

(1984) 04 AP CK 0011

In the Andhra Pradesh High Court

Case No : Election Petition No. 5 of 1983

Cheekati Parasuram Naidu

APPELLANT

Vs

Mariserla Venkatarami Naidu and Another

RESPONDENT

Date of Decision : 26-04-1984

Acts Referred:

Conduct of Elections Rules, 1961 — Rule 10(4), 10(5), 5(2)
Constitution of India, 1950 — Article 191(1), 191(1)(a), 226, 324
Representation of the People Act, 1951 — Section 9

Citation : AIR 1985 AP 169 : (1985) 1 APLJ 112

Hon'ble Judges : Kodandaramayya, J

Bench : Single Bench

Advocate : M. Gangadhrappa, for the Appellant; R. Venugopala Reddy, Govt. Pleader, for the Respondent

Judgement

1. This is an Election Petition presented under 80 of the Representation of People Act, 43 of 1951 (hereinafter called the Act). In this petition the election of the 1st respondent Mariserla Venkatarami Naidu as a Member of the A.P. Legislative Assembly from No. 9 Parvatipuram Assembly Constituency is challenged. The petitioner is one of the unsuccessful candidates in the said election.

2. The averment of the petition are as follows: -

It is stated as per the Election programme to the said Assembly Constituency, the last date for filing nominations was 11-12-1982, the date of scrutiny was 13-12-82, the date for withdrawal of nominations was 15-12-82, the date for poll was fixed on 5-1-83 and the declaration of the results was fixed on 6-1-83. The petitioner, the 1st respondent, Sarvasri Yalla Sasibhushana Rao, Dwarapureddi Suryanarayana, Doddi Parasuram and Chamala Surayya and some others filed their nomination papers. The Returning officer i.e. the 2nd respondent herein rejected the nomination of Sri Chamala Surayya and upheld the nominations of the petitioner, the 1st respondent and Sarvasri Yalla Sasibhushana Rao Dwarapureddi Suryanarayana, Doddi Parasuram and others

and after withdrawal of nominations by some of the candidates, there remained the petitioner, the 1st respondent and the above three candidates in the contest. The Returning Officer had to allot symbols on 15-12-82. The symbol of elephant was allotted to the petitioner. Sri Yalla Sasibhushana Rao filed three nominations giving his choices of symbols Bicycle, Lion and Flaming torch claiming to be the candidate of Telugu Desam Party whereas the 1st respondent also filed three nominations but in his first nomination he claimed to be an independent candidate expressing the choice of symbols as elephant, bicycle and the flaming torch in the order of preference and in the other two nomination papers he claimed to be the Telugu Desam candidate. In view of the fact that both of them claimed to be the Telugu Desam candidates the Returning Officer treated both of them as independent candidates but allotted the symbol lion to Yalla Sasibhushana Rao instead of bicycle and flaming torch to the 1st respondent and accordingly notified the respective symbols of the candidates. It is further averred that the 1st respondent contrary to the allotment of symbols began to exhibit his symbol as bicycle on 17th evening and the petitioner brought the same to the notice of the Returning Officer on 18th morning at 7-30 A.M. but he pleaded ignorance about the situation. But in the evening of 18th the Returning Officer sent a revised list of candidates and symbols to the Agent of the petitioner showing that bicycle symbol was allotted to the 1st respondent. Thus three illegalities are alleged in allotment of symbols. (1) Not allotting symbol of bicycle to Yalla Sasibhushana Rao, (2) Not drawing lots when both petitioner and the 1st respondent claimed elephant as a first preference. (3) Having allotted flaming torch to the 1st respondent the same was changed to that of a bicycle on 18-12-82 and consequently it is urged the ballot papers used at the said election are invalid and void and the votes were improperly received and the entire election is vitiated and liable to be set aside. It is also urged that the 1st respondent did not invoke the revisional jurisdiction of the election Commission and the Election Commission cannot revise the symbols in the manner it was done without giving opportunity to the candidates. The second illegality alleged in the Election petition is the Returning Officer rejected the nomination of Chamala Surayya on the ground that he was a fair price shop dealer appointed by the Revenue Divisional Officer, parvathipuram and was getting pecuniary gain and hence he was holding an office of profit within the meaning of Art. 191 of the Constitution of India and the said order is illegal and consequently the improper rejection of the nomination has vitiated the election as a whole and has become void as the said Chamala Surayya is only a retail dealer holding an authorisation and not holding any office of profit and hence it is prayed that the election of the 1st respondent as a member of the A.P. Legislative Assembly from No. 9 Parvathipuram, Constituency shall be declared as void and be set aside and the court should direct the holding of a fresh election to the membership of the A.P. Legislative Assembly from No. 9 Parvathipuram Assembly Constituency.

3. The 1st respondent who is the successful candidate and also the Returning Officer, the 2nd respondent filed their counters opposing the petition.

4. It is averred in the counter of the 1st respondent that the Election Commission and Chamala Surayya are necessary parties and the failure to implead them as party-respondents is fatal to the petitioner. It is averred that there is no illegality in allotting the symbols or changing the symbols or altering the symbol of the 1st respondent as it was done as per the orders of the Election Commission as it was necessary in view of the fact two candidates claimed to be Telugu Desam party candidates. Further the change of symbol has not materially affected the result of the election as the 1st respondent has got overwhelming majority of 19,000 votes were as the petitioner lost his deposit and it is idle to contend that the allotment of bicycle symbol has materially affected this election. Further the rejection of nomination of Chamala Surayya is valid as he holds the office of profit within the meaning of Art. 191(1) (a) of the Constitution. It is also sought to be justified that his nomination was properly rejected as on the date of election he was disqualified in view of his subsisting contract with the Government, within the meaning of section 9A of the Act.

5. The 2nd respondent filed a counter justifying the allotment of symbols and also change of symbol of the 1st respondent under the circumstances. It is stated Y. Sesibhushanarao and the 1st respondent both claimed to be Telugu Desam candidates and hence both were treated as independent candidates as per the provisions of the Act and the Rules and the Instructions of the Election Commission. Further in view of the fact that bicycle was generally given to Telugu Desam candidates that symbol was not allotted either to the 1st respondent or to Sasibhushanarao but different symbols were allotted to them. Though the 1st respondent was treated in the first instance as an independent candidate in view of the fact that the petitioner was assisting Member of the Legislative Assembly the first choice of symbol claimed by him was given to him without the necessity of drawing lots for that choice of symbol between the 1st respondent and the petitioner. Further the 1st respondent was not anxious also to have the symbol of elephant and hence there was no necessity for drawing the lots for deciding the said question of allotting the symbol of elephant between the 1st respondent and the petitioner. Regarding the change of symbol it was averred that he received a message from the Chief Secretary, Government of Andhra Pradesh on 18-12-82 and also from the District Election Officer directing to allot symbol of bicycle to the 1st respondent and as per the said instructions he issued the revised list of contesting candidates and their symbols. It is also averred that the petitioner met him in the morning of 18-12-82 but he received the instructions to change the symbol subsequent to that and hence he expressed his ignorance when the petitioner met him. He also stated that the petitioner did not give any written complaint. It is stated that the rejection of nomination of Chamala Surayya is perfectly in order and hence the Election Petition is liable to be dismissed.

6. At the time of framing of the issues, the illegality of not allotting the bicycle symbol to Sasibhushanarao who claimed as a first preference and not drawing the lots for allotting the symbol of elephant between the petitioner and the 1st

respondent, was not pressed but the contest was only on question of change of symbol of the 1st respondent from flaming torch to bicycle on 18-12-82 and hence the following issues are framed: -

(1) Whether the allotment of symbols to the petitioner, 1st respondent and Y. Sasibhushanarao is in accordance with the Election Symbols (Reservation and Allotment) Order, 1968?

(2) Whether the change of symbol allotted to the 1st respondent from flaming torch to that of bicycle on 17-12-82 is without jurisdiction and has vitiated the result of the election?

(3) Whether the nomination of Sri Chamala Surayya was improperly rejected?

(4) Whether Sri Chamala Surayya was the holder of an office of profit within the meaning of Art. 191 of the Constitution of India?

(5) Whether the rejection of the nomination of Sri Chamala Surayya has vitiated the result of the election?

On 13-3-1983 an additional issue was framed which is in the following terms.

Whether the rejection of nomination of Chamala Surayya is justified u/s 9A of the Representation of the People Act, 1951, or not?

7. Thus it is seen broadly the issues cover two questions.

(1) Whether the change of symbol of the 1st respondent from flaming torch to the bicycle is illegal and has vitiated the election?

(2) Whether the rejection of nomination of chamala Surayya is valid either on the ground that he holds the office of profit within the meaning of Art. 191(1)(a) of the Constitution or having subsisting contract within the meaning of Sec. 9-A of the Act on the date of nomination?

I shall take the first question "the change of symbol".

8. The petitioner was examined in this case as P.W. 1 and Chamala Surayya whose nomination was rejected was examined as P.W. 2 and the 1st respondent was examined as R.W. 1 and the Returning Officer was examined as R.W. 2 R.W. 3 was examined to prove the subsisting contract of Chamala Surayya with the State. Exs. A-1 to A-21 were marked on behalf of the petitioner and Exs. B-1 to B-8 were marked on behalf of the respondents. As the Returning Officer was examined in this case as R.W. 2 his evidence is material in deciding the question of the change of symbols as his evidence is the best evidence to find out when and how the change of symbols was effected. He deposed that the last date for filing nomination for this Constituency was 11-12-1982, that the petitioner filed two nominations claiming to be an independent candidate and that the 1st respondent filed three nominations and in the first nomination paper he mentioned as an independent candidate but in the subsequent nominations he mentioned as a Telugu Desam Candidate. He received total 20 nominations but

accept nine nominations. The allotment of symbols took place on 15-12-1982, the date of the withdrawal of the nominations. On that day four persons withdrew their nominations and hence five persons remained in the contest. The petitioner was allotted the symbol of elephant giving him preference of choice as he was a sitting Member to the Legislative Assembly. As both Yella Sasibhushanarao and the 1st respondent claimed to be the Telugu Desam candidates as per the instructions contained in the book for returning officers issued by the Election Commission of India, Para 23(o) both of them were treated as independent candidates. He deposed "As both of them claimed symbol of bicycle which is known as the symbol of Telugu Desam I did not allot symbol of cycle as it will tantamount to allotting party symbol to any one of them. It might be that if any particular symbol is reserved for Telugu Desam party as it may be generally understood that cycle is the symbol of Telugu Desam. It is true normally that choice of symbol shall be determined with reference to first nomination but in the present case both the candidates mentioned above claimed bicycle on the basis of both of them are party candidates. Hence I rejected it for both". He further deposed that he changed the symbol of the 1st respondent from Flaming torch to bicycle on 18-12-82 and the same was notified on 18-12-82 by affixing notice on the Notice Board and copies were served to the petitioner and other candidates as he received a message from the Chief Secretary and the District Election officer which were marked as Exs. B-2 and B-3. He also produced the authorisation of the Telugu Desam party showing that N.T. Rama Rao himself was authorised to nominate the Telugu Desam candidates as per the instructions of the District Election officer and filed Exs. B-5 and B-6. He also deposed that the 1st respondent and Sasibhushanarao filed authorisation on behalf of Telugu Desam party when they filed nominations. He also accepted Exs. A-8, A-9 and A-10 dated 16-12-82, 27-11-82 and 29-11-82 respectively filed by the petitioner as being the communications of the Election Commission to Telugu Desam party and Karnataka Kranthi Ranga under which instructions were given. He finally deposed though the 1st respondent and Yalla Sasibhushanarao filed authorisations on behalf of Telugu Desam party in view of communication of Ex. B-2 "I have recognised the 1st respondent as Telugu Desam candidate and issued the revised symbol". Further he admitted "it might be that the 1st respondent cannot be treated as a candidate of Telugu Desam party but I acted because of the order received by me. Ex. B-2 was received by me after the allotment of symbol." The other relevant documents filed by the petitioner on this question may be noticed at this stage.

9. Ex. A-1 is the certified copy of the nomination filed by the petitioner. Its serial number is 10. The order of the returning Officer as recited in the said document states that the petitioner being assisting Member of the Legislative Assembly his choice of first symbol was accepted. Ex. A-2 is the nomination paper filed by the 1st respondent bearing serial No. 14. The order of preference of symbols shown in the nomination paper is elephant, bicycle and kagada (flaming torch) and the order of the Returning Officer thereon is, "Since the symbol Elephant requested

by the candidate had already been allotted to Sri Ch. Parasuram Naidu, it could not be allotted to this candidate. The next in order of preference could not be allotted to the candidate since two candidates are authorised by one and the same party have asked for that symbol. Hence, his is third choice the "Flaming Torch" in order of preference is allotted to Sri Mariserla Venkata Rami Naidu." Ex. A-3 is the nomination paper of Yalla Sashibhushana Rao and the order of the Returning officer is as follows: "Since there are two contesting candidates from Telugu Desam party and both of them ask for the symbol Bicycle, that symbol is not allotted to them as per instruction para 23 sub-para (o) of Chapter 2 of the Hand Book for Returning Officers. Hence, Sri Sashibhushana Rao is given the symbol Lion as that is his second symbol in order of preference." Ex. A-4 is the authorisation filed by Sashibhushanrao to show that he is a Telugu Desam candidate which was signed by N.T. Rama Rao, President of Telugu Desam. Ex. A-5 is the nomination paper bearing serial no. 1 of Chamala Surayya and the order of the Returning Officer rejecting the name. I shall advert to that when I examine the second question. Ex. A-6 is the revised list of candidates and their symbols issued on 18-12-82 where the symbol of respondent No. 1 was shown as bicycle. Ex. A-7 is the order of the Tahsildar stating that some of the certified copies applied by the petitioner were not available with him. Ex. A-9 is the communication issued to the Chief Electoral Officer by the Election Commission of India signed by the Secretary of the Commission. It states that the Telugu Desam cannot be registered as a political party by the Commission and the question will be taken up after the ensuing general elections to the Legislative Assembly. However it was directed that the Commission, in exercise of the powers conferred by Art. 324 of the constitution of India, read with Rr. 5 and 10 of the Conduct of election Rr. 1961 and para 18 of the Election Symbols (Reservation and Allotment) Order, 1968 in the matter of allotment of free symbols, preference shall be given to candidates set up by the Telugu Desam and karnataka kranthi Ranga, over only the independent candidates and when the Returning officer proceeds to allot symbols to contesting candidates under sub-para 3(a) of para 12 of the Symbols Order, he should allot symbols to candidates of registered unrecognised parties in the first instance. Ex. A-10 gives further instructions by the Election Commission of India to the Telugu Desam party and the Karnataka kranthi Ranga in securing symbols selected by those parties. It states that as per para 13 of the Symbols Order the Telugu Desam party must instruct candidates to mention in their nomination papers the fact that they are being sponsored by Telugu Desam. The other conditions in para 13 like filing the authorisation and the mode of authorisation also were indicated. Ex. A-8 is dated 16-12-82 which is a very crucial document addressed by the Secretary, election Commission on India to the Chief Electoral Officer, Andhra Pradesh, Hyderabad. It directs "In continuation of Commissions Telex Message No. 56/AAP/82/1747 of fifteenth Dec. 1982 regarding allotment of symbol to Telugu Desam, President Telugu Desam has further intimated to the Commission that the following candidates of their party may be added in the list for allotment of symbol as they have complied with conditions prescribed in para 13 of symbols order and have

mentioned "Bicycle" as their first preference for symbol." It mentions of other Constituencies also besides Constituency with which we are concerned viz., Mariserla Venkatrami Naidu from No. 9 Parvathipuram Assembly Constituency. In the last para it is mentioned "It may please be ensured that in these cases also the above mentioned candidates are shown preference over other independent candidates for allotment of "Bicycle" as their symbol subject to the fulfilment of the conditions laid down in that behalf. Kindly instruct the Returning Officers concerned in the matter." This document read with Exs. B-2 and B-3 complete the picture giving instructions to the returning officer directing that the 1st respondent shall be allotted the symbol of bicycle. The second nomination paper filed by the 1st respondent is Ex.A-15. It bears serial No. 15. The order of preference was mentioned as Bicycle, Kagada and Lion. The third nomination filed by the 1st respondent is Ex. A-14. It bears serial No.16. the order of preference of symbol is bicycle, Kagada and lion. Compared these two with Ex. A-2 which is the first nomination paper, it is clear the order of preference of symbols given by the 1st respondent in the first nomination paper is Elephant, bicycle and kagada. Ex. A-16 is the nomination paper of Dwarapudi Suryanarayana showing serial No. 21. Ex. A-17 is the nomination paper of Doddi Parasuram showing serial No. as 5. Ex. A-18 is the authorisation of the President of Telugu Desam showing that Yalla Sasibhushanarao is a Telugu Desam candidate. Ex. A-19 is the nomination paper of Yalla Sasibhushanarao showing serial No. as 8. Ex. A-21 is the authorisation showing that the 1st respondent is the Telugu Desam candidate signed by N.T. Rama Rao, President of Telugu Desam.

10. In this connection it is necessary to refer to Ex. B-1 a Telugu Daily "Eenadu" dated 15-12-82 showing a news item that Yalla Sasibhushanarao withdrew his candidature in favour of the 1st respondent. Ex. B-4 is the specimen of election symbols and Ex. B-5 and Ex.B-6 disclose that N.T. Rama Rao, President of the Telugu Desam alone was authorised to give declarations on behalf of Telugu Desam candidates. Ex. B-8 is the document filed to show that bicycle symbol was allotted to candidates other than Telugu Desam candidates. One Nimmala Krishnamurthy was given that symbol in Nagur Constituency No. 8.

11. Now on this evidence we have to see whether the original allotment of symbol of flaming torch to the 1st respondent is valid and whether the change of symbol into Bicycle and issuance of a revised list is in accordance with law or constitutes any violation of non-compliance with the provisions of the constitution, or Act or any Rules or Orders made under this Act within the meaning of Sec. 100(1)(d) Cl. IV and if so whether the result of the election has been materially affected. This covers issues 1 and 2.

12. Before I consider this question on merits it is necessary to dispose of one preliminary objection of the 1st respondent. It is urged by the learned counsel that the order of the election Commission is challenged and hence in the absence of the Election Commission as a party-respondent the present question cannot

be decided. Section 82 and 86(4) of the Act make provision for necessary parties to the Election petition, and addition of parties during the trial. Sec. 82 is explicit in its terms specifying persons to be added as parties to the petition. This question was recently considered by the Supreme Court in *Jyoti Basu and Others Vs. Debi Ghosal and Others*, and it was held that no one may be joined as a party to the Election petition otherwise than as provided by Sec. 82 and 86(4) of the Act. It is also ruled that a person who is not a candidate may not be joined as a respondent to the Election Petition. It is true that the action of the Election Commission in directing changing the symbol is the subject matter of an enquiry. The petitioner is only required to show how far the action of the election Commission constitutes the violation of Sec. 100(1)(d)(iv) of the Act. If the impugned action constitutes non-compliance of the provisions of the Constitution or the Act or of the Rules or orders made under the Act, the question is liable to be examined by this court. The presence of the Election Commission is not at all necessary and the Election Commission is not called upon to justify its action but the question is how far the non-compliance of the provision referred above has materially affected the election and hence I reject this objection. In this connection I may also add that the 1st respondent also raised the same contention of non-joinder of parties of one Chamala Surayya whose nomination was rejected by the Returning Officer. The said Chamala Surayya though not added as a party he was examined in the case and for the aforesaid reasons I also reject this contention and hold that the said Chamala Surayya is not a necessary party.

13. While examining the question of the result of election due to the change of symbol it is necessary to advert to the following provisions.

14. Article 324 of the Constitution declares that the superintendence, direction and control of the preparation of the electoral rolls, and the conduct of, all elections to Parliament and to the legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission). This is the basic provision so far the powers of the Election Commission is concerned. It is necessary to refer to sec. 33 of the Act 43 of 1951 which prescribes the rule for presentation of nomination papers and the requirements of valid nominations. Sec. 38 of the Act enjoins on the Returning Officer to publish in the prescribed form the list of contesting candidates. These provisions are supplemented by the Conduct of Election Rules, 1961. Rule 5 enjoins on the election Commission to specify the symbols that may be chosen by the candidates and sub-rule (2) is necessary to extract in full.

"Subject to any general or special direction issued by the Election Commission either under sub-r. (4) or sub-r. (5) of R.10, where at any such election, more nomination papers than one are delivered by or on behalf of a candidate, the declaration as to symbols made in the nomination paper first delivered, and no other declaration as to symbols, shall be taken into consideration under R.10

even if that nomination paper has been rejected."

As per R.10 the list of contesting candidates referred to in sub-section (1) of sec. 38 shall be in Form 7A. Form 7A prescribes the serial number, the name of the candidate, the address of the candidate and the symbol allotted to him as necessary particulars to be given. Sub-rules (4) and 95) of R.10 are in the following terms"

"Sub-rule (4). At an election in a parliamentary or assembly constituency, where a poll becomes necessary, the returning officer shall consider the choice of symbols expressed by the contesting candidates in their nomination papers and shall, subject to any general or special direction issued in this behalf by the Election Commission. -

(a) allot different symbol to each contesting candidate in conformity, as far as practicable, with his choice; and

(b) if more contesting candidates than one have indicated their preference for the same symbol, decide by lot to which of such candidates the symbol will be allotted.

Sub-rule (5). The allotment by the returning officer of any symbol to a candidate shall be final except where it is inconsistent with any directions issued by the election Commission in this behalf in which case the Election Commission may revise the allotment in such manner, as it thinks fit."

15. Then it is necessary to refer to the Election Symbols (Reservation and Allotment) Order, 1968 issued by the Election Commission under the powers conferred on it by Art. 324 of the Constitution of India read with Rr.5 and 10 of the Conduct of Election Rules 1961 hereinafter referred as Symbols Order. Paragraph 2(h) defines "political party" which means "an association or body of individual citizens of India registered with the Commission as a political party under para 3 and includes a political party deemed to be registered with the Commission under the proviso to sub-para (2) of that paragraph." Paragraph 3 prescribes the procedure for registering the political parties and para 5 classifies the symbols as reserved or free. Paragraph 6 classifies the political parties as recognised political parties and unrecognised political parties. As per para 7 two categories of recognised political parties are envisaged National party or State party. A party recognised in accordance with paragraph 6 in four or more State, shall be treated as a National party and when it is recognised in less than four States, it is called "State party". Telugu Desam party with which we are concerned in this case is an unrecognised political party. However, as it is registered with the Commission though it is not entitled to a reserved symbol, preference will be given in allotting the free symbols to its candidates over independent candidates as per para 12 (3). Paragraph 13 prescribes three conditions that are necessary to be fulfilled to consider a candidate as a candidate set up by political party and it reads as follows: -

"When a candidate shall be deemed to be set up by a political party. - For the purposes of this Order a candidate shall be deemed to be set up by a political party if, and only if, -

- (a) the candidate has made a declaration to that effect in his nomination paper;
- (b) a notice in writing to that effect has, not later than 3 p.m. on the last day of withdrawal of candidatures, been delivered to the returning officer of the constituency; and
- (c) the said notice is signed by the president, the secretary or any other office-bearer of the party and the president, secretary, or such other office bearer is authorised by the party to send such notice and the name and specimen signature of the president, the secretary or such other office-bearer are communicated in advance to the returning officer of the constituency and to the Chief Electoral Officer of the State."

Similarly the power of the Commission to issue instructions and directions was embodied in para 18 which is in the following terms:

"Paragraph 18. Power of commission to issue instructions and directions. - The Commission may issue instructions and directions -

- (a) for the clarification of any of the provisions of this Order.
- (b) for the removal of any difficulty which may arise in relation to the implementation of any such provisions; and
- (c) in relation to any matter with respect to the reservation and allotment of symbols and recognition of political parties, for which this order makes no provision or makes insufficient provision, and provision is in the opinion of the Commission necessary for the smooth and orderly conduct of elections."

Further the Election Commission issued instructions embodied in a publication called "Hand Book for Returning Officer". The said instruction broadly embodies the provisions of the Constitution and the Act and the Rules and the Symbols Order and besides that special instructions that were issued. Instruction 23 relevant for our purpose is in the following terms.

"A substitute candidate may refuse or fail to withdraw his nomination in time. Unless you are definitely informed as to who is the substitute candidate, you should not allot the party symbol to either of them. You will have to treat both of them as non-party candidates and allot free symbols."

It is contended on behalf of the petitioner that these provisions contemplate that -

- (a) the symbols once allotted to candidate cannot be altered -
- (b) The change of symbol if at all must be effected before the last date for withdrawal of nomination.

(c) The Election Commission must give an opportunity to the contesting candidates when the symbol is changed.

(d) The order of preference of symbols mentioned in the nomination papers first delivered alone shall be taken into account and the Commission also has no power to alter the same.

(e) The power of the Commission to revise the allotment of symbol is restricted under R.10 (5) to cases where the Returning officer violated the directions of the Commission.

(f) If the conditions of para 13 of Symbols Order are not satisfied a candidate cannot be treated as a candidate set up by the political party.

16. These rules read with Symbols Order were the subject matter of some judicial pronouncements. In *Mani Lal Yadava Vs. Budhinath Jha*, , it was held that the election Commission can issue direction to allot a party symbol to a candidate when there is a delay in filing the confirmation that a particular candidate is a party candidate as contemplated in para 18 of the Symbols Order. It is also ruled that it is not necessary for the Election Commission to hear the other candidates. In *Sri Ram Autar Vs. Kr. Satyabir*, , it was held that the Election Commission has got power to order the change of a symbol of the candidate set up by political party when the said party wants to change its candidature. No doubt it was held on facts of that case that it was not established that the direction given by the Election Commission was after the expiry of the period of time for withdrawal of the candidature. In *Jameel Vs. Gul Mohammad and Others*, , in a similar circumstance where a political party viz., Janatha Party changed its candidate twice and requested the election Commission to allot the party symbol to the new candidate, the court held that the Commission has got ample power and there is no infirmity in the proceedings. It is necessary to refer to *Shri Sadiq Ali and Another Vs. The Election Commission of India, New Delhi and Others*, , where their Lordships considered the power of the Election Commission in the matter of allotment of symbols. In para 37 it was observed:

"It would follow from what has been discussed earlier in this judgment that the Symbols order makes detailed provisions for the reservation, choice and allotment of symbols and the recognition of political parties in connection therewith. That the Commission should specify symbols for elections in parliamentary and assembly constituencies has also been made obligatory by R.5 of Conduct of election Rules. Sub-r. (4) of R.10 gives a power to the Commission to issue general or special directions to the Returning officers in respect of the allotment of symbols. The allotment of symbols by the Returning officers has to be in accordance with those directions. Sub-rule (5) of r.10 gives a power to the Commission to revise the allotment of a symbol by the Returning officers in so far as the said allotment is inconsistent with the directions issue by the Commission. It would, therefore, follow that Commission has been clothed with plenary powers by the above mentioned Rules in the matter of allotment of

symbols. The validity of the said Rules has not been challenged before us. If the commission is not to be disabled from exercising effectively the plenary powers vested in it in the matter of allotment of symbols and for issuing directions in connection therewith. It is plainly essential that the Commission should have the power to settle a dispute between two individuals, the methods for the settlement of that dispute is provided by para 13 of the Symbols Order."

17. This case relates to rival claims of two grounds of a recognised political party. But the principle is clearly laid down that the Commission has ample power to allot the symbols.

18. No doubt it is true that the Election Commission cannot issue directions contrary to law. In fact the Supreme Court recently ruled in *Rooplal Sathi v. Nachhattar Singh*, AIR 1982 SC 1559, that any breach of para 13 or 18 of the Symbols Order amounts to non-compliance with the provisions of the Constitution or the Act or any orders made thereafter and therefore the change of allotment of symbol by the Returning Officer in compliance with the directions of the Election Commission was a matter falling within the purview of sec. 100(1) (d)(iv) of the Act. This principle that the Commission cannot issue direction contrary to law is again registered by the Supreme Court in *A.C. Jose Vs. Sivan Pillai and Others*, and held that the direction of the Election Commission directing casting of ballots by machine in some of the polling stations was without jurisdiction and contrary to law. Hence we have to see whether the change of symbol in the present case by the Returning Officer at the instance of the Election Commission was in contravention of the provisions of the Constitution, the Act, the Rules or the Symbols Order. Let us examine closely the violation complained off.

19. Rule 5(2) which enables the Returning Officer to allot symbols taking the symbol mentioned in the first nomination paper as the basis mentions that the said allotment shall be subject to the general and special directions to be issued by the Election Commission either under sub-r. (4) or Sub-r. (5) of R.10. Rule 10(4) again mentions that the allotment of symbols by the Returning Officer among the contesting candidates shall be subject to general and special directions issued by the Election Commission. Further the order of allotment of symbols that is made final under sub-rule (5) of R.10 again makes an exception stating that it shall not be inconsistent with the directions of the Commission and it can also be revised by the Commissioner if it thinks fit. Over and above para 18 leaves a residuary power to the Commission to issue instructions and directions for clarification of any of the provisions of the Symbols Order or for removal of any difficulty which may arise in implementing the orders or issue further directions when the Order makes no provision or makes insufficient provision and for smooth and orderly conduct of elections. Thus I am clearly of the opinion that the Election Commission has got ample power to order change of symbol of a candidate by virtue of the powers vested in it under Art. 324 of the Constitution read with R.10 (4) of Conduct of Election Rules of 1961 and para

18 of the Election Symbols (Reservation and Allotment) Order, 1968.

20. Let me examine the questions now raised by the petitioner seriatim.

(a) and (b): It is no doubt true that the provisions of the Act and the Rules lay down specific timings for doing of acts like filing of nominations and withdrawals. But the power of the Commission is very wide. We cannot read any limitation into the powers of the Commission to alter the symbols as the allotment of symbols both under r.5 (2) and R.10 (4) and 95) are specifically made subject to its directions. Para 18(b) of the Symbols Order specifically empowers the Commission to issue any instructions or directions for removal of any difficulty which may arise in relation to the implementation of any such provisions. Thus I see no justification to construe the above provisions barring the jurisdiction of the Commission to change allotment made by the Returning Officer. The time limit in the provisions now referred would not bar its jurisdiction to alter the symbols.

(c) I do not find any justification to import the principle of natural justice into these provisions holding that the Commission shall hear the other contesting candidates when their symbols are not changed. First of all the Rules do not contemplate such procedure. It might be when a symbol of a particular candidate is changed without notice to him there may be room for complaint that the principle of natural justice is violated. The alteration of symbol of any candidate at his instance or at the instance of the political party who sets him up cannot give room to the other candidates to complain when their symbols are not altered. Rule 10(4) and Para 18 do not admit of any enquiry or opportunity to rival candidates when their symbols are not touched.

(d) Rule 5(2) was already extracted in full which is the relevant Rule directs that the Returning officer shall take into account the declaration as to symbols made in the nomination paper first delivered. The said Rule begins with the phrase "Subject to any general or special direction issued by the Election Commission either under sub-rule (4) or sub-rule (5) of R.10". Thus it is clear the power to the Commission is not taken away to allot a symbol to a particular candidate if that symbol is mentioned in the first nomination paper. K The choice is given to the candidate. He can choose any symbol mentioned in the first nomination paper. It is true that the Returning Officer is bound to take the first nomination paper alone as the basis, but so far the Commission is concerned if it is satisfied that in a given case the omission to mention in the first nomination paper any particular symbol is not fatal and the allotment of the symbol to a particular candidate is not contrary to the other rule of preference embodied in other provisions of the Symbols order, it has ample jurisdiction to award a symbol even though not mentioned in the first nomination paper.

(e) Rule 10(5) no doubt makes the allotment of symbol by the Returning Officer final. But it makes an exception where it is inconsistent with any direction issued by the Commission. The Returning Officer is bound to follow the direction of the

Commission notwithstanding his allotment to a particular candidate. The Rule does not say that the direction issued before the allotment alone is liable to be implemented. Even directions issued subsequent to the allotment are also liable to be implemented by the returning officer and the Returning Officer is bound to obey the said directions. It is difficult to read into the sub-r. (5) that the power of Election Commission to revise a particular order of allotment is restricted to cases where the order of the Returning officer allotting the symbol is found to be inconsistent with the previous existing directions. In other words even if the order of the Returning officer is consistent with the preexisting directions and valid when it is made the Commission has got power to issue directions to change the symbol. Once I hold that the power of changing the symbol so far as the Commission is concerned is not restricted to the last date of withdrawal of the nomination, it follows the Commission has ample power to issue direction to change the symbol even if the original allotment is perfectly in order. If any direction given is not obeyed, the Commission itself is further empowered to revise the order but the said provision cannot be interpreted to mean that the Commission has power to revise the order only when the order of the Returning Officer is contrary to the pre-existing directions. It has power to give fresh directions as and when necessary. In other words the jurisdiction of the Commission is preserved to issue orders for change of symbol subsequent to the order of allotment and if the Returning Officer fails to implement the same the order is liable to be revised.

(f) It is true if the conditions of Para 13 are not satisfied a party cannot be treated as a party set up by a political party. Para 13 mentions three conditions. (1) The candidate himself must file a declaration as a candidate set up by the political party. (2) A notice to that effect to be filed before the Returning Officer not later than 3 P.M. on the last date of withdrawal of the candidates. (3) Such notice is signed by the office bearer authorised by the political party. I have already held that the time limit mentioned in this provision would not bind the Election Commission in view of its wide jurisdiction. The time limit mentioned in para 13 may not operate as a bar to exercise the powers by the Commission to allot a symbol declaring a person as a party candidate. However the basic requirement of para 13 such as filing a declaration and notice and authentication of such notice by the office bearer cannot be dispensed with. Hence reading paras 13 and 18 together, the Commission has ample power to declare a candidate as one set up by the political party if the conditions of paragraph 13 are satisfied even though there is a delay in filing the authentication by the political party.

21. Now on this legal basis the present contention of the petitioner can be examined. The first respondent mentioned bicycle as one of the symbols in his first nomination paper Ex. A-2 which bears serial No. 14. In the second and third nomination papers Exs. A-15 and A-14 respectively he mentioned the symbol of bicycle as his first preference. The omission to mention as first preference in Ex. A-2 is not fatal to his claim for the symbol. The authentication on behalf of the

1st respondent signed by the president of Telugu Desam party as per Ex. A-21 is well within time. A peculiar situation has arisen in this case where two rival candidates claimed to be the candidates set up by the political party. Ex. A-19 is the nomination paper of Yalla Sasibhushanarao showing serial No. 8. Ex. A18 is the authentication signed by Sri N.T. Rama Rao, the President of Telugu Desam showing Y. Sasibhushanarao as Telugu Desam candidate. So as per the instructions issued to the Returning Officer paragraph 25(0) he treated both of them as independent candidates. On further instructions the Election Commission accepted the 1st respondent as the Telugu Desam candidate. Thus it is clear that though initially the order of the Returning Officer declaring both of them as independent candidates in accordance with para 25(0) of Instructions, the Rules and the Symbols Order do not make any provision to decide who should be the candidate set up by the political party when two rival candidates claimed to be set up by the same political party. In such event the power of the Commission under paragraph 18 either under (b) or (c) viz., either for removal of any difficulty which may arise in relation to the implementation of these provisions or giving insurrection or direction when this Symbols Order does not make any provision or the provision already made is insufficient or when it is found to be necessary to give such a direction for smooth and orderly conduct of election can certainly be invoked. If not there will be any candidate for this Telugu Desam political party. The present case is an illustration to invoke powers under para 18 of the Symbols Order as both 1st respondent and Yalla Sasibhushanarao filed authentication from the president of the Telugu Desam party and claimed as its candidates. In the absence of any specific provision to decide the question who would be the candidate of the political party, the Commission is empowered to decide the question under para 13 read with Paragraph 18 and issue the instructions. This direction of the Commission accepting one candidate as the candidate of the political party is not in contravention of the provisions of the Act, Rules or the Symbols Order and hence I hold that the order of the Election Commission altering the symbol as per Exs. A-8, B-1 and B-2 is well within its jurisdiction and there cannot be any non-compliance of the provisions of the Act within the meaning of sec. 100(1)(d)(iv) of the Act.

22. Even assuming without admitting that the Commission has no power to issue directions as the order of allotment by the Returning Officer was not shown to be inconsistent with the previous instructions and thus the order of the Election Commission is hit by section 100(1)(iv) of the Act, the petitioner has to further establish that the result of the election is materially affected within the meaning of sec. 100(1)(d) of the Act. Now it is fairly settled that the burden is on the petitioner to show that the result of the Election has been materially effected by such non-compliance. It is observed in Paokai Haokip Vs. Rishang and Others, :

"the fact that the election is in contravention of the Act and the Rules do not alter the position with regard to S. 100(1)(d)(iv) of the Act. That section requires that the election petitioner must go a little further and prove that the result of the election had been materially affected. Where, therefore, in the election petition

against a returned candidate from a parliamentary Constituency it was proved that by change of certain polling centre and owing to firing by certain hostile elements a number of voters probably failed to record their votes which they would have done if polling had gone on smoothly and according to rules, but the election petitioner failed to prove that by such circumstances the election had been materially affected. The election of the returned candidate could not be avoided."

Now the facts of this case make it clear that there is no evidence to show that the result of the election is materially affected. The petitioner has not placed any evidence before the court except his oral assertion. It is admitted that the symbol of bicycle is a free symbol. It is not a symbol of the Telugu Desam party. But being a registered party it is entitled to preference over independent candidates. Ex. B-8 was produced by the respondent to show that the bicycle symbol was allotted to the candidates other than the Telugu Desam candidates. One Nimmala Krishna Murthy was given that symbol in Nagur Constituency No. 8. This evidence stood uncontradicted. Secondly Yalla Sasibhushanarao who filed nomination as Telugu Desam candidate withdrew from the contest and the same was deposed by the 1st respondent as R.W. 1. In support of his statement he produced Ex. B-1 Telugu Daily "Eenadu" showing a news item that Yalla Sasibhushanarao withdrew his candidature in favour of the 1st respondent. It is the support of the Telugu Desam party that got success to the 1st respondent but not the symbol of Bicycle itself. In the absence of any evidence to show that the symbol itself acquired any local importance or publicity it is difficult to hold that the change of symbol has brought out the result in the election and hence I am clearly of the opinion that the change of symbol has not materially affected the result of the election and in the absence of any evidence in this regard I hold that the petitioner failed to discharge the burden on this question. Hence I hold on issue no. 1 that the allotment of symbol is in accordance with the provisions of Election Symbols (Reservation and Allotment) Order, 1968 and on issue No. 2 that the change of symbol allotted to the 1st respondent from flaming torch to that of bicycle on 17-12-1982 is well within the jurisdiction of the Election Commission and the said change has not vitiated the result of the election.

23. The next question is whether the rejection of nomination of Chamala Surayya is invalid either on the ground that he holds office of profit within the meaning of Art. 191(1)(a) of the Constitution or having a subsisting contract within the meaning of sec. 9-A of the Act on the date of nomination.

24. It is contended on behalf of the petitioner that the said Chamala Surayya is only a retail dealer and an authorisation was given to him as per Ex. A-11 under Cl. (3) of Andhra Pradesh Schedule Commodities (Regulation and Distribution by Card System) Order, 1973 and holding an authorisation is not holding an office and hence the order of the Returning officer rejecting his nomination is illegal. It is necessary to extract the order of the Returning officer in full which is marked as Ex. A-5. "I have examined this nomination paper in accordance with S. 36 of

the Representation of the People act, 1951 and decide as follows: Since the candidate is a Fair Price Shop dealer in Basangi in Parvatipuram Taluk appointed by the RDO, Pvp and getting pecuniary gain and since he has not submitted his registration from the post of Fair Price shop dealer, his nomination is rejected this 14th day of Dec. 1982." The question is whether the said Chamala Surayya holding an authorisation for a fair price shop can be said to hold office of profit within the meaning of Art. 191(1)(a) of the Constitution of India. Alternatively it is contended that the said Chamala Surayya has a subsisting contract within the meaning of Sec. 9-A of the Act and thus disqualified for the membership of the State Assembly. In support of this contention the petitioner examined himself as P.W. 1 and filed Exs. A-5, A-12 and A-13 that were already referred. The petitioner also filed Ex. A-2 showing that no agreement was entered by the said Chamala Surayya at the time of the issuance of the authorisation. The said Chamala Surayya was examined as P.W. 2. He deposed that the Collector gave him Ex. A-11 authorisation for dealing in scheduled commodities and deposited Rs.1000/- towards security in pursuance of the notice of the Tahsildar, Parvathipuram marked as Ex. A12. Ex. A-11 is in the prescribed form appended to the Card System Order of 1973. Ex. A-13 is the further instructions given by the Tahsildar for distribution of the commodities to the card holders. He deposed that no remuneration will be payable to him for carrying on the business and no commission is paid and he can engage a clerk and Assistant and he can also take a partner in his business and that the authorisation is transferable with the permission of the Collector. He also deposed that he was a retail dealer before the authorisation was issued. He has to bear the transport expenses and he never entered into an agreement with regard to the functions of the business and there is no guarantee about the supply of the commodities to him. But when his nomination was rejected he was advised that he cannot contest the said question but he can raise that question only in the Election Petition after the elections are over. He further deposed that he could not afford to file E.P. as it is quite expensive. However he filed an application to implead himself as a party-respondent in this Election petition but he was forced to withdraw the same as his application is beyond the time. R.W. 2 the Returning Officer generally deposed that he rejected the nomination after giving an opportunity to Chamala Surayya. The respondents examined R.W. 3 to produce any agreement entered into by Chamala Surayya. He filed Ex. B-7 a communication of Collector, Srikakulam appending a pro forma of agreement to be executed by a Fair price Shop Dealer to the Government of Andhra Pradesh. But he deposed that there is no agreement executed by Chamala Surayya in the office of the Sub Collector though Chamala Surayya is still having Fair Price dealership and he is still supplied the scheduled commodities. Not only the agreement of Chamala Surayya but not other agreements executed by any dealer is available in Parvathipuram Taluk office. He said "In the office of Parvathipuram I cannot find any other agreements of any other F.P. dealers". In fact the 1st respondent took summons to the Commissioner of Civil Supplies but he could not produce the so called prescribed form of agreement said to be executed by persons to whom

authorisation is given. Ex. B7 is a certified copy of the letter addressed by the Collector, Srikakulam to all Taluk Officers and Deputy Tahsiladras. He refers to a copy of the Board's reference dated 19-4-75 advising that the agreement with the Fair Price Shop Dealers must be drawn on a stamp paper of Rs.5/-. The Government Pleader produced a file relating to this communication. But in that file there is no prescribed pro forma referred to in Ex. B-7 except a letter which states that an agreement by Fair price Shop Dealers should be executed on a non-judicial stamp of Rs.5/-. In view of this we have to proceed on the basis that not only Chamala Surayya but no other dealer in Parvathipuram Taluk office had ever executed any agreement before obtaining any authorisation for running the fair price shop and hence it is argued by the Government Pleader that the authorisation itself must be treated as subsisting agreement between the State Government and Chamala Surayya.

25. Now I shall examine the first question viz., whether the authorisation under Ex. A11 constitutes an office of profit within the meaning of Art. 191(1)(a) of the Constitution of India. Art. 191(1)(a) reads thus:

"Art. 191 (1) (a). Disqualifications for Membership. - (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State -

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the legislature of the State by law not to disqualify its holder;"

The corresponding provision for disqualification for membership in the either House of Parliament is Art. 102. A similar provision is found in Arts. 58(2), 59(2), 64 and 66(4) of the Constitution of India. A perusal of this provision discloses that in order to attract disqualification contemplated by this provision firstly there must be an office and secondly it must be an office of profit and thirdly it must be under the Government of India or the Government of State. This provision provides that the legislature can exclude any office from its operation. It is also significant to note under cl. (e) the parliament may make law adding new grounds of disqualification. There is no dispute about the third element that this employment is held under the Government of State. So we have to consider whether it is an office and secondly any profit is attached to the said office.

26. The Supreme Court of India approved more than once the definition of word "Office" given by Rowlatt, J. as affirmed by the House of Lords in *Great Western Railway Company v. Bater* (1922) Tax LR 231 at page 235.

"Now it is argued, and to my mind argued most forcibly, that that shows that what those who use the language of the Act of 1842 meant, when they spoke of an office or an employment, was an office or employment which was a subsisting, permanent, substantive position, which had an existence independent from the person who filled it? Which went on and was filled in succession by successive holders; and if you merely had a man who was engaged on whatever

terms, to do duties which were assigned to him, his employment to do those duties did not create an office to which those duties were attached. He merely was employed to do certain things and that is an end of it; and if there was no office or employment existing in the case as a thing, the so-called office or employment was merely an aggregate of the activities of the particular man for the time being. And I think myself that that is sound."

This decision was again approved by House of Lords in *Mc Millan v. Guest* (H, M. Inspector of Taxex), (1943) 24 Tax Man 190, by Lord Atkin and Lord Wright. The dicta of Lord Wright is in the following terms:

"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. This, I think, roughly corresponds with such approaches to a definition as have been attempted in the authorities, in particular *Great Western Railway Co. v. Bater*, (1922) 8 ACC 231: (1922) 2 ACC 1, where the legal construction of these words, which had been in Schedule E since 1803 43 Geo. III. C. 122 Section 175), was discussed."

The Supreme Court accepted these two definitions in *Srimati Kanta Kathuria Vs. Manak Chand Surana*, and held that the office of a Special Government Pleader is not an office of profit while *Hidayatullah, C.J. and G.K. Mitter, J.* dissenting with the majority view. As per the minority view expressed by *Hidayatullah, C.J.* an office of Special Government Pleader was created on the notification and there is an office which could successively be held and hence the said provision is attracted. The majority view delivered by *Sikri, J.* (as he then was) held that as per the definition of the Government Pleader in Sec. 2(7) of CPC any person acting under the direction of the Government Pleader is a Government Pleader and hence no significance can be attached to the Notification creating the office of Special Government Pleader and hence the Special Government Pleader who is only assisting the Government Pleader is not holding an office of profit. But in view of the subsequent Legislation removing the disqualification the appeal was allowed unanimously. *Sikri, J.*, distinguished the earlier judgment of the Supreme Court in *Mahadeo Vs. Shantibhai and Others*, , where it was held that a person appointed on a panel of lawyers who undertook to watch the cases of the Railways was said to hold an office of profit on the ground that the said case was more like the case of a standing Counsel disqualified by the house of Commons. It is no doubt true as held by the Supreme Court in *Gurugobinda Basu Vs. Sankari Prasad Ghosal and Others*, , for holding an office of profit under the Government one need not be in the service of Government and there need not be any relationship of master and servant. Accordingly it was held that a person appointed as auditor of Durgapur Projects Ltd. Or Hindusthan Steel Ltd., holds office of profit. They observed, "The decisive test for determining whether a person holds any office of profit under the Government is to test of appointment.

It is not correct to say that the several factors which enter into the determination of this question the appointing authority, the authority vested with power to terminate the appointment, the authority which determines the remuneration, the source from which the remuneration is paid, and the authority vested with power to control the manner in which the duties of the office are discharged and to give directions in that behalf-must all co-exist and each must show subordination to Government and that if one of the elements is absent, the test of a person holding an office under the Government, Central or State, is not satisfied".

27. In *Shivamurthy Swami v. Agadi Sanganna Andnappa*, (1971) 3 SCC 870 , Hegde, J., held that:

"This Court in several decisions has laid down the tests for finding out whether an office in question is an office under a Government and whether it is an office of profit. Those tests are: (1) Whether the Government makes the appointment; (2) Whether the Government has the right to remove or dismiss the holder; (3) Whether the Government pays the remuneration; (4) What are the functions of the holder does he perform them for the Government and (5) Does the Government exercise any control over the performance of those functions?"

In order to fulfil the definition all the three elements of office, profit and under the Government, must be satisfied.

28. Regarding the element of profit it was held in *Maulana Abdul Shakur Vs. Rikhab Chand and Another*, that the fact that a person is not paid from the State Revenue is not decisive, and the profit means only pecuniary gain and accordingly any amount given for out of pocket expenses cannot be considered to be profit as held by *Ravanna Subanna Vs. G.S. Kaggeerappa*, .

29. The recent judgment of the Supreme Court in *Biharilal Dobray Vs. Roshan Lal Dobray*, is an illustration for the third element viz., that the office must be held under the Government. Their Lordships held that the teacher of a Basic primary school run by the U.P. Board of Basic Education holds an office of profit as the State Government exercised administrative control and in fact overall control over the U.P. Board of Basic Education and its employees.

30. So in order to attract the provisions of Art. 191(1)(a) of the Constitution firstly the employment must be an office. Secondly some profit must be attached to it. Thirdly it must be held under the Government of India or Government of any State. In order to fulfil the first requirement of office it must be a subsisting, permanent, substantive post which must exist independent of the person who fills it. If the employment is only to do a particular work or perform specified duties, it will not partake the character of an office. The jural relationship need not be that of a master and servant. The test of appointment for the post is very important. Some pay, salary, emoluments, allowance must be attached though the quantum is not material. The source from which remuneration is paid is not always material but a factor to be taken into account.

31. As already held there is no dispute about the third factor holding the employment under the State. But the only question is whether this authorisation constitutes an office. Though some pecuniary benefit is admitted by way of margin of profit by selling the goods can that benefit be said to be a profit attached to the office? It is necessary to look to the provisions of Andhra Pradesh Scheduled Commodities (Regulation of Distribution by Card System) Order 1973 contained in III Edition, The Law of Essential Commodities Central & State Control Orders by Sri Vedula Jagannadha Rao referred by both the counsel and the prescribed form of authorisation is at page 100. The full text of the Order is found at page 102. The order was issued by the State Government by virtue of the powers vested in it u/s 3 of the Essential Commodities Act read with the Order of the Central Government delegating the powers to the State Government. 2(b) of the Order defines an "Authorised fair price shop" which means a retail dealer appointed or authorised or approved by or on behalf of the State Government under Cl. 3 for sale of all or any of the scheduled commodities. 2(g) defines "Scheduled Commodity" as commodity specified in Schedule to this Order, which is supplied by the State Government or by any agency appointed by the State Government to any authorised fair price shop or establishment for issue to the consumers; Cl. 3 is the provision under which the authority is empowered to issue authorisation to a person who is a retail dealer or a person having charge of an establishment to obtain and supply scheduled commodities in accordance with the provisions of this Order. Sub-clause (3) supersedes previous agreements. Clause 5 empowers the State Government or the Collector to issue supply cards. Clause 6 empowers the State Government to issue Regulation providing for the conditions subject to which scheduled commodities may be supplied. Clause 14 empowers the authorities to enter premises, inspect, search and seize stocks of scheduled commodities. Clause 16 enumerates conditions to be observed by the authorised fair price shop. Clause 17 provides remedy of appeal against the orders passed under Cl. (3), and Cl. (18) provides the revisional powers. The schedule gives the list of scheduled commodities as defined in Clause 2(g). The form of authorisation itself is prescribed at the end of the Regulation and such authorisation given to Chamala Surayya in this prescribed form is filed in the case and marked as Ex. A-11. It has to be signed by the Collector which includes Joint collector. Though the definition 2(b) contemplates that the authorised fair price shop means a retail dealer appointed or authorised or approved by or on behalf of the State Government the prescribed form states that a retailer is hereby approved as an authorised fair price shop keeper for the purpose of this order. The learned counsel for the 1st respondent stresses on the point that Cl. 2(b) contemplates appointment. It is no doubt true Cl. 2(b) contemplates the appointment or in the alternative authorisation or approval. In the present case it is the authorisation that was given in the prescribed form but not the appointment. It is not as if Chamala Surayya was appointed by or on behalf of the Government but he was approved as an authorised fair price shop dealer. Though an order of appointment can be issued as per the provisions of Order 1973 the alternative

mode of authorisation was prescribed in the form, and it was the authorisation that was issued. It is further urged that the prescribed form of authorisation contemplates under Condition 9 Departmental action or prosecution or both as the case may be for any contravention of the provisions of the order and hence the authorisation is in the nature of office. It only relates to taking of an action of cancelling or suspending the authorisation not against person holding the authorisation. It will be clear when we examine the other provisions of the authorisation.

32. The authorisation can be issued for a firm, co-operative society or a company in the name of a partner, the Secretary or the Manager as the case may be respectively. It is difficult to visualise that those institutions themselves are holding the office of profit under State Government. Another significant condition is the authorisation is valid only for a particular period such as 31st Dec. Under Cl. 3(4) of the Order and as per Condition 3 of the authorisation, the authorisation can be amended, suspended or cancelled during the period of its validity. This provision is a destructive of the concept of office which must be held independent of the incumbent. There is no question of amending the office muchless cancelling the office. It is significant to note that the holder of authorisation is directed to get it extended before the expiry of the period. Further the Condition 6 having prohibited the transfer of the authorisation, permits such transfer with permission under condition 7 stating "If the concern in respect of which this authorisation has been issued is to be transferred, sub-let or contracted to be run by any other person, the holder of this authorisation, shall apply to the Collector for getting the authorisation transferred to such other person. This condition clearly takes away out of the purview of the legal concept of office as the office cannot be transferred or sublet or the office cannot be considered as a concern in respect of which such a transfer or subletting is permissible. It is urged that as per the authorisation the dealer shall comply with the directions issued by the Collector regarding the purchase, sale and storage. Mere performance of the enumerated duties is not indicative that the person is holding the office. The duties of the dealer consist of obtaining and supplying schedule commodities as per the provisions of the Order of 1973. Further under the authorisation a sum, of Rs.1, 000/- shall be kept as security deposit. This order must be read with the Andhra Pradesh Scheduled Commodities (Licensing & Distribution) Order, 1982. As per Cl. 3 of the said order no person shall carry on business as a dealer except under and in accordance with the terms and conditions of the licence issued in this behalf by the Licensing Authority. The order contemplates licence to be obtained in respect of sugar, food grains, pulses and edible oils. All the food grains are included in the definition of Scheduled commodities given under this order and hence the retail dealer who carries on business must take licence under the A.P. Scheduled commodities given under this order and hence the retail dealer who carries on business must take licence under the A.P. Scheduled Commodities (Licensing & Distribution) Order and irrespective of the authorisation to be issued under the A.P. Scheduled

Commodities (Regulation of Distribution by Card System) Order, 1973, he cannot carry on the business in food grains without necessary licence under the A.P. Scheduled Commodities (Licensing & Distribution) Order, 1982 and hence it is clear that in addition to the licence already obtained under the A.P. Scheduled Commodities (Licensing & Distribution) Order, 1982 the authorisation under 1973 Order is issued which is also in the nature of a licence or permit. Further the source of remuneration is not decisive though it is also one of the criteria. It is admitted that no perquisite is paid under this authorisation. The mere margin of profit that the retail dealer obtains as he was permitted to sell the goods at the stipulated rate higher than the rate at which he purchased from the Government cannot be considered to be any emoluments or perquisites attached to the said office.

33. Thus it is seen, an authorised fair price shop is not a substantive post much less exists independent of its incumbent. The retail dealer is not appointed to hold that said post. The authorisation makes the retail dealer an approved dealer. The specified obligations of obtaining and supplying the scheduled commodities in accordance with the provisions of the Order of 1973 would not make him a holder of office. The consequence of the contravention of the provisions of the Order by the retail dealer is forfeiture of the security deposit or the cancellation of authorisation and beyond that he is not personally liable and his personal conduct cannot be the subject matter of any disciplinary action. It is inconceivable that if the authorisation itself is an office the said authorisation can be varied, amended, suspended or cancelled. Further the very fact that the authorisation can be transferred with permission puts the matter beyond doubt that the same cannot be considered as an office. Admittedly no emoluments are attached to this authorisation and the margin of profit that the retail dealer earns by selling the scheduled commodities is part of his commercial activity and cannot be considered to be profit attached to the office.

34. Hence I hold that the authorisation, is in the nature of a licence or permit and the retail dealer is only an approved authorised fair price shop keeper for the purpose of A.P. Scheduled Commodities (Regulation of Distribution by Card System) Order, 1973.

35. Once I hold that Chamala Surayya is not holding an office of profit within the meaning of Art. 191 of the Constitution of India it must follow that the nomination of Chamala Surayya was improperly rejected. Hence my finding on issue Nos. 3 and 4 is that the nomination of Chamala Surayya was improperly rejected and the said Chamala Surayya is not holding office of profit within the meaning of Art. 191 of the Constitution.

36. The should have been sufficient for disposing of this petition, as the Returning Officer rejected the nomination only on this ground. But the learned counsel for the 1st respondent wanted to justify the order of the Returning Officer on the ground that the said Chamala Surayya was disqualified under Sec. 9-A of the Act and for that an additional issue was framed on 13-3-84. I think

this Court can permit him to justify the order of the Returning Officer and accordingly the additional issue was framed though that was not the ground on which the nomination of the said person was rejected.

37. Let us look at the main Sec. 9-A of the Act which is in the following terms: -

"9A. Disqualification for Government Contracts, Etc. - A person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by that Government."

We are not concerned with the Explanation of the Section in this case - The main section posits that in order to sustain disqualification of the returned candidate the following conditions must be satisfied.

(1) The Returning candidate should have entered into contract with the appropriate Government.

(2) The contract must have been entered into in the course of the trade or business of the contractor and not merely as a casual transaction.

(3) The contract must only be either for supply of goods to the appropriate Government or for execution of any work undertaken by that Government.

(4) The said contract shall be subsisting on the relevant date.

38. As per Sec. 36 of the Act, the nomination of the candidate can be rejected if on the date fixed for scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat either under the provisions of Arts. 84, 102, 173 and 191 of the Constitution of India or part II of this Act. Sec. 9-A is under Part II of the Act. Hence we have to see whether the requirements of Sec. 9-A are fulfilled or not. It must be said that the contention that he was holding an office under Art. 191 of the Constitution is inconsistent with this contention that he is holding subsisting contract.

39. I must say at the forefront the existence of such contract is not proved. The petitioner filed Ex.. A-20 wherein an endorsement was made by the Tahsildar Parvathipuram saying that as per the records available in the Taluka Office an agreement was taken at the time of issuing authorisation to Chamala Surayya as Fair Price shop dealer of Basangi as there is no such provision in the Rules. The said Chamala Surayya was examined as P.W. 2 and he deposed that he has not executed any contract. But nonetheless it was argued on behalf of the 1st respondent that as per the prescribed form appended to the communication marked Ex. B-7 Chamala Surayya might have executed an agreement and for that purpose the 1st respondent examined R.W. 3 Head Clerk, Sub Collector's office, R.W. 3 admitted that there is no agreement executed by Chamala Surayya in the Taluk office of Parvathipuram. Significantly he also admitted not only the agreement executed by Chamala Surayya in the Taluk office of Parvathipuram.

Significantly he also admitted not only the agreement of Chamala Surayya but no other agreement executed by any person is available in the taluk office but strangely the respondents filed certified copy Ex. B-7 in the case said to be the communication sent by the District Collector to all Taluk Offices and Deputy Tahsildars stating that "A copy of the Board's Reference together with a copy of agreement to be executed by the F.P. shop dealer is herein closed for necessary action. I request you to see that the F.P. shop dealers in your area executed the agreements on the non-judicial stamped paper worth Rs.5/- and send compliance reports soon. This should be treated as specially urgent". When the petitioner objected stating that the form appended to Ex. B-7 is not the prescribed form, the 1st respondent took summons to the Commissioner of Civil Supplies and failed to examine him. However the Government Pleader produced the relevant file wherein the communication of the Board dated 26-9-74 stating that the agreement by the fair price shop dealer shall be take non a non-judicial stamp paper worth Rs.4.50. the original copy of the prescribed form of contract appended to Ex.B-7 filed into court is not available in the file. Hence it is clear that there is no proof of prescribing a form of agreement. Clause 6 of the Order 1973 empowers Government to issue regulations. No such regulation prescribing any form of agreement is forthcoming. In fact the terms of form of agreement are contrary to present authorisation. Ex. B-7 speaks of appointing the dealer. Further the endorsement of the Tahsildar under Ex. A-20 clearly proves that no agreement was taken in the entire Parvathipuram Taluk not only from Chamala Surayya but from any other retail dealer. In fact as per sub-clause (3) of Clause 3 of the Andhra Pradesh Scheduled Commodities (Regulation of Distribution by Card System) Order, 1973 all agreements executed by any authrised fair price shop for being appointed or approved and which was in force immediately before the commencement of this Order shall stand cancelled except for saving previous rights. Hence it is clear under this Order no agreement is contemplated but an issuance of authorisation alone by the Collector was contemplated, and hence I hold there is no proof of existence of a contract between Chamala Surayya and the State Government as contemplated under Sec. 9-A of the Act.

40. It is urged, for the 1st respondent and with special emphasis by the Government Pleader that the authorisation itself shall be treated as a contract. According to the learned counsel for the respondents there is no compulsion for the retail shop dealer to obtain the authorisation and when he applies for authorisation and when such authorisation was issued it amounts to entering into contract as he was required to make security deposit under Cl. 3 of the Order. It is difficult to hold that the authorisation itself is in the nature of contract. I have already examined the provision of this order when I considered the question whether it constitutes an office of profit within the meaning of Art. 191(1)(a) of the constitution, and I hold that the authorisation is in the nature of a licence or permit and I am also inclined to hold on the same reasoning that the authorisation is not a contract within the meaning of Sec. 9-A of the Act.

41. In this connection it is necessary to refer to the Legislative history of Sec. 9-

a of the Act. The said provision corresponds to S. 7(d) prior to Amending Act 58 of 1958. Prior to the amendment the section stood as follows: -

"7. A person shall be disqualified for being chosen, as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State.

Xx xx xx

(d) If, whether by himself or by any person or body of persons in trust for him or for his benefit or on his account, he has any share or interest in the contract for the supply of goods to, or for the execution of any works or the performance of any services by, the appropriate Government."

This Cl. (d) was substituted by the following Cl. 7(d) by Act No. 58 of 1958: -

"7(d) If there subsists a contract entered into in the course of his trade or business by him with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by, that Government;"

The relevant part of objects and reasons for this Amendment states: "It is accordingly proposed to re-draft Section 7(d) in a simpler and more rational way so as to bring within its purview only two categories of contracts entered into by a person with the government in the course of his trade or business. These two categories are contracts for the supply of goods and contracts for the execution of any works". It is clear the other category of contracts for the performance of any services was omitted

42. The Representation of the People (Amendment) Act, 1966 has replaced S.7 (d) by the present S. 9-A with Explanation added to it. In this connection it is pertinent to note that the Representation of the People bill, 1950 as it emerged from the Select Committee contained sub-clause (ii) to Cl. (d) of S.7 and it reads thus:

"He holds a licence, permit or authorisation of a like nature issued by the Government of India or the Government of any State under a law regulating the supply, movement or price of any goods for the purpose of trading in such goods."

It appears there are several minutes of dissent against the above sub-clause which was deleted altogether by parliament, for it was felt that to disqualify a licence or permit or authorisation holder from being a member of the Legislature would be tantamount to disenfranchising almost the whole commercial community. The Parliament took the view that to disqualify licence and permit holders would be to disenfranchise countless persons, i.e. almost the whole business community and hence, sub-cl. (ii) was deleted and only Cl. (d) remained on the statute book. Gazette of India No. 9, Part II Section 2 dated 14-4-1951, Bills and Reports of Select Committees on Bills. Now the question is in the absence of any agreement entered into between the parties can this

authorisation itself constitute an agreement. It is urged by the learned counsel in cases arising under A.P. Excise Act this court took the view that even though no formal contract was entered into the highest bidder becomes the contractor and the bid can be enforced on the basis of a contract. (vide L.Ch. Satyam v. Collector, Visakhapatnam, (1974) 1 APLJ 45 and G.P. Rahim Khan v. Govt. of A.P. (1974) 2 APLJ 80. I have no hesitation in holding that this does not furnish any analogy to the present case and the requirements of Sec. 9-a are quite different and the said provision restricts the prohibition to two types of contracts.

43. In fact this Court in B. Lakshmikantha Rao Vs. D. Chinna Mallaiah and Others, held that the contracts entered into by the returned candidate with the State Government to sell toddy and arrack did not come within the mischief of Sec. 9-A of the Act as they were neither for supply of goods to the Government nor for the execution of any works undertaken by the Government and consequently the said provision is not attracted. It is true that if the basis of jural relationship is contractual the invalidity of the contract would not detract from the operation of the provision and hence the cases relied upon by the learned counsel reported in Chatturbhuj Vithaldas Jasani Vs. Moreshwar Parashram and Others, and Bhagwan Singh Vs. Rameshwar Prasad Sastri and Others, , wherein it was held that if a contract was entered into even though it is unenforceable the disqualification will be attracted, have no application. In this case no attempt is made to show that a contract was entered into by correspondence or any such correspondence constitutes contract within the meaning of Sec. 9-A of the Act. It is no doubt true the Supreme Court held that contract by acceptance of tender by State Government not complying with Art. 299(1) of the Constitution of India may constitute a contract to attract Sec. 9-a of the Act. (Vide Abdul Rahiman Khan Vs. Sadasiva Tripathi, . But in the absence of any material to show such an offer or acceptance on the part of the Government and the candidate, in question it is not possible to hold that a contract was entered into between parties even though it is not in writing and even though, it is not in accordance with the provisions of the constitution. Further Cl.3 (3) supersedes all agreements entered into with fair price shop dealers and the authorisation is made unilateral and one sided and hence the respondents are forced to contend that the authorisation itself constitutes a contract within the meaning of Sec. 9-A of the Act.

44. It is necessary to make a distinction between a contract and a licence. The meaning of the word "Licence" given in The New Webster Dictionary is: "authority given to act in a particular way; power conferred upon a person by proper authority, to do particular acts, practice in professions, conduct certain trades, etc; the document containing such authority;". The same authority gives the meaning of the word "contract" "An agreement or mutual promise upon lawful consideration or cause which binds the parties to a performance; a bargain". But we have got a statutory definition of contract in Sec. 2(h) of the Contract Act 9 of 1872 stating "An agreement enforceable by law is a contract". It is pertinent to note how Latham, C.J. defined license; "It is an authority to do

something which would otherwise be wrongful or illegal or inoperative" Vide Federal Commissioner of Taxation v. United Aircraft Corporation, 68 CLR 525. It is no doubt true that even for licence and the application and the order or the authority granting the licence would not make any contract between the parties. It is true a licence can be created under a contract. The requirements of a contractual licence are quite different. Halsbury's Laws of England, Third Edition Vol. 23 page 431 states "To establish a contractual licence there must be a promise which is intended to be binding and is either supported by consideration, or is intended to be acted on and is in fact acted on" and hence the contractual basis for this authorisation must be established. The provisions of Card System Order, 1973 disclose that the authorisation is clearly in the nature of a licence as observed by the Supreme Court in Dwarka Prasad Laxmi Narain Vs. The State of Uttar Pradesh and Others, in considering the validity of some of the provisions of U.P. Coal Control order, 1953 it is stated "Nobody can dispute that for ensuring equitable distribution of commodities considered essential to the community and their availability at fair prices, it is quite a reasonable thing to regulate sale of these commodities through licenced vendors to whom quotas are allotted in specified quantities and who are not permitted to sell them beyond the prices that are fixed by the controlling authorities. The power of granting or withholding licences or of fixing the prices of the goods would necessarily have to be vested in certain public officers or bodies and they would certainly have to be left with some amount of discretion in these matters." The question is whether the State is exercising licensing power or entering with contracts for distributing scheduled commodities.

45. In order to establish that the authorisation itself is a contract within the meaning of Sec. 9-A of the Act, it must be established that the authorisation was issued by the appropriate Government as a contracting party. As per Art. 299 of the Constitution of India "All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise". Firstly the prescribed form of authorisation issued does not stipulate that it should issue in the name of the Governor or on behalf of the Governor. In fact Ex. A-11 the authorisation in the present case was signed by the Sub Collector and the same was not purported to be issued in the name of the Governor or on behalf of the Governor. It is also not shown that the Collector was authorised to sign on behalf of the Governor. Therefore the requirements of Art. 299 of the Constitution of India are not satisfied. Secondly the authorisation is clearly an unilateral document, and casts no obligation whatever on the part of the Government or on any authority on behalf of the Government. Thirdly the authorisation totally lacks mutuality and finality. The person holding the authorisation cannot enforce the so called contract against the Government and compel them to provide the scheduled commodities for

distribution among the card holders. It is impossible to treat the authorisation as a contract as no finality is attached to it, as the said authorisation can be varied, amended, suspended or cancelled and thus the essential ingredients of a contract with the Government are wholly lacking. The provisions of appeal and Revision in the Order of 1973 instead of a provision for arbitration is destructive of the theory that the authorisation is a contract. Further any retail dealer who is carrying on the business in scheduled commodities can apply for authorisation and the authorities are bound to consider the application and pass the order in accordance with law. this is also indicative of the fact that it is not a contract to be entered into by the Government. Hence I hold that the authorisation is in the nature of a licence or a permit but not a contract within the meaning of Sec. 9-A of the Act and the holder of a licence or a permit is not hit by the said provision.

46. Once I hold that authorisation is not a contract but a licence it is unnecessary to go into the other question viz., whether the authorisation is in the nature of a contract for the execution of the works undertaken by the Government. However as the said question was argued at length it is necessary briefly indicate the line of argument to complete the debate. Even assuming that the authorisation constitutes a contract. I am not persuaded to hold that it is in the nature of a contract for execution of works undertaken by the Government as it is admitted that it is not a contract for supply of goods to the Government.

47. It is argued that under the Essential Commodities Act 1955 (Act 10 of 1955) it is one of the duties of the State to supply and distribute certain commodities and hence the present order The Andhra Pradesh Scheduled Commodities (Regulation of Distribution by Card System) Order, 1973 was issued to supply the scheduled commodities to the public and in furtherance of that works the authorisation was issued and hence the authorisation is in the nature of contract for the works undertaken by the Government. It is pertinent to note that the legislature has deliberately omitted the words in Sec. 9-A "or the performance of any services" which is very significant and this question was examined in Satya Prakash Vs. Bashir Ahmed Qureshi, , wherein it was held that "the expression "for the execution of any works" occurring in S.7 (d) and the use of the plural word "works" indicates that what is contemplated by the Section is the carrying out of something to be built or constructed and not merely something to be done", and accordingly distinguishing the earlier judgment of the Supreme Court in N. Satyanathan Vs. K. Subramanyan and Others, , it was held that after the Amending Act 58 of 1958 a contract by which a person undertakes to transport the postal articles and mail bags cannot be said to be a contract for the supply of goods or for the execution of any works undertaken by the State. This view was accepted in Yugal Kishore Sinha Vs. Nagendra Prasad Yadav, and also in Brahma Dutt Vs. Paripurna Nand Family and Others, and I am also inclined to take a similar view.

48. In Ram Padarath Mahto Vs. Mishri Singh and Another, their Lordships of the Supreme Court held that the contract to stock and store food grains in pursuance

of the grain and supply scheme of the Government constitutes only contract of bailment and did not attract Sec. 7(d) of the Act. Their Lordships held that the contract of bailment which imposed on the bailee the obligation to stock and store the food grains in his godowns cannot be said to be contract for the purpose of service of the sale of grain which the State Government had undertaken within the meaning of Sec. 7(d). This case arose prior to the Amending Act 58 of 1958. Their Lordships distinguished *V.V. Ramaswamy v. Election Tribunal, Tirunelveli*, (1953) 8 ALLER 233 (Mad) where a contract was not only for stocking and storing of the food grains but also for disposing of it in which case the contract will be contract for service which the State Government has undertaken to perform. Some judgments were delivered by the Election Tribunals touching this question prior to the Amending Act 58 of 1958. It was held that a person holding a licence from the Government for supply of sugar to ration card holders under Sugar and Ghur Control orders was held to be not a person "interested in a contract for the supply of goods to, or the performance of any services by, the Government "within the meaning of S.7, cl. (d)". (Vide *Pandit Harish Chandra v. Raja Man Singh*) (1953) 5 ALLER 129. Similarly the owner of a food grain depot under the licence from a State in which the scheme of rationing, procurement and distribution of grains laid down by the Essential Supplies (Temporary Powers) Act, 1946, is in force, is not disqualified under Sec. 7(d) of the act. (vide *Gain Chand v. Sri Ram Bansal*) (1952) 2 ELR 136. Similarly in *Chiranjit Singh v. Ram Raj* (17) (sic) it was held that a person who was appointed as a depot-holder and authorised by the Government to supply rationed food grains to card-holders in accordance with the provisions of the Rationing Order, is a mere licensee and not a person who has entered into a contract with the Government within the meaning of Sec. 7(d) of the Act. It can be seen after the Amending Act 58 of 1958 there cannot be any doubt that the authorisation cannot be hit by Sec. 9-A of the Act.

49. Hence I hold (i) on the relevant date there is no subsisting contract between Chamala Surayya and the Government and in fact no contract was entered into by him. (ii) The authorisation Ex. A-11 issued by the Collector does not constitute a contract. (iii) Even assuming that authorisation itself constitutes a contract it is not either for supply of goods or for execution of any works undertaken by the Government and consequently Sec. 9-A of the Act is not attracted. Accordingly I hold on the additional issue that the rejection of the nomination of chamala Surayya cannot be justified as he has not incurred any disqualification under Sec. 9A of the Act.

50. Now the distinction between improper rejection and improper acceptance of nomination paper is clearly pointed out by the Supreme Court in *Mahadeo Vs. Babu Udai Pratap Singh and Others*, and it was held, after the Amending Act 27 of 1956 in regard to cases of improper rejection of a nomination paper, the material effect of such improper rejection on the election itself was implicit and could be presumed without any evidence. The rejection of a nomination of even a third party i.e. other than the election petitioner comes within the mischief of

Sec. 100(1)(c) of the Act and the election can be declared as void without any further proof that the election has been materially affected. This legal position is not disputed and cannot be disputed by the learned counsel for the respondents. In fact recently the Supreme Court in Vivekanand Giri Vs. Nawal Kishore Sahi, accepted the view of Patna High Court when the election of the successful candidate was set aside on the ground of rejection of nomination of a third party Ram Kumar Jha other than the election petitioner. Hence in view of my finding on issues 3 and 4 and the additional issue, I hold on issue No. 5 that the rejection of nomination of Chamala Surayya has vitiated the result of election of the 1st respondent from No. 9 Parvathipuram Constituency as Member of the A.P. Legislative Assembly made on 6-1-1983 is void and is hereby set aside. I also direct that the parties shall bear their own costs as the 1st respondent is in no way responsible for the illegal rejection of the nomination in question. I fix the fee of the Government Pleader at Rs.500/-.

Before I part with this case, I must add that the 1st respondent is quite innocent and the law has fallen very heavily on his head. The rejection of nomination of a third party was not at the instance of the 1st respondent but nonetheless the people's verdict in favour of the 1st respondent was nullified and he is the victim of this legal position which is very harsh indeed. The Parliament should make suitable amendment to minimise this hardship. If this position is allowed to continue as it is based on high public policy permitting even an elector to question the election, every candidate in the election should, far from being jubilant if a nomination of a rival candidate is rejected, must take special interest and caution and see that on flimsy and irrelevant grounds the nomination of any of his rival candidates is not rejected, lest he has to pay very heavily for such mistakes even though he was no way responsible for the same.

51. Order accordingly.