MAHADEO

v.

SHANTIBHAI AND ORS.

October 15, 1968

[M. HIDAYATULLAH, C.J., AND G. K. MITTER, J.]

Election—Elected candidate appointed on panel of Lawyers by Railway administration—Duty bound to watch any cases against Railway—Not free to take briefs against Railway—Railway not bound to entrust any particular case to him—If appointment involving rights and duties—Whether candidate holding an "office of profit".

The appellant's election to the M.P. Legislative Assembly in February 1967 was challenged by an election petition mainly on the allegation that he was disqualified from being a candidate as he held certain offices of profit under the Government. The trial Judge allowed the election petition holding that the appellant held an office of profit under the Government being on the panel of lawyers prepared by the Central and Western Railway Administration and having been at the material time a Professor of Law in a Government College on a regular salary of Rs. 250 per month; it was also held that on the material before the court it could not be said that the appellant held the post of the President-Member of a Tribunal constituted under s. 73 of the Madhya Pradesh Town Improvement Trust Act, 1960.

On appeal to this Court,

HELD : Dismissing the appeal :

(i) "By office" is meant the right and duty to exercise an employment or a position to which certain duties are attached. The appellant held such an office by his enagagement on the basis of a letter of appointment dated February 6, 1962 addressed to him by the Chief Commercial Superintendent of the Railway and his reply thereto whereby 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 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 adjournment. In effect this cast a continuing duty on him to protect the interests of the Railway as long as his engagement continued. The fact that the appellant would be paid only if he appeared in a case and the possibility of the Railway's not engaging him was a matter of no moment. An office of profit realy 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. [426 F—427 C]

Although it was open to the appellant to terminate the engagement at any time and he might even commit a breach of etiquette by accepting a brief against the Railway without formally putting an end to the engagement, that would not detract from the position that he was in duty bound to work for the Railway Administration and see that it causes did not suffer by default. So long as the engagement was not put an end to, he was holding an office of profit in the Railway Adminis-

A tration, and as such was disqualified for being elected to the Legislative Assembly of Madhya Pradesh. *The Statesman (Private) Ltd.* v. *H. R. Deb and others* [1968] 3 S.C.R. 614; *Mcmillan* v. *Guest* [1942] Appeal Cases 561; referred to. [427 E—F]

(ii) Although it was not necessary for the purpose of the present case to express any final opinion on the point, on the facts, there was great force in the appellant's contention that he did not hold an office B of profit by being a Professor of Law in a Government College on a salary of Rs. 250 per month. The Management of the College in question had been handed over to the University. The appellant was only a temporary Government servant. He had never become permanent nor had a lien on the post. He was sent on deputation to the University in 1959 and in the ordinary course of things such deputation would have come to an end in 1964 when he attained the age of superannuation. No order was passed in respect of him at any time either by the Govern- C ment or by the University until after the filing of the election petition. [430 F-431 B]

(iii) On the facts, it was difficult to hold that the appellant held the office of profit as the President of a Tribunal constituted under s. 73 of the Madhya Pradesh Town Improvement Trust Act, 1960. He had never been approached for the purpose nor had he ever signified his willingness to act under the terms of the notification. He had never D taken charge of any office nor had he ever discharged any function with regard to the office. [431 G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1832 of 1967.

Appeal under s. 116-A of the Representation of the People Act, 1951 from the judgment and order dated October 31, 1967 E of the Madhya Pradesh High Court, Indore Bench in Election Petition No. 40 of 1967.

S. V. Gupte, Rameshwar Nath, Mahinder Narain and *Ravinder Nath* for the appellant.

Sarjoo Prasad and *D. N. Misra* for respondent No. 1.

The Judgment of the Court was delivered by

F **Mitter, J.** This is an appeal from a judgment of the Madhya Pradesh High Court by a returned candidate at an election to Madhya Pradesh Legislative Assembly from Ujjain North-Constituency held in February 1967 declaring the election of the appellant void under s. 98 of the Representation of the People Act (hereinafter referred to as the Act).

G There was no less than eight candidates at the said election, five of whom polled very few votes. The result of the election so far as the other three were concerned was as follows :

1. Mahadev Govind Joshi, the returned candidate secured	23,709	votes
2. Mrs. Hansaban Patel polled	10,767	,,
3. Shri Bansidhar Azad polled	7,093	,,

H

The election petition was filed by the husband of the 2nd respondent, Mrs. Hansaben Patel. In the petition numerous grounds were taken for declaring the election of the appellant void under

the Act and no less than five issues with different sub-heads were framed by the court on August 31, 1967, but at the final stage of the hearing only the first issue was canvassed. The said issue reads as follows :

"1. (a) Was the respondent No. 1 holding one or more of the three following offices of profit ?

(i) his being included in the panel of lawyers prepared by the Central and Western Railway Administration;

(ii) his holding the post of the president-member of a tribunal constituted under section 73 of the M.P. Town Improvement Trusts Act, 1960;

(iii) his holding the office of Professor of law in the Madhav College, Ujjain on regular salary of Rs. 250 p.m.;

(b) If so, its effect ?"

Before the trial Judge a number of documents were exhibited and some witnesses were examined. The learned trial Judge was of opinion that the appellant, the successful candidate held an office of profit under Government being on the panel of lawyers prepared by the Central and Western Railway Administration and having been at the material time a Professor of Law in the Madhav College on a regular salary of Rs. 250 per month, but he was not prepared to hold on the material before him that the appellant held the post of the President-member of a Tribunal constituted under s. 73 of the Madhya Pradesh Town Improvement Trust Act, 1960.

The first alleged disqualification is based on a letter of appointment dated February 6, 1962 addressed by the Chief Commercial Superintendent to the appellant who accepted the conditions and terms of that letter by his reply within a few days thereafter. The letter of the Commercial Superintendent shows that the appellant's name was kept on the panel of Railway Pleaders for conducting suits filed against the Union of India in the courts of Ujjain on the terms and conditions therein mentioned. It is not necessary to recapitulate the terms excepting three or four to be mentioned presently. The first term showed that the appellant was ordinarily to be entrusted with cases up to valuation of rupees three thousand only. The ninth term imposed a condition on the appellant that he would not accept any briefs against any Railway in any court. Clause (13) of the terms is really the most important one for our present purposes and reads as follows :—

"You will be expected to watch cases coming up for hearing against this Railway in the various courts at

A UJB and give timely intimation of the same to this office. If no instructions regarding any particular case are received by you, you will be expected to appear in the court and obtain an adjournment to save the *ex-parte* proceedings against this Railway in the court. You will be paid Rs. 5 for every such adjournment if B you are not entrusted with the conduct of the suit later on."

The other terms deal mostly with the fees and the expenses to which the appellant would be entitled if he accepted the engagement.

C The question before us is, whether by accepting the engagement, the appellant could be said to have held an office of profit. The word 'office' according to Webster's New World Dictionary means, *inter alia,* "a function or duty assigned to someone, specially as an essential part of his work or position, a position of authority or trust especially in a Government, Corporation etc." According to Jowitt's Law Dictionary, it means 'the right and D duty to exercise an employment such as an office of a trustee, executor, guardian, director, Sheriff, Judge etc.' The expression 'office of profit' finds a place in an old English Act, namely, the Act of Settlement, 1701, s. 3 of which provided that "no person having an office or place of profit under the Crown could be a member of the House of Commons." The meaning of the expres- E sion came up for consideration by this Court in a recent case. *The Statesman (Private) Ltd.* v. *H. R. Deb and others*(1) decided on April 2, 1968. There, a question arose as to whether the respondent, H. R. Deb, was qualified to hold a judicial office in India in terms of s. 7(3) of the Industrial Disputes Act. Under that provision "a person shall not be qualified for appointment as the presiding officer of a Labour Court, unless *inter alia*... F (d) he has held any judicial office in India for not less than seven years". The facts relating to the career of Mr. Deb as found by this Court were as follows. He was first appointed in 1940 as a Sub Deputy Collector and was vested with powers of a Third Class Magistrate. Thereafter, he was vested with powers of a Second Class Magistrate, and after a year or so with those of a G First Class Magistrate. There seems to have been some difference of opinion between the Judges of the High Court on the point as to whether Mr. Deb held a judicial office or whether he merely discharged certain judicial functions. According to the judgment of this Court delivered by the learned Chief Justice "the dispute, therefore, really reduces itself to this : Does the H Magistrate hold an "office?" An office means no more than a position to which certain duties are attached." The learned Chief Justice also referred to the Judicial Officers Protection Act which

(1) [1968] 3 S.C.R. 614.

was enacted to protect not only Civil Judges but also Magistrates, and observed that "office means a fixed position for performance of duties." A

We may also refer to certain observations of the House of Lords in the case of *Mcmillan* v. *Guest*(1). There Lord Wright in delivering his opinion said :

> "The word "office" is of indefinite content. Its various meanings cover four columns of the New English Dictionary, but I take as the most relevant for purposes of this case the following : "A position or place to which certain duties are "attached, especially one of a more or less public character." B

This was a case arising out of assessment under the Income-tax Act. The appellant was a director of A. Wander, Ld., a private company which was resident and controlled in the United Kingdom. He was appointed a director by the articles of association and had no contract of service with the company. Since 1919 he had been resident in the United States of America, and in 1938 he became a naturalised American citizen. He had gone over to America to take over the management of a company in Chicago allied to the predecessors of A. Wander, Ld., for whom he opened a Canadian office, and concerned himself in the administrative and selling organization there. Copies of minutes; annual balance sheets etc. were regularly sent to the appellant in America, but he attended no board meetings in England except one in 1931 and only one in Chicago in 1925. He was not required to attend board meetings of the English company, and notices of such meetings were not sent to him. The question before the House of Lords was whether he held an office within the U.K. for the purposes of rule 6 of the Rules applicable to Sch. E to the Income Tax Act, 1918 and the House of Lords was of the view that he held an office and dismissed his appeal. C D E F

If by "office" is meant the right and duty to exercise an employment or a position to which certain duties are attached as observed 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 G H

(1) [1942] A. C. 561.

A 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 B 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 C 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.

D Learned counsel for the appellant argued that the appellant was not a salaried employee of the Railway. He was not even bound to act for the Railways and if he thought it proper to accept a brief against the railway the Railway Administration could only take steps against him for breach of professional etiquette and nothing more. According to counsel, he could only get re-E muneration in case he thought it proper to act on the terms of the letter and appeared in any case to support the cause of the Railway. In our view, although it was open to the appellant to terminate the engagement at any time and he might even commit a breach of etiquette by accepting a brief against the Railway without formally putting an end to the engagement, that would not detract from the position that he was in duty bound to work for F the Railway Administration and see that its causes did not suffer by default. So long as the engagement was not put an end to, he was holding an office of profit in the Railway Administration, and as such was disqualified for being elected to the Legislative Assembly of Madhya Pradesh.

The question as to whether the appellant was holding an G office of profit under the Government of Madhya Pradesh as a Professor of Law in the Madhav College, Ujjain is not altogether free from difficulty. This college was at first one owned and managed by the Government. In 1950 the appellant was invited by the Principal of the College to come and work as a lecturer. He did so for some time and his work was purely on the basis of H an arrangement between himself and the Principal. In July, 1952 the Principal wrote to the Education Department that the appellant should be formally appointed. Thereupon the Deputy Secretary, Education Department, wrote to the Director of Edu-

cation on April 7, 1952 conveying sanction of the Rajpramukh to the appellant's appointment on one year's probation as a part-time Professor of Law in Madhav College on a fixed salary of Rs. 250 per month with effect from the date he assumed his duties in a temporary capacity, that is to say, August 1, 1951. The appellant was employed only as a part-time lecturer without increment or Provident Fund benefits. His appointment was never confirmed by any letter. It is, however, the common case of the parties that he continued to act as a lecturer in Law in Madhav College till July 1967. Up to March 1959 the College was not only a Government-owned institution but one which was being managed from day to day directly by its Education Department. In 1959 there were certain changes in the management of the institution, but without the Government relinquishing ownership or ultimate control. As a matter of fact, an agreement was entered into on March 16, 1959 between the Governor of Madhya Pradesh and Vikram University Ujjain, a body corporate formed under s. 3 of the Madhya Bharat Vikram University Act, 1955, regarding certain terms under which the Governor had offered to transfer to the University the management of the Madhav College, together with its buildings and premises etc. for a period of five years in the first instance commencing from the 1st of April, 1959 and ending on the 31st March, 1964. The agreement also recorded that the University was to be in charge of the management for the said period subject to the terms and conditions therein mentioned. Under cl. (15) of the said terms and conditions "the existing members of the staff and other servants of the said college shall be treated as being on deputation to the University during its period of management and shall be deemed to have been deputed on the usual foreign service conditions, retaining their lien in the State Educational Service. The University shall be liable to make payment of salaries and other allowances, except the deputation allowance, to the members of the staff and other servants of the said college, in employment at the date of its transfer." Under cl. (16) "the University shall be entitled to make fresh appointments in regard to the staff and other servants for the said college and, on the University informing the Governor in this behalf, the Governor shall take back within a period of three months from the date of receiving information from the University, in the State Government's service the members of the existing staff and other servants belonging to the said college at the time of execution of this agreement." On March 31, 1964 a telegram was sent to the Vice-Chancellor, Vikram University recording that "pending Government decision on Sen Committee Report existing arrangement regarding Madhav College may continue on the same terms till 30th of June 1964." There is a further letter dated July 17, 1964 showing that the Government had decided to transfer the management of the

College and a regular transfer deed was in the course of preparation, but actually there is nothing to show that a transfer deed was executed as contemplated. The position became complicated by reason of the fact that as a Government servant under the Fundamental Rules in force at the time of his appointment, the appellant could continue in service only till he attained the age of 55. The age of superannuation was later increased to 58. But even on this basis the appellant had attained the age of 58 on June 30, 1964 and would be deemed to have retired from Government service unless a special order to continue him in service was made. No such order was, as a matter of fact, made. Under the Rules of the University a teacher could be continued in service up to the age of sixty but not beyond with this qualification that if a teacher reached the age of sixty during the currency of an academic session he might be permitted to continue in service and retire at the end of the session.

The letters which passed between the Vikram University on the one hand and the Government of Madhya Pradesh and/or the appellant in this case on the other which form part of the record do not permit us to come to any conclusion as to the manner in which the employment of the appellant under the Government as a part-time Professor of Law in Madhav College came to an end. On January 1, 1965 the Under Secretary to the Government of Madhya Pradesh, Education Department, wrote a letter to the Principal of Madhav College asking for information as to whether the appellant, a part-time Professor of Law, was confirmed in his existing post. The record does not include any reply to this letter. On May 22, 1967 the Registrar of the University addressed a letter to the Principal, Madhav College drawing his attention to the fact that in terms of cl. 5 of Schedule B of Statute 7-B of the University Calendar the appellant would retire on June 30, 1967 as he had already attained the age of 60 years on 31st July 1966. The occasion for writing this letter is not quite clear unless it related to his election to the Legislative Assembly because by the last sentence of the letter the writer was asking the Principal as to whether the appellant had resigned from his post on his being elected as an M.L.A. On July 4, 1967 after the filing of the election petition, the Registrar of Vikram University intimated to the appellant in writing that his services as part-time Professor of Law would not be required with effect from the commencement of the academic session 1967-68 *i.e.* from Monday, the 17th July 1967. The letter went on to add :

> "Your tenure as part-time Professor of Law in Madhav College, Ujjain has therefore ceased with effect from June 30, 1967."

By letter dated 31st July 1967 the Registrar of the University intimated the Secretary to the Government of Madhya Pradesh,

Education Department, that under instruction dated 31st March 1967 the University had been asked to maintain the *status quo* with respect to teachers transferred to the University until final terms and conditions of transfer were effected and in the absence of any Government orders to the contrary, the appellant also continued to remain in the service of the University. Finally, the letter recorded that in terms of the rules of the University fixing 60 years as the age of superannuation for teachers, the appellant had been informed that his services would not be required after 30th June 1967. It was during the hearing of the election petition that a letter dated 9th October 1967 came to be written by the Under Secretary to the Government of Madhya Pradesh, Education Department to the Registrar, Vikram University that the appellant had ceased to be in Government service with effect from 30th June 1964 in terms of the rule prescribing 58 years as the age of superannuation for Government servants.

The last letter may legitimately be subject to a comment that efforts were being made to establish that the appellant had ceased to be in Government service after June 30, 1964. It is all the more surprising that the letter of October 9, 1967 should be written at such an opportune moment when more than two years before the Under Secretary was himself enquiring of the Principal as to whether the appellant had been confirmed in his existing post.

Learned counsel for the appellant contended that after attaining the age of 58 the appellant must be treated as not in Government service and as the University had the power to manage the affairs of the College, in effect it retained him in exercise of its rights under the above mentioned rule but this would not make the appellant's employment one under the Government. On the other hand, it was contended by learned counsel for the respondent that we should ignore these deeming provisions of the Fundamental Rules and hold that as a matter of fact the appellant had continued in service till 1967 notwithstanding the Fundamental Rules of the Madhya Pradesh Government and the rules of the University which permitted the termination of his service before February 1967 but which were never resorted to. For the purpose of this case, it is not necessary to express any final opinion on the point except to say that the contention put forward on behalf of the appellant seems to have great force. The appellant was only a temporary Government servant. He had never become permanent. He really had no lien on the post. He was sent on deputation to the University in 1959 and in the ordinary course of things such deputation would have come to an end in 1964 when he attained the age of superannuation. It was really for the University to ignore the fact that he had been superannuated in 1964 and continue him in service, but that would be an

A act of the University and not of the Government. There is room for doubt as to whether in the circumstances mentioned above the appellant was holding an office of profit under the Government as a Lecturer in law in the Madhav College by reason of the fact that no order was passed in respect of him at any time either by the Government or by the University until after the filing of the
B election petition.

The last point of disqualification alleged was whether the appellant could be said to have been a holder of an office of profit by reason of his appointment as Chairman of the Improvement Trust Tribunal in Ujjain City. The appointment was gazetted in October 1966 by a notification to the effect that the
C State Government was pleased to constitute the Tribunal as specified below for the purpose of s. 73 of the Madhya Pradesh Improvement Trusts Act, 1960, for acquisition of land at Ujjain.

President
Shri M. C. Joshi, Advocate, Ujjain.
Assessors.
D 1. Shri Chand Narayan Rajdan,
Retired Traffic Superintendent
Agar Light Railway Ujjain.

The High Court in its judgment noted that there was no clear positive indication that the appellant had been consulted beforehand. There is certainly no evidence that he had acted on the
E appointment or that he had ever taken charge of the office. The finding of the High Court is that when the order was delivered at his house, the appellant took it and did not inform anybody connected with the Trust, or as for that matter, the Government, that the order had come to him by mistake and he was not "M. C. Joshi" as mentioned in the notification. The High Court gave
F the appellant what it terms "the benefit of doubt" on this alleged disqualification. But quite apart from the mistake as regards the name, it is difficult to hold that the appellant held the office of profit as the President of the Tribunal. As noted already, he had never been approached for the purpose nor had he ever signified his willingness to act under the terms of the notification. He
G had never taken charge of any office nor had he ever discharged any function with regard to the office. In the circumstances, it would hardly be right to hold that he was holding an office of profit under the Government. On the materials before it the High Court was not prepared to hold that the appellant was the holder of an office of profit and on the facts of this case, we do not feel called upon to disturb the finding of the High Court.
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In the result, the appeal fails and is dismissed with costs.

R.K.P.S. *Appeal dismissed.*