999 (1) LRI 491, 1999 (2) ADSC 90, 1999 (1) JT 591, 1999 (1) UJ (SC) 688, (1999) 2 ANDHWR 111, (1999) 2 LAB LN 625, (1999) 2 SERVLR 13, (1999) 2 SUPREME 203, (1999) 1 SCALE 564, (1999) 88 CUT LT 95**

**Bench: K.T.Thomas, Syed Shah Mohammed Quadri**

PETITIONER:

RABINDRA KUMAR NAYAK

Vs.

RESPONDENT:

COLLECTOR, MAYURBHANJ, ORISSA & ORS.

DATE OF JUDGMENT:

19/02/1999

BENCH:

K.T.Thomas, Syed Shah Mohammed Quadri

JUDGMENT:

QUADRI.J. Leave is granted.

The question that arises in this appeal is whether the appellant was holding 'office of profit' under the State Govt. while functioning provisionally as Assistant Public Prosecutor and was therefore disqualified to become a member/Chairman of a Samiti under the Orissa Panchayat Samiti Act 2959.

The factual backdrop in which the question falls for consideration may briefly be set out here :

On August 14, 1995 the appellant, an advocate practising in the courts of Cuttack, was appointed as Assistant Public Prosecutor provisionally under Rule 5(4) of the Orissa Law Officers Rules, 1971 (for short 'the rules') read with Section 25 of the Criminal Procedure Code, 1973 to conduct the criminal cases. He was entitled to daily fee of Rs. 100/- subject to restrictions under the rules. While so he contested the election to the seat of the member of Moroda Panchayat Samiti and the fourth respondent contested for the seat of member of Gudigan Panchayat samiti. After being elected as

members, both of them contested in the election to the post of Chairman of Moroda Panchayat Samiti. Appellant was declared elected as Chairman on February 10, 1997. Having lost in the contest, the fourth Respondent initiated proceeding against the appellant under Sec. 45-B of the Orissa Panchayat Samiti Act, 1959 (for short 'the Act') in the court of the District Judge, Mayurbhanj on the ground that as Assistant Public Prosecutor he was holding 'office of profit' under the Govt. so he was not eligible to be either a member or the Chairman of Moroda Panchayat Samiti. The appellant resisted the same on two grounds :

first that his appointment under Rule 5(4) of the Rules was a stop-gap arrangement so he was not 'holding office of profit: and second that the petition filed by the fourth respondent under Sec. 45-B of the Act was not maintainable as after the election was over his only remedy was to file an election petition under Section 44-A of the Act.

On Sept. 20, 1997 the learned District Judge held that the petition under Section 45-B was maintainable and the appellant was holding officer of profit under the Govt. within the meaning of Sec. 45(1)(i) of the Act; so he was disqualified to be a member or Chairman of the Panchayat samiti. The appellant challenged that order before the High Court of Orissa. On March 10, 1998 the High Court dismissed the writ petition confirming the said order of the learned District Judge. Against that order of the High Court the appellant is before us in appeal by special leave.

Shri Janaranjan Das, learned counsel for the appellant urged the very same two contentions before us as were raised before the High Court namely, (i) that the appointment of the appellant as Assistant Public Prosecutor was provisional, as a stop-gap arrangement as such he was not holding office of profit and (ii) after the election of the appellant was over only Election Petition under Section 44-A but not petition under Sec. 45-B of the Act was the remedy of the fourth respondent.

We shall deal with the first contention reading the order of appointment of the appellant as Assistant Public Prosecutor which runs as under :

Government Of Orissa Law Department No.XX 11126/L dated BBSR, the 14th August, 1995 From Shri II.Mohapatra, OS,J.S.(Sr.Br.) Legal Remembrancer.

To The District Magistrate, Mayubhanj.

Sub : Appointment of Asst.Public Prosecutors for the district of Mayurbhanj.

Sir, I am directed to say that Govt. have been pleased to appoint the following Advocates as Asst.Public Prosecutors provisionally under Rules 5(4) of the Orissa Law Officers Rules, 1971 read with Sec. 25 of the Cr. P.C., 1973 to conduct the criminal cases in the courts of magistrates both Judiciary and Executive with places shown their names until further orders.

1 to 3. xxx xxx xxx A.P.P.Baripada

4. Shri Rabi Nayak - do -

5. xxx xxx xxx \*\*\*\* The A.P.Ps are eligible to get daily fee of Rs. 100/-

(Rupees one hundred only) subject to such restrictions as are provided in Orissa Law Officers Rules, 1971.

The appointment is purely temporary and liable to be terminated at any time without notice.

The person concerned may be intimated accordingly.

Yours faithfully, sd/-

Legal Remembrancer"

The order refers to Section 25 Cr. P.C. and rule 5(4) of the Rules. Section 25 of the Code of Criminal Procedure imposes an obligation on the State Government to appoint in every district Assistant Public Prosecutor for conducting prosecution in the Courts of Magistrates. Rule 5(4) of the Rules in in the following terms :

"In case of any contingency arising due to temporary absence or vacancy in the office of the Law Officer for any reason whatsoever, subject to the provisions contained in Section 492(2) of the Criminal Procedure Code, 1898, the State Govt. may appoint a Law Officer temporarily till the return of the existing incumbent or the vacancy is filled up, as the case may be."

A perusal of the rule quoted above leaves no room for any doubt that it provides for appointment of a Law Officer in two contingencies : (i) temporary absence of the existing incumbent, and (ii) vacancy in the office of law officers for whatever reason. An appointment made under this rule is terminable on the return of the existing incumbent or on the vacancy being filled up, as the case may be.

A plain reading of the order of appointment of the appellant and the aforementioned provisions shows that in discharge of the statutory obligation the State Govt. appointed him along with others as an Assistant Public Prosecutor provisionally and that it is purely temporary, terminable at any time without notice.

We shall now consider whether such an appointment will fall within the clutches of Section 45(I)(i) which is extracted below :

"45(1). Disqualification for becoming a member and continuing as a member - A person shall not be eligible to stand for election under sub-sec. (1) of Sec. 16 if he -

(i) holds any office of profit under the State or Central Govt. or any local authority."

The phrase "holds any office of profit" employed in this clause is the bone of contention. The expression "office of profit" only means an office which yields income or profit; the word 'office' had been subject matter of judicial consideration as long back as in 1922. In *Great Western Railway Co. vs. Bater* [(1922) 8 Tax Cases 231], Rowlatt.J. defined the term "office" or "employment" as one 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. This was approved by the House of Lords in *McMillan vs. Guest* (1942) AC 561.

The Constitution Bench of this Court in *Kanta Kathuria vs. Manak Chand Surana* [AIR 1970 SC 694] quoted with approval the aforementioned exposition of 'office' by Rowlatt.J. In that case the question was whether an advocate appointed as a Special Govt. Pleader to assist the Govt. Pleader in a particular case, hold "office of profit"

under the Govt. and hence incurred disqualification under Article 191 of the Constitution of India. Relying on the said exposition, the minority view was expressed by Hidayatullah, C.J. (speaking for himself and Mitter,J.) thus "What matters is that was an office created apart from Mrs. Kathuria. It is in evidence that it was first held by Mr. Maneklal Mathur another advocate. It is likely that if Mrs. Kathuria had declined some one else could have been found. Therefore, there was an office which would be successively held; it was independent of Mrs. Kathuria who filled it, it was a substantive position and as permanent as supernumerary offices are. Every one of the tests laid down by Rowlatt.J. are found here.

We would therefore, hold that the High Court was right in its conclusion that Mrs. Kathuria held an office. Since there is no dispute that it was for profit and under the State, the election of Mrs. Kathuria must be held to be void as she was disqualified to stand for the election."

In coming to that conclusion, the learned Judges followed their own judgment in *Mahadeo vs. Shantibai* [1969 (2) SCR 422] wherein it was held that the appellant therein who was on the panel of lawyers prepared by the Western Railway Administrations, held office of profit under the Govt.

But Sikri.J. speaking for the majority, after referring to the same exposition of the term 'office' as well as the observations of Lord Atkin and Lord Wright in *McMillan's* case (supra) observed.

"There was no doubt that if her engagement as Special Government Pleader amounted to appointment to an office, it would be an office of profit under the State Govt. of Rajasthan .....

Therefore no particular significance can be attached to the notification made under Rule 813 appointing the appellant as Special Govt. Pleader. We cannot visualise an office coming into existence, every time a pleader is asked by the Govt to appear in a

case on its behalf. The notification of his name under Rule 813 does not amount to the creation of an 'office'."

The difference of opinion between the majority and the minority is on the question whether by the notification the Govt. created office of Special Govt. Pleader but not in regard to meaning of the expression 'office of profit' and the application of the tests enunciated by Rowlatt.J. In a subsequent judgment of this Court in Madhukar G.F.Pankakar vs. Jaswant Chobbildas Rajani & Ors. [AIR1976 SC 2283], the enunciation of Rowlatt. J. and observations of the House of Lords in Memillan's case, referred to above were relied upon to hold that a Medical Practitioner working as a panel doctor appointed under the Employees State Insurance Scheme did not hold "office of profit" under the State Govt. so as to attract disqualification under Section 16(1)(g) of the Maharashtra Municipalities Act, 1965. Krishna Iyer,J. speaking for the Bench concluded :

"The critical test of independent existence of the position irrespective of the occupant is just not satisfied.....we are unable to hold that there is an 'office of profit' held by him and that he is 'under government'."

From the above discussion it follows that to incur disqualification under Section 45(1)(i) of the Act it must be shown that : (i) there was a permanent office of Assistant Public Prosecutor (ii) income or profit accrued from that office and (iii) the appellant held that office.

Now adverting to the facts of this case, there is no controversy that permanency is attached to the post of Assistant Public Prosecutor and appointment to that office is regulated by the Rules which deal with the remuneration of the law officers. It is immaterial that the appellant did not in fact receive any fee. Requirements (i) and (ii) are therefore, satisfied. The appointment of the appellant as a Law Officer Assistant Public Prosecutor under the Rules would satisfy the third requirement as well.

However, Mr. Das would contend that as the appointment of the appellant was a stop gap arrangement it could not be said that he was holding office of profit. This contention is devoid of merit. From what is stated above it is clear that to fulfill the requirements of the said expression it must be shown that permanency is attached to the office and not to the term for which a person holds it. Persons who fill the office come and go in succession. One may succeed the other after a long gap or in quick succession. How long nor remains in office is irrelevant to decide whether he holds it as office of profit. We have, therefore, no hesitation in concluding that the appellant was holding office of profit on the relevant date and was not eligible to stand for election of member or Chairman of the Panchayat Samiti and in view of the provision of clause

(i) of sub-section (2) of Sec 45 he shall cease to be a member afortiori to be the Chairman of the Samiti.

We find no merit in the second contention of the learned counsel as well. To appreciate this contention it may be useful to refer to the provisions of Chapter VIA of the Act which was inserted by Orissa Act 24, 1961. It contains 17 sections (44A to 44R) dealing with the filing of election

petition, grounds on which the election of a returned candidate can be declared void the procedure to be adopted by the Election Commissioner and all allied matters. The Election Petition has to be filed before the Subordinate Judge having jurisdiction over the place where the office of the Samiti is situated. The grounds for declaring the election void are enumerated in clauses (a) to (c) of sub-section (1) of Sec. 44-L. Clause @ incorporates the ground on which the appellant is sought to be dislodged by filing an application under Section 45-B. Sec. 44-L @ of the Act reads as under.

"44-L Ground for declaring election void - (1) The Election Commissioner shall declare the election of a returned candidate void, if he is of the opinion -

"@ that such person disqualified for election under the provisions of this Act."

This provision confers power on the Election Commissioner to declare the election of a returned candidate void if he is of the opinion that such person is disqualified on any of the grounds mentioned in sub-section (1) which includes that such person was disqualified for election under the provisions of the Act. Sec 45 contains the list of various disqualifications for a person to become or continue to be a member of the Samiti. We have held above that the appellant suffered disqualification under Sec. 45 (1)(i) of the Act.

Section 45-B which empowers the District Judge to decide the question of disqualification is quoted hereunder:

"45-B. District Judge to decide question of disqualification :-

(1) Whenever it is alleged that any member of a Samiti is or has become disqualified, or whenever any such member is himself in doubt whether or not he is or has become disqualified such member or any other member may and the Chairman at the request of the Samiti. shall, apply to the place where the office of the Samiti is situated, for a decision on the allegation or doubt.

(2) The District judge, after holding an enquiry in the prescribed manner shall determine whether or not such member is or has become disqualified and his decision shall be final.

(3) Pending such decision the member shall be entitled to act as if he was not disqualified."

Sub-section (1) of Section 45-B provides that if it is alleged that any member of a Samiti is or has become disqualified, then the member himself if he is in doubt as to whether or not he is or has become disqualified or any other member may, and the Chairman of the Samiti, at the request of the samiti, shall apply to the District Judge having jurisdiction over the place where the office of the samiti is situated and seek a decision on the allegation or doubt. Sub-section (2) empowers the District Judge to determine the disqualification of the member and attaches finality to the decision given by him. Sub-section (3) entitles the concerned member to act as a member as if he was not

disqualified during the pendency of the proceedings before the District Judge.

Having given a resume of relevant provisions of the Act, we shall proceed to consider whether in view of specific machinery provided under Chapter VI-A to deal with matters connected with election of member/Chairman, a petition under section 45-B is maintainable after the election of the appellant. The Election Petition under Section 44-A can be filed by any candidate who need not be a member (Section 44-C); but an application under Section 45-B can be filed as noted above by a member of the Samiti who is in doubt about his incurring disqualification the Chairman of the Samiti at the request of the Samiti or any other member. Whereas in an application under Section 44-A a candidate can claim not only a declaration that the election of all or any of the returned candidates is void but also a further declaration that he himself or any other candidate stands duly elected Section 45-B is not concerned with either declaring the election void or granting any consequential declaration as to who has been duly elected. It merely enables the persons specified therein to invite a decision on the question of disqualification of a member. Though disqualifications mentioned in Section 45 of the Act are one of the grounds under Section 44-L on which the Election Commissioner can declare the election of a returned candidate void; there are also other grounds on which election of returned candidate can be declared void. Yet those other grounds cannot be the subject matter of an application under Section 45-B. Whereas the election petition under Section 44-A has to be filed within 15 days after the date on which the result of the election was announced on period of limitation is prescribed for an application under Section 45-B; it can be filed at any time while the member continues to act as a member of the Panchayat Samiti. There is no doubt that there is some overlapping between the two sections but field of operation of these two Sections is different and distinct. Indeed under section 45-B a District Judge is not pronouncing upon the validity of the election but is only pronouncing upon the questions to whether a member is or has become disqualified under the Act. It cannot be laid down that on relief under Section 45-B can be claimed after the declaration of the result of election.

For the above reasons, we have no hesitation in holding that the remedy of filing election petition under Section 44-A is no bar to file application under Section 45-B of the Act for inviting a decision on the question of disqualification of a member.

In the result, we confirm the order under appeal and accordingly dismiss the same with costs.