Madhuker G. E. Pankakar vs Jaswant Chobbildas Rajani & Ors on 23 March, 1976

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Author: V.R. Krishnaiyer

Bench: V.R. Krishnaiyer, N.L. Untwalia

PETITIONER:
MADHUKER G. E. PANKAKAR

Vs.

RESPONDENT:
JASWANT CHOBBILDAS RAJANI & ORS.

DATE OF JUDGMENT23/03/1976

BENCH:
KRISHNAIYER, V.R.
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KRISHNAIYER, V.R.
UNTWALIA, N.L.

CITATION:
1976 AIR 2283 1976 SCR (3) 832
1977 SCC (1) 70
CITATOR INFO :
R 1985 SC 211 (18)
R 1992 SC1959 (13,22)

ACT:
Maharashtra Municipalities Act, 1965-S. 16(1)(g)-Holding office of profit-Meaning of-Private medical practitioner on the panel of doctors under Employees State Insurance Scheme-If holding office of profit.

HEADNOTE:
To provide medical facilities to the workers in factories a statutory body called the Employees State Insurance Corporation has been established by an Act of Parliament. Under the Act financial resources of the Corporation come from contributions and other monies specified in the Act and an Employees State Insurance Fund

had been created. The State Government, to which an obligation to provide medical treatment for insured persons had been entrusted, may employ private medical practitioners who run clinics as doctors under the scheme. For inclusion of a name in the medical list of insurance medical practitioners a doctor has to apply to the Administrative Medical Officer. His application is considered by an allocation committee which recommends his name to the Director, Employees State Insurance Scheme and ultimately on approval by the Surgeon General, his name is included in the medical list. The doctor whose name is included in the medical list has to abide by the duties and conditions prescribed, is under the control of the Medical Services Committee and may even be removed or resign from the panel.

The appellant, who was a private medical practitioner and whose name was included in the panel of doctors maintained by the Corporation and the respondent, were contestants in an election for the presidentship of a municipal council. At the time of scrutiny of the nomination papers no objection was raised to the appellant's nomination and in the election that ensued the appellant was declared elected. The respondent challenged the election on the ground that the appellant was disqualified under s. 16(1)(g) of the Maharashtra Municipalities Act, 1965 which debars a person who holds an office of profit under Government from becoming a councillor, because on the date of nomination he was holding an office of profit under the Government by reason of his being a panel doctor under the Employees State Insurance Scheme. Between the date of nomination and the date of election, however, the appellant had resigned from the scheme. The election tribunal allowed the respondent's petition and declared the appellants' election void. At the same time the respondent was declared as the President.

On appeal it was contended that a doctor on the medical list prepared by the Surgeon General of the State does not hold an office of profit within the meaning of s. 16(1)(g) of the Act.

Allowing the appeal

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HELD: (1) The legislative end for disqualifying holders of office of profit under Government from seeking elective offices is to avoid the 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. At the same time the 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. Therefore experts may have to be invited into local bodies, legislatures and the like political and administrative organs based on elections. [842 E-G]

(2),a) The appellant suffered no disqualification on the score of holding an office of profit under Government. The legal provisions under the Act and the rules make of an insurance medical practitioner a category different from one who runs a private clinic and enters into contractual terms for treatment of patients sent by Government, nor is he a full fledged government servant.
833
He is a tertium quid. [842-A]

(b) The doctor under the scheme has obligations of a statutory savour. He is appointed on his application which is processed by the appropriate body, removed if found wanting obliged to discharge duties, make some reports and subject himself to certain discipline while on the panel. [844 F-G]

(3) (a) For holding an office of profit under Government one need not be in the service of Government and there need be no relationship of master and servant. One has to look at the substance, not the form. [851 D-E]

Gurugobinda [1964] 4 SCR 311 referred to.

(b) In the present case the capitation fee is the remuneration the doctor is paid and this came not from Government direct but from a complex of sources. The power to appoint, direct and remove, to regulate and discipline, may be good indicia but not decisive. Government had partly direct and partly indirect control but the conclusion is not inevitable because the doctor is put in the list not by Government directly but through a prescribed process where the Surgeon General has a presiding place. How proximate or remote is the subjection of the doctor to the control of the Government to bring him under Government is the true issue. The appellant was not a servant of Government, but a private practitioner, was not appointed directly by Government but by an officer of Government on the recommendation of a Committee, was paid not necessarily out of Government revenue and the control over him in the scheme was vested not in Government but in an administrative medical officer and director whose position is not qua Government servant but creatures of statutory rules. The ultimate power to remove him did lie in Government even as he enjoyed the power to withdraw from the panel. The mode of medical treatment was beyond Government's control and the clinic was a private one. The insurance medical practitioner is not a free-lancer but subject to duties obligations, control and rates of remuneration under the overall supervision and powers of Government. [851 F-G; 852 A-C]

Deorao v. Keshav, AIR 1958 Bom. 314 p. 318, para 12 and Manipopal v. State AIR 1970 Cal. 1, 5 para 20 referred to.

(c) The appellant is not functioning under the Government in the plenary sense implied in electoral disqualification. The ban on candidature must have a substantial link with the end viz: the possible misuse of position as Insurance Medical Practitioner in doing his

duties as Municipal President. [852 D]

(4) (a) The first step is to enquire whether a permanent, substantive position which had an existence independent from the person who filled it can be postulated in the case of insurance medical practitioner or is the post an ephemeral, ad hoc, provisional incumbency created, not independently but as a List or Panel distinguished from a thing that survives. The distinction, though delicate, is real. An office of insurance medical practitioner can be conjured up if it exists even where no doctor sits in the saddle and has duties attached to it qua office. The post of insurance medical practitioner cannot be equated with the post of a peon or a security gunman who too has duties to perform. Viewed from this point Kanta and Mahadeo are reconcilable in the former an ad hoc Assistant Government Pleader with duties and remuneration was held to fall outside office of profit in the latter a permanent panel of lawyers maintained by the Railway Administration with special duties of a lasting nature constituted an office of profit. [852 G-H; 853 A]

(b) Had there been a fixed panel of doctors with special duties and discipline, a different complexion could be discerned. No rigid number of insurance medical practitioners is required by the rules or otherwise. If an insurance medical practitioner withdraws there was no office sticking out even thereafter called office of Insurance Medical Practitioner. The critical test of independent existence of the position irrespective of the occupant is just not satisfied. Likewise it is not possible to conclude that these doctors though subject to responsibilities, eligible to remuneration and liable to removal cannot squarely fall under the expression holding under Government. Enveloped though the
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insurance medical officer is by governmental influence and working within the official orbit it is not possible to hold that there is an office of profit held by him and that he is under Government. [853 C-E]

[Obiter: On a close study of ss. 21 and 44 and in the light of the ruling of this court in 1953 SCR 1154 the election petition under s. 21 is all inclusive and not under-inclusive, even if the invalidation of the election is on the score of the disqualification under s. 16 it is appropriate to raise that point under s. 21 which is comprehensive. All grounds on the strength of which an election can be demolished can be raised in a proceeding under s. 21. The language of the provision is wide enough. It is not correct to say that s. 44 cuts back on the width of the specific section devoted to calling in question an election of a councillor (including the President). [854 D-F]

If the appellant's election were invalid there was only a single survivor left in the field. Naturally in any

constituency where there was only one valid nomination that nominee gets elected for want of a contest.]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 1270, 1315-1316 of 1975.

Appeals by Special Leave from the Judgment and Order dated the 26-8-75 of the Joint Judge at Thana in Election Petitions Nos. 3 and 4 of 1974.

R. P. Bhat (In CAs. 1315-1316/75, K. R. Chaudhury, K. Rajendra Chaudhury and Mrs. Veena Khanna for the Appellants in CAs. 1315-1316/75 and in C.A. 1270/75.

D.V. Patel (In CAs. 1315-16/75, V. N. Ganpule for respondent No. 1 in all the appeals.

D. V. Patel, P. H. Parekh and (Miss) Manju Jetley for respondent No. 2 in CAs. 1315-1316/75.

M. N. Shroff for respondents 4 and 5 in CAs. 1315- 1316/75.

The Judgment of the Court was delivered by KRISHNA IYER, J. The first two civil appeals based on admitted, abbreviated facts, revolving round the election of the President of the Basscin Council (and the third raises virtually the same point but refers to the bhibendi Municipal Council) under the Maharashtra Municipalities Act, 1965 (the Municipal Act, for short) has led to long and intricate argument, thanks partly to the haziness and incongruity of the statutory provisions, and the hard job of harmonizing and harmonizing and illumining which, by interpretative effort, has drained us of our faith in the blessings of simplicity, certainty and consistency in Indian codified law. We may pardonably, but hopefully, permit ourselves by way of constructive criticism of perfunctory codification-a proliferating source of litigation-that it was once thought, "With a Code, all our troubles and cares would magically vanish. The law, codified, would become stable, predictable and certain. The rules of law, purified, would be accessible to, and understood by, not only the legal establishment of bench and bar but the people as well."

Professor Grent E. Gilmore comments:

> "The law, codified, has proved to be quite as unstable, unpredictable, and uncertain-quite as mulishly unruly-as the common law, uncodified, had ever been. The rules of law, purified, have remained the exclusive preserve of the lawyers; the people are still very much in our toils and clutches as they ever were- if not more so."

(Quoted by H. R. Hahlo in Codifying the Common Law: Protracted Gestation-Mod. Law. Rev. January 1975, p. 23, 29-30).

Election law has necessarily to be Statutory, but a code can be clear in its scheme and must be such that litigation-proof elections should become the rule. Legislative nemesis, in the shape of ambiguity induced litigation is a serious political misfortune in the area of elections where lay men go to the polls and people's verdicts get bogged down in court disputes, attended with desperate delays. Some intelligent care at the drafting stage, some vision of the whole scheme in the framers, will reduce resort to legal quarrels and appellate spirals so that the time consumed in this Court in resolving conflicts of construction in comparatively less important legislations can be spared for more substantial issues of general public importance.

Civil Appeals Nos. 1315 and 1316 of 1975 One Shri Rajani, a candidate for Presidentship of the Bassein Municipal Council and Shri Samant, a voter in that municipal area, made common cause and filed two election petitions challenging the declaration in favour of the appellant, Dr. Parulekar, who was the successful candidate, winning by a large plurality of votes.

The resume of relevant facts sufficient to appreciate the contentions may straightway be set out. We are confining, as suggested by counsel, to the twin appeals relating to Bassein since the fate of Bhibandi must follow suit. Three candidates, including the two already mentioned, had filed nomination papers on October 21, 1974 for the presidential election of the Municipal Council. At the time of the scrutiny which took place two days later, no objection was raised to the nomination of Dr. Parulekar by anyone and, on the withdrawal of the third candidate within time, there was a straight fight between the appellant and the first respondent. The poll battle which took place on 17-11-74 found the appellant victor and he was so declared. The frustrated first respondent and his supporter, 2nd respondent, challenged the return of the appellant by separate election petitions under s. 21 of the Municipal Act. The sole ground on which the petitioners were founded was that Dr. Parulekar, the returned candidate, was disqualified under s. 16(1) (g) of the Municipal Act, the lethal vice alleged against him being that on the date of nomination he was holding an office of profit under the Government, as he was then, admittedly, working as a panel doctor appointed under the Employees' State Insurance Scheme (acronomically, the ESI scheme), a beneficial project contemplated by the ESI Act, 1948. Of course, the appellant doctor submitted his resignation on November 5, 1974 and this was accepted on November 11, 1974. Thus, before the actual polling took place, but after the nomination, he had ceased to be on the ESI panel. Another circumstance which may have some significance in the overall assessment of the justice of the case, although of marginal consequence on the law bearing upon the issues debated at the bar, is that the appellant has been a councillor of the aforesaid municipality since 1962 and he has also been a doctor on the ESI panel throughout the same span of years and no one has chosen to raise the question of disqualification on this score up till the 1st respondent fell to his rival and had no other tenable ground of attack. Necessity is the mother of invention and the respondents, aided by the cute legal ingenuity, may be, dug up the disqualification of 'office of profit' and, indeed, wholly succeeded before the Election Tribunal, the Joint Judge of Thana. The Trial Judge not merely voided the appellant's election but declared the 1st respondent President since he was the sole surviving candidate. This order of the Joint Judge has been assailed before us in the two appeals, after securing leave under Art. 136.

Three main contentions have been urged before us by Shri Bhatt, counsel for the appellant, which we will formulate and deal with one by one, although on the merits the most formidable issue is as

to whether figuring in the medical list under the ESI scheme amounts to holding an office of profit under Government. With a view to get a hang of the major plea, it is necessary to study the scheme of the ESI Act, even as to get a satisfactory solution of the other two points we have to gather the ensemble of provisions dealing with disqualification of candidates and the triple remedies provided in that behalf by the Municipal Act. The discussion, to be put in proper focus, requires formulation of the submissions of counsel, the foremost in importance and intricacy being whether a doctor on the Medical List made by the Surgeon-General of the State holds an 'office of profit' within the meaning of s. 16(1) (g) of the Municipal Act. Next in the order of priority is the question whether a petition for setting aside an election of President on the ground of disqualification for being a councillor is permissible under s. 21 of the Municipal Act in view of the special provision in s. 44 of the said Act and the rules regarding objections to nominations and appeal therefrom framed under that Act. The last question which, in a sense, is interlinked with the earlier one is as to whether, assuming the appellant to be disqualified, the first respondent can be declared the returned candidate or President, by-passing the necessity for a fresh poll-getting elected, as it were, through the judicial constituency of discretionary power.

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

We will proceed to take a close-up of the three lines of attack outlined above, and if interference with the election must follow, it will; otherwise not.

The appellant is a doctor in Maharashtra where the municipalities are organised, based on popular franchise, in terms of the Municipal Act. It is a heartening omen that this local body, Bessein, has electorally attracted professional men, not mere politicians, into its administrative circle; for the appellant is a 'medic' while respondent 1 is an 'advocate'. By a margin of over a thousand votes the former won but the lawyer rival has invoked the law to undo the election on the ground of disqualification based on s. 16(1)(g) of the Municipal Act. The ban is on one who holds an office of profit under government and the public policy behind the provision is obvious and wholesome. We may read the relevant part of the section:

> "16(1)(g): No person shall be qualified to become a Councillor whether by election, co-option or nomination, who is a subordinate officer or servant of Government or any local authority or holds an office of profit under Government or any local authority;"

The short question then is whether the appellant is qualified to be a Councillor (which expression is rightly deemed to include President, vide s. 2(7). The disqualifying stain is stated to be that he held

an office of profit under the State Government. He did resign before the date of poll but after the date of filing nomination. The nomination was vitiated and subsequent resignation did not confer moksha and the election thus became void. Assuming that if a candidature is stigmatised by a fatal blot at the time of nomination the election also suffers invalidity, despite intervening removal of the disqualification, did the doctor incur the penalty by being on the medical panel of the ESI scheme ?

The critical question, apparently simple and limpid, has, when saturated with precedential erudition and lexicographic inundation, become so learnedly obscure and conflictively turbid that were we governed by a radically streamlined methodology of legislation and liberality of interpretation, as obtains in other systems of jurisprudence, much of the forensic work could have been obviated. This is a problem of disturbing social import outside the orbit of these appeals with which alone we are currently engaged.

The magnificent concept of judicial review is at its best when kept within the beautiful trellis of broad principles of public policy and tested by the intentionability of the statute. With this predisposition calculated to make judge-power functionally meaningful, we proceed to fix the contextual semantics of 'office of profit' as a disqualificationary factor for running for municipal president. To begin with the very beginning; what is an office ?-too simplistic to answer with case that it is derived from 'officium' and bears the same sense. Indeed, in Latin and English, this word has protean connotations and judicial choice reaches the high point of frustration when the highest courts here and abroad have differed, dependent on varying situations, or statutory schemes, the mischief sought to be suppressed and the surrounding social realities. Then we come to the second question: what is an 'office of profit'? And, thirdly, to the question: when is an 'office of profit' under Government ?

The context-purpose signification of expressions of varying imports leaves room for judicial selection. Illustratively, we may refer to two decisions which throw some light but turn on the statutory setting of those cases. For instance, in Ramachandran (AIR 1961 Madras 450, 458) it has been observed:

> "..We find, in Bacon's Abridgment at Vol. 6, p. 2, the article headed 'of the nature of an officer, and the several kinds of officers', commencing thus: 'It is said that the word 'officium' principally implies a duty, and, in the next place, the charge of such duty; and that it is a rule that where one man hath to do with another's affairs against his will, and without his leave, that this is an office, and he who is in it is an officer'. And the next paragraph goes on to say:
>
> 'There is a difference between an office and an employment, every office being an employment; but there are employments which do not come under the denomination of offices; such as an agreement to make hay, herd a flock, etc; which differ widely from that of steward of a manor, etc. The first of these paragraphs implies that an officer is one to whom is delegated, by the supreme authority, some portion of its regulating and coercive powers, or who is appointed to represent the State in its relations to individual subjects. This is the central idea; and applying it to the clause

> which we have to construe, we think that the word 'officer' there means some person employed to exercise, to some extent, and in certain circumstances, a delegated function of Government. He is either himself armed with some authority or representative character, or his duties are immediately auxiliary to those of someone who is so armed."

In Statesman v. Deb it is said:

> "An office means no more than a position to which certain duties are attached. According to Earl Jowitt's Dictionary a public office is one which entitles a man to act in the affairs of others without their appointment or permission."

Both these decisions may perhaps be generally relevant but not precisely to the point.

We were taken through the panorama of case-law and statute-law relating to corporations, companies, autonomous bodies and other creatures of statute, to bring out the content of 'office of profit under government' as distinguished from offices under the control of government. Indeed, even the Constitution of India disqualifies a person for being chosen as Member, if he holds any office of profit under the Government. The question may well arise whether the ESI Corporation is under the control of government and can be equated with State so that holding any office thereunder may attract the proscription of s. 16(1)(g). We are relieved from this industrious adventure by the stand taken by counsel for the respondents, Shri Patel, that he stakes this part of his case on the sole ground that the appellant doctor is holding an office of profit under the Maharashtra government, as such. He has no case therefore that the doctor is under the control of the ESI Corporation, an institution controlled by the Union government and hence is disqualified. The short issue, therefore, is whether, under the scheme of the ESI Act and the rules framed thereunder, the appellant squarely falls within the description of holder of office of profit under the State Government. This branch of enquiry takes us to an analysis of the provisions bearing on the scheme of the medical project under the ESI Act and the role of the State government therein. We have some assistance from rulings of this Court in resolving the dispute and we may mention even in advance that a seeming disharmony between two decisions of this Court also has to be dissolved. Apparent judicial dissonance may give place to real consonance, if a dissection of the facts and discernment of the reasoning, in the light of which the decisions of this Court are rendered, is undertaken.

The ESI Act provides medical facilities for the working class, the primary responsibility for executing the project being shouldered by a statutory corporation created by s. 3 of the Act and the infra-struture for implementation is organised by the other provisions of Chapter II. A Standing Committee administers the affairs of the Corporation. A Medical Benefit Council is constituted by the Central Government to help in the discharge of the duties of the Corporation which involve expertise. The financial resources come from contributions and other moneys specified in the Act itself and an Employees' State Insurance Fund has been brought into existence in this behalf. The Corporation, although has a separate legal personality, is under the control of the Central Government. But that is not the pertinent issue before us.

The fatal sin is not that the appellant is a doctor under the ESI Corporation but that he is holding an 'office of profit' under the State Government. We may ignore provisions relating to the powers of the Corporation and turn to the role of Government vis a vis private medical practitioners like the appellant. He is not a full-time employee of Government. On the other hand, he runs his own clinic. Even so, it is argued with force that s. 58 and a fasciculus of rules framed by the State Government under s. 96, viewed as a mini-scheme, creates offices of profit which are filled by private doctors like the appellant.

The legal spring-board is s. 58 of the ESI Act and it is best to start off with reading that section:

> "58. Provision of medical treatment by State Government.-(1) The State Government shall provide for in sured persons and (where such benefit is extended to their families) their families in the State, reasonable medical, surgical and obstetric treatment:
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> Provided that the State Government may, with the approval of the Corporation, arrange for medical treatment at clinics of medical practitioners on such scale and subject to such terms and conditions as may be agreed upon.
>
> (2) Where the incidence..."

Two things are self-evident. An obligation to provide medical treatment for insured persons has been saddled on the State Government. Secondly, that Government may discharge this responsibility through arrangement with medical practitioners who run clinics. The bare bones of s. 58 have to be clothed with flesh before a viable project comes to life. This is achieved by rules framed unders. 96 especially s. 96(1) (d) & (e). We may make it clear that the Corporation's entry into the field is not inhibited by s. 58 as s. 59A underscores. But what is posed before us is the appellant's status as a holder of an office of profit under the Government since he is admittedly a medical insurance officer within the mechanism set up by the rules. Here we seek light from the several rules governing medical insurance officers, their empanelment, control, removal and allied matters. Some empathy with the plan of benefit by the State Government is a pre-requisite to an insight into the true nature of a medical insur ance officer in the context of an office of profit.

A broad idea can be gained from the key rules and so we sketch the outlines by reference to them, skipping the rest. The Chief officer entrusted with the working of the scheme is the Director Rule 2(3A) defines 'Director' as the Director, ESI scheme, Government of Maharashtra. This officer, the kingpin of the whole programme, is an appointee of the State Government. The content of medical benefits is covered by r. 4 which extends the medical services to insured persons and runs thus:

> "4. Provision of general medical services to insured persons by Insurance Medical Practitioners.-
>
> (1) The State Government shall arrange to provide general medical services to insured persons at clinics of Insurance Medical Practitioners, who have undertaken

to provide general medical services under these rules and in accordance with their terms of service.

(2) An Insurance Medical Practitioner shall be deemed to be appointed as an Insurance Medical officer for the purposes of the Regulations."

The agency for rendering medical treatment is called Insurance Medical Practitioner. Rule 2(6) defines the Insurance Medical Practitioner as one appointed as such to provide medical benefits under the Act and to perform such other functions as may be assigned to him. Rule 2(2) authorizes the appointment of one or more officers by the State Government to control the administration of medical benefits and they are called 'administrative medical officers'. These officers shall, under r. 5, prepare a list of the practitioners whose applications have been approved by the Allocation Committee (defined in r. 2(13). This list is called the Medical List of Insurance Medical Practitioners. Before a doctor can be included in the medical list, he has to apply to the administrative medical officer in the form specified by the State Government for the purpose. The Insurance Medical Practitioners have to be responsible for rendering medical treatment and must conform to the conditions specified. A Medical Service Committee shall be set up for such areas as may be considered appropriate by the State Government. This Committee investigates into questions between an Insurance Medical Practitioner and a person who is entitled to obtain treatment from that practitioner, etc. On the report of the Medical Services Committee relating to the conduct of an Insurance Medical Practitioner, the Director may take action in one or more of the ways specified in r. 22(2). He may even remove the Insurance Medical Practitioner's name from the medical list. There is an appeal by the aggrieved doctor to the State Government. Rule 24 relates to investigation into cases of disputed prescriptions, record keeping and certification relating to Insurance Medical Practitioners. The total impact of a detailed study of the various rules framed by the State Government bearing on Insurance Medical Practitioners is that a doctor applies for getting into the Medical List, agrees to abide by the duties and conditions prescribed, is under the control of the Medical Services Committee and may even be removed or resign from the panel. It is clear that he cannot extricate himself from government control by the plea that he is a private doctor because his entry into the Medical List is preceded by an application for inclusion where he undertakes certain responsibilities. Such application is considered by an Application Committee which recommends his name to the Director, Employees State Insurance Scheme. The Surgeon General ultimately grants the prayer for inclusion in the Medical List on the recommendations of the Allocation Committee. It is true that an insurance medical practitioner has the right to resign and also to have the name of any insured person removed from his list. He has duties which are prescribed by the rules vis a vis the patients. He is required to furnish various pieces of clinical information and to do other medical duties as are set out in r. 10. The State Government has the power to remove the name of any individual Insurance Medical Practitioner from the Medical List even as the latter is entitled to give notice to the Director, ESI Scheme that he desires to cease to be an Insurance Medical Practitioner and that his name may be removed from the Medical List. It follows that although he is a private doctor, running a private clinic, he is also an Insurance Medical Practitioner subject to the discipline, directions, obligations and control of the relevant officers appointed by the State Government in implementing the medical benefit scheme.

An insurance medical practitioner-the appellant is one- being a medical practitioner 'appointed as such to provide medical benefit under the Act and to perform such other functions as may be assigned to him,' the question arises whether this is tantamount to holding an office.

The legal provisions under the Act and the rules certainly make of an insurance medical practitioner a category different from one who runs a private clinic and enters into contractual terms for treatment of patients sent by Government, nor is he a full-fledged government servant. He is a tertium quid, as it were, but the finer question is whether this category falls squarely within the description of 'office of profit under government'.

This very question fell for decision before the Bombay and Calcutta High Courts but the learned Judges, on a study of the identical provisions, arrived at antipodean conclusions. After all, minds differ as rivers differ and, assisted by the flow of logic in these and other rulings cited before us, we will hopefully reach the shore of correct interpretation. The process of mentation, the office of words like office of profit' which convey many meanings and the inputs into the complex matrix of statutory construction make what looks simple to the lay, sophisticated for the legal, as the case on hand amply illustrates.

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 senice, 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 confict 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 fulltime government senants 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 know-how are inhibited from entering elected organs of public administration and offering semivoluntary services in para- official, statutory or like projects run or directed by Government or Corporation 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.

The general interpretative approach hallowed by Heydon's case is expressed by the Bench in the Bombay ruling AIR 1958 Bom 314 Deorao v. Keshav thus:

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

While we agree that this consideration is important for purity of elective offices, the need for caution against exaggerating its importance to scare away men of skill in various fields coming into socially beneficial projects on part-time posting or small fee cannot be ignored. Informed by these dual warnings, we proceed to assess the worth of the rival contentions.

Section 58 charges the State Government with the duty to provide medical facilities to insured employees. This obligation may be discharged by arrangements with private clinics. An Insurance Medical Officer is not a government servant, but he is more than a mere private doctor with a contractual obligation, for he undertakes certain functions which are regulated by law viz., rules framed under s. 96. The question is not what he is but whether he is 'holding an office of profit'.

We have already referred to the principal sections and rules, the broad scheme and infra-structure and the rights, duties and degree of control over Insurance Medical Practitioners exercised by the State directly or through its officers. A further elaboration is possible, but is supererogatory. A full study of the Bench decisions of Bombay and Calcutta led to diametrically opposite conclusions thus proving the wide judicial choice available depending on the perspective, the import and the objections one accepts from the two enactments viz. the Municipal Act and the Insurance Act. It is a context-purpose quandary.

Chainani J., speaking for the Court set out the true approach thus:

> P. 318, para 12.
>
> "In our opinion, the principal tests for deciding whether an office is under the Government, are (1) what authority has the power to make an appointment to the office concerned, (2) what authority can take disciplinary action and remove or dismiss the holder of the office and (3) by whom and from what source is his remuneration paid ? Of these, the first two are, in our opinion, more important than the third one."

Shri A. N. Ray, J. (as he then was) stated his touchstone to be fourfold:

> "The four tests which have been applied to these cases were stated by Lord Thankerton in the case of Short v. J. and W. Henderson, Limited, reported in (1946) 174 L.T. 417. These four tests are :-(a) the master's power of selection of his servant, (b) the payment of wages or other remuneration, (c) the master's right to control the method of doing the work, and (d) the master's right of suspension or dismissal.

Lord Thankerton referred to the observation of Lord Justice Clerk in the judgment under appeal in that case that a contract of service may still exist if some of these elements are absent altogether, or present only in an unusual form, and that the principal requirement of contract of service is the right of the master in some reasonable sense to control the method of doing the work, and that this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship."(1) A few searching questions and implied answers may help a solution. Is the appellant (or those of his ilk under the Scheme) an employee of government? Not more than any other expert consulted by Government for fee paid? But he has obligations of a statutory savour He is 'appointed' on his application which is processed by the appropriate body, removed if found wanting, obliged to discharge duties, make some reports and subject himself to certain discipline while on the panel. In the words of the Bombay decision :

> Para 30, p. 323.
>
> "In the form of application, a medical practitioner, who desires his name to be included in the medical list, has also to state that he agrees to abide by the terms of service. In other words, he agrees to join a service, see also Rule 22(d), which uses the words 'prejudicial to the efficiency of the Service'. He is also subject to disciplinary action and control. He cannot also resign or give up his post except by giving three months' notice under Service Rule
>
> 14. He is also required to maintain records and to submit returns. His employment has, therefore, all the attributes of a service. He must, therefore, be held to be a holder of an office. The fact that he is allowed private practice will not alter the character of his appointment."

The other features pointing in a different direction are not to be overlooked either. Ray J. (as he then was) drew the lines, boldly, when he observed:

> Para 29, p. 7.
>
> "These medical practitioners apply themselves for inclusion in the medical list. Their payment is not out of the government revenue but out of a special fund consisting of contribution made by the employers. Therefore such a fund over which the government has no legal title and which is vested in the corporation under the combined effect of sections 3 and 26 of the Act to which I have already referred

indicates beyond any doubt that the remuneration of medical practitioners is paid not out of the public exchequer. The contention of Mr. Advocate General is correct that medical practitioner in the present case gave nothing more than a voluntary undertaking to offer services in lieu of fees for professional service rendered and the inclusion of names in the list and the preparation of the list did not have the effect of making the medical practitioner an employee of the State."

x x x x

Para 23, p. 6.

"Mr. Advocate General, in my opinion, rightly contended that the medical practitioners were really undertaking and offering services and if the undertaking was treated as a contract between the medical practitioner and the persons in charge of preparation of medical list, namely, the State or the Corporation it was a mere contract for services and not a contract of services. This proposition was extracted from the decision in Gould v. Minister of National Insurance, reported in (1951) 1 KB 731 and also in (1951) I All. E.R. 368. That case was on the construction of the provisions of the National Insurance Act, 1946 and the question was whether the appellant in that case who was a music-hall artist and who had entered into a written contract with the second respondent acting on behalf of several companies, under which he undertook to appear in a variety 'act' at a theatre for one week from September 6, 1948 was an employed person within the meaning of the Act. The first respondent, the Minister of National Insurance, had decided that during that week the appellant was not an 'employed person' within the meaning of the Act. It was held that the question would turn on the particular facts of each case and the authority of cases based on different statutes would not always be of assistance.

It was said that it would be easy in some cases to say that the contract was a contract of service and in others that it was a contract for services, but between these two extremes there was a large number of cases where the line was much more difficult to draw."

Does the destiny of this case depend on murky semantics as to what is an 'office'-filling columns of Law Lexicons and English Dictionaries-or the nub of the dispute turn on contract of service versus contract for services? Alas ! Could not the law be made plainer in this area of mass- participatory process called elections ? Dickens is still valid about our modern Legislations unresponsive to the common man's need of comprehensible law and unmindful of the court's consequential wrestling with etherie differences ! 'The law is a ass-a idiot' (Mr. Bumble in Oliver Twist).

The commensense way, rather than the lexicographic street, is the better route to the destination. And that means we have to crystallise our notion of 'office of profit' and then test the fate of Insurance Medical Practitioners. Profit he does derive, but does he hold an office under Government ? Mere incumbancy in office is no disqualification even if some sitting fee or piffling honorarium is paid (vide: 1954 SC 653).

If a lawyer (or doctor in a system of National Health Insurance) is on a panel of Government for looking after cases or other legal work and paid for services rendered but, otherwise, a freelance, does he hold an office under Government ?

Shivamurthy Swami(1) clears the ground for the discussion by going to the basics which determine what is an office of profit under Government. These tests are:

> "(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 ? Does he perform them for the Government; and (5) Does the Government exercise any control over the performance of those functions ?"

We are not faced with the plea of office under the Corporation and thus under the Central Government but only with the disqualification of holding an office directly under the State Government via s. 58 read with the rules framed under s. 96 of the Insurance Act. In this connection, a closer link with the present situation is established by Kanta(2) where an Advocate, acting for Government under the directions of the Government pleader could be said to hold an office of profit. Sikri J., (as he then was) adopted the classic definition of 'office' given by Justice Rowlatt in Great Eastern Rly Co.(1) as appropriate even in an electoral context and proceeded to apply the ratio to the facts of the case. Observed the learned Judge:

> "We cannot visualise an office coming into existence, every time a pleader is asked by the Government to appear in a case on its behalf. The notification of his name under rule 8B, does not amount to the creation of an 'office'. Some reliance was also placed on rule 4 of Order 27 C.P.C. which provides that:
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> "The Government pleader in any Court shall be the agent of the Government for the purpose of receiving processes against the Government issued by such Court."

This rule would not apply to the facts of this case because the appellant was appointed only to assist the Government Advocate in a particular case. Assuming it applies, it only means that the processes could be served on the appellant, but processes can be served on an Advocate under Rule 2 of Order XLV of the Supreme Court Rules, 1966. This does not mean that an Advocate on Record would hold an office under the client. The learned Counsel for the respondent, Mr. Chagla, urges that we should keep in view the fact that the object underlying Art. 191 of the Constitution is to preserve purity of public life and to prevent conflict of duty with interest and give an interpretation which will carry out this object. It is not necessary to give a wide meaning to the word 'office' because if Parliament thinks that a legal practitioner who is being paid fees in a case by the Government should not be qualified to stand for an election as a Member of Legislative Assembly, it can make that provision under Art. 191(1)(e) of the Constitution. The case of Sakhawat Ali. v. The State of Orissa(2) provides an instance where the Legislature provided that a paid legal practitioner should not stand in the municipal elections."

This takes us to Sakhawat Ali(2) and to Mahadeo(3) which too afford some luciferous parallels.

In Sakhawat Ali (supra) the question arose about a legal practitioner employed on behalf of a Municipality standing as candidate for election to the Municipal Council. Stress was laid on the purity of public life, an object which would be thwarted if there arose a situation of conflict between interest and duty. A lawyer paid by the municipality becoming a councillor is a situation fraught with perils to purity in public life. This factor was emphasized by an express provision in the Municipal Act in that case disqualifying such paid legal practitioners from becoming candidates. Had such a step been taken in our case, the law would have been at least clear, whether it was wise or no.

In Mahadeo's Case(1) a fine distinction from Kanta (supra) arose. There also the disqualification of a lawyer on account of holding an office of profit under the government arose. After quoting Lord Wright in Mcmillan v. Guest(2), trying to define 'office', the Court proceeded to consider whether a lawyer who accepted a position on the panel of Railway pleaders for conducting suits filed against the Union of India on the terms and conditions therein mentioned, was holding an office of profit. Holding that such an appointment on the panel of lawyers for the Union of India was an office of profit, the Court observed:

> "If by 'office' is meant the right and duty to exercise an employment or a position to which certain duties are attached as obsered by this Court, it is difficult to see why the engagement of the appellant in this case under the letter of February 6, 1962 would not amount to the appellant's holding an office. By the said letter he accepted certain obligations and was required to discharge certain duties. He was not free to take a brief against the Railway Administration. Whether or not the Railway Administration thought it proper to entrust any particular case or litigation pending in the court to him, it was his duty to watch all cases coming up for hearing against the Railway Administration and to give timely intimation of the same to the office of the Chief Commercial Superintendent. Even if no instructions regarding any particular case were given to him, he was expected to appear in court and obtain an adjournment. In effect this cast a duty on him to appear in court and obtain an adjournment so as to protect the interests of the Railway. The duty or obligation was a continuing one so long as the railway did not think it proper to remove his name from the panel of Railway lawyers or so long as he did not intimate to the Railway Administration that he desired to be free from his obligation to render service to the Railway. In the absence of the above he was bound by the terms of the engagement to watch the interests of the Railway Administration, give them timely intimation of cases in which they were involved and on his own initiative apply for an adjournment in proceedings in which the Railway had made no arrangement for representation. It is true that he would get a sum of money only if he appeared but the possibility that the Railway might not engage him is a matter of no moment. An office of profit really means an office in respect of which a profit may accrue. It is not necessary that it should be possible to predicate of a holder of an office of profit that he was bound to get a certain amount of profit irrespective of the duties discharged by him."

The next case of considerable importance is Gurugobinda(3) which related to a chartered accountant, a partner of a firm of auditors of two companies which were owned by the Union Government and the State Government. Disqualification for holding an office of profit, again, in this circumstance, was pressed before the Court and S. K. Das, Acg. C. J., speaking for the Court observed:

> "We think that this contention is correct. We agree with the High Court that for holding an office of profit under the Government, one need not be in the service of Government and there need be no relationship of master and servant between them."

(P. 319) "In Maulana Abdul Shakur v. Rikhab Chand and another (1958 SCR 387) the appellant was the manager of a school run by a committee of management formed under the provisions of the Durgah Khwaja Saheb Act, 1955. He was appointed by the administrator of the Durgah and was paid Rs. 100 per month. The question arose whether he was disqualified to be chosen as a member of Parliament in view of Art. 102(1) (a) of the Constitution. It was contended for the respondent in that case that under ss. 5 and 9 of the Durgah Khwaja Saheb Act, 1955 the Government of India had the power of appointment and removal of members of the committee of management as also the power to appoint the administrator in consultation with the committee; therefore the appellant was under the control and supervision of the Government and that therefore he was holding an office of profit under the Government of India. This contention was repelled and this court pointed out the distinction between the holder of an office of profit under some other authority subject to the control of Government."

(p. 319-320) "It has to be noted that in Maulana Abdul Shakur's case the appointment of the appellant in that case was not made by the Government nor was he liable to be dismissed by the Government. The appointment was made by the administrator of a committee and he was liable to be dismissed by the same body."

(p. 320) "It is clear from the aforesaid observations that in Maulana Abdul Shakur's case the factors which were held to be decisive were (a) the power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion, and (b) payment from out of Government revenues, though it was pointed out that payment from a source other than Government revenues was not always decisive factor. In the case before us the appointment of the appellant as also his continuance in office rests solely with the Government of India in respect of the two companies. His remuneration is also fixed by Government. We assume for the purpose of this appeal that they are Government companies within the meaning of the Indian Companies Act, 1956 and 100% of the shares are held by the Government. We must also remember that in the performance of his functions the appellant is controlled by the Comptroller and Auditor-General who is himself undoubtedly holder of an office of profit under the Government, though there are safeguards in the Constitution as to his tenure of office and removability therefrom." (p. 321) "Therefore if we look at the matter from the point of view of substance rather than of form, it appears to us that the appellant as the holder of an office of profit in the two Government Companies, the Durgapur Projects Ltd., and the Hindustan Steel Ltd., is really under the Government of India; he is appointed by the Government of India, he is removable from office

by the Government of India, he perfoms functions for two Government companies under the control of the Comptroller and Auditor General who himself is appointed by the President and whose administrative powers may be controlled by rules made by the President."

(p. 322) "In Ramappa v. Sangappa the question arose as to whether the holder of a village office who has a hereditary right to it is disqualified under Art. 191 of the Constitution, which is the counterpart of Art. 102, in the matter of membership of the State Legislature. It was observed therein.

> "The Government makes the appointment to the office though it may be that it has under the statute no option but to appoint the heir to the office if he has fulfilled the statutory requirements. The office is, therefore, held by reason of the appointment by the Government and not simply because of a hereditary right to it. The fact that the Government cannot refuse to make the appointment does not alter the situation."

There again, the decisive test was held to be the test of appointment. In view of these decisions we cannot accede to the submission of Mr. Chaudhury that the several factors which enter into the determination of this question-the appointing authority, the authority vested with power to terminate the appointment, the authority which determines the remuneration, the source from which the remuneration is paid, and the authority vested with power to control the manner in which the duties of the office are discharged and to give directions in that behalf-must all co-exist and each must show subordination to Government and that it must necessarily follow that if one of the elements is absent, the test of a person holding an office under the Government. Centre or State, is not satisfied. The cases we have referred to specifically point out that the circumstance that the source from which the remuneration is paid is not from public revenue is a neutral factor-not decisive of the question. As we have said earlier whether the stress will be laid on one factor or the other will depend on the facts of each case. However, we have no hesitation in saying that where the several elements, the power to appoint, the power to dismiss, the power to control and give directions as to the manner in which the duties of the office are to be performed, and the power to determine the question of remuneration are all present in a given case, then the officer in question holds the office under the authority so empowered." (p. 322-323) The core question that comes to the fore from the survey of the panorama of case law is as to when we can designate a person gainfully engaged in some work having a nexus with Government as the holder of an 'office of profit' under Government in the setting of disqualification for candidature for municipal or like elections. The holding of an office denotes an office and connotes its holder and this duality implies the existence of the office as an independent continuity and an incumbent thereof for the nonce.

Certain aspects appear to be elementary. For holding an office of profit under Government one need not be in the service of Government and there need be no relationship of master and servant (Gurugobinda supra). Similarly, we have to look at the substance, not the form. Thirdly, all the several factors stressed by this Court, as determinative of the holding of an 'office' under Government, need not be conjointly present. The critical circumstances, not the total factors, prove decisive. A practical view not pedantic basket of tests, should guide in arriving at a sensible conclusion.

In the present case, can we say that the post (forgetting the finer issue of office, as distinguished from post) is under the State Government ? The capitation fee is the remuneration the doctor is paid and this comes not from Government direct but from a complex of sources. But Gurugobinda and Gurushantappa(1) took the view that payment of remuneration not from public revenue is a neutral factor. Is the degree of control by Government decisive ? The power to appoint, direct and remove, to regulate and discipline, may be good indicia but not decisive, as pointed out in Gurushantappa. In our case, Government does have, partly direct and partly indirect, control but the conclusion is not inevitable because the doctor is put in the List not by Government directly but through a prescribed process where the Surgeon General has a presiding place. How proximate or remote is the subjection of the doctor to the control of Government to bring him under Government is the true issue. Gurushantappa has highlighted this facet of the question. Indirect control, though real, is insufficient, flows from the ratio of Abdul Shakur(2). The appellant, as elaborated by Ray J (as he then was) in the Calcutta case, was not a servant of government but a private practitioner, was not appointed directly by Government, but by an officer of government on the recommendation of a Committee, was paid not necessarily out of Government revenue and the control over him in the scheme was vested not in Government but in an Administrative Medical Officer and Director whose position is not qua Government servant but creatures of statutory rules. The ultimate power to remove him did lie in Government even as he enjoyed the power to withdraw from the panel. The mode of medical treatment was beyond Government's control and the clinic was a private one. In sum, it is fair to hold that the Insurance Medical Practitioner is not a free-lancer but subject to duties, obligations, control and rates of remuneration under the overall supervision and powers of Government. While the verdict on being under the Government is a perilous exercise in Judicial brinkmanship, especially where the pros and cons are evenly balanced, the ruling in Kanta Kathuria which binds us and the recondite possibility of conflict of duty and interest for a Municipal President who is an Insurance Medical Practitioner under an arrangement with Government induce us to hold that though the line is fine, the appellant is not functioning under the Government in the plenary sense implied in electoral disqualification. After all, the means, i.e., the ban on candidature, must have a substantial link with the end viz., the possible misuse of position as Insurance Medical Practitioner in doing his duties as Municipal President.

This question is interlaced, in the present context, with the concept of 'office of profit'. And the twin problems baffle easy solution since an apparent-not real- conflict of reasoning exists between Mahadeo (decided by a Bench of two Judges) and Kanta (by a Bench of five Judges). Of course Sikri, J. (as he then was) thought that Mahadeo 'in no way militates against the view' which appealed to the majority in Kanta. Judicial technology sometimes distinguishes, sometimes demolishes earlier decisions; the art is fine and its use skilful. Both the cases dealt with advocates and we have referred to them in the earlier resume of precedents. Even so, a closer look will disclose why we follow the larger Bench (as we are bound to, even if there is a plain conflict between the two cases). Justice Rowlatt's locus classicus in Great Western Ry. Co. (followed by this Court in many cases) helps us steer clear of logomachy about 'officio' especially since the New English Dictionary fills four columns ! Rowlatt J. riveted attention on 'a subsisting, permanent, substantive position, which had an existence independent from the person who filled it' which went on and was filled in succession by successive holders'. So, the first step is to enquire whether 'a permanent, substantive position, which had an existence independent from the person who filled it' can be postulated in the case of an

Insurance Medical Practitioner. By contrast is the post an ephemeral, ad hoc, provisional incumbency created, not independently but as a List or Panel clastic and expiring or expanding, distinguished from a thing that survives even when no person had been appointed for the time being. 'Thin partitions do their bounds divide' we agree, but the distinction, though delicate, is real. An office of Insurance Medical Practitioner can be conjured up if it exists even where no doctor sits in the saddle and has duties attached to it qua office. We cannot equate it with the post of a peon or security gunmen who too has duties to perform or a workshop where Government vehicles are repaired, or a milk vendor from an approved list who supplies milk to government hospitals. A panel of lawyers for Legal Aid to the Poor or a body of doctors enlisted for emergency service in an epidemic outbreak charged with responsibilities and paid by Government cannot be a pile of offices of profit. If this perspective be correct, Kanta and Mahadeo fit into a legal scheme. In the former, an ad hoc Assistant Government Pleader with duties and remuneration was held to fall outside 'office of profit'. It was a casual engagement, not exalted to a permanent position, occupied pro-tempore by A or B. In Mahadeo, a permanent panel of lawyers 'maintained by the Railway Administration' with special duties of a lasting nature constituted the offices of profit-more like standing counsel. If, in our case, had there been a fixed panel of doctors with special duties and discipline, regardless of doctors being there to fill the positions or no, a different complexion could be discerned- as in the case of specified number of Government pleaders, public prosecutors and the like, the offices surviving even if they remain unfilled. On the other hand, no rigid number of Insurance Medical Practitioners is required by the rules or otherwise. If an Insurance Medical Practitioner withdraws, there is no office sticking out even thereafter called office of Insurance Medical Practitioner. The critical test of independent existence of the position irrespective of the occupant is just not satisfied. Likewise, it is not possible to conclude that these doctors, though subject to responsibilities, eligible to remuneration and liable to removal-all with a governmental savour-cannot squarely fall under the expression 'Holding under Government'. Enveloped, though the Insurance Medical Officer is, by governmental influence, and working, though he is, within an official orbit, we are unable to hold that there is an 'office of profit' held by him and that he is 'under government'. This conclusion avoids the evil of public duty conflicting with private interest and accommodation of more technical persons in semi-voluntary social projects in an era of expanding cosmos of State activity.

We hold, not without hesitation, that the appellant suffered no disqualification on the score of holding office of profit under government. Is it not a sad reflection on legislative heedlessness that, notwithstanding forensic controversy for a long period not a little legislative finger had been moved to clarify the law and preempt litigation. Judicial pessimism persuades us not to be hopeful even after this judgment. The Court and the Legislature have no medium of inter-communication under our system. Its desirability was emphasised by Justice Cardozo, way back in 1921 (when he addressed the Association of the Bar of the City of New York and proposed an agency to mediate between the courts and the legislature). In characteristically beautiful prose he said:

> "The Courts are not helped as they could and ought to be in the adaptation of law to justice. The reason they are not helped in because there is no one whose business it is to give warning that help is needed.. We must have a courier who will carry the tidings of distress.. Today courts and legislature work in separation and aloofness. The penalty is paid both in the wasted effort of production and in the lowered quality

> of the product. On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the working of one rule or another, patches the fabric here and there, and mars often when it would mend. Legislature and courts move on in proud and silent isolation. Some agency must be found to mediate between them."

In the light of the conclusion we have reached, the other two grounds raised may not strictly arise for consideration. However, since arguments have been addressed, we had better briefly express our view. It was argued by Shri Bhatt that when the ground for invalidation of the election is a disqualification for membership, the proper procedure is to invoke s. 44 and not to resort to an election petition under s. 21. On a close study of the two provisions in the light of the ruling of this Court in 1953 SCR 1154, we are satisfied that an election petition under s. 21 is all inclusive and not under inclusive. What we mean is that even if the invalidation of the election is on the score of the disqualification under s. 16 it is appropriate to raise that point under s. 21 which is comprehensive. All grounds on the strength of which an election can be demolished can be raised in a proceeding under s. 21. The language of the provision is wide enough. Maybe that supervening disqualifications after a person is elected may attract s. 44, but we are unable to agree that the latter provision cuts back on the width of the specific section devoted to calling in question an election of a councillor (including the President). We agree in this regard with the Full Bench decision in Dattatraya(1). Likewise is the fate of the feeble argument that because there is a provision for challenging the nomination of a candidate and for appealing against the decision of the returning officer regarding that objection, it is not permissible to urge a ground then available later before the Election Tribunal.

In the present case there was no decision by the Returning Officer about the nomination paper, and so we are not confronted by the appellate adjudication by the District Judge about the validity or otherwise of the nomination and its resuscitation before the Election Tribunal. In this view we do not accede to the contention of the appellant based on s. 44 or rule 15.

The third plea, not aimed at salvaging the poll success of the appellant but in unseating the respondent who has been declared elected by the Tribunal also has no merit from a legal angle although it is unfortunate that in a situation where there are only two candidates and the election of one is set aside by the Tribunal, the other automatically gets returned, without resort to polls. Anyway, in the present case, if the appellant's election were invalid, there is only a single survivor left in the field, i.e., the first respondent. Naturally, in any constituency where there is only one valid nomination, that nominee gets elected for want of contest.

To conclude, since the appellant is not disqualified, the appeals are bound to be allowed and we do so, but in the circumstances, without costs.

In the connected appeal C.A. No. 1270 of 1975 the consequence is to conform to what we have held above. Therefore, that appeal is also allowed. The parties will bear their respective costs through out.

P.B.R. Appeals allowed.