

(1963) 03 GUJ CK 0007
In the Gujarat High Court
Case No : First Appeal No. 9 of 1963

Laljibhai Jodhabhai Bar

APPELLANT

Vs

Vinodchandra Jethalal Patel

RESPONDENT

Date of Decision : 28-03-1963

Acts Referred:

Conduct of Elections Rules, 1961 — Rule 2(2)

Representation of the People Act, 1951 — Section 123(7), 2(1), 33, 36, 36(4)

Citation : AIR 1963 Guj 297 : (1963) GLR 523

Hon'ble Judges : K.T. Desai, C.J.; M.R. Mody, J

Bench : Division Bench

Advocate : C.T. Daru and H.B. Shah, for the Appellant; S.B. Vakil, for the Respondent

Final Decision : Dismissed

Judgement

K.T. Desai, C.J.—This is "an appeal from the decision of the Election Tribunal at Palanpur, Banaskantha District, given on the 13th October, 1962, dismissing the petition filed by Shri Laljibhai Jodhabhai Bar, the appellant before us, and ordering him to pay a sum of Rs. 500/- by way of costs to Vinod-charndra Jethalal Patel the respondent before us.

2. The appellant (who will hereinafter be referred to as "the petitioner") was an elector in the Deesa Legislative Assembly Constituency of Gujarat when the last general election was held in the month of February, 1962. The respondent was a candidate who had stood for election from the said constituency. On 20th January, 1962, nomination papers were filed proposing the respondent as a candidate for the election. There were also filed four nomination papers, proposing the name of Jivrajbhai Kesarbhai Desai. There were also other nomination papers filed proposing the names of other candidates for the purpose of election. Scrutiny of the nomination papers was held. On 23rd January, 1962, objections were heard and after hearing the objections the Returning Officer rejected the four nomination papers which had been filed proposing the name of

Jivarajbhai Kesarbhai Desai.. The decision of the Returning Officer is exhibited in the case as an accompaniment to Exhibit 81. In, giving his decision, the Returning Officer has observed as follows:

"On scrutiny of the nomination papers it is seen that the proposers in all the four nomination -papers have put the mark of their thumb impression and were presented to the Returning Officer by the candidate himself. There was no proposer present at the time of the presentation of the nomination papers in the office room of the Returning Officer. As this has not been done at the time of presentation, I could not satisfy myself as regards the identity of the proposers as required under Rule 2 (2) of the Conduct of Election Rules, 1961 xxx

The attestation by the Returning Officer is necessary " requirement of the rule which in this case has not been done and so it is a defect of a substantial nature invalidating the nomination papers, x x x The nomination - papers xxx are therefore rejected."

The polling took place on the 23rd of February, 1962, and the respondent was declared to have been elected at the election. The petitioner filed an election petition on 9th of April, 1962, claiming that the election of the respondent was liable to be set aside on two grounds, (1) that the nomination of Jivarajbhai Kesarbhai Desai was improperly rejected and (2) that the respondent or his election agent had committed various corrupt practices listed by him in the body of the petition.

3. We shall first deal with the question whether the nomination papers proposing the name of Jivrajbhai Kesarbhai Desai had been validly rejected or not. It was the case of the petitioner that, in fact, 8 nomination papers nominating Jivrajbhai Kesarbhai Desai as a candidate had been presented to the Returning Officer, where but only four had been accepted. It was alleged that two out of the four nomination papers which had not been accepted were duly signed by the persons proposing the name of Jivarajbhai Kesarbhai Desai and that the Returning Officer ought to have accepted those nomination papers. That ground however has not been pressed before us by Mr. Daru, the learned advocate appearing on behalf of the petitioner. The learned Tribunal has accepted the evidence of the Returning Officer to the effect that there were only four nomination papers presented to him proposing the name of fivrajbhai Kesarbhai Desai and Mr. Daru has been content to proceed with the appeal on the basis of such finding. The four nomination papers proposing the name of Jivrajbhai Kesarbhai Desai did not bear the signature of the persons proposing his name, but bore their respective thumb marks. The said nomination papers did not bear the attestation of the Returning Officer.

4. We shall first deal with the requirements of law and then consider the evidence that has been led in the case with a view to see whether the requirements of law have been satisfied. Section 33 of the Representation of the People Act, 1951, provides as under:-

"(I) On or before the date appointed under Clause (a) of Section 30 each candidate shall, either in person or by his proposer, between the hours of eleven o'clock in the forenoon and three o'clock in the afternoon deliver to the Returning Officer at the place specified in this behalf in the notice issued u/s 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer.

"X X X X (4) On the presentation of a nomination paper, the Returning Officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls:

X X X X (6) Nothing in this section shall prevent any candidate from being nominated by more than one nomination paper:

Provided that not more than four nomination papers shall be presented by or on behalf of any candidate or accepted by the Returning Officer for election in the same constituency."

This section requires that the nomination paper must be signed by an elector of the constituency as proposer. Section 2(i)(i) provides that in the Act, unless the context otherwise requires, "sign" in relation to a person who is unable to write his name means authenticate in such manner as may be prescribed. The expression "prescribed" has been defined in Section 2(i)(g) to mean prescribed by rules made under the Act. Rule 2 (2) of the Conduct of Elections Rules, 1961, provides as under:-

.(2) For the purposes of the Act or these rules, a person who is unable to write his name shall, unless otherwise expressly provided in these rules, be deemed to have signed an instrument or other paper if --

(a) He has placed a mark on such instrument or other paper in the presence of the Returning Officer or the presiding officer or such other officer as may be specified in this behalf by the Election Commission, and

(b) such officer on being satisfied as to his identity has attested the mark as being the mark of that person."

Section 36 of the Representation of the People Act, 1951, provides as under:-

"36. Scrutiny of nominations:-

X X X X (2) The Returning Officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary reject any nomination paper on any of the following grounds: -

X X X X (b) that there has been a failure to comply with any of the provisions of Section 33 or Section 34.

X X X X (4) The Returning Officer shall not reject any nomination paper on the

ground of any defect which is not of a substantial character.

X X X X (6) The Returning Officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection,

X X X X"

It was urged On behalf of the petitioner that the affixing of the thumb impression of the proposer on each of the four nomination papers in question is sufficient compliance with the provisions " of Section 33 which require that a nomination paper should be signed by an elector of the constituency as proposer. It was urged that the expression- "signed" was sufficiently wide to cover the affixation of the thumb impression of a person. Reliance, in this connection, was placed on Stroud's Judicial Dictionary, third edition, Vol. 4, pages 2783 and 2784, where it is stated as follows:-;

"Signed; Signature. (i) Speaking generally, a signature is the writing", or otherwise affixing a person's name, or a mark to represent his name, by himself or by his authority (R. v. Kent Justices (1873) 8 QB 305 with the intention of authenticating a document as being that of, or as binding on, the person whose name or mark is so written or affixed."

We have to consider the meaning of the expression "signed" as appearing in Section 33 of the Act having regard to the various provisions contained in the Act. In the interpretation clause, the word "sign" in relation to a person who is unable to write his name means authenticate in such manner as may be prescribed. The question of authentication in the prescribed manner only arises in the case of a person who is unable to write his name. It clearly implies that in respect of those persons who are able to write their names authentication in the manner prescribed would not constitute signature. The authentication as prescribed is required to be done by placing a mark on the instrument or paper in the presence of the Returning Officer or the presiding officer of such other officer as may be specified in this behalf by "the Election Commission and on such officer, being satisfied as to the identity of the person placing the mark, attesting the mark as being the mark of that person. The authentication required contemplates the placing of the mark in the presence of only certain specified persons and the attesting of such mark by such specified persons on their being satisfied as to the identity of the person placing the mark.

5. Mr. Daru, the learned advocate appearing on behalf of the appellant has urged that in the case of a person who is able to write his name the placing of a mark by him would by itself be sufficient for the purpose of satisfying the requirements of Section 33 regarding signing. The provisions contained in Section 2(i)(i) were not intended to enable persons who are able to write their names to put their mark by way of signature, but were only intended to enable persons who are unable to write their names to satisfy the requirements of Section 33. In our view, the expression "signed" in Section 33 can only mean signed by writing

one's name in one's own handwriting except in the case of persons who are unable to write their names, in whose case the provisions set out above in Rule 2 (2) have to be complied with.

6-8. (His Lordship after discussing the evidence proceeded :)

9. The nomination papers have been exhibited and they clearly show that the thumb marks of the proposers have not been attested as required under the Conduct of Elections Rules, 1961. The thumb marks, under the rules, are required to be placed in the presence of the returning officer or the presiding officer or such other, person as may, be specified in that behalf by the Election Commission. The same has not been done. Such officer has to be satisfied as to the identity of the person placing the mark. There- is no cogent evidence of such satisfaction. The mark is required to be attested by such officer as being the mark of the person placing the same. The same has not been done. It was urged that Mashru" Deva, one of the persons who had proposed the name of Jivrajbhai Kesarbhai Desai was not a person who could be regarded as one unable to write his name, in view of the evidence by him to the effect that he knew how to write his own name and his father's name. If the contention of the learned advocate for the petitioner is accepted in that connection, then in that event the provisions of Rule 2 (2) would not be applicable to him and he could not be said to have signed the nomination paper merely by putting his thumb mark. In our view, the defect in each of the said 4 forms was a defect of a substantial character and all the four nomination papers of Jivrajbhai Kesarbhai Desai were rightly rejected by the returning officer and the petitioner is not entitled to any relief on the ground of the invalid rejection of the nomination papers that had been filed proposing the name of Jivrajbhai Kesarbhai Desai.

10. The next contention that has been urged before is the one set out in paragraph 9 (a) of the petition. The said paragraph runs as under :

"9. The respondent & guilty of various corrupt practices listed below :

(a) The respondent procured the assistance of Shri Shantilal Swaroopchand Shah, the then Parliamentary Secretary to the Chief Minister of the State of Gujrat, for the furtherance of the prospects of his election. The said Shantilal Shah was in the service of the Government of Gujrat at all material dates, viz. on the dates 20-1-62 and on 26-2-62, and belong ed to the classes of Government servants mentioned in Section 123(7) of the Representation of the People Act, 195r.. He was more particularly covered by Clause (a) of Section 123(7). He was appointed by the respondent as his election agent u/s 40 of the said Act. The said Shantilal Shah acted as Respondent's statutory election agent till the end of the election and he gave his assistance to the respondent for the fur therance of the prospects of his election by can vassing and making propaganda in favour of the Respondent and his party and also by all means at his command."

At the hearing, the following issues amongst others were raised :

"(3) Is it proved that ,the respondent procured the assistance of Shri Shantilal Swaroopchand Shah for furtherance" of; his prospects in the election as alleged?

(4) Does the petitioner .prove that Shri Shantilal S. Shah, being Parliamentary Secretary" to the Chief Minister of the State of Gujrat was in the service of the Government of Gujrat on all material dates and belonged to the classes of Government servants mentioned in sectitth 123 (7), more particularly, Clause (a) thereof, of the Representation of the People Act, 1951?"

Before we consider the facts of the present case we will first examine the legal position to see what are the requirements of law in this connection.

11. Section 123(7) of the Representation of the People Act, 1951, provides as follows :

"123. The following shall be deemed to be corrupt practices for the purposes of - this Act ; -- . "?

x x x (7) The obtaining "or procuring or abetting or attempting to obtain or procure by a candidates or his agent or, by any other person with the consent of a candidate or his election agent, any assistance (other than the giving of vote) for the furtherance of the prospects of that candidate"s election, from any person in the service of Government and belonging to any of .the following classes, namely :

(a) gazetted, officers;

x x x Explanation. -- (I) In this section the expression "agent" includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate.

(2) For the purposes of Clause (7), a person shall be deemed to assist in the furtherance of the prospects of a candidate"s election if he acts as an election agent, or a polling agent or a counting agent of that candidate."

Section 40 of the said Act provides as under :

"Election agents. -- A candidate at an election may appoint in the prescribed manner any one person other than himself to be his election agent and when any such appointment is made, notice of the appointment shall be given in the prescribed manner to the returning officer."

It is not disputed in the present case that Shantilal Swaroopchand Shah was the Election Agent of the respondent within the meaning of the said Act at all material times. In view of the explanation to Section T23 under the deeming provision therein contained, by reason of the fact that Shantilal Swaroopchand Shah has acted as the Election Agent of the respondent he mist be deemed to have assisted the respondents in furtherance of the prospects of the election of the respondent. Under the circumstances we hold that the respondent had obtained the assistance of Shantilal Swaroopchand Shah for the prospects of the

election of the respondent. - The only question that remains for consideration is whether he (1) was in the service of the "Government" and (2) belonged to the class of "gazetted officers".

12. Mr. Daru, the learned advocate appearing on behalf of the petitioner has strongly urged before us that both the aforesaid conditions are satisfied in the present case. We shall first consider whether Shantilal Swaroopchand Shah was in the service of the Government. The second question whether he belonged to the class of gazetted officers or not would arise for consideration provided it is found that he was in the service of the Government. Strong reliance has been placed by Mr. Daru on a notification appearing in the Gujarat Government Gazette published on the 13th of May 1960. At page 7 under the heading "Civil Appointments" the following matter appears :

"Heads of Departments and all other Officers concerned are informed that Notifications in the Gazette are to be accepted as disposing of all references regarding leave, transfers, appointments, powers, and other personal questions affecting Gazetted Officers as to which orders are gazetted by Government in this Part of the Gazette and that any subsidiary orders as to re-employment of their subordinates and the like, which such notifications necessitate, must be issued by them on receipt of the Gazette as no other orders will be issued by Government."

Then under the heading "General Administration Department", the following notification appears :

"Sachivalaya, Ahmedabad, 1st May 1960. No. PSY-1060-D. -- Shri Shantilal S. Shah is appointed as Parliamentary Secretary to the Chief Minister with effect from 1st May 1960. He will be in charge of planning."

After various other notifications appear the words :

"By order and in the name of the Governor of Gujarat, V. Isvaran, Chief Secretary to the Government".

This notification shows that Shantilal Swaroopchand Shah has been appointed as Parliamentary Secretary of the Chief Minister with effect from 1st May 1960 by order of the Governor and that he would be in charge of planning. No document has been tendered in evidence showing the terms on which Shantilal S. Shah was appointed as Parliamentary Secretary to the Chief Minister. For the purpose of ascertaining the terms of appointment we have to fall back upon the oral evidence led in the case and on whatever inferences that could be drawn from certain documents.

There is no reference to the post of a Parliamentary Secretary in the Constitution of India. Article 163(I) of the Constitution provides as under :

""There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is

by or under this Constitution required "to exercise his functions or any of them in his discretion."

Article 164 (I) provides that :

"the Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor."

Article 164(2) provides that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State. Article 164(5) provides that the salaries and allowances of Ministers shall be such as the Legislature of the State may from time to time by law determine and, until the Legislature of the State so determines, shall be as specified in the Second Schedule. The Constitution does not make any reference to Parliamentary Secretaries or even to Deputy Ministers. Under Article 208 of the Constitution it is provided by Clause (I)" as under :

"A House of the Legislature of a State may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business."

By Section 18 of the Bombay Reorganisation Act, 1960, it is provided as follows :

"The rules as to procedure and conduct of business in force immediately before the appointed day with respect to the Legislative Assembly of Bombay, shall, until rules are made under Clause (I) of Article 208 have effect in relation to the Legislative Assembly of Maharashtra or of Gujarat, subject to such modifications and adaptations as may be made therein by the Speaker thereof."

The Gujarat Legislative Assembly Rules contain a reference to Parliamentary Secretary. Rule 2 (m) provides as under :

"2. In these rules, unless the context otherwise requires, --

x x x (m) "Minister" means a member of the Council of Ministers, and includes a Deputy Minister and a Parliamentary Secretary;"

When we turn to the various provisions contained in these rules, we find that there are provisions relating to the duties, powers and privileges of a Minister. In view of the definition given in Rule 2 (m) these powers, duties and functions of a Minister are liable to be exercised by a Parliamentary Secretary unless the context otherwise requires. Rule 45 provides that with the permission of the Speaker, a Minister may make a statement on a matter of public importance. On such statement no discussion shall be allowed but members may be permitted to ask questions for the purpose of eliciting further information in regard to the statement. Rule 61 provides that the Chief Minister or any other Minister, whether he has previously taken part in the discussion or not, shall on behalf of the Government have a general right of explaining the position of the Government at the end of the discussion, and the Speaker may inquire how much time will be required for the speech so that he may fix the hour by which

the discussion shall conclude. There are several other rules like rules relating to the reply to questions asked, relating to reply to supplementary questions and relating to withdrawal of questions, where a reference has been made to a Minister. Unless the context would otherwise require, the expression Minister would, having regard to the definition clause, include a Parliamentary Secretary. Rule 85 provides as under :

"85 (i) A member who has resigned the office of Minister may with the consent of the Speaker, make a personal statement in explanation of his resignation..

(2) Such a statement shall be made after questions and before the list of business for the day is entered upon.

(3) On such statement no debate shall be allowed :

Provided that a Minister, shall be entitled after the member has made his statement, to make a statement pertinent thereto".

This rule would equally apply to a Parliamentary Secretary by virtue of the provisions contained in Rule 2 (m). "There are various other rules applicable to Ministers which may equally apply to a Parliamentary Secretary. These rules throw some light on the nature of the functions and duties of a Parliamentary Secretary, The Parliamentary Secretary is equated with a Minister for the purpose of the Rules except where the context otherwise requires.

13. In the Official Publication of the Proceedings of the Gujrat Legislative Assembly printed in 1961, on the first page is a reference to persons who constitute the Government of Gujrat. It is headed by the Governor followed by the Council of Ministers. The names of Chief Minister and four other ministers appear followed by the name of g Deputy Ministers. The 9th name is that of Shantilal S. Shah, the Parliamentary Secretary to the Chief Minister. We have referred to this official publication merely as indicative of the character in which the Parlia mentafy Secretary is officially regarded.

14. A reference has also been made before us to the Bombay Civil Service Rules In the Appendix XLII-B under the heading "Travelling Allowance Rules Applicable to High Officials" are Section I relating to Ministers and Section II relating to Chairman, Deputy Chairman, Legislative Council, and Speaker, Deputy Speaker, legislative Assembly, followed by Section III relating to Parliamentary Secretaries, Section IIIA relating to the Parliamentary Secretary to the Chief Minister and Section IV relating to Members of the Legislature. It wag urged that as these rules which appear in the Bombay Civil Services Rules applied to Parliamentary Secretaries, they should be regarded as being in the service of the Government. No such inference is liable to be drawn as Ministers who are dealt with in Section I, Chairman, Deputy Chairman, Legislative Council, and Speaker, Deputy Speaker, Legislative Assembly, who are dealt with in Section II and Members of the Legislature who are dealt with in Section IV, and who are all governed by the travelling allowance rules mentioned therein cannot be re

graded as being in the service of the Government.

15. A further reference to Parliamentary Secretaries is found in the Gujrat Legislative Assembly Members (Removal of Disqualifications) Act, 1960 (Act No.1 of 1960). That Act was passed in view of the provisions contained in Article 103 of the Constitution which enacts that a person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or the 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 to the Constitution, other than an office declared by the Legislature of the State by law not to disqualify its holder. It is admitted that the Parliamentary Secretary receives a salary of Rs. 500,- per month. Under the aforesaid Gujrat Legislative Assembly Members (Removal of Disqualifications) Act, 1960, it is provided that a person would not be disqualified for being chosen as, or for being a member/ of the Gujrat Legislative Assembly merely by reason of the fact that he holds any of the offices specified in the Schedule appended to the Act. In the Schedule it is mentioned as item (i) the office of Parliamentary Secretary to a Minister of the Government of Gujrat.

16. A reference to a Parliamentary Secretary is also found in the Gujrat Legislative Assembly Members' Salaries and Allowances Act, 1960. Section 9 thereof provides as under :

"Notwithstanding anything contained in this Act, a Minister or Deputy Minister, the Speaker or a salaried Parliamentary Secretary shall not be entitled to any salary, allowances, or provision for residential accommodation under this Act, by reason of the fact that Minister, Deputy Minister, Speaker, or salaried Parliamentary Secretary is a Member of the Assembly."

A reference may also be made to another Act of the Gujarat Legislature being the Gujarat Ministers' Salaries and Allowances Act, 1960. That Act provides by Section 6 that there shall be paid to each Deputy Minister a salary of Rs. 750/- " per month. By Section 7 it is provided (i) that each Deputy Minister shall be entitled, without payment of rent, to the use of a furnished residence in Ahmedabad throughout his term of office and for a period of fifteen days immediately thereafter, or in end of such residence a house allowance at the rate of Rs. 150 /- per month, (2) that no charge shall fall on the Deputy Minister personally in respect of maintenance of any residence provided under this Section, and (3) that the expenditure on furnishing the residence provided under this section shall be on such scale as may be determined by rules or Orders. The provisions contained in this Act relating to Deputy Ministers do not, however, apply to Parliamentary Secretaries even though for the purpose of the rules framed by the Gujarat Legislative Assembly a Parliamentary Secretary is included in the expression "Minister". We have made a reference at some length to all these provisions with a view to assess the real position occupied by a Parliamentary Secretary so far as the " rules and legislation go, "

17-18. (His Lordship after discussing the evidence proceeded:)

19. The evidence of the last two witnesses coupled with the provisions contained in the Gujarat Legislative Assembly Rules show that the position of a Parliamentary Secretary is very nearly akin to that of a Deputy Minister Mr. Darn, the learned advocate who appears on behalf of the petitioner has contended that our Constitution does not recognise a Parliamentary Secretary, that it makes a reference only to a Council of Ministers and that it cannot be said that ,a Parliamentary Secretary is a member of the Council of Ministers. Mr. Daru is right when he contends that there is no reference to a Parliamentary Secretary in the Constitution. There is equally no reference in the "Constitution to a Deputy Minister, From the mere fact that a reference, has not been made to a Parliamentary Secretary in the Constitution and from the mere fact that he may not be liable to be regarded as a Minister, it does not follow that merely because his appointment has been made by the Governor and his appointment has been gazetted that" he has become a person who is in the service of the Government. In this connection, it would not be out of place to refer to several text-books which state the position of a Parliamentary Secretary in England. We have borrowed many institutions from England and the institution of a Parliamentary Secretary seems to be one of them.

20. In the book "Government and Parliament" by the Rt. Honourable Lord Morrison of Lambeth, Second Edition, at page 59 it is stated as under:-

"Each departmental Minister usually has a Parliamentary Secretary to assist him, but in some-of the larger Departments there may be two, or even three at the" Scottish office. Mostly they are Members of the House of Commons, or if not then of the House of Lords. They must not, of course, be confused with the Permanent Secretary who is the senior civil servant in the Department. Now-a days they are selected by the Prime Minister in consultation with the Minister concerned."

At page 99 it has been observed by the learned author that Whips, Parliamentary Secretaries and Parliamentary Private" Secretaries, and the leader of the House are part of the machinery of Government. In dealing with the question of the life of a Parliamentary Secretary at page 66 it is observed that a "Parliamentary Secretary of today is a possible Minister of the future", that "in the case of the Minister being a Peer, it is of course absolutely essential for the Parliamentary Secretary" in the Commons to be in on the ground floor" of departmental discussions, for he is the departmental spokesman in the House of Commons" and that

"a similar need arises where the Minister is in the Commons" a"nd the Parliamentary Secretary is in the Lords."

At page 115 it is observed" that all departmental Ministers have a Parliamentary Secretary or Secretaries" who are members of the "Government, that Parliamentary Secretaries" are available to assist their" Ministers in the Office

and on the Front Bench, "that among their, important duties is to ""be accessible to" Members who "seek information" or wish to make representations or complaints so that their Ministers may be made aware of parliamentary apprehensions and opinions," and that "many of these matters can be dealt; with by the Parliamentary Secretary on his own responsibility.

21. In the book "British Government" by Hiram Miller Stout, at page 79 the author, in reference to junior ministers, observed as "follows These are members of the majority party in Parliament who serve as assistants to the heads of departments and ministers and who are usually known as Parliamentary Secretaries to these ministries. All these ministers form the Government of the day."

22. In Sir Ivor Jennings' book, "Cabinet Government, 3rd Edition, the author has" at page-59 referred to Parliamentary Secretaries as "rank-ing as assistant Ministers. At page 231 he has-stated that Ministers of State and Parliamentary Secretaries can effectively, deputies for the departmental ministers only when they have themselves assumed the responsibility (subject to the control of the departmental ministers) for the Branch of administration under discussion.

23. A reference to these books clearly shows that in Great Britain, Parliamentary Secretaries-are regarded as forming part of the Government. On the materials that have been placed before us, we are of the view that Parliamentary Secretaries in this State of Gujarat also form part of the Government and they cannot be regarded as being in the service of the Government within the meaning of Section 123(7) "of the Representation" Of the People Act, 1951.

24. It is not necessary for us to refer to all the authorities which have been cited at the bar on the subject. We will, however, refer to one judgment of the Supreme Court strongly relied upon by the learned advocate for the petitioner in support of his contention that a Parliamentary Secretary should be regarded as one in the service-of the Government. It is a decision of the Supreme Court in the case of Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, . Justice Bhagwati who delivered the judgment of the Court had, in that case, to consider the question as to who was a-workman within the meaning of the Industrial Disputes Act, 1947. In the course of his judgment he observes at pp. 157 and 158 (of SCR) : (at p. 267 of ATR) as follows:-

"The principles according to which the relationship as between employer and employee or master and servant has got to be determined are well settled. The test which is uniformly applied in order to determine the relationship is the existence of a right of control in respect of the manner in which the work is to be done. A distinction is also drawn between a contract for Services and a contract of service, and that distinction is "put in this way" "in the one" case the master can order or require what is to be done while in the other case he cannot only order or require what is" to be done but how itself it shall "be done. (Per Hilbery, J., in Collins v. Hertfordshire "Coun-"ty "Council 1947 KB 598.

He further proceeds" to state that "the "test is, how-"ever, not accepted as universally correct. Then a passage from the judgment of Lord Justice Denning of the case of *Stevenson, Jordon and Harri-son Ltd. v. Macdonald and Evans*, reported in ILR 1952 101 at pp. no and in, has been quoted wherein it has been stated as under:-

"There are" many contracts of service where the master cannot control the manner in which the work is to be done as in the case of a captain of a ship. Lord Justice Somervell went on to say: One perhaps cannot get much beyond this; "Was the contract a, contract of service within the meaning which an ordinary man would give under the words"? I respectfully agree. As my Lord has said, it is almost impossible to give a precise definition of the distinction. It. is often tasy to recognise a contract of service when you see it, but difficult to say wherein the difference lies, xxx One feature which seems to run through that instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for service, bis" work, although done for the business, is not integrated into it but is only accessory to it."

The learned Judge has also referred to a pronouncement of the House of Lords in *Short v. J. and W. Henderson, Ltd.*, reported in ILR (1946) 427, where Lord Thankerton recapitulated the four indicia of a contract of service which had been referred to in the judgment under appeal, viz., (a) the master's power of selection of his servant, (b) the payment of wages of other remuneration, (c) the master's right to control the method of doing the work, and (d) the master's right of suspension or dismissal, and the limitations thereon. After citing various authorities Mr. Justice Bhagwati in the course of his judgment at p. 160 (of SCR) : (at p. 268 of AIR) " has observed as follows: -

"The principle which emerges from these authorities is that the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt at page 23 in *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd.* 1947 1 AC 23, "the proper test is whether or not the hirer had authority to control the manner of execution of the act in question".

As observed by Lord Justice Somervell, it is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies. There is no evidence led before us to show that the Minister to whom a Parliamentary Secretary may be attached exercises that degree of control in the manner of the execution of the work of the Parliamentary Secretary as would give rise to the relationship of master and servant between the one and the other.

25. Mr. Dam hag also invited our attention to the decision of the Privy Council in the case of *Emperor v. Sibnath Banerji*, reported in AIR 1943 PC 156. The Privy

Council in that case had to consider the provisions of Section 49 of the Government of India Act (1935), which provided as under: -

"49. (r) The executive authority of a Province shall be exercised on behalf of His Majesty by the Governor, either directly or through officers subordinate to him, x x x"

The Privy Council in that case has at p. 163 observed as follows:-

"So far as it is relevant in the present case, their Lordships are unable to accept a suggestion by counsel for the respondents that the Home Minister is not an officer subordinate to the Governor within the meaning of Section 49(I), and so far as the decision in *Emperor Vs. Hemendra Prosad Ghosh and Another*, , decides that a minister is not such an officer their Lordships are unable to agree with it. While a minister may have duties to the Legislature, the provisions of Section 51 as to the appointment, payment and dismissal of ministers, and Section 59 (3) and (4) of the Act of 1935, and the Business Rules made by virtue of Section 59, place beyond doubt that the Home Minister is an officer subordinate to the Governor."

Mr. Daru argued that Article 154 of the Constitution is couched in somewhat similar terms, where it has been laid down that the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Placing reliance upon the judgment of the Privy Council he urged that a Minister himself was an officer subordinate to the Governor, that a Minister could well be regarded as a person in the service of the Government and that if a Minister could be so regarded, a Parliamentary Secretary could equally be so regarded. What the Privy Council lays down in that case is that the Minister is an officer subordinate to the Governor, but from that it does not of necessity follow that a Minister is in the service of the Government. From the fact that the appointment of a Minister is required to be made under the Constitution by the Governor, from the fact that the appointment of a Minister by the Governor is gazetted, from the fact that a Minister receives a salary and allowance, it does not follow that he is a person in the service of the Government. The Council of Ministers under Article 164 of the Constitution is collectively responsible to the Legislative Assembly of the State. From the mere fact that the Chief Minister and other Ministers are required to be appointed under Article 164 of the Constitution by the Governor and have to be paid salaries and allowances, it does not follow that the relationship of master and servant exists between the Governor and any minister. The very test on which Mr. Daru relied, which has been referred to in the case reported in *Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra*, is by itself sufficient to show that the relationship of master and servant does not so exist. Though the Governor appoints a Minister he is not in a position to control the manner of the execution of the duties which have to be discharged by the Ministers in their capacity, as Ministers. Similarly, in the case of a Parliamentary Secretary there is nothing to show that the Governor who appoints a

Parliamentary Secretary is in a position to control the manner in which a Parliamentary Secretary is to do his work as such Parliamentary Secretary.

26. On the facts of the present case, having regard to the material that has been placed before us, we hold that Shantilal Swaroopchand Shah was not in the service of the Government within the meaning of Section 123(7) of the Representation of the People Act, 1951, at any material time in view thereof, the further question whether he is a gazetted Officer, does not arise for consideration and we refrain from dealing with that aspect of the matter."

27. In the result it cannot be said that any corrupt practice has been resorted to by the respondent in appointing Shantilal Swaroopchand Shah as his election agent and utilising the service of Shantilal Swaroopchand Shah for the furtherance of the prospects of the respondent's election. No other points have been pressed before us. In the result, we confirm the order of the Election Tribunal dismissing the petition and ordering the petitioner to pay to the respondent Rs. 500/- by way of costs. The appeal fails and is dismissed with costs. We fix the cost of the appeal at Rs. 500/- and direct that the appellant do pay to the respondent the sum of Rs. 500/- as and by way of costs. We also direct that the substance of the decision be communicated forthwith to the Election Commission and the Speaker of the Gujarat Legislative Assembly and that an authenticated copy of the decision be sent to the Election Commission.