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Nature of "Office of Profit"

- The expression "Office of Profit" is not defined by the constitution. Although Supreme Court in several of its adjudications clarified the legal aspect of "Office of Profit" for the purpose of disqualification.

Office is an employment of substantive subsequent & permanent position having an existence independent to the person who occupied it. Apart from this the authority should be co-terminous/co-equal with responsibility which an office enjoys.

- Profit means an office capable of yielding a profit or from which a person might reasonably be expected to make a profit. In *Jaya Bachan* case 2006,

Supreme Court held that if the pecuniary gain is receivable in connection with the office then the office would be regarded as "Office of Profit" irrespective of whether such pecuniary gain has been actually received or not.

- If a person is making a profit, he/she is not disqualified, if he is not holding an office. However, if a person holds an office & expected to receive a profit then the office could be regarded as an "Office of Profit".
- Supreme Court also held that the question whether a person holds an "Office of Profit" is required to be interpreted in a realistic manner. Nature of Payment must be considered as a matter of substance rather than its form. Nomenclature is not important,

in fact the use of expressions like "Honourarium" can't take the payment out of profit if there is a pecuniary gain for the recipient.

• Supreme Court in Shir Murthy Swamy Case, 1971 specified 5 criterias based on which an office could be regarded as "Office of Profit".

i) if the power of recruitment, selection & appointment lies in appropriate govt.

ii) The service conditions with regard to the office are determined by appropriate govt.

iii) Appropriate govt. have the power to remove or dismiss the incumbent from the office.

iv) The functions & duties performed by the office is for appropriate govt.

v) Appropriate Govts. are also authorised

to control, supervise & superintend all these functions & duties.

The Issues, considerations & grounds of Criticism

1. In classifying & exempting an office the Parliament must adhere to Objective Criteria & refrain from subjective Criteria. However, in most of the cases where exemption is provided the Subjective criteria surpass/supersede the Objective consideration. The action is subjective if the Parliament begins by identifying an office holder & based on that identity provides the exemption.

2. According to one School of Thought the provisions like "Office of Profit" are completely unpragmatic.

in an organic parliamentary democracy like India. It is because the whole framework of Indian Constitution relies on the notion of flexibility, but the provision of "office of profit" insert artificial rigidity in our parliamentary functioning, Further, this rigid provision of "office of profit" again become flexible when Parliament enact a law to provide exemption to respective office.

3. The expression of "Office of Profit" is not defined by the Constitution it means the Constitutional Framework itself provides overriding powers to Executive to exempt any office for the purpose of Article 103 & 191.

Relevance → Write on your own

4. In Ashok Kumar Bhattacharya Case, Supreme Court held that whether a person holds an office under appropriate

govt. each case must be measured or judged separately. It should be noted that court of law is highly inconsistent while adjudicating the cases of "Office of Profit".

5. As per the mandate of Indian constitutional framework a member shall be disqualified from the very moment he comes to hold an "Office of Profit". The effect of assuming in such a situation where the parliament has validly exempt retrospectively, makes the whole scheme of Article 102 & 191 ineffective & nugatory.

Disqualification on the grounds of Defection

Defection is a type of moral turpitude & ethical wickedness on the part of elected representatives when they show rancorous behaviour against the ideology of a political party & parliamentary values. Since the ideology of a political party is deeply indulged in the voting behaviour, it is required for the members of parliament to respect & operationalise these values of Indian parliamentary system. In the case of any non-compliance the legal framework of anti-defection law becomes operationalise.

The legal instrument of 52nd amendment act, 1985, amended by 91st amendment act, 2003, ensures the stability of a govt in an environment where money power can be used to persuade individual members of parliament to bring down their elected govt.

In one sense it also provides some overriding powers to the political party with the purpose to control & regulate the behaviour of their own members in different parliamentary proceedings & deliberations.

It is also an instrument which curtails the tendencies like "Criminalisation of Politics" & "Politicisation of Criminals".

Xth Schedule
(Ref. Lakshmi Kant for notes)