(2005) 05 BOM CK 0053

In the Bombay High Court

Case No : Election Petition No. 2 of 2002

Jose Philips Domingo D''Souza APPELLANT

Vs

Shri Rajendra Vishwanat Arlekar and Others RESPONDENT

Date of Decision : 27-05-2005

Acts Referred:

Companies Act, 1956 — Section 6(17)
Constitution of India, 1950 — Article 102(1)(a), 116, 125, 14, 191
General Clauses Act, 1897 — Section 2(58)(b)
Government of Union Territories Act, 1963 — Section 13, 14, 14(1), 3
Representation of the People Act, 1951 — Section 100(1)(a), 103, 116A, 123, 78

Citation : (2005) 05 BOM CK 0053

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : J.E. Coelho Pereira and Mr. S. Karpe, for the Appellant; V.P. Thali and Ms. G. Pednekar, Advocates for the Respondent No. 1, for the Respondent

Judgement

N.A. Britto, J.—The petitioner herein is one of the defeated candidates while the respondent No. 1 ("respondent", for short) is the returned candidate at the elections held on 30.5.02 to the 25-Vasco-da-Gama Assembly Constituency in the State of Goa. In this petition filed u/s 100(1)(a) and (b), of the Representation of the People Act, 1951, the petitioner has challenged the election of the respondent on the allegation that the respondent was disqualified to be chosen as a member of the Legislative Assembly of Goa on the ground that he had held an office of profit being the Chairman of the Goa State Scheduled Castes and Other Backward Classes Finance & Development Corporation Limited ("Corporation", for short) and for having indulged in corrupt practices at the said election.

2. The respondent was appointed as a Chairman of the said Corporation by the Government by Order No. 13-4-90/SWD/Part dated 9.2.2000 and published on Gazette dated 9.3.2000 - Exh. 61 in exercise of the powers conferred under Cause 116 of the Articles of Association of the said Corporation by re-constituting

the Board of Directors of the said Corporation and the respondent held that position until 11.6.04 when the Board was re-constituted again with one Advocate Shri Adpaikar as the Chairman and other Directors except one who was retained.

3. The Corporation was initially registered as a Government Company under the Companies Act, 1956 with the Government of Goa having 51% of shares and the Central Government having 49% of shares on or about 2.4.1990 as Goa State Backward Classes Finance and Development Corporation Ltd. and the name of the said Corporation was changed to what it is at present on 12.8.93. The promoters were all Government servants, so also the first Directors, as can be seen from the memorandum and Article of Association - Exh. 42.

4. The Legislative Assembly was dissolved on 27.2.02 and as per the Schedule of Elections announced by the Election Commission - Exh. 55 the model Code of Conduct came into effect from 17.4.02, the last date for filing nominations was 13.5.02. and the respondent was declared as the returned candidate.

5. The following issues were framed by this Court after hearing he learned counsel on behalf of both the parties:-

(1) Whether the Petitioner proves that the Respondent No. 1 being the Chairman of the Goa State Scheduled Castes and Other Backward Classes Finance and Development Corporation Ltd. was holding an office of profit under the State Government on the date of Election to 125-Vasco-da-Gama Constituency?

(2) Whether the Petitioner proves that the respondent has committed corrupt practices as enumerated in para 14 clauses (a) to (f) of the petition?

(3) Whether the petitioner proves that he is entitled to be declared as duly elected?

(4) What relief? What Order?

6. I shall first deal with the case of the petitioner as regards Issue No. 2.

7. The petitioner enumerated the corrupt practices allegedly committed by the respondent in para 14, clauses (a) to (f), but the petitioner in the course of his evidence, abandoned the said allegations except those of clauses (d) and (f) of para 14 of the petition.

8. As per the petitioner, the respondent personally distributed cheques to a number of beneficiaries under the Dayanand Social Security Scheme on 18.5.02 after the nomination. Dayanand Social Security Scheme is a scheme of the Social Welfare Department of the Government of Goa and the Life Insurance Corporation. The petitioner obtained the list of the D.S.S.S. beneficiaries for Mormugao Taluka from Life Insurance Corporation of India, Panaji, Goa. Shri Audesh Narayan Tripathi - serial No. 230 of the said list was handed over cheque dated 1.5.02 for Rs. 500/- by the respondent on 18.5.02. Shri Khanolkar Vinayak Vishnu at serial No. 239 was handed over the cheque dated 1.5.02 for Rs. 500/-

on 18.5.02. Smt. Tarabai Gaude at serial No. 241 was handed over cheque dated 1.5.02 for Rs. 500/- on 18.5.02. All the three cheques were drawn on Corporation Bank, Panaji. These acts of the respondent are in violation of the Code of Conduct and amounts to corrupt practice in the election. Likewise, the petitioner pleaded that the respondent granted sanction for a loan of Rs. 80,417/- under letter dated 25.4.02 from the funds of the Corporation in violation of the Code of Conduct which amounts to corrupt practice in the election.

9. The respondent denied the said allegations of clauses (d) and (f) of para 14 of the petition levelled by the petitioner and further denied that he committed any act in violation of the Code of Conduct or which amounts to corrupt practice in the election. As far as the loan is concerned, the respondent stated that the grant of sanction for the said loan is part of the duty of the Chairman of the said Corporation and the same was not in violation of any Code of Conduct and the said act did not amount to corrupt practice as defined under the Representation of the People Act, 1951. The respondent also denied that the respondent committed any act that amounts to corrupt practice in the elections.

10. In order to prove the said allegations of corrupt practices, the petitioner examined P.W.2 Sanjiv Gadkar who is the Director of Social Welfare of the Government of Goa, P.W.3 Chitra Naik who is the Branch Manager of L.I.C., P.W.5 Audesh Tripathi, P.W.6, Tarabai Gaude, both beneficiaries of the said scheme and P.W.7 Balaji Satardekar, the loanee.

11. The petitioner in his evidence stated that the Government of Goa had floated a scheme of social security entitled "Dayanand Social Security Scheme" under which the pension amount of Rs. 500/- is paid to senior citizens, single women and disabled persons and that the said payments on being sanctioned by the Social Welfare Department and the Government of Goa are effected by the L.I.C. of India. He stated that the objective of the said scheme was to provide financial assistance to the most vulnerable sections of the society and, inter alia, covers beneficiaries from communities of toddy tappers, coconut pluckers, etc. The petitioner further stated that during the time of election, as part of his election campaign, in order to induce voters to vote for him, the respondent himself distributed cheques of Rs. 500/- each under the said scheme to Audesh Tripathi, Vinayak V. Khanolkar and Tarabai J. Gaude on 18.5.02. As per the petitioner, the respondent being the Chairman of the Corporation and the Corporation being a part of the Social Welfare Department, the respondent secured from the said Department the sanction of the application of the said persons and disbursed the said amounts to coincide with the election, so that the respondent could induce the voters to vote for the respondent and therefore the respondent by the said acts, committed corrupt practices and succeeded in getting not only the votes of the said beneficiaries of the loans granted as well as the persons to whom the cheques were distributed but also their friends and family members and thereby the respondent committed corrupt practices during the election which has

materially affected the election in favour of the petitioner. In cross-examination the petitioner admitted that he had not stated in the petition that the result of the elections had been materially affected because of the corrupt practices of the respondent or because he held an office of profit. He also stated that regarding the cheques, the persons who have been named by him, came and informed him but he did not remember the dates, but they informed him immediately after 18.5.02 when the cheques were distributed. Again the petitioner stated that the cheques were distributed to the said three voters to induce them to vote and that this fact was known to him before the filing of the petition. The petitioner again admitted that he had not alleged the fact of inducement in the petition and when he was questioned again as to why he had not made the said allegation the petitioner dodged an answer and stated that he had mentioned about the same in the petition.

12. P.W.2, Gadkar, the Director of Social Welfare of the Government of Goa produced a proforma application to be made for pension under the said Scheme and produced the Rules regulating the said Scheme.

13. P.W.3, Chitra Naik stated that the said pension scheme is operated through the L.I.C. and that initially the cheques were drawn and sent to the Directorate of Social Welfare. She stated that the funds to make payment for the said pension came from the Government. She confirmed that the pension was paid to Audesh Tripathi, Vishnu Khanolkar and Tarabai Gaude from April, 2002.

14. P.W.5, Audesh Tripathi who is an Ex-Congress (I) General Secretary of the Mormugao Constituency and member of GCC(I) stated that initially he received Rs. 500/- as pension from the Government. He stated that he knew that he got the pension through the Department of Social Welfare and L.I.C. and that Mr. Arlekar (respondent) during the last elections, came with a cheque of pension of one month and gave it to him being the first payment of his pension. He stated that Mr. Arlekar came along with 40 to 50 persons and told him that his pension was passed and he asked him to vote for him and at that time Mr. Arlekar was going from house to house asking for votes. He further stated that Mr. Arlekar did not tell him as to who had managed to get the pension for him. In cross-examination he stated that he did not remember as to how many months prior to that he had made the application. He further stated that when Mr. Arlekar came with the cheques, he was going from house to house to canvass for votes. He denied the suggestion that Mr. Arlekar had not the brought the cheque and handed it over to him. When he was asked as to who he had voted for, he stated that his vote was confidential and he did not wish to tell about the same.

15. P.W.6, Tarabai Gaude, although initially stated that Mr. Arlekar had brought the pension cheque and given it to her, to cast her vote, later she stated that Mr. Arlekar gave the cheque and told her that she should vote for him. In cross-examination she stated that she knows that the pension comes from the Government. She further stated that nobody forced her to vote for any particular person and when she was asked on behalf of the petitioner itself as to whom she

had voted, she replied that one is not supposed to tell about the same. She denied that Mr. Arlekar had not given the cheque to her.

16. P.W.7, Bala Satardekar, who is an autorickshaw driver stated that he had made an application in February, 2002 for a loan of Rs. 80,000/-, but later on, on seeing the application he stated that his application is dated 19.3.02. According to him, Mr. Arlekar was the Chairman of the said Corporation and was their neighbour and in order to sanction the said loan, he had to ask for a favour and therefore he met Mr. Arlekar and told him that he would make an application for a loan, and after making the application he met him again and told him that he had applied for the said loan. He stated that in April of that year, one person by name Nuruti was sent by Mr. Arlekar and that the loan was sanctioned and he should go and collect the loan. But when the said Nuruti came to his residence, he was absent and it is the wife who told him about the same, but when he went to the office of the Corporation he came to know that the loan was sanctioned but that the rest of the formalities were not completed and he had to bring some witnesses and comply with the said formalities and therefore he again approached Mr. Arlekar and then Mr. Arlekar told him he was busy with the elections and had no time to go to the office and that he would go after the elections and do the work. P.W.7 Bala Satardekar further stated that Mr. Arlekar also told him that his loan was sanctioned and he should help him by voting for him and by telling his friends and relatives to vote for him and he told his friends and relative that Mr. Arlekar having done his work that they should vote for him. According to him he canvassed for votes amongst 450 people and he was confident that at least 400 persons must have voted for Mr. Arlekar. He further stated that he got his loan in October, 2002 when Mr. Arlekar was still the Chairman. In cross-examination he admitted that his application was complete when he filed it and he was asked whether if Mr. Arlekar was not the Chairman whether his loan would not be sanctioned and he answered by stating that he thought it to be so, but again stated that even when Mr. Arlekar was the Chairman, they took time to make payments of the loan. He was asked whether in case the petitioner was the Chairman, his work could not be done and he answered by stating that he could not say so and in case the petitioner was the Chairman he would have approached him. In further cross-examination he stated that he was entitled for the loan as per Rules when he applied for the same and further stated that in case Mr. Arlekar was not there he would not have got the loan that early as it took some time for him to get the money on account of the elections.

17. Section 123 of the Representation of the People Act, 1951 describes what are corrupt practices and which include in terms of sub-section (1) bribery which has been explained in clauses (A) and (B) which at the foot of it has an explanation; undue influence in terms of sub-section (2); an appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language, etc. in terms of sub-section (3), the

promotion of, or attempt to promote, feelings of enmity or hatred between different classes of citizens of India on grounds of religion, race, caste, community, or language, in terms of Sub-section (3-A); the propagation of the practice or the commission of sati in terms of sub-section (3-B) and propagation of false statements in terms of sub-section (4) etc.

18. It is not necessary to reproduce Section 123 of the Representation of the People Act, 1951, in detail, considering the submissions made. The petitioner has not been able to bring the facts stated by P.W.5 Audesh Tripathi, P.W.6 Tarabai Gaude and P.W.7 Bala Satardekar within the purview of any of the subsections of Section 123 of the Representation of People Act, 1951 which as already stated defines ''corrupt practices'' and all that has been stated on behalf of the petitioner is that the petitioner''s case comes under the Explanation below clause (B) of sub-section (1) of Section 123 of the said Act which reads as follows:-

Explanation - For the purposes of this clause the term "gratification" is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses bona fide incurred at, or for the purpose of, any election and duly entered in the account of election expenses referred to in section 78.

19. As can be seen from the evidence of P.W.3 Chitra Naik, P.W.4 Olinda Fernandes and P.W.5 Audesh Tripathi, at the relevant time the pension applications under Dayanand Social Security Scheme were processed through the Directorate of Social Welfare and the cheques issued by the L.I.C. were forwarded back to the Directorate of Social Welfare, Panaji, it is quite probable that the respondent being the Chairman of the Corporation and then an activist of the Bharatiya Janata party, collected the said cheques from the Directorate of Social Welfare and handed over the cheques at the time of canvassing of the votes to P.W.5 Audesh Tripathi and P.W.6 Tarabai Gaude. I am not inclined to believe the respondent that he did not hand over the said cheques to them. On the contrary, I am inclined to believe both P.W.5, Audesh Tripathi and P.W.6, Tarabai Gaude, that the respondent did hand over the cheques to them. Petitioner has not proved that the respondent was in any way instrumental in getting the said cheques issued or passed. In my view only because the respondent had distributed the cheques to the said P.W.5, Audesh Tripathi and P.W.6, Tarabai Gaude at the time of canvassing for votes and probably with a view to impress upon them that he had done some work for them, the same did not amount to corrupt practice as defined under the Representation of the People Act, 1951. As far as P.W.7, Bala Satardekar, is concerned, I am not inclined to accept his evidence as it does not inspire confidence. He had applied for loan much before the elections were announced and was disbursed the loan much after the elections. Only a sanction order was issued in respect of the loan which was applied for by him and he was called upon to complete the rest of the formalities. As already seen, when P.W.7, Bala Satardekar, approached the

respondent, Bala Satardekar was allegedly told that the respondent was busy with the elections and had no time to go to the office and that he would go after the elections and do his work, and if this is so, I find it difficult to believe that P.W.7, Bala Satardekar, would go about canvassing for votes for the respondent saying that his work was done by him. P.W.7, Satardekar, is only a rickshaw driver who claims he canvassed votes for the respondent mostly amongst his passengers and claims that he is confident that the respondent got, on that count, at least 400 votes which claim is too good to be true. That apart the said loan must have been sanctioned by the Board of Directors (as later admitted by the respondent at page 32 contrary to what he stated in para 15 of his affidavit) and there was no special favour which the respondent had done towards him. In fact, P.W.7 concedes that the disbursement of loan took a long time inspite of the fact that the respondent was the Chairman of the Corporation and in any event, it must be stated that only because the sanction order was passed by the said Corporation, it did not amount to committing any corrupt practices by the respondent. Issue No. 2 therefore has got to be held as not proved.

20. That should take us to Issue No. 3. No submission has been made that the petitioner would be entitled to be declared as elected, in case the petitioner succeeds in the petition on the other ground pleaded by him. The petitioner has stated that the respondent got 5606 votes while he got 4509 votes. He was asked as to on what basis he could have got the remaining votes and he replied by stating that the respondent got the said votes by making use of the machinery of the Corporation namely the vehicle for propaganda, the mobile phone to contact people and officers and he got more votes than him. He was again asked as to how he could say that the other votes which Mr. Arlekar got, would have come to him and he answered by stating that he was confident that he would have got them as he presumed that they were his voters. However, as already stated, he admitted that he had not pleaded in the petition that Mr. Arlekar had made use of the machinery of the Corporation namely the vehicle for propaganda, mobile phone to contact people and officers and also the Scheme. It is well settled that no amount of evidence can be accepted in support of a plea which has not been taken. In my view this issue has got to be held as not proved on the failure of the petitioner to prove that the Respondent got more votes either because he indulged in corrupt practices or because he used the machinery of the Corporation.

21. Returning to the first issue, it is the case of the petitioner that on the date of filing nomination and the date of election, the respondent was disqualified to be chosen to fill the seat under the Constitution of India and the Representation of the People Act, 1951. As per the petitioner, the Government of Goa had formed the said Corporation and incorporated the same on 2.4.90 and that the Chairman, Vice-Chairman and the Directors of the said Corporation are appointed by the Government of Goa and the first Board of Directors consisted of Government officials and subsequent Board of Directors, some non-official members were also appointed on the Board and the Government of Goa has the

right and power to remove or dismiss the holder of office at any time. The petitioner stated that in the brochure - Exh. 46, published by the Corporation, it has been stated that the said Company is an undertaking of the Government of Goa and the functions performed by the said Corporation are Government functions in pursuance of Art. 46 of the Constitution of India which are performed by the Social Welfare Department of the Government of Goa and that the whole control over the Corporation is exercised by the Government of Goa and the said brochure shows that the Board of Directors are under the Chief Minister, Social Welfare Minister, Secretary, Social Welfare Department and Director, Social Welfare Department. As per the petitioner, by Order dated 9.2.2000 the respondent was appointed as Chairman of the Board of Directors and that the said Chairman enjoys pecuniary benefits under the Resolutions of the Board which are:-

(i) a vehicle for his office and personal use, which is allotted to the Corporation by the Government;

(ii) fuel quota which was enhanced from 200 to 500 litres under the Resolution No. 14/2000 - Exh. 51 by the Board of Directors of the Corporation;

(iii) Three persons as personal staff namely a clerk, a peon and a driver who are paid by the Corporation in the account of the Chairman;

(iv) Mobile cell phone supplied by the Corporation and the aforesaid pecuniary benefits were enjoyed by the respondent as Chairman of the said Corporation. As per the petitioner for the period from 1.4.02 to 30.6.02 an expenditure of Rs. 5200/- was incurred by way of fuel consumption for the car used by the respondent. The petitioner has stated that the fuel entitlement of 500 litres of petrol when quantified in terms of money at the rate of Rs. 29/- per litre, works out to Rs. 14,500/-. The petitioner stated that towards the personal staff, the respondent was paid a sum of Rs. 64,132/- for the period from March, 2002 to June, 2002 and towards the mobile phone a sum of Rs. 6050/- for the period from 1.4.2002 to 30.6.2002. According to the petitioner, as per the Order dated 9.2.01 the entitlement of the Directors is the actual traveling allowance and that the decision of the Board of Directors to increase the petrol quota from 200 to 500 litres per month cannot be considered as perquisites granted to the respondent by way of traveling allowance to bring the respondent outside the purview of disqualification under Art. 191 of the Constitution of India and the said expenditure tantamounts to drawal by the respondent which brings him within the disqualification for holding an office of profit. According to the petitioner the expenditure of Rs. 6050/- for the said period on the said mobile and Rs. 32,834/- for the period from 1.4.2002 to 30.6.2002 on the personal staff amounts to remuneration to the respondent by the Corporation which disentitled the respondent to contest the elections and hold the office of Member of the Legislative Assembly. As per the petitioner the office of the Chairman is a public office, an office of profit under the Government of Goa and that the legislature of the State of Goa has not declared by law the office of the Chairman of the said

Corporation not to disqualify its holder.

22. On the other hand, it is the case of the respondent on this issue that the appointment of the Chairman, Vice-Chairman and the Directors of the Corporation are made in accordance with the Articles of Association of the said Corporation and the provisions of the Companies Act, 1956. As per the respondent, the holder of office could be removed only by vote in accordance with the Articles of Association of the said Corporation and the provisions of the Companies Act, 1956. The respondent denied that in the said brochure it was stated that the Company was a Government undertaking and that in any event if it is so stated, the said Corporation was not an undertaking of the Government of Goa, but a Company incorporated under the Companies Act, 1956. The respondent denied that the Corporation performed Government functions in pursuance of Art. 46 of the Constitution of India. The respondent denied that the alleged benefits were benefits or pecuniary benefits and further stated that the vehicle allotted to the Chairman was for the purpose of enabling him in the discharge of his duties as Chairman of the Corporation and to recoup the expenses towards performance of his duties and the said vehicle belonged to the Corporation and was not allotted by the Government. As far as the staff is concerned, the respondent stated that the staff was not personal staff of the Chairman, but the staff allotted by the Corporation to the Chairman. The respondent stated that the Chairman of the Corporation was provided with the staff, vehicle, fuel quota and the cell phone for the purpose of enabling him to discharge the duties as Chairman of the Corporation and to recoup the expenses towards performance of his duties. According to the respondent he was not holding any office of profit under the State Government. The respondent further stated that the Legislative Assembly of the State of Goa was not required to make any law under Art. 191(1)(a) of the Constitution of India, since the Act of 1982 continued to operate, apply and to hold the field preventing disqualification of the holder of the office of Chairman of the Corporation as per the scheme of the Goa State Reorganization Act, 1987 which made laws applicable to new areas until altered, repealed or amended by the legislature of the State of Goa.

23. The relevant portion of Article 191 of the Constitution of India on the basis of which the respondent is sought to be disqualified reads as follows:-

191(1)(a) - A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State 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 disqualify its holder;

24. The object of enacting Article 191(1)(a) of the Constitution as held by the Supreme Court is that there should not be any conflict between the duties and the interest of elected member to ensure that Legislature does not have persons who receive benefit from the executive and may on that count be under its obligation and thus amenable to its influence whilst discharging the Legislative

functions. The object which is sought to be achieved by the Legislature in disqualifying holders of office of profit under Government is obviously to avoid conflict between the duty and interest and to cut out the misuse of the official position to advance private benefit and to avoid the likelihood of influencing the Government to promote personal advantage.

25. The word ''office'' has not been defined either in the Constitution or the Representation of the People Act, 1951. The respondent for the first time in his evidence, without any plea to that effect, having been taken, has stated that his appointment was to a post without any further clarification or explanation. However, in cross-examination the respondent has admitted that he was holding the office as Chairman and that he was the Chairman of the Board of Directors. He was asked whether he was an officer of the Corporation by virtue of his being a Director and Chairman of the Corporation and he replied that he did not think so. The definition of the word ''officer'' given under the Companies Act, 1956 was brought to his notice and it was suggested to him that being the Chairman of the Board of Directors he was an officer of the Corporation and he replied that he did not think that he was an officer of the Corporation. In the written submissions filed on behalf of the respondent, it is not disputed that the respondent was not holding any office. The petitioner has stated that the Chairman had not to do any official work of the Corporation except attend the meetings. The respondent was asked as to what were his powers to be exercised besides to preside over the meetings of the Board and he answered by stating that he had powers, though there is no mention of the said powers in the Memorandum or Articles of Association. He was again asked as to whether he was assigned any duties by resolution of the Board, besides presiding over the meetings regarding the functioning of the Corporation and he answered by stating that he did not remember about the same. He admitted that he could not deny the fact that there was no such resolution by which any duties were assigned to him. Again he was asked whether any powers were conferred on him as a Director by the Board, besides presiding over the meetings of the Board and he stated that he did not remember about the same. He was again asked whether he could produce any resolution of the Board conferring any power on him as a Director besides presiding over the meetings of the Board and he answered the same by stating that he did not remember about the same. When Art. 154 of the Articles of Association - Exh. 42 was brought to his notice, he stated that Art. 154 was not for the purpose of presiding over the meetings of the Board. He was again asked for what purpose it was and he answered by stating that it was only to head the Board of Directors throughout the tenure. He was again asked if that is so, what are the functions of the Managing Director under Arts. 145 and 146 of the Articles of Association and he avoided an answer by stating that it is already mentioned in the said Articles. When further questioned that under the Articles the managing of the affairs of the Corporation was entrusted to the Managing Director, he accepted that position and further stated that he is the Chief Executive Officer. The respondent also admitted that in the Resolution taken in

the 49th meeting - Exh. 52 the Board had not specified any duties to be performed by the Chairman. The evidence of the petitioner and the respondent when read with the said Articles-Exh. 42 shows that the only duty of the office of being the Chairman was to call for and preside over the meetings of the Board and in terms of Art. 95 of the Articles in case there was equality of votes, the Chairman was to have a casting vote in addition to the vote or votes to which he was entitled to as a member. The admission by the respondent that the management of the affairs of the Corporation is entrusted to the Managing Director is borne out by Art. 145 under which the Government of Goa has power to appoint the Managing Director. P.W.8, Arjun Pednekar who is the Asst. Manager (Projects) of the Corporation, was asked whether the Chairman did not hold any office as such, and he categorically answered by stating that the Chairman holds the office of the Chairman of the Corporation. It was suggested to P.W.9, Jose Philip, who was the Managing Director of the Corporation that the appointment of the Chairman was not an appointment to an office and he answered by stating that he was having an office. It was again suggested to him that the office of the Chairman was not an office of profit and he answered by stating that the Chairman was holding an office with all the perks mentioned by him. It is therefore obvious that the respondent as Chairman of the Corporation whose duty was to preside over the meetings of the Board of Directors and to cast a casting vote where necessary was holding an office. The word ''office'' generally means a position or place to which certain duties are attached. I have already referred to the duties of the Chairman as per the Articles of Association of the said Corporation. The definition of the word ''office'' given by Justice Rowlatt in the case of Great Western Rly. Co. v. Bater was accepted by the Constitution Bench of the Supreme Court in the case of Srimati Kanta Kathuria Vs. Manak Chand Surana, and it was stated that the test to be applied was whether it was a subsisting, permanent, substantive position which had an existence independent of the person who filled it which went on and was filled in succession by successive holder. It is not the case of the respondent that he was appointed to do a particular work or to perform special duties at the end of which his Chairmanship would have come to an end after the said work or the duties were over. The Supreme Court in the case of Madhukar G.E. Pankakar Vs. Jaswant Chobbildas Rajani and Others, has stated that the holding an office denotes an office and connotes its holder and this duality implies the existence of the office as an independent continuity and the incumbent thereof for the nonce. The Supreme Court followed the view of the Constitution Bench in the case of Kanta Kathuria (supra) and held that the words "its holder" occurring in Article 191(1)(a) indicate that there must be an office which exists independently of the holder of the office and the fact that the legislature of the State has been authorised by Art. 191 to declare an office of profit not to disqualify its holder contemplates existence of an office apart from its holder. If the respondent was the Chairman of the Corporation until 10.6.04, it was Advocate Shri Adpaikar who became the Chairman from 11.6.04. This shows that the office of the Chairman is distinct, permanent and has continuity. It follows that the office of the Chairman of the Board of Directors of the Corporation which was occupied by the respondent at one time was an office within the meaning of Art. 191(1)(a) of the Constitution.

26. Was it an office of profit? is the next question which requires consideration. An office of profit is an office which is capable of yielding a profit or pecuniary gain. In the case of Shivamurthy Swami v. Agadi Sanganna Andnappa, (1971) 3 SCC 870 on which reliance has been placed on behalf of the respondent, it has been stated that the word '' profit '' connotes the idea of pecuniary gain, its quantum or amount would not be material but the amount of money receivable by a person in connection with the office he held may be material in deciding whether the office carries any profit. In the case of Shibu Soren Vs. Dayanand Sahay and Others, on which reliance has been placed by both the parties, the Supreme Court speaking through its three learned Judges, has stated that the expression ''office of profit'' has not been defined either in the Constitution or in the Representation of the People Act, but in common parlance the expression ''profit'' connotes an idea of some pecuniary gain if there is really some gain, its label - "honorarium", "remuneration", "salary" - is not material - it is the substance and not the form which matters and even the quantum or amount of "pecuniary gain" is not relevant - what needs to be found out is whether the amount of money receivable by the person concerned in connection with the office he holds, gives to him some " pecuniary gain" other than as compensation to defray his out-of pocket expenses which may have the possibility to bring that person under the influence of the executive, which is conferring that benefit on him. The Supreme Court further stated that the payment of honorarium may not by itself imply payment of any pay, remuneration, salary or emoluments and honorarium is a concept different than salary or remuneration and its payment cannot constitute an office of profit unless there is some pecuniary gain for the recipient. The Supreme Court stated that for the purpose of Art. 191(1)(a) of the Constitution the word ''profit'' connotes an idea of pecuniary gain though the label under which it is paid nor the quantum of the amount is relevant to determine the issue. The Supreme Court further stated that the question where a person holds an office of profit is required to be interpreted in a realistic manner having regard to the facts and circumstances of each case and relevant statutory provisions. A practical view not pedantic basket of tests must therefore guide the courts to arrive at an appropriate conclusion and the expression " office of profit " should be interpreted with the flavour of reality bearing in mind the object of Art. 102(1)(a) [so also Art. 191(1)(a)] namely to eliminate or in any event to reduce the risk of conflict between the duty amongst the members of the Legislature by ensuring that the Legislature does not have persons who receive benefits from the executive and may thus be amenable to its influence. The Supreme Court also stated that a balanced view has to be taken. Referring to its earlier decision in the case of Madhukar G.E. Pankakar (supra) the Supreme Court stated that a balanced view, even if it involves ''judicious irreverence'' to vintage precedents, is the wiser desideratum.

27. The petitioner by his own evidence and that of P.W.4 Olinda Fernandes, P.W.8, Arjun Pednekar, and P.W.9, Jose Philip, has proved that the respondent as Chairman enjoyed the following privileges or perquisites or benefits pursuant to the resolutions passed by the Board of Directors although in terms of Order of appointment/reconstitution of the Board of Directors dated 9.2.2000 (Exh. 62) the non-official Directors were entitled to a sitting allowance at the rate of Rs. 100/- plus actual traveling allowance which admittedly the respondent did not claim or was paid and which were in terms of Article 125 of the Articles of Association and were compensatory in nature:-

(i) A car for the full time use of the Chairman with the facility of using upto 500 litres of petrol vide resolution No. 14/2000 (Exh. 66) which facility the petitioner has valued at Rs. 14,500/- per month at the rate of Rs. 29/- per litre. The petitioner has proved that the respondent incurred an expenditure for diesel consumption, as the car being used by the respondent was a diesel run vehicle of Rs. 62,974/- for the financial year 2001-2002 and Rs. 5200/- for the period from 1.4.2002 to 30.6.2002.

(ii) The respondent also enjoyed a mobile set/phone bearing No. 9823173088 at the cost of the Corporation for which Rs. 1959/- was paid for the period from 11.3.02 to 10.4.02, Rs. 23,949/- were paid for the financial year 2001-02 and Rs. 6050/- were paid forth period from 1.4.02 to 30.6.02.

(iii) The respondent had one P.A., one driver and one peon who were appointed as the personal staff of the Chairman and the expenditure incurred on them from March, 2001 to February, 2002 was Rs. 1,84,889/- and from March, 2002 to June, 2002 was Rs. 64,132/-.

28. As per the petitioner the salary of the staff of the Chairman was paid by the Corporation, but they were not doing the work of the Corporation and they were doing the personal work of the Chairman. According to him the Chairman had no other official work of the Corporation except attending the meetings. He also stated that the Chairman might have had to do some other official work by coming to the office. According to him he was asked as to what he meant by the personal staff of the Chairman and he answered by stating that the Chairman had personal staff to do his work only.

29. P.W.8, Arjun Pednekar, stated that the said staff was personal to the Chairman because it is he who appointed them and it is he who could also terminate their services. He also stated that the staff were not functioning from the office of the Corporation and that he did not know from where they were functioning. He stated that the Corporation had its own staff, 15 in number including the Managing Director and that the said personal staff of the Chairman were not signing the muster roll because they were not supposed to sign.

30. P.W.9, Jose Philip, stated that the Chairman had personal staff, but when the Chairman came to the Office he would use the staff of the Corporation. According to him the said personal staff were not functioning from the Office of the

Corporation and they were not signing any muster roll and as a Managing Director he did not assign any work to them of the Corporation. He stated that the names of the personal staff were given by the Chairman and they were appointed for the sake of payment of salary and were not accountable to do any work of the Corporation and they were reporting to the Chairman. According to him the personal staff were meant to do whatever work was given to them by the Chairman and they were not signing the muster roll. As per the respondent the said staff was provided to the Chairman to enable him to discharge the duties as Chairman of the Corporation and that the said staff was not the personal staff of the Chairman but the staff allotted by the Corporation to the Chairman for the purpose of performing his duties. The respondent admitted that the driver was appointed at his suggestion by the Managing Director and the peon and P.A. were appointed in the same manner but he did not remember whether the Board had passed any resolution to provide him the said personal staff and he stated that he did not remember about the said resolution. He was shown the certified copy of the Resolution No. 8/90 at Exh. 78 and he stated, inspite of resolution being shown to him, that he did not remember about the same. It was suggested to him that by the said resolution he was given power to select the personal staff and he dodged the answer and stated that the said resolution did not give power to appoint. He admitted that the resolution stated that they were the personal staff of Chairman and it allowed, the Chairman to remove any or all of them. He was asked whether he had taken the driver as his entitlement, after he had admitted that there were two regular office drivers, and he stated that the Managing Director had suggested that he was allowed to have a driver and therefore he should have one. He admitted that the said driver ceased to be his driver after he ceased to be the Chairman.

31. Admittedly, the car of the respondent was sent for election duty from 13.5.02 till 3.6.02 as stated by P.W.4 Olinda Fernandes, with another driver, but the said personal driver was still paid by the Corporation after the respondent issued a certificate - Exh. 47 that the said driver attended duties from 11.5.02 to 31.5.02. The respondent admitted that for the said period the car was not with him and when it was suggested to him that the amount of Rs. 3413/- was paid to the said driver Rajendra Naik because he had done some work for him, the respondent avoided an answer to the question and stated that he was paid as he was in service and further stated that the said driver attended his residence in the mornings and went home in the evenings. The respondent for the first time in cross-examination stated that his P.A. and the peon were from his Constituency and they were working from the Office of the Corporation whenever he used to be there, but he did not know whether they were signing the muster roll. He was asked if, according to him the said staff were there only when he was there in the office, then the question of signing the muster roll in the office of the Corporation would not arise and then the respondent answered stating that he did not know whether they were signing the muster roll and he also did not inquire from them whether they were signing the same because he did not feel it

necessary to inquire about it. He stated that he did not remember whether the Corporation had two regular peons, but he had a cabin in the Corporation and he did not remember the peon of the Corporation attending to him. He further stated that he did not remember how much staff the Corporation had, but again admitted that the said Rajendra, Pravin and Ulhas left when he left as Chairman of the Board of Directors. The evidence of the respondent does not at all inspire any confidence. Whenever he had to answer uncomfortable questions, the respondent either dodged direct answers or stated that either he did not know or he did not remember. I am inclined to accept the evidence of the petitioner as well as P.W.8, Arjun Pednekar, and P.W.9, Jose Philip, and conclude that the personal staff provided to the respondent were not doing any work of the Corporation in the office of the Corporation but were doing the personal work of the respondent unconnected with the work of the Corporation. It is quite probable that they were appointed to do party work at the cost of the Corporation. It sounds highly improbable that the respondent as Chairman required any staff at home to do the work of the Corporation when the main work of the Corporation of the Chairman was only of attending the meetings of the Board. It is therefore obvious that by virtue of being provided the said three personal staff inspite of the Corporation having its own driver, the respondent obtained profit or pecuniary gain. As far as the car is concerned, the petitioner has stated that although the expenditure by the Chairman towards petrol was within permissible limits, he was not using the said petrol for official work of the Corporation. He further stated that the respondent was paid the petrol bills as part of his remuneration. He was asked whether the respondent was not entitled for the payment of the petrol bills and the petitioner answered by stating that he was entitled partly and further explained, by partly he meant that the respondent did not come to the Corporation all the time and he was also doing his personal work and as such for all the bills the respondent was not entitled to be paid.

32. P.W.9, Jose Philip, stated that the car was at the disposal of the Chairman and there were no timings for him and the car was not coming to the Corporation Office after office hours and it was at the disposal of the Chairman and the use of the car was not restricted. The provision for a car with 500 litres of petrol per month cannot be considered to be compensatory in nature when considered in the light of the work of the Chairman whose work was mainly to preside over the meetings as stated by P.W.9, Jose Philip. P.W.9, Jose Philip, has also stated that the Chairman was using the said car for official purpose as well as for his other work. Admittedly, the respondent surrendered the car when the election Code of Conduct was enforced and this is a clear indication that the respondent perceived the car to be Government property which he was not entitled to use for the said period. When the respondent was asked in cross-examination whether if it was not a Government Corporation, he would not be entitled to use the car, the respondent avoided a direct answer and stated that he felt that it was necessary to surrender the car. He ultimately admitted that in case it was a private corporation it was not necessary to surrender the car. As far as the mobile is

concerned, the respondent had it for his unrestricted use. The said mobile was granted to the Chairman vide Resolution No. 8/01 - Exh. 78 at the end of which the Chairman proposed vote of thanks. However, when the respondent was asked the reason why he was provided with the mobile by the Board, he stated that he did not know the special reason. He admitted that he had a telephone in his cabin which he was using for official purpose. He stated that he did not remember whether the said Resolution was moved by Vassant Shirwaikar being one of the Directors during his tenure. When the said Resolution was shown to him, he stated that he did not remember whether physically he was present when the said Resolution was passed and when it was specifically again suggested to him that he was present, he answered by stating that it was possible that he was present. Again the respondent stated that he did not remember whether he had voted in support of the Resolution at the said meeting and when it was brought to his notice that all the Directors unanimously had resolved that the mobile phone facility be provided to the Chairman, the respondent stated that as the Resolution was unanimous, there was no voting as such. It appears to me that in the perception of the respondent whenever a resolution is passed by voice vote, it does not include his own. It was suggested to him that the said Resolution was a camouflage saying that he could not be contacted on phone to provide a benefit to him and he denied the said suggestion. When it was suggested to him that the said mobile was provided to him as a facility as benefit to him and the bills were paid by the Board, he stated that it was not a benefit or facility. Considering that the respondent had an office phone and his main duty was to attend the meetings of the Board of Directors, providing or availing of a facility of mobile phone with unrestricted number of calls, can be considered as a perquisite or profit or monetary gain provided to the Chairman and not a facility to compensate out-of-pocket expenses. It is therefore but obvious that the facilities or perquisites or benefits of the personal staff, car, mobile, by whatever name called, were in the nature of profits or monetary gains or remuneration and not by way of recoupment of expenses towards performance of his duties as contended by the respondent in my view the respondent held an office of profit as Chairman of the Board of Directors of the Corporation.

33. Was that office an office of profit under the State Government? Admittedly, the Corporation is a Government Company as defined u/s 6(17) of the Companies Act, 1956 as the Government of Goa holds 51% of the paid up share capital and for that reason the Corporation was always referred to as an undertaking of the Government of Goa. The respondent during his tenure as the Chairman, published a brochure - Exh. 46, as regards the schemes of the said Corporation and thereunder it was mentioned that the Corporation was a Government of Goa undertaking. However, the respondent now has stated that the Corporation is not an undertaking of the Government. At the same time, he has admitted that the said brochure - Exh. 46, was published during his tenure and when it was brought to his notice that the brochure mentions the

Corporation to be a Government undertaking, the respondent stated that it was wrongly shown. When questioned further as to why he did not get it corrected, he replied stating that he had asked the Managing Director to correct it, and when further asked as to who was the said Managing Director whom he had told to correct it, the respondent, as usual, stated that he did not know who was the Managing Director at that time. He also stated that he had not told the Managing Director in writing to delete the name "Government of Goa undertaking" from the said brochure and, ultimately, the brochure remained without being changed. It was suggested to him that he had falsely stated that he had told the Managing Director to change the brochure as he had come now with a false story that the Corporation is not a Government undertaking, a suggestion which he denied. He was asked by the Court whether he could given any example in the State of Goa of any Government undertaking, which was not a Government Company or a Government Department and he answered stating that he could not tell off hand. Since the Corporation was a Government Company in which the Government of Goa held 51% of the share capital, the Corporation as well as the Government would be justified in regarding the Corporation as a Government undertaking which, in other words means it is a Government enterprise. As a Government undertaking and from the time of inception, it is the Government which has been appointing the Board of Directors of the Corporation. This is clearly reflected in the Order itself by which the respondent himself was appointed as Chairman and number of Orders referred to therein shows that the Board was reconstituted from time-to-time by the Government. In this regard P.W.9, Jose Philip, has stated that whenever the Government decides to reconstitute the Board, the Government does it. P.W.9, Jose Philip, has further confirmed that the Corporation is a Government undertaking and has further assigned a reason for saying so, namely because it is established by the Government of Goa and is funded by the Government of Goa, though it is registered under the Companies Act, 1956. The contention of the respondent is that in terms of Article 154 of the Articles of Association, the respondent had to be appointed as a Chairman by the Directors and since he was not so appointed in accordance with the said Articles of Association, in the eyes of law no office was held by the respondent. However, in cross-examination the respondent has admitted that as Chairman he was a director of the said Corporation. He was also asked whether Sub-clause (3) of Clause 116 of the Articles enabled the Government to nominate all the directors and he answered by stating that the Government could nominate minimum three directors and not all, but when he was asked again whether there was any bar to nominate more than three directors, he answered that he thought that there was no such bar. He was again asked if the Government had no powers to appoint the Chairman as to how he acted as a Chairman and took the benefits of office from the Government and, as usual, he avoided a direct answer to the said question and stated that he considered that the Government appointed him as a director alongwith other directors. He was again asked whether he had brought to the notice of the Government at any time that his appointment was not validly made and he answered by stating in the negative. Yet again he was asked as to why he had not brought to the notice of the Government that the Government had no powers to appoint him and his answer was that he did not feel it was necessary. However, he admitted that he took charge of the chairmanship pursuant to the Order dated 9th March, 2000, published on Gazette Exh. 62, which Order was passed to reconstitute the Board of Directors. In my view, the contention of the respondent that there was no office held by him in the eyes of law has got to be rejected. After having been appointed by the Government as a Chairman of the Board of Directors pursuant to the said Order dated 9th March, 2000, and after having acted as such for almost a period of four years and after availing of the perquisites or benefits arising out of the said office, the respondent cannot now be heard to say that his appointment was illegal or was not valid in the eyes of law and this on the basis of the principle that a person cannot be allowed to approbate and reprobate at the same time. In the case of R.N. Gosain Vs. Yashpal Dhir, , the Supreme Court has stated that the law does not permit a person to both approbate and reprobate, i.e. "a person cannot say at one time that the transaction is valid and thereby obtain some advantage, to which he could only be entitled to on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage." The contention of the respondent that his appointment was not validly made is now belatedly taken only with a view to avoid his disqualification. The Supreme Court in the case of Gurugobinda Basu Vs. Sankari Prasad Ghosal and Others, , has stated that for holding an office of profit under the Government, one need not be in the service of the Government and there need not be relationship of master and servant between them. The Supreme Court has further stated that the decisive test for determining whether a person holds any office of profit under the Government is the test of appointment. The Supreme Court has further stated that it is not correct to say that several factors which enter into the determination of this question, the appointing authority, the authority vested with the power to terminate the appointment, the authority which determines the remuneration, the source from which the remuneration is paid and the authority vested with the 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 the 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. The Supreme Court stated that the circumstance that the source from which the remuneration is paid is not from public revenue, is a neutral factor - not decisive of the question and whether stress will be laid on one factor or the other will depend on the facts of each case. However, where several elements, the power to appoint, the power to dismiss, the power to control and give directions as to the manner in which the duties of the office are to be performed, and the power to determine the question of remuneration, are all present in a given case, then it must be held that the officer in question holds the office under the authorities so empowered. In the case of Biharilal Dobray Vs. Roshan Lal Dobray, , the Supreme Court has again stated that for holding an office of profit under the Government, a person need not be in the service of the

Government and there need not be any relationship of master and servant between them. An office of profit involves two elements, namely that there should be an office and that it should carry some remuneration, and, the true test of determination of the question whether a statutory corporation is independent of the Government depends upon the degree of control the Government has over it, the extent of control exercised by several other bodies or committees over it and their composition, the degree of its dependence on Government for its financial needs and the functional aspect, namely whether the body is discharging any important governmental function or just some function which is merely optional from the point of view of the Government. If, as stated by P.W.9, Jose Philip, whenever the Government decides to reconstitute the Board, the Government does it, it follows therefrom that the power of appointment as well as removal of the Board of Directors, including the Chairman, lay with the Government and this was in accordance with Article 116 of the said Articles of Association of the Corporation.

34. As far as the functions performed by the Corporation are concerned, they are but governmental functions. The petitioner was asked on what basis he had stated that the Corporation performs governmental functions and he answered by stating that because the Government controls the Corporation. That may not be the right answer. However, P.W.9, Jose Philip, has stated that the work of the Corporation was to grant loans at nominal rates of interest for economic activities. Article 44 of the Constitution states that the State shall promote with special care, the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes and shall protect them from social injustice and all forms of exploitation. The main objects of the Corporation as stated in the Memorandum of Association are to carry on the business of identifying the Scheduled Castes and other backward class communities entrepreneurs and promotion of strengthening of this class of generating activities for the socio-economic advancement of the Scheduled Castes and other backward classes of communities specially others from the weaker sections of society and preparation of a shelf of viable projects, providing technical consultancy services, etc. The respondent has, himself admitted that the Corporation is formed for the upliftment of the weaker sections of the people and, in particular the Scheduled Castes and Scheduled Tribes and is formed to promote the directive principles of state policy under the Constitution. The respondent has also stated that in the matter of certain schemes there was interaction between the Corporation and Directorate of Social Welfare of the Government of Goa and the said Directorate had certain schemes which were implemented through the Corporation. He has further stated that the loans to be given by the Corporation were for the upliftment of the socially and economically backward classes of Scheduled Castes and the handicapped. It is therefore obvious that the Corporation was essentially meant to carry out Governmental functions.

35. As far as the control of the Corporation by the Government is concerned, the

Government was bound to control the Corporation as the Government was a major shareholder and the Corporation was the undertaking of the Government. The petitioner has stated that the Government controls the Corporation, but when he was asked whether he could show from the Memorandum of Association whether the Government controls the Corporation, he stated that he could not show the same, but at the same time denied the suggestion that the Government had no control over the Corporation. P.W.8, Arjun Pednekar, has stated that the Corporation comes under the Department of Social Welfare of the Government of Goa and that all their files are moved through the Directorate of Social Welfare to the Government. According to him, the Government has control over the Corporation because it is the Government which gives the share capital and the Corporation does not have its own funds, besides the share capital given by the Government. According to P.W.9, Jose Philip, the Corporation runs under the Department of Social Welfare of the Government of Goa. He has further stated that the Corporation is autonomous, but under Government control. The respondent has stated that the Government has no control over the Corporation. The respondent was questioned, after Articles 145 and 146 of the Memorandum of Association were shown to him, whether the managing directors during his tenure were appointed by the Government and were Class I officers of the Government and he answered by saying that he did not know about the same, except that they were Government servants. He also stated that he did not know whether they were appointed on deputation and that he did not inquire to find out what was their grade. When asked whether he did not find it proper to make such enquiries, he stated that he did not find it necessary. The evidence of P.W.9, Jose Philip, shows that during his tenure the Corporation had an accountant on deputation from the Directorate of Accounts of the Government of Goa and that he too was posted as managing director on deputation by the Government of Goa. As per Article 145 of the Articles of Association, the Government has the power to appoint from time-to-time a managing director on such terms and conditions as the Government may think fit. By virtue of Article 146 of the Articles of Association, the managing director so appointed is required to manage the whole affairs of the company subject to the superintendence, control and guidance of the Corporation. It is, therefore obvious that the Government can exercise and does exercise control over the Corporation through the managing director appointed by it.

36. As far as the funds are concerned, the Corporation has none of its own. As stated by P.W.8, Arjun Pednekar, they run the establishment of the Corporation from the share capital and the interest they get from the deposits which are also from the share capital. He has also stated that they get grant-in-aid from the Government for below poverty line and Scheduled Caste people, which are used for the improvement of the said Scheduled Castes and below poverty line families by giving them subsidies. The respondent himself appears to be unaware about this position, for he has stated that he does not know whether every year the State Government pays to the Corporation substantial amount towards the

share capital and yet he has denied the suggestion that the money which is paid by the Government every year is spent for the administrative and maintenance expenses of the Corporation. It is but obvious that the facilities or perquisites or remuneration which were enjoyed by the respondent during his tenure as Chairman were paid by the Corporation from the funds received from the Government of Goa. Although the respondent stated in paragraph 12 of his affidavit that the Corporation generates its own income from the loans given by N.S.C.S.T.F.D.C. (National Scheduled Castes and Scheduled Tribes Financial and Development Corporation) and N.B.C.F.D.C. (National Backward Classes Financial and Development Corporation) etc., at nominal rate of interest and the Corporation used to advance loans to the persons of backward class and Scheduled Castes at a higher rate of interest and the difference was generating income to the Corporation, the respondent in cross-examination stated that he did not know whether the said Corporations were belonging to the Central Government. He further stated that he did not make any enquiries to find out whether the said Corporations were belonging to the Central Government during his tenure as Chairman because he found it was not necessary to find out about it. The respondent was asked whether he did not find it necessary because the managing director would find out about the same and the respondent stated that he did not know about the same. However, the respondent admitted that the loans taken by his Corporation from the Corporations mentioned in paragraph 12, were guaranteed by the Government of Goa and the said guarantees were approved in the budget of the Government and which in turn were approved by the Assembly, and, therefore, it is but obvious that if at all the said Corporations mentioned in paragraph 12 of the affidavit gave loans at a lower rate for the Corporation to give loans at a higher rate, then the said loans could be availed of only because the Government of Goa guaranteed the payment of the same.

37. The last question is whether the Goa, Daman and Diu Members of the Legislative Assembly (Removal of Disqualification) Act, 1982 ("Act of 1982", for short), can be considered to be a valid law passed under Article 191(1)(a) of the Constitution by virtue of Section 66 of the Goa, Daman and Diu Reorganization Act, 1987 ("Act of 1987" for short). There are two aspects to be considered here, one which is required to be considered and the other which is not required to be considered, though both the parties have strenuously argued about the same.

38. Admittedly, the office of the Chairman of the Corporation was not covered under Item No. 9 of the Schedule to the Act of 1982, because in the case at hand, the respondent as Chairman enjoyed perquisites in the nature of profit or pecuniary gains amounting to remuneration.

39. Item No. 9 of the said Schedule which read along with Sub-section (2) of the Act of 1982, would read as follows:-

A person shall not be disqualified for being chosen as, or for being, a Member of the Legislative Assembly of Goa, Daman and Diu by reason of the fact that he holds the office of Chairman, Director or member of a statutory or non-statutory body or committee of Corporation constituted by the Government of Goa, Daman and Diu:

Provided that the Chairman, Director or Member of any of the aforesaid Committees or bodies or Corporations is not entitled to any remuneration other than compensatory allowance.

Explanation: For the purpose of the aforesaid entries-

(i) "compensatory allowance" means any sum of money payable to the holder of an office by way of daily allowance, such allowance not exceeding the amount of daily allowance to which a member of the Legislative Assembly is entitled under the Goa, Daman and Diu Salary, Allowance and Pension of the Members of the Legislative Assembly Act, 1964 (2 of 1965), any conveyance allowance, house rent allowance, or traveling allowance for the purpose of enabling him to recoup any expenditure incurred by him in performing the functions of that office;

(ii) "statutory body" means any corporation, committee, commission, council, board or other body of persons, whether incorporated or not, established by or under any law for the time being in force;

(iii) "non-statutory body" means any body of persons other than a statutory body.

40. Since what the respondent was paid for was not compensatory allowances as defined under Item No. 9 of the Schedule to the Act of 1982, but were pecuniary benefits amounting to remuneration, it appears that the Legislature of the State of Goa visualized this situation and, in my view rightly, and passed Bill no. 7/05 while this petition was pending in this Court, in its Session held from 10th January, 2005 to 14th January, 2005, known as the Goa Members of Legislative Assembly (Removal of Disqualification) (Amendment) Bill 2005, which Bill is yet to receive the assent of the Governor, to become a law. The said Bill was passed to amend the Act of 1982, so as to amend the Schedule to the said Act of 1982 and to include vide item no. 12 the office of the Chairman of the Corporation. On this aspect, the respondent in his cross-examination stated that the office of the Chairman of the Corporation was brought under the purview of the said amendment in the Schedule as Item No. 12 and further stated that Damodar G., Naik, who is a B.J.P. M.L.A. had moved an amendment to bring the Chairman of the Corporation within the purview of the said Bill. The respondent admitted that the amendment pertaining to this Corporation was deemed to have come into force from 1st January, 2002. He stated that he was present in the House when the said Bill was passed by voice vote, but denied the suggestion that he had voted in support of the Bill because otherwise he would have been disqualified in this petition. He also denied the suggestion that the amendment was brought in by his party colleague the said Damodar Naik in order to prevent his disqualification in this petition and further stated that in the House there was no difference between the members and all belonged to the same House! The respondent was asked twice whether he knew the principle that any person who had got an interest should not take part in any deliberations and whether he

knew about this principle at that time, and, both the times he stated that it was difficult to answer either yes or no and when he was asked again whether he was refusing to answer the said question, he stated that he had answered the question. As already stated, it is but obvious that the amendment was brought by the Legislature of the State to the Act of 1982 only because the office of the Chairman was not covered by the Act of 1982.

41. Regarding the second aspect, it may be stated that Article 239A of the Constitution provided for creation of local legislatures or council of ministers or both for certain Union Territories and pursuant thereto the Parliament enacted the Government of Union Territories Act, 1963 ("Act of 1963", for short), which in terms of Section 3 thereof provided for a Legislative Assembly for the Union Territory of Goa, Daman and Diu. Subsection (1) of Section 14 of the Act of 1963 like Article 191(1)(a) of the Constitution, provided that a person shall be disqualified for being chosen as, and for being a Member of the Legislative Assembly of the Union Territory, inter alia, if he holds any office of profit under the Government of India, or the Government of any State, or the Government of the Union Territory, other than the office declared by law made by Parliament, or by the Legislative Assembly of the Union Territory, not to disqualify its holder. Presumably, the then Legislative Assembly of the Union Territory of Goa, Daman and Diu passed the said Act of 1982, to provide for removal of certain disqualifications for being chosen and for being a member of the Legislative Assembly of Goa, Daman and Diu, and which Act was passed u/s 14(1) of the Act of 1963. It is the contention of the petitioner that the only immunity which the respondent could claim, if any, would be in case the office of the Chairman of the Corporation was taken out from the pale of disqualification by a law made by the State Legislature to that effect and since there is no such law enacted by the Legislative Assembly of the State of Goa, after Goa became a State, no exemption is available to the respondent. It is the contention of the petitioner that the Act of 1982 cannot be said to be in force and valid to confer such exemption because the Act of 1982 was passed by the Legislative Assembly of the Union Territory of Goa, Daman and Diu and after Goa became a State, the Legislative Assembly of the State of Goa has not enacted such law, nor has adopted the same after Goa became a State. On the other hand, it is the contention of the respondent that as per Section 66 of the Goa, Daman and Diu Reorganization Act, 1987, ("Act of 1987" for short), the Act of 1982 continues to be in force. According to the respondent, Section 12 of the Act of 1987 has made a provision for a Legislative Assembly and Section 13 of the Act of 1987 has provided for the existing Legislative Assembly of the Union Territory to be the Legislative Assembly of the State until a new Legislative Assembly was constituted and summoned to meet for its first session. As per the respondent the State of Goa came into being on 30th May, 1987, pursuant to the Act of 1987 and as such, a Member of the Legislative Assembly of the Union Territory by a fiction became Member of the State Legislative Assembly. It is the contention made on behalf of the respondent that whenever a new State is formed or there

is a reorganization of State, a legislative provision is always made to create a fiction in order to avoid chaotic situation and absurd realities. It is submitted that Section 66 of the Act of 1987 corresponds to Section 119 of the States Reorganization Act, 1956, and the object underlying Section 119 of the States Reorganization Act, 1956 was to effect quick transition without wasting time in an attempt to secure uniformity of laws which would have inevitably delayed the process of reorganization. Section 119 was to provide for the interregnum between the reorganization of the State and the time by which the legislature of such States suitably amended, altered or modified such laws to make them uniform and for the purpose of facilitating the application of the law made by the earlier legislature in relation to the new State, a power was given to the appropriate Government to make such adaptations and modifications of the laws whether by way of repeal or amendment, as may be necessary or expedient and thereupon every such law would have effect subject to the adaptation or modification so made until altered, repealed or amended by a competent legislature, which is provided by Section 67 of the Act of 1987. Further, it is the respondent''s contention that in the light of Section 13 of the Act of 1987, the members of the Union Territory of Goa, Daman and Diu Legislative Assembly, by fiction became the members of the Legislative Assembly of the State of Goa. As per the respondent, the law passed by the members of the Legislative Assembly of the Union Territory of Goa, Daman and Diu by fiction created by Section 13 read with Section 66 of the said Act, became the law of the said legislature. It is contended that the State of Goa came into being on 30th May, 1987 and in case from 31st May, 1987 an M.L.A. of the Union Territory became an M.L.A. of the State of Goa and in case such an M.L.A. held an office like the case at hand, he would stand disqualified under Article 191, being a member of the State legislature, in case the interpretation sought to be advanced by the petitioner is accepted, and this would create a chaotic situation and would lead to absurd results. Reference is made to Article 367 of the Constitution and it is submitted that the General Clauses Act, 1887, is made applicable and the expression "State" appearing in Article 191(1)(a) of the Constitution could be construed as Union Territory in view of Section 2(58)(b) of the said General Clauses Act. Reliance has been placed on the case of Shriram Haribhau Mankar Vs. Madhusudan Atmaram Vairale, .

42. In my view, the contentions made on behalf of the petitioner deserve to be accepted in preference to those made on behalf of the respondent.

43. Admittedly, and by virtue of the Act of 1987, the Union Territory of Goa, Daman and Diu with effect from 30th May, 1987, was reorganized into the State of Goa and the Union Territory of Daman and Diu. No doubt, Section 13 of the Act of 1987 made the provisional Legislative Assembly of the Union Territory to be the Legislative Assembly of the new State until the Legislative Assembly of the new State was duly constituted and summoned to meet for the first session and as long as the provisional Legislative Assembly was in existence, it was deemed to be the Legislative Assembly of the State of Goa duly constituted

under the Constitution and was held to be competent to discharge all the function of the Legislative Assembly of the State under the Constitution and the members thereof were deemed to be the members of the Legislative Assembly of the State of Goa duly elected under the Constitution.

44. Section 66 of the Act of 1987 dealt with the territorial extent of laws, and provided that the provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and the territorial references in any such law to the existing Union Territory would, until otherwise provided by a competent legislature or other competent authority, be construed as meaning the territories within the existing Union territory before the appointed day.

45. Section 67 of the Act of 1987 deals with the power to adapt laws. It provides for the purpose of facilitating the application in relation to the State of Goa or the Union Territory of Daman and Diu of any law made before the appointed day, the appropriate Government may, within two years from that day, by order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon every such law shall have effect subject to the adaptations and modifications so made until altered, repealed or amended by a competent Legislature or other competent authority.

46. In my view, the case of Shriram Haribhau Mankar (supra) is of no assistance to the case of the respondent. In that case what this Court was concerned with was to find out whether the person holding the office of Deputy Minister of the State incurred any disqualification by reason thereof, from being nominated or becoming a member of the Assembly under Article 191(1)(a) of the Constitution, and, this Court held that a Deputy Minister must be treated and included in a class of Ministers even though a Deputy Minister was not included in the word "Minister" in Article 191(2) of the Constitution and this Court further held that a Deputy Minister must be treated and included in a class of Minister even though a Deputy Minister was not included in the word "Minister" in Article 191(2) of the Constitution, because said office of Deputy Minister was fully protected from challenge by virtue of Section 13 of the Maharashtra Adaptation of Laws Order, 1960, which had provided that a person would not be disqualified for being chosen as or for being a member of the Legislative Assembly of Maharashtra, or Legislative Council of Maharashtra, merely because of the reason of the fact that he holds the office of Deputy Minister.

47. As already stated, admittedly, the Act of 1982 was passed by the then Legislative Assembly of the Union Territory of Goa, Daman and Diu u/s 14 of the Government of Union Territories Act, 1963, for the protection of its own members, namely the members of the Legislative Assembly of the Union Territory of Goa, Daman and Diu. It was nobody''s case that the Act of 1982 was a law passed by the provisional Legislative Assembly as declared by Section 13 of the Act of 1987. Admittedly, also there was no adaptation order made by the

Government in relation to the said Act of 1982, pursuant to the legislative powers given u/s 67 of the Act of 1987. In my humble opinion, the Act of 1982 being a law passed by the Legislative Assembly of the then Union Territory of Goa, Daman and Diu, for the protection of its own members, u/s 14 of the Act of 1963, and even in case it had a territorial extension and was in force by virtue of Section 66 of the Act of 1987, it would not be valid to provide protection from disqualification to the members of the Legislative Assembly of the State of Goa, since it was not the law made by the Legislative Assembly of the State of Goa in terms of Article 191(1)(a) of the Constitution. In other words, a law passed by the legislature of the Union Territory for the protection of its own members u/s 14 of the Act of 1963 cannot be equated with the law to be passed by the State Legislative Assembly under Article 191(1)(a) of the Constitution. I am supported in this view by the decision of the Division Bench delivered in the case of Shankaragouda Vs. Sirur Veerabhadrappa, on which reliance has been placed on behalf of the petitioner.

48. One of the questions which arose in the case of Shankaragouda vs. Sirur Veerbhadrappa, (supra) was whether a law which was continued u/s 119 of the States Reorganization Act and adapted u/s 120 of that Act was the law which could be regarded as one made by the legislature of the State of Mysore for the purpose of Article 191 of the Constitution. Here it may be noted that there was an adaptation order made by the appropriate Governments, both in the case of Shriram Mankar (supra) and Shankaragouda (supra) and inspite of such an adaptation order, the Division Bench observed that:-

The holding of an office of profit under the Government of India or the Government of a State is a disqualification under the provisions of Article 191 of the Constitution for membership of a Legislative Assembly or a Legislative Council. The machinery for the removal of such disqualification is, what is provided by that very Article. It is only when such office of profit is declared by the law of the legislature of the State not to disqualify its holder, that the disqualification ceases to exist.

....

....

The words ''legislature of a State'' occurring in clause (a) clearly have reference to the Legislative Assembly and the Legislative Council to which Article 191 refers. That being so, the law by which an office of profit could be declared as not to disqualify its holder for the membership of the Mysore Legislative Assembly could have been enacted only by the Legislature of the new State of Mysore. It was for the legislature to make a law as respects that matter, after the reorganization, the consequences of the omission by that legislature to make such a law, would have been that all offices of profit held under the Government of India or under the Government of any State, disqualified their holders from being chosen as member of the Legislative Assembly or Legislative Council of the

State.

The Division Bench further stated that a law made by the Hyderabad Legislative Assembly for a purpose concerning itself, even after its adaptation, (here I have my respectful disagreement with the said observation), cannot claim to be a law made by the Legislature of the new State of Mysore for the purpose of Article 191 of the Constitution. Any equiperation of the Hyderabad Act with a law to be made by the Legislature of the new State of Mysore seems plainly impossible. The position would not be different even if the adaptation was within the competence of the Government of Mysore. The Division Bench therefore concluded stating that the provisions of Section 120 of the Act read with paragraph 6(1) of the Mysore Adaptation of Laws Order did not convert the Hyderabad Act into a law made by the Legislature of the new State of Mysore. As already stated, the Act of 1982 was a law made pursuant to Article 14 of the Government of Union Territories Act, 1963, for the protection of its own members. It is not the law made under Article 191 of the Constitution. Moreover, the Act of 1982 was also not the law enacted by the provisional Assembly as declared by Section 13 of the Act of 1987. The Government of the day chose not to adapt the said 1982 Act pursuant to the legislative powers given to it u/s 67 of the Act. Here it may be noted that such powers were given so as to prevent situations like the one sought to be explained on behalf of the respondent, namely that if the State of Goa came into existence on 30th May, 1987 and in case from 31st May, 1987, an M.L.A. of the Union Territory became an M.L.A. of the State of Goa and in case such an M.L.A. held an office like the case at hand, he would stand disqualified under Article 191 of the Constitution, being a member of the State legislature. In this context reference could be made to the case of The Commissioner of Commercial Tax, Ranchi and Another Vs. Swarn Rekha Cokes and Coals Pvt. Ltd. and Others, , wherein the Supreme Court, with reference to Sections 84 and 85 of the Bihar Reorganization Act, 2000, which Sections are akin to Sections 66 and 67 of the Act of 1987, has observed that such provisions are enacted to maintain continuity and, at the same time, authorize the States to make such modifications and adaptations as are considered necessary by some issuance of orders within two years, and thereafter, by legislation or exercise of power by the competent authority. The Government of the day having not chosen to adapt the Act of 1982 u/s 67 of the Act of 1987, nor the Legislative Assembly of the State of Goa having passed a law under Article 191(1)(a) of the Constitution to prevent such disqualification, the respondent has no one to blame but himself for the consequences which follow in the absence of necessary legislation by State Legislative Assembly declaring the office of profit of the Chairman of the Board not to disqualify its holder. I, therefore, hold issue no. 1 as proved.

49. From the above discussion, it is very clear that the respondent as Chairman of the Board held an office of profit under the State Government, which has not been declared so far by the Legislature of the State of Goa by law not to disqualify its holder, as required by Article 191(1)(a) of the Constitution. In my

view, the petitioner has satisfied all the tests laid down from time-to-time in finding out whether the office of the Chairman of the Corporation was an office of profit under the Government of the State. It is, therefore, obvious that the respondent, as on the date of the filing of the nomination, as well as on the date the respondent was declared elected to the State Legislature, was disqualified for being chosen as well as for being a Member of the Legislative Assembly, for the respondent was holding the office of Chairman of the Corporation, which is an office of profit under the State Government, which has not been declared by the Legislature of the State of Goa, as not to disqualify its holder. At the cost of repetition, it may stated that the Act of 1982 made by the Legislative Assembly of the Union Territory of Goa, Daman and Diu, concerning itself, in the absence of adaptation order having been made u/s 67 of the Act of 1987, cannot be considered to be a valid law made by the new Legislative Assembly of Goa for the purposes of Article 191(1)(a) of the Constitution, to avoid disqualification.

50. Having considered all the aspects of the controversy in the light of the high purposes underlying Article 191(1)(a) of the Constitution, I am of the view that the respondent was disqualified for being chosen and for being a member of the Legislative Assembly of Goa as he was holding an office of profit under the State Government and his election, therefore, has to be considered as void and as a result deserves to be set aside.

51. Consequently, as regards issue no. 4, the petition is partly allowed and the election of the respondent is hereby set aside as being void, with costs of Rs. 10,000/- (rupees ten thousand only) to be paid by the respondent to the petitioner. The Registrar to comply with the provisions of Section 103 of the Representation of the People Act, 1951. Shri Thali, the learned counsel on behalf of the respondent, requests for a stay of the operation of this Judgment for a period eight weeks. On behalf of the respondent, a written application has also been filed. The grant of stay has been opposed by Shri Coelho Pereira, the learned Senior Counsel. Shri Coelho Pereira has placed reliance on the judgment of the Supreme Court in the case of Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another, . Shri Coelho Pereira has submitted that the respondent having been disqualified by this Court, there is no question of a blanket stay, the respondent''s election having been set aside and, at the most, a conditional stay could be granted, in the manner granted by the Hon''ble Supreme Court in terms of Sub-para (iii) of Para 31 in the case of Smt. Indira N. Gandhi (supra). On the other hand, Shri Thali has submitted that if at all the Hon''ble Supreme Court had granted stay of the operation of the Judgment of the High Court, it was essentially because the matter dealt therein was based on corrupt practices, which is not so in the case at hand. Shri Thali has also referred to Sub-section (2) of Section 116-A of the Representation of the People Act, 1950 and has submitted that the respondent as a matter of right can approach the Supreme Court within a period of 30 days. Without further dilating on the Judgment of the Hon''ble Supreme Court in the case of Smt. Indira N. Gandhi (supra), and considering the totality of the facts of the case at hand, including that at present

the Legislative Assembly of Goa is under suspended animation, I am of the view that the Judgment of this Court ought to be stayed for a period of 30 days to enable the respondent to appeal to the Supreme Court and this without any conditions. The petitioner will be at liberty to apply afresh to this Court, for modification of this Order, if permissible under law, in case the proclamation under Article 356 of the Constitution is revoked.

