

(2010) 09 UK CK 0168
In the Uttarakhand High Court

Kaustubha Nand Pant

APPELLANT

Vs

The Member Secretary, Basic Shiksha Parishad and Others

RESPONDENT

Date of Decision : 09-09-2010

Acts Referred:

Constitution of India, 1950 — Article 191(1)
Town Area Act, 1914 — Section 6(K)

Citation : (2010) 09 UK CK 0168

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Judgement

Sudhanshu Dhulia, J.—This Writ Petition was dismissed as infructuous by order of this Court dated 19.7.2006. Now a restoration application has been filed by the petitioner for recalling the order dated 19.7.2006 along with an application for condoning the delay in filing the restoration application.

2. The grounds shown for delay in filing the restoration application appear to be just and bona fide. Delay condonation application is allowed. Delay is condoned.

3. The reasons assigned in the restoration application also appear to be just and bona fide. The restoration application is also allowed. Order dated 19.7.2006 is recalled. Writ Petition is restored to its original number.

4. The Writ Petition was filed in the year 1992, before the High Court of Judicature at Allahabad. This has been pending now for the last almost 20 years. It would indeed be a travesty of justice if the adjudication on this is delayed any further. Sri Manoj Tiwari, Senior Advocate also expressed his willingness to argue the matter finally. State is represented by Sri N.P. Shah, the learned Standing Counsel for the State.

5. The present writ petition has been filed by the petitioner challenging the order of his dismissal from services dated 6.10.1990 passed by the then "Basic Shiksha Adhikari", Nainital and the order dated 4.12.1991 passed by the Appellate Authority, of the department, whereby his appeal was also dismissed.

6. The facts of this case are as follows:

The petitioner was a teacher in a primary school at a place called "Lalkuan", which at the relevant time was a part of district Nainital. In the year 1989, the petitioner contested an election for the office of the Chairman of Town Area Committee "Lalkuan". He ultimately lost that election. All the same, he was suspended from service on 3.8.1989 and subsequently a departmental proceeding was initiated against him where the principal charge against him was that he had contested the election for the Chairman of Town Area Committee, Lalkuan without any prior approval although there was a specific prohibition for him to contest such an election, being a teacher in a primary school, run by the "Basic Shiksha Parishad". An Enquiry Officer was also appointed. The defence of the petitioner was that he had only contested the election after procuring a "No Objection Certificate" from one Sri Leela Nand Joshi, who was the "Prati Up Vidyalaya Nirikshak" and it was only on the basis of this certificate that he contested such election. Sri Leela Nand Joshi was, therefore, a material witness in the departmental proceeding yet he failed to turn up as a witness, and therefore, could not be examined, nor his statement could be recorded in the departmental proceedings. The Enquiry Officer, however, came to the conclusion that the petitioner had obtained a "No Objection Certificate", and there was no fault as such on his part, and therefore, he should be reinstated in service. Though the Enquiry Officer specifically stated that being an employee of "Basic Shiksha Parishad". At this juncture it is necessary to state that at the relevant time i.e. in the year 1989, District Nainital (where Lalkuan was situated) was a part of the erstwhile State of Uttar Pradesh and Education upto Class 8th was under a Board, known as "U.P. Basic Shiksha Parishad" and employees and teachers of this Board, though strictly may not be Government employees, yet the Board was definitely an instrumentality of the State. As such the enquiry officer rightly opined that the petitioner should have known that such an election cannot be contested by him and therefore he recommended that for this he may be proceeded departmentally. In sum and substance though the enquiry officer stated that the petitioner should be reinstated in service and recommended only a minor punishment for the petitioner.

7. All the same, the findings recorded by the enquiry officer were not accepted and after giving a fresh opportunity of hearing to the petitioner a detail order was passed in which the statement of Sri Leela Nand Joshi, one who had given "No Objection Certificate" was also procured. Sri Leela Nand Joshi only stated that the certificate which he has given states that the petitioner is not a government employee. If any thing is added before or after the certificate then it cannot be subscribed to him. However, the "Basic Shiksha Adhikari" came to the conclusion that as per the orders given by the Director of the "Parishad" from time to time, no employee or the teacher of the "Parishad" can contest any election. In fact such an employee can only contest elections after formally resigning from the "Parishad". He has particularly referred to order dated 17.5.1977, 15.6.1984 and 29.5.1989 in which the Director of the "Parishad" has

specifically stated that no employee or the teacher of the "Parishad" can contest an election to Parliament, State Legislature or Gram Sabha. Making it base of his order, the petitioner was dismissed from service. Order dated 29.5.1989 is available on record. The same is marked and treated as Annexure -A to the Writ Petition. The order of Director Education as well as the Chairman, Basic Education, U.P. Basic Shiksha Parishad, Lucknow states that any teacher or employee of Basic Shiksha Parishad can only contest election of Gram Sabha/Vidhan Sabha/Lok Sabha after resigning from the office of profit. Indeed the Apex Court in the case of B Biharilal Dobray Vs. Roshan Lal Dobray, has held that the post of Assistant Teacher in a primary school governed under the "Basic Shiksha Parishad" is an "office of profit", and hence it attracts a disqualification under Article 191(1)(a) of the Constitution of India. Article 191(1)(a) of the Constitution of India reads as follows:

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

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

Therefore, an office of a teacher of a primary school, which is governed by the U.P. Basic Shiksha Parishad would attract disqualification as it is indeed is an "office of profit", as laid down by the Apex Court in Biharilal Dobray (supra).

8. What is an "office of profit" has been defined in a catena of decisions by the Apex Court. Most of these cases arise out of an election petition where a disqualification is attracted for holding an office of profit under the Government. However, the present case does not come within the nature of these cases. It is not a case where the petitioner was elected as a member of State Legislature or Parliament and then the question arose as to his disqualification! Here the petitioner contested and lost the elections. He never entered Parliament or a State Legislature or even a local body for that matter. Moreover, the petitioner had not contested the election of a State Legislature or Parliament. He had merely contested an election of a Chairman of a Town Area Committee. Now, at the relevant point of time the elections of the Town Area Committee were governed by an Act known as " the Town Area Act, 1914". Today a Town Area Committee has got a different nomenclature and it is known as a "Nagar Panchayat". Be that as it may, the disqualification from members and Chairman of a Town Area Committee are given u/s 6(K)(f) of the Town Area Act. Section 6(K)(f) reads as under:

6-K. Disqualifications for members and Chairman. - A person, notwithstanding that he is otherwise qualified, shall be disqualified for being chosen as, and for being a member or Chairman of a Committee, if he-

(a) ...

(aa) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) is in the service of the State or the Central Government or any local authority, or is a District Government Counsel or an Additional or Assistant District Government counsel or an Honorary Magistrate or an Honorary Munsif or an Honorary Assistant Collector, or

9. Although being an Assistant Teacher in a primary school under the Basic Shiksha Parishad is not specifically a disqualification u/s 6(K)(f), however, as per the ratio laid down by the Apex Court in Bihaari Lal's case (supra) a service of an assistant teacher would be deemed to be a service under the State Government, and therefore, it would attract disqualification u/s 6(K)(f) of the Act. However, it is reiterated that this Court is not concerned with an elected member of Town Area Committee whose qualification or disqualification has to be examined by this Court. As it has already been stated the petitioner has lost the election. The question before this Court is not as to the petitioners' disqualification as a Chairman of the Town Area Committee but the question before this Court is what impropriety or illegality, or what act of indiscipline the petitioner committed while standing for the election of Chairman of Town Area Committee being an Assistant Teacher in a primary school under Basic Shiksha Parishad.

10. The service conditions of the Assistant Teacher in a primary school at the relevant time were being governed by various Acts and Rules, namely, Basic Education Act, 1972, Basic Education Staff Rules, 1973 Basic Education (Teachers) Service Rules, 1981 Primary Education Act, 1919 etc. Though the service conditions do not specifically prohibit an Assistant Teacher from contesting an election to a Chairman of Town Area Committee, however, the orders of the Director and the Chairman of the Basic Shiksha Parishad warning that teachers should not contest the election and if at all they should, they must first resign from the office have been placed before this Court. Therefore, there is no doubt about the fact that there was a clear direction from the Director of Education that teacher should not contest elections. However, the petitioner had submitted before the concerned authority a "No Objection Certificate". Although the veracity of this certificate has been somewhat dented inasmuch as the statement has come that there was some kind of manipulation. However, since this fact has not been clearly established, this Court is not going into this aspect as to whether the petitioner tempered with certain documents in order to contest the elections. Yet, the fact of the matter is that the petitioner indeed violated the directions of Director of Education; and this is not in doubt. This much has been clearly established that the office of an Assistant Teacher in a primary school

(governed by the Basic Shiksha Parishad) which is an office of profit, and therefore, in all fairness the petitioner should not have contested the elections. However, this Court must also examine the fact that this petition was filed way back in the year 1992 which pertains to an alleged act of indiscipline of the year 1989 and since then the order impugned by the petitioner has been stayed and the petitioner has been teaching in the school on the strength of the interim order dated 27.2.1992. It has been stated at the bar that the petitioner has since retired after attaining the age of superannuation, though his post retirement benefits have not been given due to pendency of the petition.

11. Now what is the alleged offence or wrong the petitioner is supposed to have committed? He has contested an election to a local body and therefore by doing so has violated the directions of the Director of his department. The reason why any person who is holding an office of profit is disqualified or debarred from a legislative function is that if a person continues to hold an office of profit, he would not independently discharge his legislative functions. Therefore it is primarily done in pursuance of the doctrine of separation of powers, so that the executive may remain separate from the legislature. However, the Apex court has also stated in a catena of decisions that these cases have to be examined in a pragmatic manner. This is so because at stake is also something very important - which is the right to contest in an election! a very important right by any yardstick, in a democratic set up such as in India. Consequently, without taking a very legalistic approach in the manner this Court deems it fit and proper that the present controversies be decided, inter alia, on the basis of facts which has already been referred in the preceding paragraphs, such as the nature of the alleged offence and the fact that during the pendency of this petition before this Court the petitioner has reached the age of his superannuation and has retired from service.

12. The petitioner has indeed committed a wrong. He has contested for an election in violation of the directions of the Director of the Basic Shiksha Parishad. But the question would be, whether penologically speaking the punishment of dismissal from service is in proportion to the alleged act of indiscipline! In the considered view of this Court the punishment awarded to the petitioner is rather too severe, under the facts and circumstances of the case. Therefore though this Court holds that the petitioner was not right in contesting elections, as he was holding an office of profit, the punishment imposed upon the petitioner being too severe, the impugned order is liable to be set aside. The ends of justice will be met if instead of punishment of dismissal from service, the petitioner is awarded the punishment of "withholding of five annual increments with non-cumulative effect". In the interest of justice such a punishment should be enough. Therefore the Writ Petition is partly allowed. The order dated 6.10.1990 passed by the "Basic Shiksha Adhikari", Nainital and the order dated 4.12.1991 passed by the Appellate Authority i.e. Member Secretary, Basic Shiksha Parishad, Uttar Pradesh, Allahabad are quashed. It is directed that from the date the impugned order was passed instead of dismissal the punishment

would be "the stoppage of increments for five years with non-cumulative effect". It is clarified that the "financial implication", resulting from this order particularly "stoppage of increments" is not symbolic but substantial and it is liable to be adjusted, if need be, from the post retirement funds of the petitioner. This Court has been informed that in the State of Uttarakhand Basic Shiksha Parishad does not exist and the school is directly under the control of State Government. The State Government of Uttarakhand, therefore, is directed to pay the post retirement benefits to the petitioner after fixing his pension and other post retirement benefits as expeditiously as possible and definitely within a period of three months from the date of production of a certified copy of this order.

13. Since the matter pertains to a period prior to 9.11.2000 i.e. the day before the creation of State of Uttarakhand, and in order to remove any confusion this Court is not giving any finding as to whether State of U.P., U.P. Basic Shiksha Parishad or the State of Uttarakhand is liable to pay the pension and post retirement benefits to the petitioner. It has been fixed upon the State of Uttarakhand only for the sake of convenience. In case the pension and the other post retirement benefits are liable to be given by the State of U.P. or by the Basic Shiksha Parishad, U.P., the same is liable to be remitted to the State of Uttarakhand by the authority concerned.

14. No order as to costs.