



## OFFICE OF PROFIT – LEGAL IMPEDIMENT OR LUCRATIVE VENTURE?

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### Abstract

Winston Churchill once said, “Politics is not a game; it’s an earnest business”. The Constitution of India also expresses similar intentions by involving itself with such system of polity that manifests pure democratic values without any conflicts of interest to uphold its pristine glory. This is done also by disqualifying the members of the House on the ground of office of profit. Though politics is said to be an earnest “business”, the Constitution makes itself devoid of any business interests or participation in choosing the members to make them serve the country by taking an active part in parliamentary democracy. It even perfectly displays the conscience of the golden document which has always inspired to preach and follow governance of ethics and polity of virtue.

Of late, the same provisions of office of profit and disqualifications due to it have become a vice to parliamentary democracy and places itself in a juxtaposition that by being cleverly vague and naive, it has made many parliamentarians and lawmakers escape the ramifications of disqualification, rather than holding them tight and sanctioning them with disqualification of membership for holding an office that conferred pecuniary benefits on him. This paper discusses the evolution and purpose of office of profit incorporated in the Constitution for disqualification of

membership. It also elaborates some instances in which many ambiguities in the term ‘office of profit’ were developed as it has no express definition in the Constitution. The need for its express interpretation in the Constitution is discussed and some suggestions are also made in the paper. Such a measure would help in clarifying the ambiguities and also guide the present and potential political stakeholders in a right direction by being mentored by the values and principles enshrined in the Constitution.

### INTRODUCTION

‘The rich get richer and the poor get poorer’ said P B Shelly. We are living in a world growing increasingly unequal. Every person thrives hard to earn their living, but few earn more than what they actually need to live. To quote Charles Sawyer, ‘Profit is an ignition system of our economy’. But the same cannot be the case in parliamentary democracy, especially according to the provisions of the Constitution of India. The people who are elected as members of Parliament or State Legislature have a duty towards the government and its people. They are qualified to become a member of the House only when they do not hold any office of profit and should be devoid of any additional emoluments other than that received by virtue of him being a member of the House. There is no clear definition of office of profit given under the Constitution but there are several interpretations made in various judgments. At the first place, it is essential to look into the evolution of Office of Profit and its subsequent developments which made persons holding such lucrative offices to be disqualified in the eyes of law.



## CONCEPT AND EVOLUTION OF OFFICE OF PROFIT

The concept of office of profit was first introduced by the United Kingdom through the Act of Settlement 1701, in which Section 6 prohibits a person from serving as a member of the House of Commons when he had an office or place of profit under the King or received a pension from the Crown.

The rationale behind disqualifying such persons from the membership of House of Commons is that it would be contrary to the privileges of the House when some offices are directly involved in advising the Crown. While some offices require political impartiality, some office-bearers, like a colonial governor, cannot devote sufficient time to attend the House.

The Constitution of United States of America, enforced in 1789, prohibits a Member of Congress from being appointed to an executive office when it was created or its compensation was increased during the term of that Member in the Congress. This is mainly due to its strict adherence to the principle of separation of powers. The term "office of profit" is referred to in such a way that its holder is subject to impeachment and removal from office<sup>1</sup> and is prohibited from receiving emoluments or titles from foreign powers<sup>2</sup> and also from serving as a presidential elector.<sup>3</sup>

The Constitution of Australia disqualifies anyone who holds an office of profit under

the Crown from being a Member or elected to the Parliament of Australia<sup>4</sup>. When the Australian Constitutions Act 1842 was initially enacted by the United Kingdom, there were no disqualification provisions for holding an office of profit. It was, however, imported by New South Wales in its 1855 Constitution to provide clarity to the election of government officers to the Parliament and their ability to vote against Government policies. Most states in Australia can alter their disqualification provisions by providing general and specific exemptions in relation to particular offices through an ordinary legislation<sup>5</sup>.

The Constitution of India has specifically mentioned the grounds of disqualification, one among them being a holder of an office of profit. A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament or State Legislature if he holds any office of profit under the Union or State Government, other than those exempted by law<sup>6</sup>. Though the Constitution has not defined the term "office of profit", the Courts have laid down important tests for the determination of office of profit. Those tests are:

- Whether the government has the power of appointment and dismissal of the incumbent from the office
- Whether the government pays the remuneration
- Whether the functions performed by the holder are for the government

<sup>1</sup> Constitution of United States of America, art. I, s. 3(7).

<sup>2</sup> Constitution of United States of America, art. I, s. 9(8).

<sup>3</sup> Constitution of United States of America, art. II, s. 1(2).

<sup>4</sup> Section 44(iv), Constitution of Australia

<sup>5</sup> Prof. Anne Twomey, Office of Profit under the Crown, Parliament of Australia, 2018

<sup>6</sup> Constitution of India, arts. 102, 191.



- Whether the government exercises control over the performance of those functions.<sup>7</sup>

The Courts have, hitherto, been subjecting each and every case of office of profit to these tests, which finds and answers in the affirmative when the particular office satisfies any one of these tests and would be affirmed that it is an office of profit and its incumbent becomes the holder of office of profit.

#### **PURPOSE OF DISQUALIFICATION FOR HOLDING AN OFFICE OF PROFIT**

The purpose of adding office of profit as a ground for disqualification of membership was pointed out by Mr. K.T. Shah<sup>8</sup> in the Constituent Assembly, by stating that the old-time disqualification, arising out of the possibility of conflict of interests between one's own private interests and that of public service has led to the insertion as a disqualification the holding of any office of profit. At that time, he had moved an amendment to draft Article 167, which was later renumbered as Article 191, to further add detail to that particular ground by expressing that:

**"A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative council of State-**

**(a) if he holds any office of profit or contract of building or of supply of any article, or is a shareholder in any joint stock company which has such a contract of building or of supply of any article under the Government, etc....."**

It was reasoned by him that the mere holding of an office of profit, i.e., any post carrying some salary or allowance attached to it is scarcely a temptation to at least many likely candidates who have attained prominence in their business or profession and whose other source of income may be much greater than Government salaries. This, however, does not make holding of a post of profit under Government the less a disqualification.<sup>9</sup>

He had expressed that one of the most considerable sources of corruption is that of a building contract. The possibility of enormous profits being obtained through large development projects, in which the State is interested, will be a source of gain as those who have it in their power to grant or have such contracts, can afford to help to obtain such contracts for others on easy terms from Government. A member of the Legislature should, according to him, be free of any such temptation. Therefore, anyone who holds such contracts or who is interested as a shareholder in a joint stock Construction company or in a large scale company supplying articles should be disqualified from membership of the Legislature.<sup>10</sup>

But his amendment was not moved by the Constituent Assembly. Had it been moved, there would have been a more clear picture on the purpose and position of office of profit and would have provided necessary guidance to all those people in the legal and political circle to easily interpret and abide by the rules and tenets enshrined in the Constitution.

<sup>7</sup> Maulana Abdul Shakur v. Rikhab Chand, AIR 1958 SC 52

<sup>8</sup> Hon'ble Member of the Constituent Assembly

<sup>9</sup> VIII, Constituent Assembly Debates dated 2<sup>nd</sup> June 1949

<sup>10</sup> *Id.*



## NUANCES AND AMBIGUITIES IN THE JUDICIAL INTERPRETATIONS OF OFFICE OF PROFIT – SOME INSTANCES

Office of Profit is considered vicious by the Constitution, though it is a necessity for the members of the Legislature as an earning source for their living, as they cannot hold on to the membership of the House for a long period. But their lucrative purposes induces them to hold on to their positions which, according to law, is an office of profit through which they tend to gain pecuniary profits over and above the benefits they receive during the term of their membership in the House. What really constitutes an office of profit is ambiguous and equivocal when a thorough observation is made on judgements rendered by the High Courts and Supreme Court, as it highly varies on a case-to-case basis. It is essential to examine the legal position of office of profit through its factors expressed by the paradoxical interpretations of the Courts, which the members often misuse to elude from the harmful repercussions of disqualification.

### NATURE OF OFFICE AND ITS HOLDING

What constitutes an office of profit is the nature and characteristics of such office and the possible implications it would have on the holder of such office. It often appears to be a paradox where an office, though appearing to be one that does not attract disqualification in its logical sense, happens to be so after all legal considerations and poses itself as a predicament to its holder and an anathema to the members of the House. It may also be a fear factor to those members who had high aspirations of occupying such office to

project themselves as a part of the authoritative level in the Executive.

The determination of a particular position as an office of profit was made by analyzing its nature and perpetual existence in **M.V. Rajashekar v. Vatal Nagaraj**,<sup>11</sup> by the High Court of Karnataka and the Supreme Court. Initially, Mr. Vatal Nagaraj was appointed as a One Man Commission by the Government of Karnataka to study the problems faced by Kannadigas in the Border areas of Kerala, Maharashtra, Andhra Pradesh, Goa and Tamil Nadu. Subsequently, he, as the Chairman of the Commission, was accorded the status of a Minister of Cabinet rank and a sum of Rs. 5 lakhs was provided in the State Budget for defraying his pay expenses and daily expenditure. When he had filed his nomination papers for the election to the Karnataka Legislative Council, the Returning Officer scrutinized and rejected them on a finding that he was holding an office of profit and, as such, was disqualified from being elected. He, therefore, filed the election petition before the High Court of Karnataka alleging, inter alia, that his nomination has been improperly rejected and, therefore, the election of all the Members must be declared void.

The High Court had held that the Chairman of One Man Commission held by Mr. Vatal Nagaraj is not an office of profit and as such, he does not incur disqualification under Article 191 of the Constitution. It had also held that the rejection of his nomination by the Returning Officer is improper and illegal. It had predominantly relied on the legal definition and perspective of the term “office”, with respect to its perpetuity, expounded by Hon’ble Justice Rowlatt J., in

<sup>11</sup> AIR 2002 SC 742



**Great Western Railway Co. v. Bater**,<sup>12</sup> by stating that an office is a subsisting, permanent, substantive position which has an existence independent of the person who fills it and which will be filled in succession by successive holders. If there is no such existence, the so-called office is merely an aggregate of the activities of the particular man for the time being. As the tenure of Chairman of the Commission is temporary which ends as soon as the ad-hoc report is submitted to the government, it cannot even be said to be an “office” and therefore, does not constitute an office of profit. This view was reiterated in **Kanta Kathuria v. Manak Chand Surana**.<sup>13</sup>

When an appeal was preferred by the aggrieved parties, the Supreme Court had set aside the impugned judgement of the High Court and upheld the decision of the Returning Officer rejecting the nomination of Mr. Vatal Nagaraj for holding an office of profit. The Court had found, inter alia, that as the Chairman of the Commission is entitled to emoluments and other pecuniary benefits, it cannot be said to be compensatory allowance as per the law laid down in **Shivamurthy Swami Inamdar v. Agadi Sanganna Andanappa**<sup>14</sup> and therefore, Mr. Vatal Nagaraj was the holder of an office of profit and would be subject to disqualification under Article 191 of the Constitution.

The apex Court had observed, by quoting the ruling in **Ashok Kumar Bhattacharyya v. Ajoy Biswas**,<sup>15</sup> that the question whether a person holds an office of profit is required to

be interpreted in a realistic manner having regard to the facts and circumstances of each case and relevant statutory provisions. The term ‘office of profit’ should be interpreted with the flavour of reality. The object of providing such disqualification under Article 191 is that the members should be free to carry on his duty fearlessly without being subjected to any kind of governmental pressure. It is intended to eliminate the possibility of a conflict between duty and interest and to maintain the purity of the Legislatures.<sup>16</sup> This should be the right approach to be adopted, particularly when the word ‘office’ has not been defined in the Constitution.

It is required to find out whether there exists any nexus between the duties discharged by the candidate and the government, and that a conflict is bound to arise in discharging his duties both as an office-bearer and a member. It was emphasized by the Court, by quoting the holding in **Madhukar G.E. Pankakar v. Jaswant Chobbildas Rajani**<sup>17</sup> that the practical view, not pedantic basket of tests, should guide in arriving at a sensible conclusion by finding out whether the Government has some control and was there any profit attached to that post which the incumbent was holding at the time of filing of nomination.

Mere incumbency of an office with additional monetary benefits does not necessarily imply office of profit. Some posts are exempted from disqualification and the holders of such posts would not be disqualified from their membership of the

<sup>12</sup> (1922) 8 Tax Cases 231

<sup>13</sup> AIR 1970 SC 694

<sup>14</sup> (1971) 3 SCC 870

<sup>15</sup> (1985) 1 SCC 151

<sup>16</sup> Biharilal Dobray v. Roshan Lal Dobray, AIR 1984 SC 385

<sup>17</sup> (1977) 1 SCC 70



House. Such posts are specified in the Table mentioned in the Parliament (Prevention of Disqualification) Act, 1959 (In short “the Act of 1959”). This being the case, the Supreme Court had to adjudicate an election petition even in this legal context and to clarify the position of such exempted posts.

The apex Court had to decide on such a dispute in **Purno Agitok Sangma v. Pranab Mukherjee**.<sup>18</sup> In that case, Mr. P.A. Sangma (Petitioner) and Mr. Pranab Mukherjee (Respondent) were the candidates for the Presidential Elections held in 2012. When the respondent filed his nomination papers to the Returning Officer (RO), the petitioner had urged the RO to reject them as it was found, according to the petitioner, that the respondent was holding an office of profit. At that time, the respondent was the Chairman of the Indian Statistical Institute, Calcutta for which he was entitled to honorariums, salary and other allowances by the Government. Then the respondent had also filed his resignation letter from the above post to the RO, who scrutinized and accepted his nomination papers. Aggrieved by it, the petitioner filed a plea before the Election Commission of India to overrule the order of RO but it had failed to entertain the plea as all disputes regarding Presidential Elections had to be filed before and decided by the Supreme Court.<sup>19</sup> In the meantime, the Presidential Elections were held and the respondent was elected as the 13<sup>th</sup> President of India.

The petitioner then moved the Supreme Court to nullify the election of the respondent as the President of India as he was not qualified to become President under Article 58 of the Constitution of India on the ground

that he was holding an office of profit. Though this case is an issue of election of the President of India, the legal proposition in this case is equally relevant to members of the House when the legal aspect of an office exempted from disqualification is concerned. The Court held that the post of Chairman of Indian Statistical Institute, Calcutta was not an office of profit and declared the election of the Respondent as the 13<sup>th</sup> President of India completely valid. It had observed that in order to constitute a post as an office of profit it should either be controlled by or be on the payroll of the Government. As the post of Chairman of Indian Statistical Institute, Calcutta was purely honorary in nature, which was manifested in its functioning itself as its holder need not participate in the administrative activities of the Institute which is duly handled by the President and his Council, the post cannot be said to be an office of profit though it had honorariums, salary and other allowances to its holder. Moreover, since the holder of the particular post has been excluded from disqualification by Section 3 of the 1959 Act, it is clear that the said post cannot be an office of profit.

In the minority opinion of this judgement, it was stated that as the words in the Constitution should be read in their natural meaning to construe according to its true legislative intent, Article 58 and its purpose has to be read independently of Articles 84 and 102.<sup>20</sup> Moreover, the Act of 1959 has no application insofar as election to the office of the President is concerned and, as such, the disqualification incurred by a Presidential candidate on account of holding of an office of profit is not removed by the provisions of the said Act.

<sup>18</sup> (2013) 2 SCC 239

<sup>19</sup> Constitution of India, art. 71

<sup>20</sup> Baburao Patel v. Dr. Zakir Hussain, AIR 1968 SC 904



Therefore, the judgements are not unequivocal and are subject to various interpretations of the Courts as even the term “office” differs from case to case. In addition to this, an office of profit today may or may not be an office of profit tomorrow as it may tend to differ when the government ratifies the categories of those offices which may come under it.

### **PAY, ALLOWANCES AND OTHER PECUNIARY BENEFITS**

Office of profit was, at first, identified based on the allowances and emoluments the holder is entitled to during his incumbency in such office. If the particular post is capable of yielding lucrative gains to its holder, then such post or position is an office of profit. But when the holder receives such allowance that is just enough for his functioning in his office, which is also known as compensatory allowance, then the post is not an office of profit.

To constitute an office as an office of profit, the monetary benefit is the material deciding factor.<sup>21</sup> Profit means pecuniary or material gain.<sup>22</sup> The office must carry or must be capable of yielding pecuniary benefits. The usage of appropriate nomenclature would not take the payment out of the concept of profit, if there was some pecuniary gain for the recipient in addition to daily allowances.<sup>23</sup> In **Umrao Singh v. Darbara Singh**<sup>24</sup>, it was held that when the Chairman of a Panchayat Samithi was paid Rs. 100 a month as a

consolidated allowance for performing all official duties and was also granted mileage and daily allowance for journeys performed for any official work outside the District, it was not an office of profit as it cannot be said that the amount received by a Chairman for travelling and daily allowance was in excess of the amount of expenditure, although such said allowances were in addition to the payment of consolidated monthly allowance and as such there was no pecuniary gain to the Chairman.

The prerequisite of conferring monetary benefits to the holder of office of profit was explained in detail by the Supreme Court in the case of **Jaya Bachchan v. Union of India**.<sup>25</sup> In this case, Mrs. Jaya Bachchan, a Rajya Sabha MP, was appointed as the Chairperson of Uttar Pradesh Film Development Council, who was entitled to a monthly honorarium along with entitlement expenditure, chauffeur driven car, telephones at office and residence, free accommodation and medical facilities to self and family members, apart from other allowances. The said post was not exempted from disqualification by any law. She was disqualified as a member of the Rajya Sabha on the ground of holding an office of profit. When the decision was challenged before the Supreme Court, it had ruled that the office that Mrs. Jaya Bachchan held is an office of profit and validated the disqualification order. Though it was contended by her that she did not enjoy the benefits given by the State Government and has not received any of them, the Court had stated that if the

<sup>21</sup> Ravanna Subanna v. G.S. Kaggeerappa, AIR 1954 SC 653

<sup>22</sup> *Supra* Note 12

<sup>23</sup> Shibu Soren v. Dayanand Sahay, AIR 2001 SC 2583

<sup>24</sup> Umrao Singh v. Darbara Singh, A.I.R. 1969 S.C. 262

<sup>25</sup> AIR 2006 SC 2119



pecuniary gain is receivable in connection with the office, then it becomes an office of profit, irrespective of whether such pecuniary gain is received or not.

The Court had further stated that an office of profit is a position that brings to the holder some financial gain or advantage. The nature of the payment must be considered as a matter of substance rather than of form. Thus, for deciding the question as to whether one is holding an office of profit or not, what is relevant is whether the office is capable of yielding pecuniary gain and not whether the person actually obtained it. Therefore, from the material gains, it is evident that the petitioner held an office of profit and her disqualification is completely valid.

The material gains attached to the post manifests itself as an office of profit. But a disqualification order on the ground of office of profit with all the additional remunerations was set aside by the Karnataka High Court in **Ramakrishna Hegde v. State of Karnataka**.<sup>26</sup>

In the above mentioned case, Mr. Ramakrishna Hedge (Petitioner) was elected as a Member of the Karnataka Legislative Assembly. He was offered the post of Deputy Chairman of the Planning Commission in the rank of a Cabinet Minister. He declined the offer as he had identified it to be an 'office of profit' that would lead to his disqualification. The Law Ministry advised the Government of India that in view of relevant provisions, there would be no bar on the petitioner holding the said post so long as he does not receive any remuneration other than compensatory allowance. Thereafter, the petitioner accepted the offer and it was

specifically stated in the appointment order that he would not draw any salary but would be entitled only to daily allowance, a chauffeur-driven car and rent free furnished accommodation including free supply of electricity and water. He held the said post for a particular period, after which he had resigned and continued as an MLA. When it was brought to the notice of the Governor of Karnataka by stating that the said post was an office of profit, capable of yielding pecuniary gain, thereby attracting [Article 191\(1\)\(a\)](#), he referred it to the Election Commission and after having heard the parties, it had tendered its opinion to the Governor, on the basis of which, he had passed an order disqualifying the petitioner from the membership of the Karnataka Legislative Assembly.

When this dispute was adjudicated by the High Court, it had held that the post of Deputy Chairman of the Planning Commission held by Mr. Ramakrishna Hegde was not an office of profit and had subsequently quashed the order of disqualification. It was clear from the terms and conditions of appointment that he was neither entitled to any remuneration or salary nor received any of them.

The Court had observed, by quoting the decision of the Supreme Court in **Karbhari Bhimaji Rohamare v. Shanker Rao Genuji Kolhe**,<sup>27</sup> that the issue of determination of a position as an office of profit should be interpreted reasonably, having regard to the circumstances and the class of person whose case is dealt with. In deciding the question whether the office really carried any profit, the amount of money receivable by a person by virtue of holding such office becomes material.

<sup>26</sup> AIR 1993 Kar. 54: ILR. 1992 Kar. 3028

<sup>27</sup> AIR 1975 SC 575





It was made clear by the Court that the Planning Commission is a Committee for the purpose of Karnataka Legislature (Prevention of Disqualification) Act, 1956 and the allowances to which the petitioner was entitled under the terms and conditions of his appointment order come within the meaning of Compensatory Allowance. No salary or pay scale was attached to the post to state that the petitioner was entitled to any remuneration. In addition, the appointment order has spelt out clearly that the petitioner would draw no salary. The other aspect to be considered is whether the petitioner as a matter of fact profited himself by holding the office so as to call it a 'pecuniary gain'. In the instant case the petitioner has received allowances which come within the meaning of 'Compensatory Allowance' as a Deputy Chairman of the Planning Commission. Merely because the petitioner had some privileges as a rank of a Cabinet Minister, it cannot be said that he had pecuniary gain. The office did not really carry any profit and the petitioner also could not have sued or claimed any salary. Therefore, it was inferred that the post of Deputy Chairman of Planning Commission is not an office of profit and the disqualification of the petitioner was bad in law.

Thus, it can be said that the office of profit is very ambiguous that even its legal position cannot be determined unequivocally by the Courts. Though it may have case-to-case disparities, the validity of it can be easily questioned when it doesn't have a reliable interpretation, which would be of utmost help to all the three organs of democracy.

## APPOINTMENT AND RETENTION OF CONTROL BY THE GOVERNMENT

To constitute an office of profit, it must be controlled either by the Union or State Government. This can be ensured when it is found that the Government is exclusively empowered to appoint and dismiss the holder of the office and also has unmitigated control over the office. This factor, which is the basic and prominent factor that constitutes an office of profit, was critically analysed by the Delhi High Court in **Kailash Gahlot v. Election Commission of India**.<sup>28</sup>

In that case, 21 MLAs of Aam Aadmi Party, including Mr. Kailash Gahlot, were appointed as Parliamentary Secretaries to the Ministers in the Government of NCT of Delhi. They were not eligible for any remuneration or perks of any kind from the government. However, they were allowed to use government transport for official purposes only and office space in the Ministers office was provided to them to facilitate their work. One day, the President of India received an unsigned petition asserting that appointment of the petitioners as Parliamentary Secretaries with the above amenities would result in their disqualification as MLAs. Post of Parliamentary Secretary was "office of profit held under the Government" and it had not been exempted under any law. After receiving due opinion from the Election Commission, the President passed an order disqualifying the 21 MLAs from the membership of Delhi Legislative Assembly. When the disqualification order was challenged before the Delhi High Court, it had held, inter alia, that the opinion of Election Commission rendered to the

<sup>28</sup> AIROnline 2018 Del. 2470



President and the consequent disqualification order is vitiated and bad in law and accordingly, it was quashed. Though the order was quashed mainly on the ground of violation of principles of natural justice, the complex and contradictory judgements relied upon by the parties have made the High Court to deliberately not comment on the expression “office of profit under the Government” as it had intended only to highlight the complexity and divergent views which require consideration before a firm and decisive opinion can be formed and given in a case of this nature. The authorities cited are of paramount importance to legally define and assess the position of office of profit with regards to appointment, dismissal and retention of control of the government over the particular office.

The Election Commission had relied on **Guru Gobinda Basu v. Sankari Prasad Ghosal**<sup>29</sup> where Supreme Court had laid some main factors for the determination of a particular office as an office of profit. Those factors are: (i) the appointing authority, (ii) the authority vested with power to terminate the appointment, (iii) the authority which determines the remuneration, (iv) the source from which the remuneration is paid, and (v) 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. But all these factors need not coexist. Mere absence of one of the factors may not negate the overall test. The decisive test is the test of appointment and the stress on other tests will depend on facts of each case. The

same was also reiterated in **Pradyut Bordoloi v. Swapan Roy**.<sup>30</sup> It had also relied on the case of **Anokh Singh v. Punjab State Election Commission**<sup>31</sup> to outline the necessity to value the nature and importance of the functions performed by the MLAs as Parliament Secretaries, which closely resembles that of Executive being done by members of the Legislature, thereby leading to conflict of interests between the two vital organs of democracy.

On the other hand, the petitioners placed strong reliance on **Madhukar G.E. Pankakar v. Jaswant Chobbildas Rajani**<sup>32</sup> by stating that the expression “office of profit” postulates and requires that (i) there should be an office, (ii) office should carry profit, i.e., pecuniary gain and (iii) the office should be under Government. As the office of Parliamentary Secretary was not in existence, prior in point of time and was not created, it had no permanency independent of the occupant. They had also relied on the definition of office laid down in **Great Western Railway Co. v. Bater**<sup>33</sup> which was reiterated by Supreme Court in **Kanta Kathuria v. Manak Chand Surana**.<sup>34</sup> Indirect control, though real, is insufficient to prove an office of profit<sup>35</sup>. The Supreme Court had held in a particular case that the elected member had not incurred disqualification as the panel doctor under the Corporation, though he was subjected to responsibilities, eligible to remuneration and liable to removal, as he did not squarely fall within the expression “holding office under Government”.<sup>36</sup>

<sup>29</sup> AIR 1964 SC 254

<sup>30</sup> (2001) 2 SCC 19

<sup>31</sup> (2011) 11 SCC 181

<sup>32</sup> *Supra* Note 15

<sup>33</sup> *Supra* Note 10

<sup>34</sup> *Supra* Note 11

<sup>35</sup> *Supra* Note 5

<sup>36</sup> D. R. Gurushantappa v. Abdul Khuddus Anwar, (1969) 1 SCC 466



Thus, the ambiguity of office of profit is clearly conspicuous and it needs to be expressly interpreted to simplify the law behind it, to address and resolve the loopholes of it and to vividly express the intent of disqualification of members on the ground of holding an office of profit so as to prevent members of the House to exploit the provisions of the Constitution to elude from the disadvantaged position and dire consequences of disqualification of membership of the Legislature.

### **EXPRESS INTERPRETATION OF OFFICE OF PROFIT IN THE CONSTITUTION OF INDIA – A MUCH NEEDED APPROACH**

As the provisions dealing with disqualification on the ground of holding an office of profit is highly unequivocal and paradoxical, it warrants an express interpretation of office of profit in the Constitution to drive away the shadows and clarify the skeptical position of office of profit due to its surrounding ambiguity. An office of profit is categorized based on three main characteristics: appointing authority, pecuniary or material gain and the perpetual existence of the office. The tests laid down by the Supreme Court in various cases are also based on these broad categorizations. Therefore, the express interpretations also should involve clear provisions based on these factors.

#### **A. Appointing Authority and Clear Procedure for Appointment and Dismissal:**

It is clear that an office of profit is independent of its holder.<sup>37</sup> Consequently, only the holder of it is disqualified by law and

the office is not dissolved on account of such incumbency by such person. Thus, the office is occupied by a person who is appointed by the Government, which has an inherent power to specify and control the powers, duties and functions of such office. There should be direct control of the Government over the office as indirect control is not sufficient to prove office of profit.<sup>38</sup> In addition to that, there should be clear and specific procedures for appointment and dismissal of persons from the office of profit as it is the sole decisive test for identifying an office of profit.<sup>39</sup> Such clear guidelines would manifest the unmitigated control of the Government over the office and it also helps to differentiate between an office and a post under the Government, as Government employees cannot be declared as holders of office of profit based on the mere presumption that they are appointed by the Government and are in Governmental posts and positions. Therefore, a clear-cut procedure and guidelines should be laid down for the appointment and dismissal of holders of office of profit.

#### **B. Permanent and Substantive Existence of Office:**

In order to disqualify a member of the Legislature for holding an office of profit, there should be an office and it should have perpetual existence. This essential character differentiates the office from its incumbent, which helps in disqualifying the member without dissolving the office. Moreover, the incumbent should be appointed only in an active capacity and not in an honorary capacity as incumbents in such a capacity may not be, at times, considered as holders of office of profit. Therefore, the office should

<sup>37</sup> *Supra* Note 11

<sup>38</sup> *Supra* Note 5

<sup>39</sup> *Supra* Note 26



be in such a nature that it is permanent and the holders should play an active role in the duties and functions of such office. In addition to that, the posts and positions saved from Disqualification should be amended and altered in such a way that it includes only such offices that have perpetual and substantial existence and should not include temporary posts like One Man Commissions and similar positions merely because it comes under the definition of Commission or Committee etc. according to both Central and State laws.

### C. Pecuniary and Material Gains:

The basic pre-requisite of an office of profit is that it should provide pecuniary or material gain to the holder. Therefore, any office that is attached with any pecuniary benefit and material gain like salary, honorarium, conveyance allowance, telephone allowance etc. should be declared as an office of profit except that office which provides only compensatory allowance to its holder as a result of its incumbency. In **U.C. Raman v. P.T.A. Rahim**<sup>40</sup>, the office of Chairperson of Haj Committee under the State Government is not an office of profit as the holder was receiving only travel and daily allowances, which were compensatory allowances. Judicial review can be done to clarify and explain the position of the office when the nomenclature of the payment to its incumbent is different or in contrary to the actual pecuniary benefit received by the holder.

Express interpretation of office of profit in the Constitution is the need of the hour which becomes quintessential to address and

resolve the issues around the legal position of office of profit and it should affect those members who are trying to elude from their disqualification and exploit the constitutional provision to further their cause. Therefore, such express interpretations of office of profit should be incorporated in the Constitution through an amendment to the Constitution or by a separate Act of Parliament that has overarching power on all States to be used as a Code that specifies common interpretations and positions to be applied to members of both the Parliament as well as the State Legislatures.

### CONCLUSION

Office of profit is one of those legal areas that have been mooted on for almost half a century by legal luminaries and experts all over the country. It is known more for its ambiguity rather than its association with the Constitution as a ground for disqualification of members of the House. Express interpretation of office of profit and its nature of duties and functions in the Constitution or through a specific Act of Parliament is the only way to clarify the paradoxical legal position of office of profit and enlighten the legal minds on the constitutional purpose of disqualification of members on the ground of holding an office of profit. It would also vividly manifest the constitutional intent of incorporating such a provision by the founders of the Constitution. It makes the present and prospective members legally and morally alert not to pursue such a wrong path to elude from the clutches of disqualification and its legal consequences by their abhorrent and oblique conduct. Moreover, it would not lead to perverse and capricious decisions by the authorities thereby setting a right

<sup>40</sup> U.C. Raman v. P.T.A. Rahim, A.I.R. 2014 S.C. 3477



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direction for people in the legal and political field to follow the spirit of Constitutionalism for preserving and safeguarding the Constitution of India.

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