

(2013) 11 GAU CK 0040
In the Gauhati High Court
Case No : Writ Petition (C) No. 6024 of 2013

Hiphei and Others

APPELLANT

Vs

The State of Mizoram and Others

RESPONDENT

Date of Decision : 06-11-2013

Acts Referred:

Citation : AIR 2014 Guw 22

Hon'ble Judges : M.R. Pathak, J;B.K. Sharma, J

Bench : Division Bench

Advocate : Michael Zothankum and A.D. Choudhury, for the Appellant; P. Pathak, Ms. Changkakati, A.K. Sarma, G.A. and D. Baruah, SC, for the Respondent

Final Decision : Allowed

Judgement

B.K. Sharma, J.—The 3 (three) petitioners are the elected members of 3 (three) autonomous district councils in the State of Mizoram, namely, Mara Autonomous District Council; Lal Autonomous District Council and Chakma Autonomous District Council, constituted under Para 2 of the 6th Schedule to the Constitution of India. They were elected as such pursuant to the elections held in May, 2012; December, 2010 and April, 2013 respectively. As members of the respective district councils, they have further been elected as chairman, Chief Executive Member and Chief Executive Member respectively of the said district councils. The question for determination in this writ petition is as to whether the petitioners hold any office of profit rendering them ineligible or disqualified from contesting the ensuing Assembly election in the State of Mizoram.

2. As per the rules framed under para 2 of the 6th Schedule to the Constitution of India, the district councils are body corporate having perpetual succession and common seal. The members consisting of the said councils are required to be elected on the basis of adult suffrage with a provision of few members to be nominated by the Governor of the State. Under the rules, the elected members are not removable either by the Govt. of India or the Govt. of Mizoram. As stated

in the writ petition, neither the Govt. of India nor the Govt. of Mizoram is having any power to control the manner in which the duties of the members of the district council are to be performed nor there is any power vested with the Government to give direction in that behalf.

3. The State of Mizoram obtained the state-hood on 20-2-1987 by way of enactment of the State of Mizoram Act, 1986. Prior to that, Mizoram was a Union Territory. The Mizoram Legislative Assembly enacted the legislation for removal of certain disqualification for being chosen as and for being a member of the Mizoram Legislative Assembly which is called the Mizoram Union Territory Legislative Members (Removable of Disqualification) Act, 1975. Schedule 4 of the Act provided that the office of the Chief Executive Member, Executive Member, Chairman, Vice-Chairman or Member of any Autonomous District Councils and the President, Vice President or Member of any Village Council constituted in Mizoram under any existing law or regulation shall not be treated as disqualification for being chosen as and for being a member of the Mizoram legislative Assembly. However, by a subsequent amendment called the Mizoram State Legislature Members (Removal of Disqualification) (Amendment) Act, 2006, Schedule 4 stood deleted. For a ready reference, the relevant clause (Un-amended) are quoted below:--

1. to 3.

4. The (office of the Chief Executive Member, Executive Member, Chairman), Vice-Chairman or Member of any Autonomous District Councils and the President, Vice-President or member of any Village Council constituted in Mizoram under any existing law or Regulation. 5. to 10.

4. According to the petitioners, deletion of Clause 4 of the schedule to the Act, of 1975 is un-reasonable, violative of Article 14 of the Constitution of India and also against the basic object and principle underlying in Article 191(1) of the Constitution of India. It is the further case of the petitioners that they being not holders of any office of profit, they cannot be debarred from contesting the ensuing election scheduled to be held in the month of December, 2013. Agitating their grievance in this respect, they had made Annexure-6 representation dated 20-9-2013 but the same having replied in the negative vide Annexure-7 communication dated 25-9-2013, they have filed the instant writ petition.

5. According to Mr. Michael Zothankum, appearing along with Mr. A.D. Choudhury, learned counsel for the petitioners, irrespective of deletion of clause 4 to the schedule of the Act, the petitioners being not holders of any office of profit contemplated in the context of earning disqualification for being chosen as and for being a member of the MLA, the petitioners are entitled to contest the election while remaining as Member of the respective district council. In this connection, he has placed reliance on the decisions of the Apex Court reported in Pradyut Bordoloi Vs. Swapan Roy, Shibu Soren Vs. Dayanand Sahay and Others, and Bhagwati Prasad Dixit "Ghorewala" Vs. Rajeev Gandhi,

6. Opposing the argument advanced by the learned counsel for the petitioners, Mr. P. Pathak, learned senior counsel on the other hand submitted that clause-4 of the schedule having been deleted by bringing an amendment, the petitioners are not entitled to contest in the ensuing Assembly Election, they being holders of Office of Profit. Referring to the Annexure-7 clarification issued by the Joint Chief Electoral Officer, Mizoram dated 25-9-2013, he submitted that the amendment having been brought purposefully to debar the candidates holding office of profit, the petitioners, unless they resign as members of the District Council, cannot contest the election.

7. Mr. D. Baruah, learned counsel representing the respondent No. 6 i.e. the Election Commission of India placing reliance on the decision of the Apex Court as reported in *Satrucharla Chandrasekhar Raju Vs. Vyricherla Pradeep Kumar Dev and another*, submitted that unless the particular test relating to Office of Profit is clear, and/or passed by the petitioners, they cannot contest the election as members of the District Council.

8. We have given our anxious consideration to the submissions made by the learned counsel for the parties and have also perused the entire materials on record. Although, the writ petition was entertained by order dated 9-10-2013 but none of the respondents have filed any counter-affidavit. In the order dated 9-10-2013, the submission made by the learned counsel for the petitioners that in view of the Apex Court decision in *Pradyut Bordoloi Vs. Swapan Roy*, a person holding an elected office being not removable by the Government cannot be held to be holding the Office of Profit under the Government. In the said decision, the Apex Court dealing with the phrase "Office of Profit" in the context of contesting an election, held that the Government's power to appoint and remove from the office is the prime test.

9. In the aforesaid case, the respondent holding the post of a Clerk Grade-I in Coal India Ltd., a company having 100% shareholding of the Government, was held to be not holding an Office of Profit and thus did not earn any disqualification u/s 10 of the Representation of the People Act, 1951. While answering the issue as to whether a person holds an office under the Government and the determinative factor thereof, the Apex Court held that the first and foremost question to be asked is.....Whether the Government has power to appoint and remove the person on and from the office.....? If the answer is in the negative, no further inquiry is called for, the basic determinative test having failed. However, if the answer be a positive one, further probe is to go on in respect of the other factors pointed out in its earlier decisions.

10. In the instant case, it is nobody's case that the petitioners are holders of Office of Profit being conferred by the Government by appointing them as members of the District Council and thereafter as Chairman and Chief Executive Member. Both the positions earned by them are by virtue of elections, firstly, as member of the District Council and secondly as Chairman and Chief Executive Member. Thus, the answer to the basic question is in the negative. They have

neither been appointed by the Government nor are removable from their offices by any intervention of the Government. If that be so, they having passed the basic test irrespective of deletion of clause-4 of the schedule to the Act of 1975, in our considered view, they are entitled to contest the election even without resigning from their present office as Member and Chairman/Chief Executive Member of the respective District Councils.

11. In *Shibu Soren Vs. Dayanand Sahay and Others*, dealing with the term "Office of Profit" and the interpretation thereof, the Apex Court referring to its earlier decision in *Satrucharla Chandrasekhar Raju Vs. Vyricherla Pradeep Kumar Dev and another*, emphasized on the determining factor on the question as to when can a person be said to be holding an Office of Profit "Under the Government", in reference to the power of the Government to appoint a person in Office or to revoke his appointment at its discretion. The mere control of the Government over the authority having the power to appoint, dismiss or control the working of the Office employed by such authority does not disqualify that Officer from being a candidate for election as a member of the Legislature.

12. In *Bhagwati Prasad Dixit "Ghorewala" Vs. Rajeev Gandhi*, the plea that a person becomes disqualified for membership of either house of Parliament in case he is in receipt of salary and amongst payable to such member was held to be not tenable.

13. Mr. D. Baruah, learned counsel representing the Election Department has referred to the decision of the Apex Court in *Satrucharla Chandrasekhar Raju Vs. Vyricherla Pradeep Kumar Dev and another*, more particularly, paragraphs 18 and 32 thereof. In the said decision, the Apex Court recording the findings that the appellant was holding an Office of Profit and emphasizing the need to bear in mind, the test in reference to Articles 102(1)(a) and 191(1)(a) of the Constitution of India, held that the most important requirement is whether the office is under the Government. It was held that while appreciating that aspect of the matter, it will have to be borne in mind the object, namely, to avoid conflict between duty and interest and to eliminate the misuse of official position to advance private benefit and to avoid likelihood of interference of the Government to promote personal advantage. In the instant case, it is not the case of any one of the respondents that the petitioners as Members and Chairman/Chief Executive Member of the respective District Council are holders of Office under the Government and there is likelihood of conflict between duty and interest and there is possibility of misuse of official position to advance private benefit.

14. As specifically pleaded in the writ petition, the Rules for constitution and conduct of business of the District Council mandates that the Government has nothing to do in the election of its Members. Moreover, being an elected Office, the Government has no power to remove the returned candidate of the District Council from its office nor the District Council Rules provide such powers to the Government. Looking at the matter from that point of view, the impugned amendment, if read in the context of debarment of the petitioners from

contesting the Assembly Election, would be violative of Article 191(1)(a) of the Constitution of India.

15. In the instant case, neither the Government of India nor the Government of Mizoram is the appointing authority of the petitioners. They are holding their respective office only by virtue of election by the electorate of the District Council constituted under Para 2 of the 6th Schedule of the Constitution of India. Neither the Government of India nor the Govt. of Mizoram is vested with the powers to terminate the office of the petitioners. As stated in the writ petition, the Executive, either of the Govt. of India or the State of Mizoram has any authority to determine the remuneration of the petitioners and their remunerations are determined by way of Rules framed under Para 11 of the 6th Schedule of the Constitution of India.

16. During the course of hearing of the writ petition, the learned counsel for the petitioner has drawn our attention to the Lai Autonomous District Council (Constitution and conduct of Business) Rules, 2001. Rule 11 of the said Rules specifically provides that subject to the provision contained in any law made under Article 191 of the Constitution of India, no person shall be or continued to be simultaneously a Member of the District Council of two or more Autonomous District Council or a Member of the District Council and of the Mizoram Legislative Assembly (MLA). Referring to this provision, the learned counsel for the petitioners submitted that once the petitioners are elected to the MLA, they will cease to be members of the District Council.

17. Above being the position and not disputed by the official respondents except by the newly impleaded respondent i.e. the respondent No. 7, who is the present Member of the MLA, 37th Lawngtlai, West Constituency, we are of the considered opinion that irrespective of the amendment brought in 2006 (Annexure-5) to clause 4 of the Act of 1975, the petitioners are entitled to contest in the ensuing election and the reasons assigned in the impugned communication dated 25-9-2013 (Annexure-7) is not sustainable in law. Consequently, the petitioners will be entitled to contest in the ensuing election slated to be held in the State of Mizoram, for which last date of submission of nomination is 8-11-2013. Writ petition is allowed. There shall be no order as to costs.