

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) No. 6406 of 2008 & CM 12246/2008

GOVT. OF NCT OF DELHI Petitioner
Through: Mr. S.D. Salwan, Addl. Standing Counsel

versus

M/S. SHYAM SUNDER GOEL Respondent
Through: Mr. Sanjiv Kumar, Advocate.

CORAM: JUSTICE S. MURALIDHAR

1. Whether reporters of local paper may be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be referred in the digest? Yes

ORDER
17.08.2010

1. An interesting question concerning the ineligibility of an elected Municipal Councillor to hold, after being so elected, a Kerosene Oil Dealership ('KOD') licence issued by the Government of National Capital Territory of Delhi ('GNCTD') arises for consideration in the present petition.

2. The Respondent's sole proprietor Shri Shyam Sunder Goel, who was elected Councillor of the Municipal Corporation of Delhi ('MCD') in the year 2002 was, at the time of being so elected, holding a KOD licence in the name of the proprietary concern of M/s. Shyam Sunder Goel under the Delhi Kerosene Oil (Export & Prices) Control Order, 1962 ('Control Order').

3. The Respondent was issued the above licence in the year 1976

itself. He did not inform the Food & Supplies Department (‘FSD’) of the GNCTD of the fact of his being elected as a Councillor. According to the Petitioner, the GNCTD, this fact came to the notice of the FSD sometime in January 2003. On 28th March 2003, the GNCTD wrote to the MCD seeking specific information in reply to which, on 30th April 2003, the MCD informed the GNCTD as under:

“Sir,

Please refer to your letter No. AC(E)/F&S/03/814 dated 28.3.2003 on the subject cited above.

In this connection, I am directed to inform you that the desired information is given as under:

1. Whether a person elected as Corporator heads any committee and Members thereof gets any financial benefits from MCD.	The Councillors and persons shall be entitled to receive a daily allowance at the rate of one hundred and fifty rupees for each day on which they attend a meeting or meetings of the Corporation or any Committee thereof subject to the maximum of rupees one thousand five hundred per month.
2. Whether the Corporator posts involves financial gains.	‘No’
3. Whether the person elected as Corporator can continue to be a Govt. Licencee against the Licence already allotted.	‘No’

4. On the basis of the above response of the MCD, the FSD of the GNCTD issued to the Respondent a notice on 22nd July 2003 asking

him to show cause in writing as to why his licence should not be cancelled as he had not informed the FSD of his being elected as the Councillor of the MCD. In reply to the said show cause notice, the Respondent replied stating that he was not aware of the fact that an MCD Councillor could not hold a KOD licence simultaneously. The Respondent requested the Department to transfer the licence that stood in the name of the proprietary concern of M/s. Shyam Sunder Goel in the name of his wife Smt. Usha Goel.

5. Thereafter on 5th November 2004, the following order was passed by the Assistant Commissioner of the FSD:

“With reference to the Show Cause Notice No. F.AC (E) F&S/03/2298 dt. 22.07.2003 and your subsequent replies/explanations. You are informed that your request for the change in proprietorship of KOD Lic. No. 1730/76 of M/s. Shyam Sunder Goel, 7/14, Trilokpuri, Delhi, in favour of your wife Smt. Usha Goel cannot be acceded to as per departmental policy.

I being the licencing authority and after satisfying myself do hereby order for cancellation of your lic. No. 1730/76 with immediate effect.

This issues with prior approval of CFS Govt. of NCT of Delhi.

(Surender Kumar)

Asstt. Commissioner (East)”

6. Aggrieved by the above order, the Respondent filed an appeal before the Commissioner FSD who, by a detailed order dated 7th

April 2006, dismissed his appeal. Aggrieved by the above order, the Respondent filed a further appeal under Clause 8 of the Control Order before the Financial Commissioner ('FC'), Delhi. By the impugned order dated 10th April 2008, the FC allowed the appeal of the Respondent, by holding that the Respondent could not be held to be holding an 'office of profit' of the GNCTD by virtue of holding a KOD licence.

7. Aggrieved by the above impugned order dated 10th April 2008 passed by the FC, the present writ petition has been filed by the GNCTD.

8. It may be noticed that in the meanwhile the term of the Respondent as MCD Councilor came to an end in the year 2007 itself.

9. It is submitted by Mr. S.D. Salwan, learned counsel appearing for the Petitioner that the learned FC erred in holding that the holding of a KOD licence was not an 'office of profit', while at the same time observing that the KOD licence granted to the Respondent was his only source of livelihood and business. Secondly, it is submitted that the Respondent had accepted the fact that he could not continue to hold the KOD licence and, therefore, in response to the show cause notice he only requested that the licence be transferred in his wife's name. The learned FC had not adverted to this aspect at all. The learned FC has also failed to notice that there is no provision in the Control Order that permits a transfer of a licence to the wife upon

being elected as a Municipal Councillor. Thirdly, it is submitted that the mere fact that the term of the Respondent as Municipal Councillor got over in 2007, would not cure the illegality attached to his continuing to hold a KOD licence during the period when he was the Municipal Councillor. Lastly, it is submitted that the learned FC has not adverted to the clarification issued by the MCD to the GNCTD on 30th April 2003 clearly stating that a person elected as a Councillor cannot continue to be a government licensee against a licence already allotted.

10. It is submitted by Mr. Salwan that the meaning of the term ‘office of profit’ would turn on the wording of the particular statute and the governing orders. Further the expression ‘office of profit’ would include an office, the holding of which entitles the holder to an honorarium, remuneration or salary. Relying upon the judgment of the Supreme Court in *Shibu Soren v. Dayanand Sahay* (2001) 7 SCC 425, it is submitted that “it is the substance and not the form which matters and even the quantum or amount of ‘pecuniary gain’ is not relevant”. It is submitted that the commission earned by the Respondent on the sales made in the fair price shop was sufficient to bring the KOD under the expression ‘office of profit’. Reliance is also placed on the judgment in *Shrikant v. Vasantrao* (2006) 2 SCC 682, *Jaya Bachchan v. Union of India* (2006) 5 SCC 266 and *Consumer Education and Research Society v. Union of India* (2009) 9 SCC 648.

11. Learned counsel for the Respondent, on the other hand, submits that the Respondent having ceased to be a Councillor since 2007, no prejudice whatsoever can be caused to the MCD if the Respondent resumes holding the KOD licence. According to him, since 2007 there was no conflict of interest since the Petitioner has, in any event, not been elected as a Municipal Councillor thereafter. It is submitted that the holding of a KOD licence might be a disqualification for the Respondent to continue as a Councillor but not vice-versa. In other words, except as permitted under the provisions of the Control Order, a KOD licence cannot be cancelled only because the MCD has clarified that a Municipal Councillor cannot hold a KOD licence. It is submitted that the impugned order only refuses permission to the Respondent for transfer of the KOD licence in the name of his wife but does not give any specific reason why the Respondent's KOD licence should be cancelled. It is submitted that the judgment of the Supreme Court in *Shrikant* clarified that holding a liquor licence or running a vend did not amount to an 'office of profit' and, therefore, would not disqualify an elected member only on that score. Reliance is placed on the judgments in *Kartar Singh Bhadana v. Hari Singh Nalwa (2001) 4 SCC 661*, *Dewan Joynal Abedin v. Abdul Wazed 1998 Supp SCC 580* and *Ranjeet Singh v. Harmohinder Singh Pradhan (1999) 4 SCC 517*. It is submitted that in so far as there is no subsisting conflict between holding an elected post and an office of profit after 2007, there should be no difficulty in directing revival of the Respondent's KOD licence.

12. This Court is unable to accept the explanation of the Respondent that despite being elected as a Municipal Councillor in 2002, he was unaware that under Section 9(1)(g) of the DMC Act, a person shall be disqualified for being chosen as a Councillor if he holds any office of profit under the Government, i.e. the GNCTD or the Central Government. It appears that under Section 17(1)(a), one of the grounds on which an election as Councillor can be set aside is that on the date of his election a returned candidate was not qualified or was disqualified to be chosen as a Councillor. This would include any of the disqualifications under Section 9(1) of the DMC Act.

13. While it is correct that what is being questioned here by the GNCTD is the order of the learned FC restoring the KOD licence and not a challenge to the election of the Respondent as a Municipal Councillor, the learned FC appears to have erred in not appreciating that the MCD was by its clarification dated 30th April 2003 giving effect to Section 9(1)(f) of the DMC Act by ordering that once a person is elected as a Councillor, he cannot continue to be a licensee of the GNCTD.

14. This is a separate disqualification for holding a KOD licence contingent upon the licence holder being elected as a Councillor of the MCD and is traceable to Section 9(1)(g) of the DMC Act. It is not, as is sought to be contended by the Respondent, that such disqualification for holding a KOD licence should be found only in

any provision in the Control Order. Certainly there is an implied condition of the licence that the licence holder will not continue to function as such if he is otherwise disabled from doing so by virtue of the office to which he is elected after becoming a licensee.

15. In the considered view of this Court, the reasoning of the learned FC in the impugned order that the Respondent, by holding a KOD licence, cannot be held to be holding an office of profit under the GNCTD is erroneous. However, relatively magnificent may be the earnings of the Respondent through commission as a KOD licensee, it would still be an 'office of profit' under the GNCTD.

16. In *Shrikant*, the question was whether on account of having a subsisting contract with a local or other authority, a member of a Legislative Assembly stood disqualified in terms of Section 9A of the Representation of the People Act, 1951 ('RP Act, 1951'). It was held that Section 9A only disqualified persons having subsisting contracts with the State Government and not with any local or other authority. It was explained that for the purpose of Section 9A, what was relevant was whether the candidate has a subsisting contract with the appropriate government (i.e. the State Government) either for supply of goods to the Government or by execution of any work undertaken by the State Government. It is in the above context that it was held that subsisting contracts with local authorities would not attract the disqualification under Section 9A of the RP Act, 1951.

17. It appears to this Court that the decision in *Shrikant* cannot come to the aid of the Respondent herein for the simple reason that the statute here in question i.e. the DMC Act, in Section 9 (1)(g), talks of disqualification even where an 'office of profit' is held under the GNCTD or the Central Government and not only with the MCD. As explained by the Supreme Court in *Shibu Soren*, for determining whether a person can be said to be holding an 'office of profit' under the Government, each case has to be judged in light of the relevant provisions of the statute and on its own peculiar facts. It was explained that whenever such question arises, a realistic approach would have to be adopted having regard to the facts and circumstances of each case and the relevant statutory provisions. It was explained that a ban on the candidature must have a substantial and reasonable nexus with the object sought to be achieved, namely elimination or in any event reduction of possibility of misuse of the position which the legislator concerned holds or has held at the relevant time. In the said case, it was further explained in para 26 as under:

“The expression "office of profit" has not been defined either in the Constitution or in the Representation of People Act. 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 concerned person in connection with the office he holds, gives to him some

"pecuniary gain", other than an '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."

18. In the above case, it was held that the drawing of honorarium and allowances by Shri Shibu Soren for attending meetings as Chairman of the Interim Jharkhand Area Autonomous Council would attract the disqualification for the purposes of Article 191(1)(a) of the Constitution of India.

19. The above law was reiterated in *Jaya Bachchan* where in para 6 it was explained as under:

“An office of profit is an office which is capable of yielding a profit or pecuniary gain. Holding an office under the Central or State Government, to which some pay, salary, emolument, remuneration or non-compensatory allowance is attached, is 'holding an office of profit'. The question whether a person holds an office of profit is required to be interpreted in a realistic manner. Nature of the payment must be considered as a matter of substance rather than of form. Nomenclature is not important. In fact, mere use of the word 'honorarium' cannot take the payment out of the purview of profit, if there is pecuniary gain for the recipient. Payment of honorarium, in addition to daily allowances in the nature of compensatory allowances, rent free accommodation and chauffeur driven car at State expense, are clearly in the nature of remuneration and a source of pecuniary gain and hence constitute profit. For deciding the question as to whether one is holding an office of profit or not, what is relevant is

whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtained a monetary gain. If the "pecuniary gain" is "receivable" in connection with the office then it becomes an office of profit, irrespective of whether such pecuniary gain is actually received or not.”

20. Most recently, in *Consumer Education and Research Society* it was explained in para 77 as under:

“In this case, what kind of office would amount to an 'office of profit' under the Government and whether such an office of profit is to be exempted is a matter to be considered by the Parliament. The key concern that certain offices or places held by a MP may be either incompatible with his/her duty as an elected representative of the people or affect his/her independence and thus weaken his/her loyalty to his/her constituency and, therefore, should disqualify the holder thereof, is a matter to be addressed by the Parliament. It is also not possible to classify and include the offices exempted from the said disqualification in a generic sense. While making the legislation exempting any office, the question whether such office is incompatible with his/her position as a MP and whether his/her independence would be compromised and whether his/her loyalty to his/her constituency will be affected, should no doubt be kept in mind to safeguard the independence of the Members of the legislature and to ensure that they are free from any kind of undue influence from the executive.”

21. Keeping in view the background of the law explained by the Supreme Court in the above decisions, the decision of the MCD not

to permit an elected Councillor to continue to be a KOD licensee under the GNCTD cannot be faulted. The said decision of the MCD has not been challenged by the Respondent who, having served as a Municipal Councillor for the full term, could in any event not now turn around and challenge the decision. That the Respondent was not aware of the above decision is no excuse. It does not help him to seek revival of his KOD licence notwithstanding that he has completed his complete term as a Municipal Councillor.

22. There is also merit in the contention that the Respondent was also aware that his continuing to hold the KOD licence, while being a Municipal Councilor, was legally untenable and that is why he responded to the show cause notice by seeking transfer of the KOD licence in favour of his wife. Although the Respondent appears to have given up the said ground in these proceedings, it was certainly one of the points urged when the order was passed by the Commissioner, FSD on 7th April 2006. As rightly pointed out in the said order, there is no provision in the Control Order or even the instructions or guidelines issued thereunder to effect a change in the constitution of a licence holder even when the original licensee is alive. The departmental guidelines issued on 17th June 2002 made it clear that change in constitution will be allowed only in case of death of licensee, and consequent transfer of the licence to his successor, legal heir or natural heir. Therefore, the Petitioner was justified in rejecting the prayer of the Respondent for transfer of the KOD licence in the name of his wife upon his being elected as a Municipal

Councillor.

23. In light of the above legal position, there is no question of permitting the Respondent to get his KOD licence revived upon the completion of his tenure as a Municipal Councillor. The KOD licence could not be held by him after he got elected as a Councillor. It was incumbent upon him to have surrendered it immediately upon being elected as a Councillor.

24. For the aforementioned reasons, the impugned order of the learned FC dated 10th April 2008 is set aside. The writ petition is allowed but, in the circumstances, with no order as to costs. Application also stands dismissed.

S. MURALIDHAR, J

AUGUST 17, 2010
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