

Shibu Soren ... Appellant vs Dayanand Sahay & Ors. ... Respondents on 19 July, 2001

Equivalent citations: 2001 (7) SRJ 200, AIR 2001 SUPREME COURT 2583, 2001 AIR SCW 2626, 2001 AIR - JHAR. H. C. R. 187, (2001) 5 JT 504 (SC), 2001 (5) JT 504, 2001 (3) LRI 1157, 2001 (4) SCALE 395, 2001 (7) SCC 425, (2001) 2 ORISSA LR 620, (2001) 3 MAD LJ 124, (2001) 4 SCJ 338, (2001) 4 ANDHLD 107, (2001) 5 SUPREME 193, (2001) 4 RECCIVR 493, (2001) 4 SCALE 395, (2001) 3 BLJ 597, (2001) 4 CIVLJ 57

Bench: Chief Justice, R.C. Lahoti, Shivaraj V. Patil

CASE NO.:
Appeal (civil) 3538 of 2000

PETITIONER:
SHIBU SOREN ... APPELLANT

Vs.

RESPONDENT:
DAYANAND SAHAY & ORS. ... RESPONDENTS

DATE OF JUDGMENT: 19/07/2001

BENCH:
CJI, R.C. Lahoti & Shivaraj V. Patil

JUDGMENT:

DR. A.S.ANAND, CJI:

Pursuant to a Notification issued by the Election Commission for filling up seven seats of Rajya Sabha, nine persons, including the appellant and seven respondents filed their nomination papers, which on scrutiny were found to be valid. On the last date for withdrawal of nominations, one candidate withdrew, thus leaving eight candidates to contest the election for seven seats. Polling took place on 18th June, 1998 and after counting of votes, result was declared on the same date. Appellant secured the highest number of votes (43.74) and along with respondents 2 to 7 was declared elected. Respondent No.1 was defeated. Respondent No.1 herein, thereupon filed an Election Petition under Section 80 and 81 of the Representation of Peoples

Act, 1951 (hereinafter referred to as the R.P. Act), calling in question election of the appellant on the ground that at the time of filling his nomination papers, the appellant was holding "an office of profit" under the State Government as Chairman of the Interim Jharkhand Area Autonomous Council (for short 'JAAC'), set up under the Jharkhand Area Autonomous Council Act, 1994 (hereinafter the JAAC Act) and was thus disqualified to contest election to Rajya Sabha. Respondent No.1, not only sought setting aside of the election of appellant but also a declaration to have been duly elected, instead, as a member of the Rajya Sabha. Election petition was resisted by the appellant and it was asserted that office of Chairman of the interim JAAC was not an 'office of profit' or even an 'office' under the State Government and further that the election petitioner was barred from raising the challenge, for not having raised that objection at the time of scrutiny of nomination papers before the returning officer. It was vehemently maintained that the returned candidate had not been earning any 'profit' and was drawing only honorarium and allowances to meet his 'out of pocket expenses' and the office he was holding could not be treated as an 'office of profit' under the State Government and, therefore, his election was not liable to be set aside. According to an additional plea raised by the appellant, his disqualification, if any stood removed by Section 3 of the Parliament (Prevention of Disqualification) Act, 1959 since he enjoyed the status of a Minister while functioning as Chairman of the Interim Council.

On 10th May, 2000, a learned designated Judge of the Patna High Court, allowed the election petition and set aside election of the appellant. It was held that the office of Chairman of Interim JAAC was an 'office of profit' under the State Government because the payment of honorarium at Rs.1750/- per month to the Chairman could not be construed as compensatory allowance. It was also held that the Chairman of the interim JAAC held his office under the State Government and, therefore, disqualification stipulated by Article 102(1)(a) of the Constitution of India was clearly attracted to the appellant's election. It was further held that the said disqualification was not saved by the Parliament "Prevention of Disqualification Act, 1959" on the pleas raised in the additional written statement which inter alia included the plea that as Chairman of interim council, the appellant enjoyed the 'status' and other privileges of a Minister within the State and hence his disqualification stood removed by Section 3 of Prevention of Disqualification Act, 1959. Consequently, the election of the appellant was declared void and respondent No.1 was declared duly elected to Rajya Sabha. This appeal is directed against that judgment of the Patna High Court dated 19th May, 2000.

Article 102(1)(a) of the Constitution of India deals with disqualifications for 'being chosen as' and 'for being a member of either House of Parliament' and inter alia provides:

(1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament-

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

A perusal of the above provision shows that three elements which are sine qua non for attracting the above provision are that the person concerned must hold an office (1) under the Government of India or any State; (2) the office should be an 'office of profit' and (3) the office should be other than an office declared by Parliament by law not to disqualify its holder. Article 102(1)(a) (supra) corresponds to Article 191(1)(a) of the Constitution of India which lays down similar disqualifications for being chosen as or for being a member of the Legislative Council or Assembly of a State.

Both Articles 102(1)(a) and Article 191(1)(a) were incorporated with a view to eliminate or in any event reduce the risk of conflict between duty and interest amongst members of the Legislature so as to ensure that the concerned legislator does not come under an obligation of the Executive, on account of receiving pecuniary gain or profit from it, which may render him amenable to influence of the Executive, while discharging his obligations as a legislator. It is in the context of Article 102(1)(a) (supra) that we have to examine the meaningful question whether the appellant in the present case held an 'office of profit' under the State Government at the relevant time - the date of scrutiny of nomination papers and whether that office has not been declared by the Parliament by law not to disqualify its holder.

To examine this meaningful question let us first take a panoramic view of the case law on the subject.

In *Ravabba Subanna vs. G. S. Kaggeerappa*, A.I.R. 1954 S.C. 653, the issue involved was whether a person holding the position of Chairman of Gubbi Taluk Development Committee, could be said to be holding an 'office of profit' under the Government.

During the elections held for Town Municipal Councillorship of Gubbi in the State of Mysore an objection was raised at the time of scrutiny of nomination papers to the nomination of the appellant, in that case, on the ground that he was holding an office of profit under the Government (Chairman of Gubbi Taluk Development Committee) and was therefore disqualified for being chosen as a Councillor under Section 14 of the Mysore Town Municipalities Act, 1951. The objection was overruled and nomination paper of the appellant was accepted. After voting, the appellant was declared elected. The respondent filed an Election Petition before the appropriate forum. The learned Designated authority dismissed the Election Petition holding that the appellant who was drawing a fee of Rs.6/- per sitting could not be said to be holding an 'office of profit' under the Government as contemplated by Section 14 of the Act. The High Court of Mysore, accepted the appeal filed by the respondent and set aside election of the appellant. Allowing the appeal of the appellant this Court held that a fee of Rs.6/- which the Chairman was entitled to draw for each sitting of the Committee was neither meant to be payment by way of remuneration nor could it amount to 'profit'; and that the fee was paid to the Chairman to enable him to meet "out of pocket expenses which he has to incur for attending the meetings of the committee". This Court,

accordingly, held the appellant could not be said to be "holding any office of profit" under the Government at the material time.

In *Maulana Abdul Shakur vs. Rikhab Chand and another* : (1958) SCR 387 a Constitution Bench of this Court considered the case of a Manager of a School run by a Committee of Management formed under the provisions of the Dargah Khwaja Saheb Act, 1955. The concerned candidate had been appointed by the Administrator of the Dargah and was being paid a salary of Rs.100/- per month. The Government of India under sections 5 and 9 of the DKS Act, 1955 had the power to appoint as well as remove Members of the Committee of Management and power to appoint an Administrator in consultation with the Committee. It was found on facts, by the court, that the concerned candidate was neither appointed by the Government of India nor was he removable by it. It was also found that his salary was not fixed or paid by the Government but that the same was paid out of the funds of the Dargah endowment. In the light of these facts, the Bench opined that though the appellant was holding his appointment under a statutory body appointed by the Government, he could not be held to be holder of an office of profit under the Government of India within the meaning of Article 102 (1)(a) of the Constitution of India. The Bench accordingly set aside the judgment of the High Court which had held the election of the concerned candidate to be bad on the ground that the concerned candidate was holding an office of profit under the Government at the relevant time. This Court observed :.

"On the other hand on March 1, 1956, he was holding his appointment under a Committee which is a statutory body and such appointment cannot be called an appointment by or under the control of the Government of India nor is his salary paid out of the revenues of the Government but out of the funds of Durgah Endowment. In the circumstances the majority of the Tribunal has erred in holding that the appellant held an office of profit under the Government and the opinion of the Chairman to the contrary lays down the correct position."

In *Kanta Kathuria vs. Manak Chand Surana*, (1970) 2 SCR 835, a Constitution Bench of this Court considered the case of an Advocate, who held an office of Special Government Pleader under the Government of Rajasthan to conduct arbitration cases between the Government and Modern Construction Company. Her remuneration had been fixed at Rs. 150/- per day for each date of hearing, Rs.75/- per day for days of travel and dates on which the case was adjourned as well as for days spent on preparation of the case. She held that office for over two years. She contested assembly elections in 1967 and was declared elected to the Rajasthan Legislative Assembly. On her election being challenged, the High Court held that she was disqualified on the ground of holding an office of profit under the State Government. During the pendency of her appeal in the Supreme Court, the Governor of Rajasthan by an Ordinance removed the particular 'disqualification' retrospectively. The Ordinance was replaced by an Act by the Legislature. Dealing with the issue whether the office held by the appellant in that case could be said to be an office of profit under the State Government of Rajasthan and the effect of the Act of the state legislature removing that disqualification, Sikri, J. speaking for the majority of the Bench opined:

"It seems to us that the High Court erred in holding that the appellant held an office. There is 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 Government of Rajasthan. The word 'office' has various meanings and we have to see which is the appropriate meaning to be ascribed to this word in the context. It seems to us that the words 'its holder' occurring in Art. 191(1)(a), indicate that there must be an office which exists independently of the holder of the office. Further, the very fact that the Legislature of the State has been authorised by Art. 191 to declare an office of profit not to disqualify its holder, contemplates existence of an office apart from its holder. In other words, the Legislature of a State is empowered to declare that an office of profit of a particular description or name would not disqualify its holder and not that a particular holder of an office of profit would not be disqualified."

and finally held that the appellant was not disqualified to contest the election under Article 191(1)(a) of the Constitution.

Dealing with the question of removal of disqualification retrospectively by the Rajasthan Legislative Assembly, the majority also opined that the State Legislature was competent to declare a certain office as not to disqualify its holder to contest election to the State Legislature. Bench repelled the argument that the impugned Act, i.e., Removal of Disqualification Act as enacted by the state Legislature amounted to amending or altering the Representation of People Act, 1951. Consequently the appeal of Kanta Kathuria was allowed and judgment of the High Court was set aside and election petition of the respondent was dismissed.

The minority speaking through Hidayatullah, C.J., however, held that Ms. Kathuria was holding an "office of profit" under the State but agreed with the majority that her disqualification stood removed by retrospective operation of the Removal of Disqualification Act, which the State Legislature was 'competent to enact'.

In Shivamurthy Swami vs. Agadi Sanganna Andanappa, 1971(3) SCC 870, the question under consideration of this Court was whether a Member of Koppal Taluk Development Board as well as a member of the District Development Council could be said to be holding an 'office of profit' under the Government. After analysing the fact situation besides relevant provisions including provisions of Article 102(1)(a) of the Constitution and various precedents of this Court, the Bench opined:

"... Therefore before the provisions of that Article can be attracted, it must be established that he was holding an office under the Union or the State Government and that that office was an office of profit and thereafter we must see whether the disqualification relating to that office has been removed by any Parliamentary legislation. In other words, the office in question must have been held under a Government and to that some 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...".

(Emphasis supplied) The Bench noticed that the concerned person, Sangappa, became an ex- officio member of these bodies by virtue of his being elected as a member of the Mysore Legislative Council and therefore "it could not be said that he was holding those offices under the Government." The Court further opined that the allowances paid to the members of the Koppal Taluk Development Board and District Development Council were intended to meet their out of pocket expenses and were in the nature of compensatory allowances and not "profits". The Court summarised the tests which may be applied to determine whether an "office" is an office of profit under the State Government thus:

(1) whether the Government makes the appointment;

(2) whether the Government has the right to remove or dismiss the holder; (3) whether the Government pays the remuneration;

(4) what are the functions of the holder; and (5) Does the Government exercise any control over the performance of those functions?"

In *Karbhari Bhimaji Rohamare vs. Shankar Rao Genuji Kolhe & Ors.*, (1975) 1 SCC 252, election of Respondent No.1, who was a member of Wage Board for Sugar Industry constituted by the Government of Maharashtra under Bombay Industrial Relations Act, 1946, was called in question on various grounds. In the Supreme Court, however, only ground pressed was to the effect that the election of first Respondent in that case was liable to be set aside on the ground that he was holding 'an office of profit' under the State Government as 'a member of the Wage Board'. After noticing various provisions of the relevant statutes, it was held that first Respondent did hold an 'office under the Government', but that it was not 'an office of profit'.

Reference was made to the notification constituting the Wage Board as well as to the resolution appended thereto, which provided that non-official members of the Wage Board would be paid honorarium at the rate of Rs.25/- per day for attending meeting of the Wage Board and that they would also be allowed to draw Travelling Allowance and Daily Allowance at the rate prescribed under the Bombay Civil Service Rules. This Court opined that mere drawal of Daily Allowance and Travelling Allowance could not make membership of the Board, an 'office of profit' as the drawal of those allowances would fall within the definition of the expression "Compensatory Allowance". The controversy, however, centered around the question whether honorarium payable to the members of the Wage Board could render that office as an 'office of profit'. After referring to dictionary meaning of the word "honorarium" and its interpretation in some other judgments, this Court agreed with the learned Judge of the High Court, who had refused to set aside the election of the first Respondent, that "the payment of honorarium to the first Respondent, apart from Daily Allowance

and Travelling Allowance, for attending the meetings of the Board did not amount to the first Respondent 'making any pecuniary gain thereby'." It was opined that merely because part of the payment made to the first Respondent was called 'honorarium', it did not lead to a conclusion that it was not meant to meet daily expenses, and was meant to be 'a source of profit'. In the words of the Court:

"...Merely because part of the payment made to the first respondent is called honorarium and part of the payment daily allowance, we cannot come to the conclusion that the daily allowance is sufficient to meet his daily expenses and the honorarium is a source of profit. A member of the Wage Board cannot expect to stay in Taj Hotel and have a few drinks and claim the expenditure incurred, which may come perhaps to Rs.150 to Rs.200 a day, for his personal expenses. In such a case it may well be held to give him a pecuniary gain. On the other hand he is not expected to live like a sanyasi and stay in a dharmshala and depend upon the hospitality of his friends and relatives or force himself upon them. Nobody with a knowledge of the expenditure likely to be incurred by a person staying at a place away from his home could fail to realise how correct the assessment of the learned Judge is. We are satisfied that the payments made to the first respondent cannot be a source of profit unless he stays with some friends or relatives or stays in a dharmshala..."

The Court further opined:

"The question has to be looked at in a realistic way. ...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 we are dealing with and not divorced from reality. The first respondent did not hold an office of profit."

(Emphasis ours) This Court, thus, held that the first respondent in that case did not hold 'an office of profit' and as such did not incur any disqualification for being a member of the legislature.

A two Judge Bench of this Court in *Surya Kant Roy vs. Imamul Hai Khan* (1975) 3 SCR 909 dealt with the case of Chairman of a Board constituted under the Bihar and Orissa Mining Settlement Act, 1920. He was appointed as Chairman by the State Government from amongst the Members of the Board. The High Court had held that the returned candidate in that case, namely the Chairman of the Board, did not suffer from a disqualification envisaged by Article 102 of the Constitution. Agreeing with the High Court, the Court. opined that merely because returned candidate had been appointed as Chairman of the Board by the Government from amongst the Members of the Board, it would not make him a person holding an office under the State Government:. The Court also held the fact that Government provided grants to the Board, did not mean that "all the funds of the Board were Government funds or Government properties". The Court noticed the tests laid down in *Shivamurthy Swami's case* (supra) and observed that the Government did not pay the remuneration nor did the holder of the office perform his functions for the Government and, therefore, he could not be said to hold an office under the State Government. The question whether the office was an

'office of profit' was, however, left open for want of material on the record. The Bench opined :-

"The office held by the respondent is held under a local authority. The holding of an office of profit in it does not bring about a disqualification even if that local authority be under the control of the Government. The mere control of Government over the authority having the power to appoint, dismiss, or control the working of the officer employed by such authority does not disqualify that officer from being a candidate for election as a member of the Legislature. Therefore, the control exercised by the Government over the Board in this case does not make the Board an organ of the Government nor does it make the respondent a person holding an office under the Government. It is, therefore, unnecessary to go into the question whether the office held by the respondent was an office of profit, though we may indicate that on the evidence available in this case we have come to the conclusion that it is not an office of profit."

(Emphasis ours) In *Madhukar G. E. Pankakar Vs. Jaswant Chobbildas Rajani & Ors.*, (1977) 1 SCC 70, the name of the appellant was included in the list of doctors under the Employees State Insurance Scheme. He resigned from his job underESIS before the date of poll to the Municipal Election, but after the date of filing of nomination papers. In challenging his election, the defeated candidate urged that as a doctor under the ESI Corporation, the appellant was holding 'an office of profit'. After a detailed analysis of various judgments and statutory provisions, this Court held that appellant suffered no such disqualification. The Court elaborately dealt with the issue of disqualification on the ground of holding 'an office of profit' under the State/Central Government and opined:

"Back to the issue of 'office of profit'. If the position of an insurance medical officer is an 'office', it actually yields profit or at least probably may. In this very case the appellant was making sizeable income by way of capitation fee from the medical services, rendered to insured employees. The crucial question then is whether this species of medical officers are holding 'office' and that 'under government'. There is a haphazard heap of case-law about these expressions but they strike different notes and our job is to orchestrate them in the setting of the statute. After all, all law is a means to an end. What is the legislative end here in disqualifying holders of 'offices of profit under government'? Obviously, to avoid a conflict between duty and interest, to cut out the misuse of official position to advance private benefit and to avert the likelihood of influencing government to promote personal advantage. So this is the mischief to be suppressed. At the same time we have to bear in mind that our Constitution mandates the State to undertake multiform public welfare and socio-economic activities involving technical persons, welfare workers, and lay people on a massive scale so that participatory government may prove a progressive reality. In such an expanding situation, can we keep out from elective posts at various levels many doctors, lawyers, engineers and scientists, not to speak of an army of other non-officials who are wanted in various fields, not as full-time government servants but as part time participants in people's projects sponsored by government? For

instance, if a National Legal Services Authority funded largely by the State comes into being, a large segment of the legal profession may be employed part time in the ennobling occupation of legal aid to the poor. Doctors, lawyers, engineers, scientists and other experts may have to be invited into local bodies, legislatures and like political and administrative organs based on election if these vital limbs of representative government are not to be the monopoly of populist politicians or lay members but sprinkled with technicians in an age which belongs to technology. So, an interpretation of 'office of profit' to cast the net so wide that all our citizens with specialities and knowhow are inhibited from entering elected organs of public administration and offering semi-voluntary services in para-official, statutory or like projects run or directed by Government or corporations controlled by the State may be detrimental to democracy itself. Even athletes may hesitate to come into Sports Councils if some fee for services is paid and that proves their funeral if elected to a panchayat. A balanced view, even if it involves 'judicious irreverence' to vintage precedents, is the wiser desideratum".

In *Biharilal Dobray vs. Roshan Lal Dobray*, (1984) 1 SCC 551, the Court once again reiterated that a person, who is elected to a legislature should be free to carry out his duties fearlessly 'without being subjected to any kind of governmental pressure' and that Article 191(1)(a) is intended to eliminate the possibility of a conflict between duty and interest with a view to maintain purity of the legislature and that relevant provision has to be interpreted in a realistic manner only so to achieve that objective.

Ashok Kumar Bhattacharyya vs. Ajoy Biswas, (1985) 2 SCR 50, was a case concerning an employee of the Agartala Municipality holding the post of an Assistant Accountant which carried a pay scale of Rs.80-180/- per month. At the relevant time that employee was drawing a monthly salary of Rs.200/-. The Bench opined:

"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 of the Act... To make in all cases employees of local authorities subject to the control of Government and to treat them as holders of office of profit under the Government would be to obliterate the specific differentiation made under Article 58(2) and Article 102(1)(a) of the Constitution and to extend the disqualification under Article 58(2) to one under Article 102(1)(a) to an extent not warranted by the language of the Article."

The Bench approved the decision of the High Court holding that the returned candidate in that case did not hold an 'office of profit' under the Government of Tripura on the date of the filing of his nomination papers.

In *Satrucharla Chandrasekher Raju Vs. Vyricherla Pradeep Kumar Dev*, (1992) Supp.1 SCR 408, the appellant had been appointed as a Single Teacher in a primary school by the Project Officer of the Integrated Tribal Development Agency (ITDA). The High Court held that the appellant was holding

an 'office of profit' and had, thus, incurred a disqualification envisaged by Article 191(1)(a) of the Constitution. Setting aside the order of the High Court, and allowing the appeal it was held by this Court:

"What emerges from the above discussion is that the Government has some control over the ITDA which is set up as a project, since it provides funds and sanctions the posts: the District Collector is appointed as Project Officer and some officers are ex-officio members of the ITDA which carries out the object of providing the compulsory education in tribal areas. But the ITDA is a registered Society having its own constitution. Though the Project Officer is the District Collector, he acts as a different entity. The power to appoint or to remove teachers is not with the Government but with the Project Officer. The Government may have control over the appointing authority but has no direct control over the teachers. The small post that appellant holds in ITDA is only that of a Teacher who is directly under the control of the Project Officer. In such a situation the question of any conflict between his duties and interests as an elected member does not arise since it cannot be said that he, as a teacher, can be subjected to any kind of pressure by the Government which has neither the power to appoint him nor to remove him from service. Taking a practical view of the substance of these factors into consideration, we are of the view that the appellant cannot be held to be holding an office of profit under the Government...".

(emphasis supplied) From a resume of precedents noticed above we find that in order to attract disqualification contained in Article 102(1)(a), a person must not only be holding "an office" but that office must be "an office of profit" and should be "under the Government" and should be an office other than an office declared by the competent legislature by law, not to disqualify its holder. The first question which comes to the fore, therefore is as to when can a person be said to be 'holding an office of profit' under the Government.

The expression "office of profit" has not been defined either in the Constitution or in the Representation of People Act. 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.

With a view to determine whether the concerned office is an "office of profit", the Court must, however, take a realistic view. Taking a broad or general view, ignoring essential details is not desirable nor is it permissible to take a narrow view by which technicality may overtake reality. It is a rule of interpretation of statutes that the statutory provisions are so construed as to avoid absurdity and to further rather than defeat or frustrate the object of the enactment. Courts,

therefore, while construing a statute avoid strict construction by construing the entire Act. (See with advantage *Ashok Kumar Bhattacharyya vs. Ajoy Biswas and ors.*, 1985 (2) SCR 50; *Tinsukhia Electric Supply Co. Ltd. vs. State of Assam and ors.*, 1989 (3) SCC 709 and *Commissioner of Income Tax, Bangalore vs. J.H. Gotla, Yadagiri*, 1985 (4) SCC 343). While interpreting statutory provisions, courts have to be mindful of the consequences of disqualifying a candidate for being chosen as, and for being, a member of the legislature on the ground of his holding an office of profit under the State or the Central Government, at the relevant time. The Court has to bear in mind that what is at stake is the right to contest an election and to be a member of the legislature, indeed a very important right in any democratic set up. "A practical view not pedantic basket of tests" must, therefore, guide the Courts to arrive at an appropriate conclusion. A ban on candidature must have a substantial and reasonable nexus to the object sought to be achieved namely, elimination of or in any event reduction of possibility of misuse of the position which the concerned legislator holds or had held at the relevant time. The principle for debarring holders of office of profit under the Government from being a Member of Parliament is that such person cannot exercise his functions independently of the executive of which he becomes a part by receiving "pecuniary gain". Under Article 102(1)(a), of course, the Parliament has the jurisdiction to declare an 'office' as not to disqualify its holder to be a Member of Parliament and likewise under Article 191(1)(a) the State Legislature has the jurisdiction to declare an 'office' as not to disqualify its holder to be a member of the State Legislatures. Moreover, apart from the office being an "office of profit", it must also be an office under the State or Central Government.

When can a person be said to be holding an office of profit "under the Government" came up for consideration by this Court in *Satrucharla Chandrasekhar Raju vs. Vyricherla Pradeep Kumar Dev* and another, 1992 (4) SCC 404, and after examining a catena of authorities, it was opined :

"On a careful examination of the ratio laid down in the above-mentioned cases some of the tests or principles that emerge for determining whether a person holds an office of profit under the Government, may be summarised thus :

- (1) The power of the Government to appoint a person in office or to revoke his appointment at its discretion. The mere control of the Government over the authority having the power to appoint, dismiss, or control the working of the officer employed by such authority does not disqualify that officer from being a candidate for election as a member of the Legislature.
- (2) The payment from out of the Government revenues are important factors in determining whether a person is holding an office of profit or not of the Government. Though payment from a source other than the Government revenue is not always a decisive factor.
- (3) The incorporation of a body corporate and entrusting the functions to it by the Government may suggest that the statute intended it to be a statutory corporation independent of the Government. But it is not conclusive on the question whether it is really so independent. Sometimes, the form may be that of a body corporate

independent of the Government, but in substance, it may just be the alter ego of the Government itself.

(4) The true test of determination of the said question depends upon the degree of control the Government has over it, the extent of control exercised by very other bodies or committees, and its composition, the degree of its dependence on the Government for its financial needs and the functional aspect, namely, whether the body is discharging any important Governmental function or just some function which is merely optional from the point of view of the Government."

(Emphasis ours) Thus, for determination of the core question, each case has to be judged in the light of the relevant provisions of the statute and its own peculiar facts, keeping in view the object of enacting Article 102 (1)(a) and 191(1)(a) namely that there should not be any conflict between duties and interests of an elected member to ensure that the concerned legislature does not contain persons who receive benefits from the Executive and may on that account be under its obligation and, thus, amenable to its influence while discharging their legislative functions.

With a view to find out whether in the instant case, the appellant suffered any disqualification as prescribed by Article 102(1)(a)(supra), it is desirable to first notice some of the relevant provisions of Jharkhand Area Autonomous Council Act, 1994 (hereinafter JAAC Act 1994) and the provisions under which the appellant was appointed as 'Chairman' of the 'Interim Council' of JAAC.

On the basis of certain discussions held on 28th April, 1993, a tripartite agreement was drawn up on 26.9.1994. It was agreed that JAAC should be set up to speed up the process of plenary development of the area to fulfil the aspiration of the people of Chotta Nagpur and Santhal Pargana area. So far as the constitution of an interim Council is concerned, clause (xix) of the Agreement provided:

"Till the aforesaid arrangements come into effect, State Government may appoint a provisional general council comprising 50 percent from MPs, MLAs, MLCs and 50 percent from amongst the Jharkhand Movement leaders. The State Government may also appoint an Executive Committee drawn from among these members. Such provisional Council/Committee shall have life of not more than six months."

The Chief Minister of Bihar, one of the signatories to the tripartite agreement, confirmed in the said agreement that the State Government would "expedite and complete" various formalities to bring into existence JAAC and with that end in view "introduce and seek approval of the Bihar Legislative Assembly" to the revised Bill to deal with JAAC.

An Act to establish JAAC was thereafter enacted to provide for "plenary development of Tribal Area of Chhota Nagpur and Santhal Pargana" view a view to fulfil ambitions of the people of the area. The JAAC Act 1994 was to come into force with effect from the date as the State Government may by notification in the Official Gazette appoint. This Act incorporated the substratum of clause (xix) of the Tripartite agreement (supra) also. We may, at this stage, take note of some of the relevant provisions of the Act. These are:

"Definitions.- In this Act, unless there is anything repugnant in the subject or context:-

- (a) "Governor" means the Governor of the State of Bihar;
- (b) "The State Government" means the Government of Bihar;
- (c) "Area" means the area specified in sub-section (2) of Section 1;
- (d) "Council" means the Jharkhand Area Autonomous Council;
- (e) "Member" means the members of the Jharkhand Area Autonomous Council;
- (f) The executive Council" means the executive Council constituted under Section 20 of the Act;
- (g)
- (h) "Act" means the Jharkhand Area Autonomous Council Act, 1994;
- (i) "Rules" means the rule made by the State Government under this Act;
- (j) "Regulations" means the regulation made by the council under this Act;
- (k) "Bylaw" means the bylaw made by the Council under this Act;..."

"Section 3. The Constitution of Council.- (1) The State Government shall establish an Autonomous Council for the area of the Council which shall consist of not more than 162 directly elected members and not more than 18 nominated members.

(2) The Council shall be a body corporate which shall have a perpetual succession and a common seal and right to acquire, hold and dispose off movable and immovable property within and without the limits of the Council Area and it may sue and be sued by the aforesaid name."

"Section 6. Disqualifications for the membership.- (1) a person shall be disqualified for being chosen and for being a member of the Council if-

(a) he holds any office of profit under the Government of India, any State Government, a local body and corporation, Board or Authority, Co-operative Society, a company established under the Company Act, 1956 (Central Act 1 of 1956) in which more than 25 per cent has been contributed in the share capital by any Government or Governments, other than an office declared by the Legislature of the State by law not to disqualify its holder;

(2) If he is or has been elected as a member of parliament or a member of Legislature or the Chairman of the District Board or the Pramukh of the Panchayat Samiti or the Mayor of Municipal Corporation or the Chairman of the Municipality and is elected as a member of Council and has not submitted resignation from the membership of the Parliament or Legislature or from the post held in the District Board or Panchayat Samiti or Corporation or Municipality within 21 days, he shall cease to be the member of the Council."

"11. Duration of the Council.- The Council, if not dissolved earlier under section 12 shall continue for five years from the date appointed for its first meeting, and no longer and on the expiration of the said period the Council shall stand dissolved."

"12. Dissolution of the Council.- (1) The Governor, after providing a reasonable opportunity of being heard, may, in his discretion, dissolve the Council, if he is satisfied that the Council is unable to perform its functions or is functioning in such a manner that it may not be able to achieve its objectives. (2) On dissolution of the Council, under sub-section (1) the new Council shall be constituted within six months from such dissolution:

Provided that the said period may be extended for six months by the Governor if circumstances exist from which he is satisfied that it is impracticable to hold election within the said period.

(3) In case of dissolution, the Governor shall appoint an officer not below the rank of Additional Secretary to the Government of India to exercise all the powers and to perform all the duties of the council."

"13. Nomination of the members to the Council.- (1) The members shall be nominated to the Council in the following manner:-

(a) Maximum 8 members of the Legislative Assembly representing their Legislative Assembly Constituencies of the Area shall be nominated by the speaker, Bihar Legislative Assembly;

(b) Maximum two members of the Parliament representing their Lok Sabha Constituencies wholly or mostly of the Area shall be nominated by the State Government;

(c) Maximum 8 persons having experience of Public works, urban works, rural development on social welfare works and who are inhabitants of the Area, shall be nominated by the State Government.

(2) the nomination of the members under clauses (a) and (b) of sub-section (1) shall be for two years or till the duration of the Council, whichever is earlier:

Provided that on cessation of membership of Legislative Assembly or Lok Sabha before expiry of the period of nomination, his membership of the Council shall automatically cease with effect from the date of cessation as member of Legislative Assembly of Lok Sabha as the case may be.

(3) The nomination of members under Clause (c) of sub-section (1) may be upto the duration of the Council:

Provided that they shall not have the right to vote.

(4) The members of the Council may be re-nominated."

"15. The Chairman of the Council.-(1) The Council shall have a Chairman who shall be a member of the Scheduled Tribes.

(2) The Chairman shall be elected by the elected members of the Council from amongst them.

(3) The State Government may nominate any elected member as Presiding Officer for the election of the Chairman who may determine the procedure for election."

"17. Vacancy, resignation and removal from the office of Chairman. - The member holding the office of the Chairman of the Council.

(a) if ceases to be an elected member of the Council, he shall vacate his office;

(b) may tender his resignation in writing under his hand addressed to the Vice-Chairman at any time; and

(c) may be removed from his office by a resolution passed by the majority of the elected members of the Council at that time:

Provided that no resolution for the purpose of clause (c) shall be proposed until a prior notice of at least fourteen days intending to move the proposed resolution is given."

"23. Constitution of Interim Council and Interim Executive Council. -

(1) The State Government before constitution of the Council under Section 3, may constitute an Interim Council.

(2) The State Government shall nominate 50 per cent members of the Interim Council out of its total membership from the members of the Lok Sabha and the Legislative Assembly representing the constituency which lies wholly or mostly in the

Area and from the members of the Rajya Sabha and Legislative Council, who are the inhabitants of the Area and the remaining 50 per cent members shall be nominated from amongst the persons who are inhabitants of the Area and have interest in its development.

(3) The State Government shall nominate the Chairman and the Vice-Chairman of the Interim Council.

Provided that the member of the Scheduled Tribes can only be nominated as the Chairman.

(4) The State Government shall constitute an Interim Executive Council from amongst the members of the Interim Council.

(5) The Chairman and the Vice-Chairman of the Interim Council shall be Ex- Officio Chief Executive Councillor and Vice-Chief Executive Councillor (6) The duration of the Interim Council and the Interim Executive Council shall be for 6 (revised to 18) months or till the constitution of the Council under Section 3 whichever is earlier.

(7) The Chairman and the Vice-Chairman of the Interim Council and the members of the Interim Executive Council shall hold their office during the pleasure of the State Government."

"26. Honorarium and Allowances to the Chairman, Vice-Chairman and Members.-

(1) Honorarium worth Rs. 1,750, Rs. 1,250 and Rs. 1,000 per month shall be payable to the Chairman, Vice-Chairman and the Members of the Executive Council respectively.

(2) Save as under clause (1), honorarium of Rs. 750 per month shall be payable to the remaining members.

(3) The Chairman, the Vice-Chairman and the members of the Executive Committee shall be paid daily allowance at the rate of Rs.150 per day for the period spent outside the head-quarters for the work of Council and other members shall be paid daily allowance at the rate of Rs.125 per day for taking part in the meetings of the Council.

(4) On a tour undertaken by the Chairman, the Vice-Chairman and the Members of the Executive Council for the works of the Council and by the members of the Council to attend the meeting of the Council, a first class or Air-conditioned 2 tier railway fare which has actually been paid, shall be payable:

Provided that on journey by air undertaken for the works of the Council by the Chairman and the Vice-Chairman, the fare actually paid, shall be payable."

"29. Powers and Function of the Council.-(1) The Council shall have the following powers and functions relating to the development of the Area:-

(a) to prepare long-term and short terms plans for all-round development of the Area;

(b) to consider the preparation and execution of projects relating to development of the Area;

(c) to formulate the projects relating to the Area;

(d) to Co-ordinate, supervise and review the projects of the Area;

(e) to suggest measures for accelerated development of the Area; (2) The Council may ply passenger bus services in the Area. (3) Subject to the general guidelines of the state Government, the Council shall have the following powers and functions on the subjects specified in Schedule 3 -

(a) to fix priority and prepare plans for development programmes;

(b) to formulate projects;

(c) to sanction projects

(d) to get projects executed;

(e) to sanction Central Plans relating the Area and to get it executed;

(f) to review, supervise, co-ordinate and monitor the projects."

"30. Supervisory powers and functions of the Council.- (1) The Council shall have such supervisory powers and functions with respect to non-developmental and regulatory subjects specified in schedule 3 as may be prescribed, for public purposes, by the State Government in consultation with the Council.

(2) The Council in its area, may supervise Municipal Corporations, Municipalities, Notified Area Committees, District Boards, Panchayat Samities and Gram Panchayats."

"34. Financial powers of the Council.-

(6) The Council may utilize the fund for payment of pay and allowances of the Chairman, Vice Chairman, Members of the Council, Officers and Staff of the Council Office and on Office expenditure and the development programmes of the area including grant to the District boards for different development plans."

"36. The powers and Functions of Interim Council and Interim Executive Council.

- Unless the context otherwise requires or is not relevant or specially otherwise provided; the provisions relating to the Council and the Executive Council, shall be deemed to apply to the Interim Council and Interim Executive Council as the case may be.

"42. Direction by the State Government. - The Council in the discharge of its functions, shall be guided by such direction on policy matters as may be given to it from time to time by the State Government."

Learned counsel for the parties appearing before us did not dispute that the appellant by virtue of his nomination as Chairman of interim JAA Council by the State Government held 'an office', which existed independently of its holder. However, they were seriously at variance as to whether the office held by the appellant could be said to be "an office of profit" as also whether it could be said that the office of Chairman of interim Council is "an office under the State Government". We shall separately consider the issue whether the concerned office had been declared by the competent legislature as not to disqualify its holder.

The question whether a person holds an office of profit, as already noticed, is required to be interpreted in a realistic 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. Now to some factual matrix in the present case.

The appellant was admittedly holding an office of Chairman of the Interim JAA Council when he filed his nomination paper for election to Rajya Sabha. He belonged to the Scheduled Tribes and had been nominated as Chairman of the Interim JAA Council, by the State Government. He held his office 'at the pleasure' of the State Government. Appellant has also admitted in his statement in the High Court that as Chairman of the Interim Council he was receiving:

(1) An honorarium of Rs.1750/- per month;

(2) Daily allowance at the rate of Rs.150/- per day for the period spent outside the headquarter besides travelling expenses as prescribed; (3) Daily allowance at the rate of Rs.120/- per day for attending meetings of the interim council;

(4) Furnished rent free accommodation (quarters) and (5) A car with Driver That receipt of daily allowance at the rate of Rs.150/- per day for the period spent outside

his headquarters and Rs.120/- per day for attending meetings of the Interim JAA Council by the appellant, is in its very nature only compensatory allowance, intended to meet out of pocket expenses, was not disputed by learned counsel for the parties either in the High Court or even before us and in our opinion rightly so. The serious controversy, however, revolves around the nature of payment of Rs.1,750/- per month as "honorarium"

to the appellant as also whether the 'office' held by the Chairman of the Interim JAA Council was an "office under the State Government".

Does the receipt of "honorarium at the rate of Rs.1,750/- per month by the appellant, besides other allowances and perquisites, amount to causing any "pecuniary gains" to the appellant?

Mr. Rao, learned senior counsel appearing for the appellant is right in his submission that payment of 'honorarium' may not by itself imply payment of any pay, salary, remuneration or emoluments to the appellant. Indeed, "honorarium" is a concept different than salary or remuneration and its payment cannot constitute an "office of profit" unless there is some 'pecuniary gain' for the recipient. However, for what follows we are unable to agree with him that the payment of honorarium, in the established facts and circumstances of the case, did not amount to giving 'pecuniary gains' or 'profits' to the appellant.

The word 'profit' for the purpose of Article 102(1)(a) or Article 191 "connotes an idea of pecuniary gain", though neither the label under which it is paid nor the quantum of the amount may always be material to determine the issue. In the instant case, the appellant on his own admission was to receive Rs.150/- per day as allowance for performing work of the interim Council outside the headquarters and Rs.120/- per day for the days of sitting of the Council. These amounts, in our opinion, were intended to meet out of pocket expenses of the appellant and were in the nature of compensatory allowances and were not a source of profit. Payment of Rs.1,750/- per month as honorarium was in addition to the aforesaid allowances. In *Karbhari Bhimaji Rohamare's case* (supra) this Court opined that a person receiving an honorarium of Rs.25/- per day besides travelling and daily allowances could not be said to be making any pecuniary gain nor could it become a 'source of profit' for the concerned person, unless he stays "with some friends or relatives or stays in a dharamshala..." Indeed, those observations were made taking a realistic view of the matter based on the fact situation in that case. In the present case, besides the receipt of daily allowances and honorarium, the appellant had, as admitted by him, also been provided with rent free accommodation besides a car with a driver at State expense. Keeping in view these facilities, the payment of an additional amount of Rs.1,750/- per month as an honorarium was, under the circumstances, clearly in the nature of giving some pecuniary gain to the appellant and was not intended to compensate the appellant for his out of pocket expenses. In various precedents relied upon by learned counsel for the parties before us and referred to by us in an earlier part of this judgment, the element of providing rent free accommodation and a chauffeur driven car at the State expense in addition to "honorarium" and other allowances to the concerned person was not involved. These are relevant factors. The grant of honorarium of Rs.1,750/- per month besides other perquisites, granted by the State Government to its own nominee, in addition to the payment of

daily allowances, to meet out of pocket expenses, does bring in an element of granting 'profits' to the appellant. He certainly can be said to have made pecuniary gain out of the payment of honorarium of Rs.1,750/- per month. It is not possible to construe the payment of Rs.1750/- per month, to be payment in the nature of "compensatory allowance". While construing the true nature of "honorarium", the grant of other perquisites cannot be overlooked or ignored. The honorarium' receivable by the appellant at the rate of Rs.1,750/- per month, besides other 'allowances' and 'perquisites' was surely not in the nature of gratuitous payment, voluntary donation or compensation to meet any out of pocket expenses. It was in the nature of 'remuneration' and was a source of 'pecuniary gain'. The receipt of honorarium at the rate of Rs.1,750/- per month, besides daily allowances, rent free accommodation and a chauffeur driven car at the State expense, to the appellant was a benefit capable of bringing about a conflict between the duty and interest of the appellant as a member of Parliament - the precise vice to which Article 102(1)(a) is attracted.

We are, therefore, in the established facts and circumstances of the case, in agreement with the High Court that the appellant, as Chairman of the Interim JAA Council was in receipt of pecuniary gain in the form of honorarium and he, thus, held an "office of profit". This now takes us to the next question. Did the appellant hold this 'office of profit' as Chairman of Interim JAA Council "under the State"?

The term 'Interim Council' has not been defined under the JAAC Act though provision for its constitution, based on clause (xix) of the Tripartite Agreement has been made in Section 23 of the Act. The JAAC Act essentially deals with setting up of a regular council its composition, jurisdiction and status etc. so as to replace Chotta Nagpur and Santhal Pargana Development Authority, with a view to ensure accelerated plenary development of the area through elected representatives (see: objects and reasons of JAAC Act). As already noticed paragraph (xix) of the Tripartite Agreement dated 26.9.1994 (supra), provided for appointment of a provisional general council by the State Government to act as a body to facilitate setting up of a Regular council under the JAAC Act. This provisional council was, obviously, to act as a limb or agency of the State Government, charged with the specific task of facilitating the setting up of a Regular Council under the JAAC Act. Vide sub-section (2) of Section 23, it is the State Government which alone shall nominate 50 percent members of the interim council out of its total membership from the members of Lok Sabha and the Legislative Assembly representing the constituency which lies wholly or mostly in the Area and from the members of Rajya Sabha and Legislative Council who are inhabitants of the area. Remaining 50 per cent members were also to be nominated by the State Government from amongst persons who are inhabitants of the area and have an interest in its development. Thus, we find that an Interim JAA Council contemplated by JAAC Act was to consist only of nominees appointed by the State Government, who were to hold their office 'at the pleasure of the State Government' [Section 23(7)]. No element of election is involved in the Constitution of Interim Council at all. The obligation to set up the Regular Council, as per the tripartite agreement and confirmation made by Chief Minister of Bihar, was that of the State Government. The State Government could discharge that function through any of its agencies or departments. The State Government, proposed the Constitution of an Interim Council to discharge its obligations and provided for its composition as well as the manner of appointment and their continuance in office of the members under Section 23(2) of the JAAC Act. Section 23(3) of the Act provided that the State Government shall nominate the Chairman and

Vice-Chairman of the Interim-Council with a rider that only a member of the Scheduled Tribes could be so nominated. The Chairman and members were to hold office "at the pleasure of the State". Thus, the power and jurisdiction to appoint (nominate) or remove Chairman of the Interim JAA Council, is vested exclusively in the State Government. Vide Section 23(4) of the Act, the State Government has the exclusive jurisdiction to constitute an Interim Executive Council from amongst its nominees of the Interim JAA Council. The members of the Interim Executive Council are also to hold their office during the pleasure of the State Government. The disqualifications for membership of the regular council, as envisaged under the JAAC Act, are not attracted to membership of the Interim Council. Because whereas Section 6(2) of JAAC Act disqualifies a Member of Parliament as well as a member of the State Legislature, and members of other specified bodies, to be a member of the council, unless he resigns from membership of the legislature or the local body, as the case may be within 21 days of his election there is no such requirement in the case of interim Council. The provision of Section 6(2) is in contra-distinction to the provisions of Section 23(2) of the Act, which mandates the State Government shall nominate 50 per cent of the total membership of the interim council from out of the members of Parliament or the State Legislature only. The JAAC Act, therefore, itself drew a clear distinction between status of the interim JAA Council and the Regular Council, both in the matter of appointment as well as of removal of members including Chairman and Vice-Chairman as also for disqualifications referred to in Section 6 in so far as the members of the Regular Council are concerned. Our critical analysis of the provisions of JAAC Act shows that the Interim JAA Council, a body comprising exclusively of Government appointees, holding their office at its pleasure, was created to act as a limb or agency of the Government to facilitate smooth creation of Regular Council under the JAAC Act. Section 23(6) of the Act provides that duration of the Interim Council was to be for a period of six months (subsequently extended to 18 months), subject to the Constitution of the regular Council under Section 3, whichever is earlier. This limited life span of the interim Council stands to reason when we consider the composition, the manner of appointment and the job entrusted to the Interim Council. The State Government not only had the exclusive jurisdiction to appoint (nominate) the Chairman of Interim JAA Council but also power to remove him since under Section 23(7) of the JAAC Act, the Chairman and Vice-Chairman of the Interim JAA Council, as well as members of the Interim Executive Council, "shall hold their office during the pleasure of the State Government". On the other hand, the Chairman and members of Regular Council are governed inter alia by Sections 3, 6, 11, 12 and 17 of the Act in the matter of appointment and removal. The State Government has no role to play either in the appointment of Chairman of the Regular Council or in his removal. We are unable to persuade ourselves to agree with Mr. Rao that the distinction gets almost obliterated by Sections 36 or 42 of the Act.

Section 36 of the Act deals with the powers and functions of Interim JAA Council and Interim Executive Council and commences with the expression "unless the context otherwise requires or is not relevant or specifically otherwise provided", the provisions relating to Regular Council and the Regular Executive Council shall be "deemed" to apply to the Interim Council or the Executive Council. This provision cannot affect the potency of Section 23(3) and (7) of the Act which specifically provides for the manner of appointment of the Chairman etc. of Interim Council as well as with continuation in office of the Chairman and members of Interim Council "at the pleasure of the State Government" only. Again, Section 17 of the Act which deals with "vacancy, resignation and removal" of the Chairman of Regular Council, has no application to the nominated Chairman of

Interim Council, who holds office at the pleasure of the State Government under the specific provision of Section 23(7) of the Act. These provisions indicate that the legislature while enacting JAAC Act did not consider Chairman of Interim JAA Council to be 'at par' with the Chairman of regular Council. Moreover directions which can be given to the regular Council by the State Government have a limited scope within the meaning of Section 42 of the Act, but the same is not true of directions which can be given to the Interim JAA Council.

The appellant was nominated (appointed) as Chairman of the Interim Council by the State Government by virtue of powers vested in it under Section 23 of the Act. He was to hold the office of the Chairman of Interim Council "at the pleasure of the State Government" vide Section 23(7) of the Act. Thus, not only was the appellant appointed (nominated) by the State Government, it was the State Government which had the right to remove or dismiss the holder of that office besides controlling the manner of functioning of the Interim Council and providing funds for the interim JAA Council out of which honorarium of Rs.1,750/- per month was paid to the appellant. It follows that various tests laid down by this Court to determine whether the appellant was holding an office 'under the State Government' including the decisive test of the power of Government to appoint the person in office as well as revoke his appointment at its discretion and be responsible for the expenses, are fully satisfied in the case of the appellant [see Shivamurthy Swami Inamdar's case (1971) as also Guru Gobind Basu vs. Shankar Prasad Ghosal, AIR 1964 SC 254, with advantage] and, therefore, we hold that the appellant was holding his office under the State Government.

Since, we have already found that the honorarium of Rs.1,750/- paid to the appellant as Chairman of Interim Council, besides other daily allowances and perquisites of rent free accommodation and car with a driver, could not be said to be in the nature of 'compensatory allowances' and was in the nature of remuneration or salary, inherently implying an element of "profit" and of giving 'pecuniary gain' to the appellant, it follows that the appellant was holding an office of profit under the State Government.

We must at this stage point out that the facts situation in Surya Kant Roy's case (supra) as well as the fact situation in Maulana Abdul Shakur's case (supra) were entirely different. Indeed the concerned person in those cases held office in a statutory body, but it was found on facts of those cases that neither he was appointed by the Government nor was he removable by the Government and also that he did not perform any function "for the Government"

and that he was not receiving any remuneration from the Government either. In Shivamurthy Swami's case (supra) also the essential tests as to whether the Government paid the remuneration and whether the concerned person performed his functions for the Government as also the right of the Government to appoint and remove him were found missing. In the instant case the position is entirely different. Till a regular Council was set up, the funds were provided for by the Government. As already noticed, task assigned to the interim Council was a task which it was performing for the Government to facilitate the setting up of the regular Council. The Government, and not any statutory body, had the right to nominate (appoint) the interim JAA Council and its Chairman; members of the interim JAA Council,

including the Chairman held their offices "at the pleasure of the Government" which also controlled the functions of the interim Council. Those judgments, therefore, are clearly distinguishable and cannot come to the aid of the appellant to hold that in the established facts and circumstances of this case, he did not hold an office of profit under the State Government. Apparently, faced with this fact situation, the appellant took the plea, in his additional written statement, and it was canvassed before us as also in the High Court, that even if the office held by him as Chairman of the Interim Council was to be construed as an "office of profit under the State Government", the disqualification provided for under Article 102(1)(a) stood removed by Parliament (Prevention of Disqualification) Act, 1959, since as Chairman of Interim Council, he enjoyed the 'status' of a Minister. The argument was rightly repelled by the High Court observing that nowhere in the JAAC Act is it provided that the Chairman of the Interim JAA Council would enjoy the status of a Minister.

We have no quarrel with the proposition that holding an office of profit under the Government of India or under the Government of any State would be a disqualification only if that office is not declared by the Parliament by law not to disqualify its holder. In exercise of this power, the Parliament under Article 102 of the Constitution has exempted some offices from operation of the disqualification and similarly under Article 191, State Legislatures have passed several enactments exempting some offices from operation of this disqualification. Therefore, before holding a person disqualified, it will have to be seen whether that office is not exempted by the competent Legislature from operation of the disqualification clause. Articles 102 and 191 both, by explanation, have clarified that a person shall not be deemed to hold an office of profit under Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister- either for the Union or any State. Thus, the disqualification, in the case of the appellant, could only be removed by the Parliament, since the membership of Rajya Sabha was in issue, within the meaning of Article 102(1)(a). No such disqualification was removed by the Parliament as the JAAC Act has not been included in the Schedule to the 1959 Act. The State Legislature is not competent to remove any disqualification in respect of a member of Parliament. Even if it be assumed, though there is no basis or material to so assume, that the State Legislature or Government had, by implication removed the disqualification by granting "deemed" status of a Minister to the appellant, it had no jurisdiction to remove the disqualification from which the appellant was suffering, because it is Membership of the Rajya Sabha and not of State Legislature which was in issue. The judgment of the Constitution Bench in Kanta Kathuria's case (supra) cannot come to the aid of the appellant because what was upheld in that case was the jurisdiction of the State Legislature to remove disqualification in respect of a member of the State Legislature and not in respect of a member of the Parliament. The office of Chairman of Interim JAA Council, as already noticed, has not been exempted under the Parliament (Prevention of Disqualification) Act, 1959 and as such the disqualification contained in Article 102(1)(a) is squarely attracted to the facts of the present case. The appellant was,

thus, rightly held to have been holding 'an office of profit under the State Government' at the relevant time and, thus, was disqualified to be a member of Rajya Sabha. The High Court was justified in setting aside his election and we are not persuaded to take a contrary view either.

The learned designated Judge of the High Court after setting aside election of the appellant, declared respondent No.1, Shri Dayanand Sahay to be duly elected to Rajya Sabha relying upon the law laid down in Vishwanath Reddy vs. Konappa Rudrappa Nadouda, AIR 1969 SC 604. The correctness of that view of the High Court was not disputed before us. We, accordingly, also uphold the declaration made by the High Court in favour of respondent No.1.

Thus, this appeal fails and is hereby dismissed. The parties shall however, bear their own costs insofar as this appeal is concerned.

.....CJI.

.....J. (R.C. LAHOTI)J. (SHIVARAJ V. PATIL) New Delhi;

July 19, 2001.