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August 14.

GURUGOBINDA BASU

v.

SANKARI PRASAD GHOSAL and ORS.

(S. K. DAS, ACTING C.J., K. SUBBA RAO, RAGHUBAR DAYAL, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.)

Elections—Appellant a chartered accountant and a partner of a firm of auditors—The firm appointed as auditors of two Government owned companies—Appellant elected to Lok Sabha—Whether he holds an office of profit under the Union Government—Tests to be applied—Constitution of India, Art. 102(1)(*a*)—*Indian Companies Act,* 1956 (1 *of* 1956) *ss.* 224, 227, 619—*Representation of the People Act,* 1950 (43 *of* 1950). *s.* 116.

The appellant was a chartered accountant and a partner of a firm of auditors. This firm acted as auditors of two companies, among others, registered under the Indian Companies Act, 1956, the entirety of the shares of one of which are owned by the Union Government and the entirety of the shares of the other by the West Bengal Government. The appellant was declared elected to the Lok Sabha. His election was challenged by two voters of the constituency by means of an election petition. The main ground raised was that the appellant was at the relevant period the holder of an office of profit under the Government of India as well as the State Government and hence he was disqualified from standing for election under Art. 102(1)(a) of the Constitution. The Election Tribunal accepted this contention and declared the election of the appellant void. The appellant filed an appeal before the High Court in which he did not succeed. The present appeal was by virtue of a certificate granted by the High Court under Art. 133(1)(c) of the Constitution.

It was contended before this Court that on a true construction of the expression "under the Government of India or the Government of any State" occurring in cl. (a) of Art. 102 (1) of the Constitution the appellant could not be said to hold an office of profit under the Government of India or the Government of West Bengal. It was argued that the various tests, namely, who has the power to appoint, who has the right to remove, who pays the remuneration, what are the functions and who exercises the control should all co-exist and each must show subordination to the Government. The fulfilment of some of the tests alone, would not be sufficient to determine that a person holds an office of profit under the Government. It was contented on behalf of the respondent that the tests were not cumulative and that the court should look to the substance rather than to the form.

Held :

(i) For holding an office of profit under the Government a person need not be in the service of the Government and there need not be any relationship of master and servant between them.

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(ii) The examination of the various provisions of the Companies Act, 1956 (ss. 224, 227, 618 and 619) showed that so far as the two companies in question were concerned the appellant was appointed as an auditor by the Central Government, was removable by the Central Government, that the Comptroller and the Auditor General of India exercised full control over him and that his remuneration was fixed by the Central Government under sub-s. (8) of s. 224 of the Companies Act though it was paid by the companies concerned.

(iii) 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. It is not necessary that all these must co-exist nor is the fact that the source from which the remuneration is paid is not from public revenue decisive.

(iv) The appellant held an office of profit under the Government of India within the meaning of Art. 102(1)(a) of the Constitution of India and as such he was disqualified for being chosen as a member of Parliament.

Maulana Abdul Shakur v. *Rikhab Chand*, [1958] S.C.R. 387, distinguished.

Ramappa v. *Sangappa*, [1959] S. C. R. 1167, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 486 of 1963.

Appeal from the Judgment and order dated September 27, 1962, of the Calcutta High Court in Appeal from Original Decree No. 424 of 1962.

S. Chaudhuri, R. C. Deb and *S. S. Shukla, for* the appellant.

Hari Prosonna Mukherjee, K. G. Hazra Chaudhari and *D. N. Mukherjee,* for the respondents Nos. 1 and 2.

August 14, 1963. The Judgment of the Court was delivered by

S. K. Das Acg. C. J.

S. K. DAS, Acting Chief Justice.—This is an appeal on a certificate granted by the High Court of Calcutta under Art. 133(1)(c) of the Constitution. No preliminary objection having been taken as to the competency of the certificate, we have heard the appeal on merits.

The short facts giving rise to the appeal are these. The appellant before us is Gurugobinda Basu who is a chartered accountant and a partner of the firm of auditors carrying on business under the name and style of G. Basu and Company. This firm acted as the auditor of certain

companies and corporations, such as the Life Insurance Corporation of India, the Durgapur Projects Ltd., and the Hindustan Steel Ltd., on payment of certain remuneration. The appellant was also a Director of the West Bengal Financial Corporation having been appointed or nominated as such by the State Government of West Bengal. The appointment carried with it the right to receive fees or remuneration as director of the said corporation.

In February-March, 1962, the appellant was elected to the House of the People from Constituency No. 34 (Burdwan Parliamentary Constituency) which is a single member constituency. The election was held in February, 1962. There were two candidates, namely, the appellant and respondent No. 3 to this appeal. The appellant was declared elected on March 1, 1962, he having secured 1,55,485 votes as against his rival who secured 1,23,015 votes. This election was challenged by two voters of the said constituency by means of an election petition dated April 10, 1962. The challenge was founded on two grounds : (1) that the appellant was, at the relevant time, the holder of offices of profit both under the Government of India and the Government of West Bengal and this disqualified him from standing for election under Art. 102 (1)(a) of the Constitution; and (2) that he was guilty of certain corrupt practices which vitiated his election. The second ground was abandoned at the trial, and we are no longer concerned with it.

The election Tribunal held that the appellant was a holder of offices of profit both under the Government of India and the Government of West Bengal and was therefore disqualified from standing for election under Art. 102(1)(a) of the Constitution. The Election Tribunal accordingly allowed the election petition and declared that the election of the appellant to the House of the People was void. There was an appeal to the High Court under s. 116-A of the Representation of the People Act, 1951. The High Court dismissed the appeal, but granted a certificate of fitness under Art. 133(1)(c) of the Constitution.

The only question before us is whether the appellant was disqualified from being chosen as, and for being, a member of the House of the People under Art. 102(1)(a) of the Constitution. The answer to the question depends

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on whether the appellant held any offices of profit under the Government of India or the Government of any State other than such offices as had been declared by Parliament by law not to disqualify their holder. It has not been seriously disputed before us that the office of auditor which the appellant held as partner of the firm of G. Basu and Company was an office of profit. It has not been contended by the appellant before us that the office of profit which he held had been declared by Parliament by law not to disqualify the holder. Therefore the arguments before us have proceeded entirely on the question as to the true scope and meaning of the expression "under the Government of India or the Government of any State" occurring in cl. (a) of Art. 102(1) of the Constitution. The contention on behalf of the appellant has been that on a true construction of the aforesaid expression, the appellant cannot be said to hold an office of profit under the Government of India or the Government of West Bengal. On behalf of the respondents the contention is that the office of auditor which the appellant holds is an office of profit under the Government of India in respect of the Life Insurance Corporation of India, the Durgapur Projects Ltd. and the Hindustan Steel Ltd., and in respect of the West Bengal Financial Corporation of which the appellant is a Director appointed by the Government of West Bengal, he holds an office of profit under the Government of West Bengal. These are the respective contentions which fall for consideration in the present appeal.

It is necessary to state here that if in respect of any of the four companies or corporations it be held that the appellant holds an office of profit under the Government, be it under the Government of India or the Government of West Bengal, then the appeal must be dismissed. It would be unnecessary then to consider whether the office of profit which the appellant holds in respect of the other companies is an office of profit under the Government or not. We would therefore take up first the two companies, namely, the Durgapur Projects Ltd., and the Hindustan Steel Ltd., which are 100% Government companies and consider the respective contentions of the parties before us in respect of the office of auditor which the appellant holds in these two companies. If we hold that in

respect of any of these two companies the appellant holds an office of profit under the Government of India, then it would be unnecessary to consider the position of the appellant in any of the other companies.

It is not disputed that the Hindustan Steel Ltd., and the Durgapur Projects Ltd. are Government companies within the meaning of s. 2(18) read with s. 617 of the Indian Companies Act, 1956. It has been stated before us that 100% of the shares of the Durgapur Projects Ltd. are held by the Government of West Bengal and 100% of the shares of the Hindustan Steel Ltd. are held by the Union Government. We may now read s. 619 of the Indian Companies Act, 1956.

"(1) In the case of a Government company, the following provisions shall apply, notwithstanding anything contained in sections 224 to 233.

(2) The auditor of a Government company shall be appointed or re-appointed by the Central Government on the advice of the Comptroller and Auditor-General of India.

(3) The Comptroller and Auditor-General of India shall have power—

(a) to direct the manner in which the company's accounts shall be audited by the auditor appointed in pursuance of sub-section (2) and to give such auditor instructions in regard to any matters relating to the performance of his functions as such :

(b) to conduct a supplementary or test audit of the company's accounts by such person or persons as he may authorise in this behalf; and for the purposes of such audit, to require information or additional information to be furnished to any person or persons so authorised, on such matters, by such person or persons, and in such form, as the Comptroller and Auditor-General may, by general or special order, direct.

(4) The auditor aforesaid shall submit a copy of his audit report to the Comptroller and Auditor-General of India who shall have the right to comment upon, or supplement, the audit report in such manner as he may think fit.

(5) Any such comments upon, or supplement to,

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the audit report shall be placed before the annual general meeting of the company at the same time and in the same manner as the audit report."

It is clear from the aforesaid provisions that notwithstanding s. 224 of the Act which empowers every company to appoint an auditor or auditors at each annual general meetings, the appointment of an auditor of a Government company rests solely with the Central Government and in making such appointment the Central Government takes the advice of the Comptroller and Auditor-General of India. Under s. 224(7) of the Act an auditor appointed under s. 224 may be removed from office before the expiry of his term only by the company in general meeting, after obtaining the previous approval of the Central Government in that behalf. The remuneration of the auditors of a company is to be fixed in accordance with the provisions of sub-s. (8) of s. 224. It is clear however that sub-s. (7) of s. 224 does not apply to a Government company because the auditor of a Government company is not appointed under s. 224 of the Act, but is appointed under sub-s. (2) of s. 619 of the Act. It is clear therefore that the appointment of an auditor in a Government company rests solely with the Central Government and so also his removal from office. Under sub-s. (3) of s. 619 the Comptroller and Auditor-General of India exercises control over the auditor of a Government company in respect of various matters including the manner in which the company's accounts shall be audited. The Auditor-General has also the right to give such auditor instructions in regard to any matter relating to the performance of his functions as such. The Auditor-General may conduct a supplementary or test audit of the company's accounts by such person or persons as he may authorise in this behalf. In other words, the Comptroller and Auditor-General of India exercises full control over the auditors of a Government company. The powers and duties of auditors in respect of companies other than Government companies are laid down in s. 227 of the Act but by virtue of sub-s. (1) of s. 619 of the Act, the provisions in s. 227 of the Act do not apply to a Government company because a Government company is subject to the provisions of s. 619 of the Act. Under s. 619-A of the Act, where the

Central Government is a member of a Government company, an annual report of the working and affairs of the company has to be prepared and laid before both Houses of Parliament with a copy of the audit report and the comments made by the Comptroller and Auditor-General. Under s. 620 of the Act the Central Government may by notification direct that any of the provisions of the Act, other than ss. 618, 619 and 639, shall not apply to any Government company.

The net result of the aforesaid provisions is that so far as the Durgapur Projects Ltd. and the Hindustan Steel Ltd. are concerned, the appellant was appointed an auditor by the Central Government; he is removable by the Central Government and the Comptroller and Auditor-General of India exercises full control over him. His remuneration is fixed by the Central Government under sub-s. (8) of s. 224 of the Act though it is paid by the company.

In these circumstances the question is, does the appellant hold an office of profit under the Central Government? We may now read Art. 102(1) of the Constitution.

> 102. (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 ;
>
> (b) * * * *
>
> (c) * * * *
>
> (d) * * * *
>
> (e) * * * *

We have stated earlier that the sole question before us is whether the office of profit which the appellant undoubtedly holds as auditor of the Durgapur Projects Ltd., and the Hindustan Steel Ltd. is or is not under the Government of India. According to Mr. Chaudhuri who has argued the appeal on behalf of the appellant, the expression "under the Government" occurring in Art. 102(1)(a) implies subordination to Government. His argument is that ordinarily there are five tests of such subordination, namely, (1) whether Government makes the appointment to the office; (2) whether Government has the right to remove or dis-

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miss the holder of office; (3) whether Government pays the remuneration; (4) what are the functions which the holder of the office performs and does he perform them for Government; and (5) does Government exercise any control over the performance of those functions. His argument further is that the tests must all co-exist and each must show subordination to Government so that the fulfilment of only some of the tests is not enough to bring the holder of the office under the Government. According to him all the tests must be fulfilled before it can be said that the holder of the office is under the Government. His contention is that the Election Tribunal and the High Court were in error in holding that the appellant was a holder of office under the Government, because they misconstrued the scope and effect of the expression "under the Government" in Art. 102(1)(a) of the Constitution. He has contended that tests (3), (4) and (5) adverted to above are not fulfilled in the present case. The appellant gets his remuneration from the company though fixed by Government; he performs functions for the company and he is controlled by the Comptroller and Auditor-General who is different from the Government.

On behalf of the respondents it is argued that the tests are not cumulative in the sense contended for by the appellant, and what has to be considered is the substance of the matter which must be determined by a consideration of all the factors present in a case, and whether stress will be laid on one factor or the other will depend on the circumstances of each particular case. According to the respondents, the tests of appointment and dismissal are important tests in the present case, and in the matter of a company which is a 100% Government company, the payment of remuneration fixed by Government, the performance of the functions for the company and the exercise of control by the Comptroller and Auditor-General, looked at from the point of view of substance and taken in conjunction with the power of appointment and dismissal, really bring the holder of the office under the Government which appoints him.

One point may be cleared up at this stage. On behalf of the respondents no question has been raised that the Durgapur Projects, Limited, or the Hindustan Steel, Limi-

ted, is a department of Government or an emanation of Government—a question which was considered at some length in *Narayanaswamy* v. *Krishnamurthi*(1). Learned counsel for the respondents has been content to argue before us on the basis that the two companies having been incorporated under the Indian Companies Act, 1956 are separate legal entities distinct from Government. Even on that footing he has contended that in view of the provisions of s. 619 and other provisions of the Indian Companies Act, 1956, an auditor appointed by the Central Government and liable to be removed from office by the same Government, is a holder of an office of profit under the Government in respect of a company which is really a hundred per cent Government company.

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. The Constitution itself makes a distinction between 'the holder of an office of profit under the Government' and 'the holder of a post or service under the Government'; see Arts. 309 and 314. The Constitution has also made a distinction between 'the holder of an office of profit under the Government' and 'the holder of an office of profit under a local or other authority subject to the control of Government'; see Art. 58(2) and 66(4). In *Maulana Abdul Shakur* v. *Rikhab Chand and another*(2) 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 super-

(1) I.L.R. [1958] Mad. 513.
(2) [1958] S.C.R. 387.

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vision 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 the Government' and 'the holder of an office of profit under some other authority subject to the control of Government'. Mr. Chaudhuri has contended before us that the decision is in his favour. He has argued that the appellant in the present case holds an office of profit under the Durgapur Projects Ltd. and the Hindustan Steel Ltd. which are incorporated under the Indian Companies Act; the fact that the Comptroller and Auditor-General or even the Government of India exercises some control does not make the appellant any the less a holder of office under the two companies. We do not think that this line of argument is correct. It has to be noted that in *Maulana Abdul Shakur's* case(1) 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. In these circumstances this Court observed:

> "No doubt the Committee of the Durgah Endowment is to be appointed by the Gevernment of India but it is a body corporate with perpetual succession acting within the four corners of the Act. Merely because the Committee or the members of the Committee are removable by the Government of India or the Committee can make bye-laws prescribing the duties and powers of its employees cannot in our opinion convert the servants of the Committee into holders of office of profit under the Government of India. The appellant is neither appointed by the Government of India nor is removable by the Government of India nor is he paid out of the revenues of India. 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 payment from out of Government revenues are important factors in determining whether that person is holding an office of profit under the Government though pay-

(1) [1958] S.C.R. 387.

ment from a source other than Government revenue is not always a decisive factor. But the appointment of the appellant does not come within this test."

It is clear from the aforesaid observations that in *Maulana Abdul Shakur's* case(1) 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 a 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 the two companies are statutory bodies distinct from Government but we must remember at the same time 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 himself is 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. Under Art. 148 of the Constitution the Comptroller and Auditor-General of India is appointed by the President and he can be removed from office in like manner and on the like grounds as a Judge of the Supreme Court. The salary and other conditions of service of the Comptroller and Auditor-General shall be such as may be determined by Parliament by law and until they are so determined shall be as specified in the Second Schedule to the Constitution. Under cl. (4) of Art. 148 the Comptroller and Auditor-General is not eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office. Cl. (5) of the said Article lays down that subject to the provisions of the Constitution and of any law made by Parliament, the administrative powers of the Comptroller and Auditor-

(1) [1958] S.C.R. 387.

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General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General. Under Art. 149 of the Constitution the Comptroller and Auditor-General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of the Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively. The reports of the Comptroller and Auditor-General of India relating to the accounts of the Union have to be submitted to the President and the reports of the Comptroller and Auditor-General relating to the accounts of a State have to be submitted to the Governor. From the aforesaid provisions it appears to us that the Comptroller and Auditor-General is himself a holder of an office of profit under the Government of India, being appointed by the President and his administrative powers are such as may be prescribed by rules made by the President, subject to the provisions of the Constitution and of any law made by Parliament. 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 performs 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.

In *Ramappa* v. *Sangappa*(1) 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 counter-part of Art. 102, in the matter

(1) [1959] S.C.R. 1167.

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, Central 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 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.

For the reasons given above we have come to the conclusion that the Election Tribunal and the High Court were right in coming to the conclusion that the appellant as an auditor of the two Government companies held an

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office of profit under the Government of India within the meaning of Art. 102(1)(a) of the Constitution. As such he was disqualified for being chosen as, and for being, a member of either House of Parliament. It is unnecessary to consider the further question whether he was a holder of an office of profit either under the Government of India or the Government of West Bengal by reason of being an auditor for the Life Insurance Corporation of India or a Director of the West Bengal Financial Corporation.

The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

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August 14

VASUMATIBEN GAURISHANKAR BHATT

v.

NAVAIRAM MANCHHARAM VORA AND ORS.

(P. B. GAJENDRAGADKAR AND K. C. DAS GUPTA, JJ.)

Landlord and Tenant—Tenant in arrears of rent for about two years—Notice served by the landlord—A few days later the Act amended—Suit filed by the landlord for eviction—Pending the hearing of suit all arrears paid by tenant—Whether the tenant can be evicted on the ground of arrears of rent—Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 *(Bom. 57 of* 1947) *s.* 12.

The appellant was a tenant of the respondents occupying one room of a building belonging to them. She was in arrears of rent. The respondents served a notice on her claiming to recover arrears of rent for a period of two years and two months. A few days after the service of this notice the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, which governs this case was amended. The respondents thereafter filed a suit for the eviction of the appellant on the ground that they required the premises for *bona fide* personal use and on the ground that the appellant was in arrears of rent for more than 6 months. The suit was resisted by the appellant on several grounds but pending the hearing of the suit and before the decree was passed she deposited the entire rent due from her.

The trial Judge upheld both the contentions of the respondent and decreed the eviction of the appellant. On appeal the District Judge rejected the contention of *bona fide* personal use put forward by the respondent but found that the appellant was in arrears of rent and dismissed the appeal. The revision filed by the present