

(2018) 04 CHH CK 0158

In the Chhattisgarh High Court

Case No : Writ Petition (PIL) No. 119, 3057 of 2016, 3 of 2017

Mohammad Akbar

APPELLANT

Vs

Shri D. D. Singh

RESPONDENT

Date of Decision : 13-04-2018

Acts Referred:

Assam (Alteration Of Boundaries) Act, 1951 — Section 7
Constitution of India, 1950 — Article 164(1A), 164(2), 163, 167(a), 163(1)

Citation : (2018) 04 CHH CK 0158

Hon'ble Judges : THOTTATHIL B. RADHAKRISHNAN, J;SHARAD KUMAR GUPTA, J

Bench : Division Bench

Advocate : Amrito Das, Abhyuday Singh, J.K.Gilda, Prasoon Bhaduri,
H.C.Shukla, Raja Sharma, Ankur Agrawal, Chandresh??Shrivastava

Judgement

1. Eleven members of the Chhattisgarh State Legislative Assembly are Parliamentary Secretaries by virtue of notifications issued by the Governor of

the said State, followed by administration of oath of secrecy as regards such office to each of them and upon each of them being allocated to assist

the different Ministers who are also specified in that regard.

2. Writ Petition (PIL) No. 119 of 2016 is filed seeking that the appointment of the aforesaid persons as Parliamentary Secretary be invalidated by

holding that such appointments are void ab initio, fundamentally for the reason that such appointments result in infraction of Article 164(1A) of the

Constitution of India and such appointments are the result of colourable exercise of power to circumvent the restrictive covenant contained in that

provision of the Constitution. It is also the plea that creating a political post of Parliamentary Secretary is beyond the legislative competence of the

State and therefore, neither the State nor the Governor, in exercise of executive

power, could have made such appointments. During pendency of that writ petition, Writ Petition (C) No. 3 of 2017 was filed challenging the Chhattisgarh Vidhan Mandal Sadasya Nirarhata Nivaran Adhiniyam, 1967; for short 'the 1967 Act', to the extent of inclusion of 'Parliamentary Secretary' in the Schedule to that Act, whereby the holding of the said office is not an office of profit which would disqualify the holders of such office from being chosen or for being members of the State legislature.

Consequently, a declaration is sought that each of the aforesaid Parliamentary Secretaries is disqualified for being a member of the Legislative

Assembly. Thereafter, Writ Petition (C) No. 3057 of 2016 is filed by the Petitioner in Writ Petition (C) No. 3 of 2017, seeking reliefs at par with those

sought for in Writ Petition (PIL) No. 119 of 2016.

3. The State has filed a consolidated return as to their contention in the aforesaid three writ petitions. The impugned action is pleaded as to be in

conformity with the Constitution. The Petitioners' allegation that the appointment of the Parliamentary Secretaries result in infraction of Article

164(1A) of the Constitution, is refuted. The inclusion of the Parliamentary Secretaries in the Schedule to the 1967 Act had never been under challenge

and the continued inclusion of the Parliamentary Secretary in the Schedule to the Act is not in violation of any provisions of the Constitution, it is

contended.

4. The sum and substance of the arguments on behalf of the Petitioners is that by having Parliamentary Secretaries, the limit prescribed under Article

164(1A) of the Constitution is violated and that there is no post of Parliamentary Secretary created by law and hence, there is no power to make any

appointment to any such post. The further plea is that the appointment of the Parliamentary Secretaries is a colourable exercise of power, aimed only

at political appeasement and such appointments have been made without the authority of law. Once those appointments as Parliamentary Secretaries

fall as unsustainable in terms of the Constitution, there is no ground to continue any protection from disqualification, to such persons on the basis of

provisions of the 1967 Act, it is argued.

5. On behalf of the State and the private Respondents who are the Parliamentary Secretaries, it is argued that the concept of Parliamentary

Secretaries is not alien to the modalities of governance and management of

democracies and is part of accepted norms relating to governance through an elected government in a democratic process. The so-called appointment and administration of oath of secrecy are to ensure that the Ministers who collectively form the Cabinet would not have any opportunity to dissociate and excuse-off their collective responsibility from the actions of the Parliamentary Secretaries attached to each of the Ministers concerned, to whom the Parliamentary Secretaries are allotted.

6. On 01.08.2017, an interlocutory order was issued in these writ petitions. It reads as follows:

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These writ petitions raised questions regarding the office of Parliamentary Secretaries in the State of Chhattisgarh.

These matters are listed today for consideration of the applications for interim relief.

Learned Advocate General points out that these matters are fixed for final hearing on 23.08.2017.

For the purpose of considering whether interlocutory order has to be issued, we treat Writ Petition (C) No. 3057 of 2016 as the leading case in which

all the persons who are Parliamentary Secretaries in the State of Chhattisgarh are impleaded as Respondents and in which certain notifications are

sought to be quashed, apart from seeking a declaration that the appointment of Respondents No. 5 to 15 therein as Parliamentary Secretaries is void

ab initio.

Different submissions have been made by the learned counsel for the Petitioners, learned counsel for the contesting Respondents and the learned

Advocate General touching the applicability or otherwise of the ratio of the judgment of the Hon'ble Supreme Court of India in *Bimolangshu Roy*

(Dead) Through LRs v. State of Assam; 2017 SCC Online SC 813. The question whether that judgment clinches the issues in relation to

Parliamentary Secretaries of different States is indicated, to point out that some of the matters from a couple of other States are still pending before

Their Lordships of the Supreme Court.

Be that as it may, apart from the law laid by the Hon'ble Supreme Court in *Bimolangshu Roy* (supra), Article 163(1) of the Constitution provides for a

Council of Ministers with the Chief Minister as the head for the purposes stated

therein. Article 164(1) of the Constitution provides inter alia that the Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advise of the Chief Minister.

Clause (1A) of Article 164 of the Constitution, introduced as per 91st Amendment to the Constitution, enjoins that the total number of Ministers,

including the Chief Minister, in the Council of Ministers in a State shall not exceed fifteen per cent of the total number of members of the Legislative

Assembly of that State. The proviso to that clause is not relevant here. One seminal principle that arises on a conjoint reading of Articles 163(1) and

164(1) of the Constitution is that only a person who is appointed as Minister by the Governor on the advise of the Chief Minister can be part of the

Council of Ministers . This means that no person who is not so appointed can carry out any function referable to Article 163(1) of the Constitution or

discharge any executive function as a Minister in the Council of Ministers.

The participation of any person, other than as a Member of Legislative Assembly in the proceedings of the Legislative Assembly is a matter which

will stand regulated by the Rules of Business of that House, the master of which is the Speaker. This order is issued in no manner intending to impair

the powers, responsibilities and duties of the Speaker of the Chhattisgarh Legislative Assembly or to interfere with the proceedings of that House.

For the reasons aforesaid, it is ordered that none among Respondents No. 5 to 15 in Writ Petition

(C) No. 3057 of 2016 shall discharge any function as Member of Council of Ministers unless such person has been appointed as a Minister by the

Governor in terms of Article 164(1) of the Constitution.

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7. There are 90 Members in the Chhattisgarh Legislative Assembly. There is a Chief Minister and 12 Ministers, taking the total number of Ministers in

the Council of Ministers to 13. That is the full compliment permissible as per Article 164(1A) of the Constitution.

Are the 11 Parliamentary Secretaries, who are among the Respondents, Ministers in the Council of Ministers in the State of Chhattisgarh, for the

purpose of Article 164(1A) of the Constitution?

8. Article 163 of the Constitution enjoins that there shall be a Council of Ministers with the Chief Minister as the head to aid and advise the Governor

in exercise of his functions, except in relation to matters differently stated therein. Article 164(2) provides that the Council of Ministers shall be

collectively responsible to the Legislative Assembly of the State. The duties of the Chief Minister in terms of Article 167 (a) of the Constitution

relates, inter alia, to all decisions of the Council of Ministers, relating to the administration of the affairs of the State. Clause (c) of Article 167 is the

constitutional authority under which the Governor could require the Council of Ministers to consider any matter on which a decision has been taken by

a Minister, but which has not been considered by the Council. The doctrine of collective responsibility embedded in Article 164(2) of the Constitution

thus pulsates on to the duties of the Council of Ministers in terms of Article 163(1) and to the ultimate requirement that even the decisions taken by a

Minister could be made part of the collective responsibility of the Council of Ministers. This collective responsibility of the Council of Ministers to the

Legislative Assembly of the State is not diluted by the quality of office of any person assisting the Minister. Fundamentally, the 11 Parliamentary

Secretaries who are among the Respondents, are not Ministers and they are not part of the Council of Ministers. The question whether a particular

person is a Minister, primarily depends upon the quality of his appointment and the duties and responsibilities attached to the office of being a Minister.

Article 164(1) of the Constitution provides for appointment of Minister by the Governor on the advise of the Chief Minister. The oath of office for a

Minister for a State in terms of Article 164(3), in the form set forth for that purpose in the Third Schedule, is specific to the discharge of duties as

Minister for the State. The quality of the office of the Minister is thus clearly determinable in terms of the Constitutional provisions noted hereinabove.

There is no room to hold that the phrase "total number of Ministers" occurring in Article 164(1A) of the Constitution requires to be differently

dealt with. This is all the more so because the prescription of the total number is as regards the Ministers in the Council of Ministers.

9. Clause (1A) was introduced in Article 164 as per the Constitution (Ninety-first Amendment) Act, 2003. Contextually, we deem it appropriate to

notice as to how the Parliament appreciated the Bill for amending the Constitution in that regard. The Bill was moved by introducing this particular

subject by specifically treating the size of the Cabinet and the requirement to downsize the Council of Ministers. There is no express provision or

implicit principle in Article 164(1A) of the Constitution which would permit enlarging the scope of the phrase "total number of Ministers in the Council of Ministers in a State" beyond the total number of Ministers, including the Chief Minister, who have been appointed by the Governor, as such, in terms of Article 164(1) of the Constitution. Therefore, any person, including a Member of the Legislative Assembly, who is not appointed by the Governor as Minister and who has not entered the office as Minister after being administered the oath of office in terms of the Third Schedule, as Minister, cannot be counted as Minister to determine the total number of Ministers in the Council of Ministers for the purpose of Article 164(1A) of the Constitution.

10. Parliamentary Government is that system of Government having the real executive power vested in a Cabinet composed of members of the Legislature who are individually and collectively responsible to the Legislature. It is this constitutional responsibility which has been dilated upon in the preceding paragraphs. Parliamentary practice and parliamentary procedure in the management of executive governance through a system of parliamentary government do not exclude the involvement of Parliamentary Secretaries who are called to the duty of assisting a Minister or Ministers or the Prime Minister or the Chief Minister. To ensure institutional secrecy, they are administered oath. This does not mean that they are appointed to a particular post in Government or that they enter the service of any Government as a member of its service and thereby becoming a Government servant. The provision for Parliamentary Secretary is not a new concept. The RT Hon. Lord Morrison of Lambeth's Government and Parliament, 3rd Edn, is quoted in Advanced Law Lexicon (P. Ramanath Aiyar) 3rd Edition, to say that Parliamentary Secretary is not to be confused with Government Secretaries who are civil servants and that Parliamentary Secretaries are to assist the Ministers. It is seen to be a matter of practice that Ministers are given support of Parliamentary Secretaries to assist in management of Departments. We do not see that 'Parliamentary Secretary' is anathema to the scheme of the Indian Constitution.

11. Reference was made on behalf of the Petitioners, to the judgment of the Hon'ble Supreme Court in *Bimolangshu Roy (Dead) Through LRs v. State of Assam & Another*; 2017 SCC Online 813, the judgment of the Himachal

Pradesh High Court in Citizen Rights Protection Forum v. Union of India & Others; 2006 (1) ShimLC 60, the judgment of the Bombay High Court in Adv. Aires Rodrigues v. The State of Goa & Others; 2009 SCC Online Bom 119, the judgment of the Calcutta High Court in Vishak Bhattacharya v. The State of West Bengal & Others; AIR 2015 Cal 187, the judgment of the High Court of Punjab and Haryana, in Jagmohan Singh Bhatti v. Union of India & Others; 2016 SCC OnLine P&H 6387; the judgment of the High Court of Meghalaya in Shri Madal Sumer v. State of Meghalaya & Others; 2017 SCC Online Megh 342, and the judgment of the High Court of Sikkim in Pahalam Subba & Others v. The State of Sikkim & Others; Writ Petition (PIL) No. 04 of 2016, decided on 25.08.2017.

12. In Bimolangshu Roy (supra), the Apex Court was dealing with a statute which contained a legislative declaration that the Parliamentary

Secretaries ought to be of the rank and status of a Minister of the State. Noticing absence of legislative competence, the Apex Court declared the

Assam Parliamentary Secretaries (Appointment, Salaries Allowances and Miscellaneous Provisions) Act, 2004; for short 'the Assam Act' as

unconstitutional. However, as stated in the last paragraph of that judgment, other issues including, as regards Article 164(1) of the Constitution, were

not answered. In the case in hand, the Parliamentary Secretaries who are among the Respondents are not shown to be having rank or status of a

Minister of the State or the authority to exercise powers or discharge functions and perform duties of a Minister. Unlike the provisions of Section 7 of

the Assam Act which was under challenge before the Apex Court, there is no provision under which the Parliamentary Secretaries in the State of

Chhattisgarh, who are among the Respondents herein, would be entitled to salary and allowances as are admissible to a Minister. The terms of the

notification under which they are working as Parliamentary Secretaries, after being administered oath of secrecy, do not equate them with any of the

constitutional authorities in Chapter II of Part VI of the Constitution. They are also not posted with any authority to carry out any constitutional or

statutory function. Their duty is only to assist the Minister to whom each of them were required to assist in terms of the impugned notification.

Bimolangshu Roy (supra) does not, therefore, apply to the case in hand.

13. In Citizen Rights Protection Forum (supra), the Himachal Pradesh High Court

did not go into the question of Article 164(1A) of the Constitution, but ultimately held that there is no statutory or constitutional provision under which appointment of Parliamentary Secretaries could be made. Unlike in that case, the appointment of Parliamentary Secretaries who are among the Respondents herein, were not made by the Chief Minister. They were notified by the Governor on the recommendation of the Chief Minister. Thus, the notification appointing the Parliamentary Secretaries who are among the Respondents herein, is purely a part of the due management of the political executive, which is not shown to be in violation of any constitutional or statutory provision. They are not appointed to a post in the Government or under the Government.

14. In *Adv. Aires Rodrigues (supra)*, the Parliamentary Secretaries were confirmed with the rank of a Cabinet Minister and facilities and privileges as that of the rank/status of a Cabinet Minister. That is not the facts situation in the case in hand. While we are in agreement with the principles of law stated therein as regards Article 162, 163 and 164(1A) of the Constitution, we are unable to apply that as a precedent to the case in hand, which does not deal with a situation where either by status, authority or privilege, Parliamentary Secretaries are equated to Ministers. The same would be the situation as regards *Vishak Bhattacharya (supra)* in which the Calcutta High Court was also dealing with a case where appointment of Parliamentary Secretaries carried with it the rank and status of a Minister of the State. We have also noticed the conflict of opinion expressed in the said precedent, though, the learned Judges concurred as to the ultimate decision.

15. The ratio evolved in *Jagmohan Singh Bhatti (supra)*, as regards service under the State and the service within the Assembly, do not have any bearing on the facts of this case. That decision, insofar as it relates to Article 164(1A) is concerned, squarely stands on the undisputed fact that the Parliamentary Secretaries in the State of Punjab were, in fact, performing the functions almost like Ministers and also had the perks and facilities equivalent to that of a Minister, which was the facts situation even as per that State's stand in that case. As already noted, the situation in the case in hand is not so.

16. *Shri Madal Sumer (supra)* dealt with the issue of legislative competence to make a law for appointment of Parliamentary Secretaries.

Bimolangshu Roy (supra) rendered by the Apex Court was followed. Pahalam Subba & Others (supra) related to the validity of the statute which provided for appointment, salaries, allowances etc. relating to Parliamentary Secretaries. These judgments cannot be applied as precedents to the facts situation relating to the appointment of Parliamentary Secretaries in the State of Chhattisgarh who are among the Respondents in the case in hand, having regard to the quality of office, distinct from being Ministers, as already noted above.

17. For the aforesaid reasons, the 11 Parliamentary Secretaries in the State of Chhattisgarh, who are among the Respondents, are not shown to be discharging any of the constitutional or statutory functions or duties of Ministers. They are not Ministers and cannot be treated as Ministers for the purpose of the terms 'Minister' or 'Council of Ministers' in Articles 163 and 164 of the Constitution or for the purpose of the phrase "total number of Ministers" in Article 164(1A).

Is the inclusion of the Parliamentary Secretaries in the Schedule to the 1967 Act, liable to be declared void and inoperative?

18. The Chhattisgarh Mantri (Vetan Tatha Bhatta) Adhiniyam, 1972; for short '1972 Act' provides for payment of salaries and allowances. That is not under challenge. Presumption as to its constitutionality is not to be ignored. The payments under that Act are duly authorised payments in consonance with that law made by the legislature. The law laid down by the Apex Court in Shivamurthy Swami Inamdar v. Agadi Sanganna Andanappa; (1971) 3 SCC 870 and Anokh Singh v. Punjab State Election Commission, (2011) 11 SCC 181, is to the effect that the mere receipt of payments of such nature is not sufficient to hold that the recipient holds an office of profit. The payments made to the Parliamentary Secretaries under the 1972 Act does not lead to the conclusion that the Parliamentary Secretaries are holding office of profit. There is no plea by the Petitioners; nor is there any material placed on record by them to hold; that there is no co-relation between the expenditure in performance of the functions of the Parliamentary Secretaries and the payments receivable by them, in terms of the 1972 Act. Therefore, the inclusion of the Parliamentary Secretaries in the Schedule to the 1967 Act cannot be stamped with the vice of legislative impermissibility, particularly in the light of clause (1)(a) of Article 191 of the

Constitution. Hence, the inclusion of Parliamentary Secretary in the Schedule to the 1967 Act is not liable to be declared void and inoperative.

19. In the result, these writ petitions are ordered repelling the contentions raised therein, but making absolute the interlocutory order dated 01.08.2017, quoted above. No costs.