(1967) 07 BOM CK 0023

Bombay High Court

Case No: Special Civil Application No. 941 of 1967

Vasudeo Ganu Vartak		APPELLANT
	Vs	
Returning Officer and Others		RESPONDENT

Date of Decision: July 4, 1967

Acts Referred:

- Constitution of India, 1950 - Article 226, 227
- Maharashtra Zilla Parishad Election Rules, 1962 - Rule 20(1)

Citation: AIR 1968 Bom 259 : (1967) 69 BOMLR 776 : (1968) MhLj 79

Hon'ble Judges: Mody, J; Chandrachud, J

Bench: Division Bench

Advocate: V.D. Mengde and P.P. Hudlikar, for the Appellant; K.C. Adhina, H.M. Seervai, General and A.M. Setalwad, instructed by Little and Co. Attorneys, for the Respondent

Judgement

Chandrachud, J.

(1) The petitioner filed his nomination paper for election to the Thana Zilla Parishad from the Palghat electoral division of the Edwan Constituency. The 2nd respondent, a rival candidate, objected to the petitioner''s nomination on the ground that the schools of which the petitioner was a Head Master was in receipt of Grant-in-Aid from the State Government, and therefore, the petitioner was holding an office of profit under or in the gift of Government. The Returning Officer upheld the objection by his order dated the 6th of May 1967 and rejected the nomination paper of the petitioner.

(2) The petitioner filed an appeal against the decision of the Returning Officer on the 8th of May 1967 and that appeal was presented by him to Mr. D. B. Deshpande, Assistant Judge, Thana, who for the time being, was holding charge of the District Court Mr. N. D. Kamat, the Registrar of the High Court, had been posted as the District Judge of Thana, but he took charge of that post on the 12th of May. Mr. Kamat heard the appeal on the 12th and by his judgment dated the 15th of May, he

held that the appeal was not properly presented, because the appeal lay to the District Judge as a persona designata and Mr. Deshpande who was not posted or appointed as the District Judge of Thana, had not right to accept the appeal. The learned District Judge also observed while dismissing the appeal that since the school of which the petitioner was the Head Master received Grant-in-Aid from the State Government, the petitioner was disqualified from contesting the election. Being aggrieved by this decision, the petitioner approaches this Court under Articles 226 and 227 of the Constitution.

(3) Turning first to the question arising out of presentation of the appeal to the learned Assistant Judge, Section 14 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 (Maharashtra Act V of 1962), hereinafter called the "Act", provides by sub-section (2) that the State Government shall make rules, inter alia, for an appeal to a judge not below the rank of a District Judge against the decision of a Returning Officer accepting or rejecting a nomination paper. Rule 20 of the Maharashtra Zilla Parishads Election Rules, 1962, hereinafter called the "the Rules", provides by sub-rule (1), in so far as is material, that any candidate aggrieved by a decision of the Returning Officer accepting or rejecting a nomination paper, may present an appeal therefrom to the District Judge of the district in which the area of the Zilla Parishad is situate, within a period of three days from the date on which the names of the candidates whose nomination papers are accepted by the Returning Officer, are published. Now in view of the provisions contained Now in view of the provisions contained in Section 14 (2) of the Act read with Rule 20 of the Rules, there can be no doubt that an appeal against the decision of the Returning Officer accepting or rejecting a nomination paper lies to the District Judge as a persona designata and the appeal does not lie to the District Court as such. Since the appeal lies to the District Judge and not to the District Court, Mr. D. B. Deshpande who did not hold the office of the District Judge, Thana, could not have accepted the appeal filed by the petitioner. The appeal therefore was not properly presented.

(4) It was however no fault of the petitioner that the appeal was not presented to Mr. N. D. Kamat who was posted as the District Judge of Thana Mr. Kamat was posted as the District and Sessions Judge of Thana by a notification dated the 30th of March 1967 which is published in the Maharashtra Government Gazette Part 1 ''A'' dated the 6th of April 1967. That notification says: "Mr. N. D. Kamat, Registrar, High Court, Appellate Side, Bombay, is appointed as District and Sessions Judge, Thana, vice Mr. G. N. Patankar was holding the office of a Joint District Judge at Thana and he handed over the charge of his post on the 29th of April 1967. Mr. Deshpande, the Assistant Judge took over the charge of the District Court but was not appointed to act or officiate as a District Judge or as a Joint District Judge. Though Mr. Kamat''s appointment as the District and Sessions judge of Thana was made on the 30th of March 1967 he continued to function as the Registrar of the High Court till the 10th of May 1967. On that day he handed over the charge of the

Registrar''s office to Mr. P. S. Malvankar who until then was working as an Additional Registrar Mr. Kamat took charge of the office of the District and Sessions Judge, Thana, on the 12th of May and it was on that day that he could take cognizance of the appeal in his capacity as a District Judge of Thana. By reason of the fact that Mr. Patankar handed over the charge of the office of the Joint District and Sessions Judge, Thana on the 29th of April 1967 and by reason further of the fact that Mr. Kamat who was posted to that office did not take charge of that office till the 12th May 1967, the petitioner could not have presented his appeal to the District Judge of Thana within the period of limitation prescribed by R. 20.

(5) The learned District Judge was held that the appeal filed by the petitioner was not competent because it was not properly presented and his judgment would show that he has referred to the merits of the matter only incidentally. As in substance, the learned Judge has not considered the appeal on merits, the order passed by the Returning Officer cannot be said to have merged with the order passed in appeal and therefore, we can treat this petition as one against the order passed by the Returning Officer rejecting the nomination paper filed by the petitioner. It is urged by Mr. Adhina, who appears on behalf of the 2nd respondent that in that view the petition would be open to the objection that the petitioner has not exhausted an adequate alternative remedy which was open to him. Now it is true that there are limitations on the power of the High Court to issue writs, some historical, some statutory and some self-imposed. The limitation that the High Court will not ordinarily issue a writ in favour of a person who has an adequate alternative remedy is a self-imposed limitation, its reason being that the remedy by way of a writ is an extraordinary remedy. The normal rule, however, can be relaxed in appropriate cases and the matter before us is one such case. The petitioner had an adequate remedy by way of an appeal to the District Judge but for reasons beyond his control he could not file the appeal within the period of limitation. It is not as if he permitted his remedy to become time-barred, for he presented his appeal within limitation but there was no designated authority to accept it. Mr. Kamat who was posted as a District Judge, Thana, took charge of his office after the short period of three day''s limitation had run out and while the period was running, no one was in charge of the post of the District Judge. In the interests of justice, therefore, we must entertain this petition as one against the order of the Returning Officer and see if there is an error of law apparent on the face of the order passed by him.

(6) A question of some importance which falls for consideration in this petition is whether the Returning Officer was justified in rejecting the nomination of the petitioner on the ground that he holds an office of profit under or in the gift of the Government. Section 16 of the Act which deals with disqualification''s of Councillors provides by sub-section (1) Clause (h) that subject to the provisions of sub-section (2), (which in this case is not material) a person shall be disqualified for being chosen as and for being, a Councillor "if he holds any office of profit under a Panchayat or Zilla Parishad or under or in the gift of the Government". We are concerned in this

case to determine whether the petitioner holds an office of profit under the Government or in the gift of the Government. Now the petitioner is the Head Master of a Secondary School called "Sharada Bhavan" which receives Grant-in-Aid from the Government of Maharashtra and the argument that the petitioner is disqualified from becoming a Councillor is founded on the basis that at least a part of the petitioner''s salary, if not the whole of it, must be held as coming out of the grant paid to the school by the Government and therefore, the petitioner holds an office of profit under or in the gift of the Government.

(7) That the petitioner holds an office of profit cannot be disputed because as held by a Division Bench of this Court in Deorao Laxman Anande Vs. Keshav Laxman Borkar, an "office of profit" means an office capable of yielding a profit or from which a person might reasonably be expected to make a profit. What Section 16 (1) (h) of the Act, however, requires is that the office of profit must be held under the Government or it must be in the gift of the Government. For a proper decision of the question whether the petitioner holds an office under or in the gift of the Government, it is necessary to look at the provisions contained in what is known as the "Secondary Schools Code", (hereinafter called the Code") which is issued by the Government of Maharashtra through its Education and Social Welfare Department.

(8) Rule 1 of the Code says that Secondary School may be recognised by the Department, by which is meant the Department of Education or the Department of Technical Education in the State of Maharashtra, provided the schools conform to the rules set forth in the Code. Rule 86 provides that recognised schools are eligible for four kinds of grants which may be paid at the discretion of the sanctioning authority subject to the availability of funds. One of such four grants is called the maintenance grant". Rule 87 says that subject to funds being available, Secondary Schools of a certain class would be eligible for maintenance grants on their total admitted expenditure of preceding year at 45 per cent of the admissible expenditure in urban areas and at 50 per cent of the admissible expenditure in rural areas. Rule 93 provides that normally the grant paid in any year is based on the actual expenditure incurred during the previous year and admitted for purposes of grant.

(9) Rule 67 of the Code which deals with the selection or appointment of the staff of the Secondary Schools says that appointments of teaching and non-teaching staff in the school shall be made by the School Committee in consultation with the Head of the School concerned. Rule 61 which deals with the appointment and duties of Head-master and Headmistresses says that the Management of a school shall give careful consideration to the question of filling up the post of Head of a school and shall appoint a well qualified and competent person from amongst those available, including those already employed, in the schools run by the same Management, for appointment as the Head. Under this rule seniority is required to be given due consideration in the appointment of the Head and in case the management intends

to deviate from the procedure suggested in the rule, the reasons for the same are required to be communicated to the Director of Education and his previous permission is required to be obtained.

(10) Rule 72 of the Code says that if an employee of a school commits a breach of any of the service condition rules, the school authorities will hold an enquiry and if the breach is proved, the school authorities will be free to warn the employee or to withhold his promotion or increment for a period not exceeding a year. Rule 75 says that the discretion to refuse or revoke leave to a member of the staff vests in the Head of the School, the School Committee or the Management as the case may be. Rule 77.1 which deals with termination of employment says that the service of a non-permanent employee may be terminated by the Management at any time without assigning any reason after giving one calendar month''s notice or by paying one month''s salary in lieu of notice. The rest of this rule is not material. Rule 77.2 says that the services of a permanent employee may be terminated by the Management without assigning any reason on giving compensation on the basis indicated in the rule. It further says that no employee should be removed under the rule without the prior approval of the Deputy Director of Education. Rule 77.2.2 says that the Management shall immediately inform the Education Officer concerned of the action regarding the discharge of and payment made to such an employee. This rule further says that no employee can be relieved by the management without previous payment of the prescribed compensation and failure to do so is liable to entail a cut in the grant-in-aid sanctioned for the school and such other action against the Management as the Deputy Director may consider appropriate.

(11) These provisions show that the Code constitutes a set of rules to which a school must conform if it is to be eligible for receiving the grant, and if on any occasion the Management of the school deviates from the rules contained in the Code, the Government can secure compliance with the rules by withdrawing the grant-in-aid or by effecting an appropriate cut therein. In short, the institution of which the petitioner is the Headmaster is subject in some measure to the control of the State Government but the petitioner himself is certainly not subject to any such control. To secure obedience of the staff to the rules is matter between the school and its staff and the Government does not enter into that picture. The rules in the Code do not envisage that if any of the rules is infringed by any member of the staff of a school, the Government could ask the defaulting person to remedy the breach.

(12) It is also clear from the rules that though the salary payable to the teachers and certain other members of the staff is taken into account for fixing the maintenance grant payable to the school, the grant which is eventually sanctioned is not earmarked either wholly or partly for the payment of the salary of the staff. Further, the Government has no right to appoint the members of the staff including the Headmaster of the school nor does it have the power to terminate their services. It has also no power to hold disciplinary proceedings against a defaulting member of

the staff of a school. Lastly, the functions which a person performs in the discharge of his duties as a teacher and a Head-master are not performed for and on behalf of the Government and the Government does not exercise any control over the performance of those functions. In our opinion, therefore, the office of the Headmaster which the petitioner holds, though an office of profit, is not an office of profit under the Government.

(13) The learned Counsel for the 2nd respondent relies very strongly on two rules in the Code as militating against this conclusion. Rule 77.6 on which the Counsel relies, says that the expenditure incurred by the Management on payment of compensation and salary in lieu of notice period cannot be held admissible for purposes of grant except in cases where the discharge of the employee is at the instance of Government. It is urged that this rule shows that an employee of a Secondary school can be discharged at the instance of Government and to that extent, at any rate, the office held by the person concerned can be said to be under the Government. It is not possible to accept this submission, because what is contemplated by Rule 77.6, when it speaks of the discharge of an employee at the instance of the Government, is that the Government can issue instructions to a Secondary school for the discharge of an employee if any of the rules in the Code is infringed by the employee. In fact, if the discharge of any employee can be at the highest be at the instance of Government, the rule emphasises that the Government can merely instruct the school concerned to discharge an employee but it cannot itself discharge him. The other rule on which Mr. Adhina relies is R. 87.4 which says that the payment of teachers'' salaries (including allowances) will be the first charge of the maintenance grants paid to schools. It is urged that the payment of the petitioner''s salary thus comes out of public funds and therefore, the office of profit under the Government. Now, in the first place, R. 87.4 cannot be read in an isolated way, for the other rules to which we have drawn attention make it clear that the real concept of the maintenance grant is to reimburse a school partly in regard to the expenses incurred by it on admissible items. The object of the provision contained in Rule 87.4 is that it should not happen that the Government gives grant-in-aid to a school in order that it should be in a position to meet its just obligations and the grant is utilised by the school for non-essential purposes. A matter of outstanding importance in the conduct of a school is the payment of the salary of teachers and it is for that reason that Rule 87.4 provides that the payment of teachers'' salaries shall constitute the first charge on the maintenance grants paid to schools. This provision cannot be construed to mean that the grant-in-aid or any part of it is earmarked for the payment of the salaries of teachers. It would be useful in this behalf to draw attention to Rule 3 (3) which says that a school seeking recognition must satisfy the Department that its financial stability is assured. It is only if the financial stability of the school is assured and it is only if the other conditions in Rule 3 are satisfied that a Secondary School can be recognised under the Code. It is only if the school is recognised that a grant can be given to it.

(14) At the most, an unpaid teacher in a defaulting school may take steps to ensure that the Government will compel the school to pay him his salary by applying the sanction withdrawal of the grant. Moreover, the grant is sanctioned in relation to a stated proportion of the actual expenses incurred on admissible items in the preceding year and therefore, in a large majority of cases the salaries of the teachers shall have been paid before the grant is received for the particular year. Rule 87.4, therefore, is in the nature of a pre-condition to the continuance of the grant, the condition being that the grant must not be expended for other purposes if the salaries of the teachers remain unpaid. If the salaries remain unpaid (and such cases would be few, for then the Government will not accord recognition to the school for the purposes of the grant), the grant is required to be utilised first for the payment of the teachers'' salaries. Even there it must be borne in mind that the grant represents but a proportion of admissible expenditure incurred by the school and therefore, the grant may, in conceivable cases, be inadequate to meet the full payment of salaries due to teachers. That emphasises that the salary of the petitioner does not truly come out of public funds. Normally, the salaries are paid by the schools in due course and a provision like the one contained in R. 87-4 which is designed to meet an exceptional class of cases cannot alter that basic fact.

(15) Mr. Mengde who appears on behalf of the petitioners has drawn our attention to two decisions of the Supreme Court to which reference must be made. In Maulana Abdul Shakur Vs. Rikhab Chand and Another, , the election of the appellant to the State Legislature of Ajmer was called in question on the ground that he held an "office of profit under the Government of India" within the meaning of Art. 102(1)(a) of the Constitution. The appellant was the Manager of a school called "Madarsa Durgah Khwaja Sahib Akbari", and drew a salary or an honorarium of Rs. 100 per month. The school was run by the "Durgah Committee" which was subject to the control of the Government of India in a variety of ways specified in an Act called Durgah Khwaja Sahib Act, 1955. Under the Act, the Government of India had the right to appoint an Administrator who was to be the ex-officio secretary of the committee. The appellant was appointed as the Manager of the school by the Administrator and the argument was that by reason of the stringent control which the Government of India was entitled to exercise over the administration of the School, the office held by the appellant was one "under the Government of India". In repelling this argument the Supreme Court says:

"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 revenue are important factors in determining whether that person is holding an office of profit under the Government though payment 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". Applying the ratio of this decision to the case in hand, the fact that the school of which the petitioner is the Headmaster is subject to the control of the State Government in some matters, would not justify the conclusion that the petitioners holds an office under the Government.

(16) In Gurugobinda Basu Vs. Sankari Prasad Ghosal and Others, the appellant was a partner of a firm of auditors which acted as the Auditor for Government Corporations like the Life Insurance Corporation of India, the Durgapur Projects Limited and the Hindustan Steel Limited. He was also a Director of the West Bengal Financial Corporation, having been appointed by the State Government of West Bengal. This appointment carried the right to receive fees or remuneration as Director of the Corporation. It was held:

"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"

and therefore, the appellant held an office of profit under the Government of India within the meaning of Art. 102(1)(a) of the Constitution. In the case before us, the State Government has no right to appoint the petitioner, or to continue him in that post or to remove him and in addition the salary of the petitioner does not come out of public funds, though of course, as observed by the Supreme Court in Maulana Abdul Shakur Vs. Rikhab Chand and Another, payment of salary from a source other than Government revenue is not always a decisive factor.

(17) It is urged by Mr. Adhina that assuming that the petitioner does not hold an office of profit under the Government, he would be still be holding an office of profit "in the gift of the Government." In our opinion, this argument is weaker still. The office of the Headmaster which the petitioner holds cannot be any stretch of language be said to be in the gift of the Government. The Oxford English Dictionary, 1961 Edi 4 156, middle column, that the phrase "in a person''s gift" means "the power or right of giving," Murray''s Dictionary, Volume IV, page 156, middle column, gives the same meaning to the phrase "in a person''s gift". As we have pointed out earlier, the Government has no right to appoint the petitioner, it has in fact not appointed him and it has no right to continue him in the post of a teacher or a Headmaster. The salary of the petitioner does not also come out of Government revenues. It is, therefore, not possible to hold that the petitioner holds an office which is in the gift of the Government.

(18) For these reasons, we set aside the orders passed by the learned District Judge and the Returning Officer and hold that the petitioner''s nomination paper was wrongly rejected by the latter. The petition is accordingly allowed and the rule made absolute. The 2nd respondent will pay the costs of this petition to the petitioner. There will be no order as to costs of respondents 1 and 6, as the learned Advocate General who appeared on their behalf stated that respondent 1 (the Returning Officer) submitted to the orders of the Court while respondent 6 (the State of Maharashtra) did not maintain the position that the petitioner holds an office of profit under or in the gift of the Government.

(19) Rule made absolute.