

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 3rd October, 2011

+ **W.P.(C) 2686/2011**

% **SHAMBHU DAYAL SHARMA****Petitioner**

Through: Mr. S.S. Tomar, Adv.

Versus

MCD & ORS.

.....**Respondents**

Through: Mr. H.S. Phoolka, Sr. Adv. with Mr. Dev P. Bhardwaj, Adv. for R-1 MCD.
Ms. Shilpi Kaushik, Adv. for R-2 UOI.
Mr. Maninder Singh, Sr. Adv. with Mr. V. Mukherjee & Mr. Gaurav Sharma, Adv. for R-4.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? yes
2. To be referred to the reporter or not? yes
3. Whether the judgment should be reported in the Digest? yes

RAJIV SAHAI ENDLAW, J.

1. The petition as originally filed claiming the relief of quashing the election held on 20th April, 2011 of the respondent no.4 Ms. Rajni Abbi to the post of Mayor, Delhi Municipal Corporation was found to be incomplete

and inadequate and permission granted to amend the petition. Though a proposed amended petition was filed but opportunity to further amend the petition was sought and was also granted. Proposed amended petition dated 1st June, 2011 has been filed. However since the notice of the petition had not been issued, though the counsels for the respondent no.1 MCD, respondent no.2 UOI and respondent no.4 Ms. Rajni Abbi were appearing on advance notice and were opposing even the amendments sought, and finding the controversy entailed to be purely legal, with consent, the counsels were finally heard on the averments in the last proposed amended petition dated 1st June, 2011.

2. The petitioner claims to be one of the Councillors of MCD. It is his case, that the respondent no.4 is gainfully employed with the Delhi University (Law Centre-II) where she is working as a Reader in Law/Associate Professor and drawing gross salary of ₹96,635/- and has not sought permission from Delhi University before seeking her appointment as a Mayor of the MCD or even for the post of Councillor; that the respondent no.4 does not even fulfill the requisite conditions for appointment/election

for the post of Councillor in MCD on account of disqualification incurred by her as given in Section 9 of the Delhi Municipal Corporation (DMC) Act, 1957; once she cannot be a Councillor, she cannot be chosen or elected as the Mayor; that there is thus an error apparent in the election held on 20th April, 2011 of the respondent no.4 to the post of Mayor of the MCD. The petitioner thus claims issuance of a writ of certiorari quashing the election held on 20th April, 2011 of the respondent no.4 to the post of Mayor of the MCD.

3. The petitioner relies on the replies to the queries under the Right to Information Act, 2005 informing that, the respondent no.4 joined as Reader in Law w.e.f. 8th April, 2005 and was as on 5th May, 2011 working in Law Centre-II, Faculty of Law, University of Delhi, A.R.S.D. College Complex, Dhaura Kuan, New Delhi and that she had taken classes even in the month of April, 2011 on the 1st, 4th, 7th, 8th, 11th and 15th; that the respondent no.4 was as on 2nd May, 2011 being paid her salary regularly till date and her gross salary was ₹96,635/- from January, 2011 onwards; that Delhi University is a Central University; that the respondent no.4 had applied for leave for

contesting the elections of the MCD; that the respondent no.4 as on 28th April, 2011 was teaching; that the respondent no.4 had taken leave from 1st August, 2008 to 5th July, 2010 for study with pay.

4. The counsel for the petitioner has invited attention to Section 9 of the DMC Act prescribing disqualifications for being chosen as and for being a Councillor; as per Clause (g) thereof, a person is disqualified for being chosen as and for being a Councillor if he holds any office of profit under the Government or Central Government. It is thus argued that the respondent no.4 being employed with the Faculty of Law, University of Delhi at the time of her election on 5th April, 2007 as Councillor of the MCD, was disqualified from being a Councillor even and thus could not have been elected as Mayor.

5. The senior counsel for the respondent no.4 has invited attention to the following provisions of the DMC Act:-

- (i) Section 2(27) where “member” in relation to the MCD means a Councillor;
- (ii) Section 3(3) to demonstrate that MCD is composed of Councillors;

(iii) Section 3(4) to show that Councillors have to be chosen by direct election on the basis of adult suffrage from various wards into which Delhi is divided;

(iv) Section 4 prescribing the duration of the Corporation as five years;

(It is thus stated that the term of the present Corporation is till the year 2012 only).

(v) Sections 8 & 9 prescribing qualifications and disqualifications for being chosen as and for being a Councillor;

(It is argued that the disqualification is holding any office of profit under the Government or Central Government and which means that the appointment and termination of employment should be by Government)

(vi) Section 15 prohibiting an election of a Councillor from being called in question except by an election petition presented to the Court of the District Judge of Delhi within fifteen days from the date of publication of the result of the election;

(It is thus urged that the challenge if any to the election of the respondent no.4 as the Councillor could have been made only by way

of an election petition preferred within fifteen days of 5th April, 2007 and which admittedly has not been done)

(vii) Section 17 prescribing the grounds for declaring elections to be void;

(viii) Section 21(2) providing that an election of a Councillor not called in question in accordance with the provisions of the Act shall be deemed to be a good and valid election;

(ix) Section 34 dealing with the payments to Councillors;

(x) Section 35(1) to contend that the qualification for election as the Mayor is to be a Councillor;

(It is urged that once there is no challenge to the election of the respondent no.4 as a Councillor, her election as the Mayor cannot be challenged inasmuch as respondent no.4 is admittedly a Councillor)

(xi) Section 36(2) regarding the facilities for the post of Mayor.

6. The senior counsel for the respondent no.4 has thus contended:

(a) that no challenge to the election of respondent no.4 as Councillor was made in the manner provided;

- (b) that no challenge in the manner provided having been made, election of respondent no.4 as Councillor is a good and valid election;
- (c) no challenge to the election of the respondent no.4 as Councillor is made in the present petition also;
- (d) the only qualification for election as the Mayor is, to be a Councillor and which qualification the respondent no.4 satisfies;
- (e) the challenge to the election as Mayor is thus misconceived;
- (f) that without prejudice to the aforesaid, the respondent no.4, for the reason of holding the office of a Reader in Law / Associate Professor in the Delhi University cannot be said to be holding any office of profit under the Government or Central Government so as to incur disqualification under Section 9(1)(g) of the DMC Act as contended.

7. Reliance is placed on *Pradyut Bordoloi Vs. Swapan Roy* (2001) 2 SCC 19 laying down that to determine whether a person holds an office

under the Government, the first and foremost question to be asked is, whether the Government has power to appoint and remove the person on and from the office? If the answer is in the negative, no further inquiry is called for, the basic determinative test having failed. If the answer is a positive one, further probe has to go on. It is urged that Delhi University was constituted by the Delhi University Act, 1922 enacted by the Parliament and the respondent no.4 was appointed by the Delhi University and not by the Government and is not removable by the Government and hence the Delhi University cannot be said to be Government.

8. The senior counsel for the respondent MCD has contended:-

- (a) that different authorities conduct the election of Councillors and of the Mayor;
- (b) that while the elections of the Mayor are conducted by the MCD, elections of Councillors are conducted by the Election Commission;
- (c) hence in a proceeding challenging the election of Mayor, the election as Councillor cannot be considered;

- (d) that the petitioner has only challenged the election of the respondent no.4 as the Mayor and not her election as a Councillor;
- (e) Reference is made to Article 243-ZG of the Constitution of India prescribing a bar to the challenge of Municipal Elections;
- (f) Reference in this regard is also made to Sections 33(1)(a) and 33(3) of the DMC Act to contend that for challenge to be made after the time for presenting an election petition has lapsed, the disqualification ought to have been incurred only after the election and the question whether such disqualification has been incurred or not has to be referred for decision of the Administrator whose decision is final. Reliance is placed on ***Consumer Education and Research Society Vs. Union of India*** (2009) 9 SCC 648 dealing with Article 101(3) of the Constitution. It is thus contended that this petition is not maintainable;
- (g) Reference is invited to Sections 33(4) and 33A of the DMC Act

prescribing for the Administrator to obtain the opinion of the Election Commission and the powers of Election Commission in this regard. It is thus contended that the statute contains a detailed procedure and challenge by way of present petition cannot be made;

- (h) It is argued that if election petition is not filed within time, a candidate who at the time of election may not have been eligible, is entitled to continue;
- (i) It is reiterated with reference to Section 35 of the DMC Act that the only qualification for the election as the Mayor is to be a “member” i.e. a Councillor of MCD and which qualification the respondent no.4 satisfies;
- (j) Reference is made to Section 14 of the DMC Act providing for publication in the official gazette, of the names of all persons elected as Councillors. It is contended that as long as the name of the respondent no.4 appears as a Councillor, she cannot be said to be not eligible for election as the Mayor;

(k) Attention is invited to Article 191(1)(a) of the Constitution of India also prescribing a disqualification of holding any office of profit under the Government for being a member of Legislative Assembly or Legislative Council of a State and to ***Aklu Ram Mahto Vs. Rajendra Mahto*** (1999) 3 SCC 541 holding that a person holds an office of profit under the Government if, i) Government is the Appointing Authority; ii) Government is the authority vested with power to terminate the appointment; iii) Government is the authority which determines the remuneration; iv) Government is the source from which remuneration is paid; and, v) Government is the authority vested with power to control the manner in which the duties of office are discharged. In the facts of that case, it was held that employment in the Bokaro Steel Plant did not amount to holding an office of profit under the Central Government because it was a company incorporated under the Companies Act, though its shares were owned by the Central Government

and Chairman and the Board of Directors were appointed by the President of India. It was however found that the appointment and removal of workers was under the control of Steel Authority of India Ltd. (SAIL) and their remuneration were also determined by SAIL and that the functions discharged by SAIL or by Bokaro Steel Plant could not be considered as essential functions of the Government;

- (l) Attention is also invited to ***Anokh Singh Vs. Punjab State Election Commission*** AIR 2011 SC 230 holding the office of Lambardar to be not an office of profit under the Government.
- (m) Reference is made to ***Joti Prasad Upadhyaya Vs. Kalka Prasad Bhatnagar*** AIR 1962 Allahabad 128 where a Division Bench held the Vice-Chancellor of the Agra University to be not holding any office of profit under the State Government and further holding that the provisions of the Constitution indicate that the Governor functions in two different capacities and which cannot be confused with each other; that in making

appointment of Vice-Chancellor, the Governor acts as the Chancellor of the University and not on behalf of the Government.

- (n) Reference in this regard is also made to ***Dr. V.S. Acharya Vs. Returning Officer and Deputy Commissioner*** ILR 1990 Karnataka 2546 and to ***Roshan Lal Dobrey Vs. Behari Lal Dobrey*** MANU/UP/0628/1982;
- (o) It is urged that a Reader/Lecturer in the University is appointed by the Executive Council of the University and which cannot be said to be the Government and thus a teacher in the University cannot be said to be holding an office of profit under the Government.

9. The counsel for the petitioner in rejoinder has contended:

- (a) That only a rival candidate from same constituency could have challenged the election of the petitioner as a Councillor under Section 15(2) of the DMC Act;
- (b) That the said option being not available to other persons as the

petitioner, it cannot be urged that the petitioner had any alternative remedy;

- (c) Reference is made to *Meera Kanwaria Vs. State Election Commissioner* 2004 I AD (Delhi) 554 laying down that the disqualification prescribed in Section 9 relates both, to the stage where a person seeks election and the stage after the person is chosen or elected as a Councillor and thus upholding the maintainability of a petition under Article 226 even though an election petition had not been filed;
- (d) That there is no equivalent of Article 193 of the Constitution in the DMC Act;
- (e) Attention is invited to *Biharilal Dobray v. Roshan Lal Dobray* AIR 1984 SC 385 where an Assistant Teacher of a Basic Primary School run by U.P. Board of Basic Education was held to be holding an office of profit under the Government.

10. On enquiry as to the source of income/vocation of the petitioner, it is stated that the petitioner is having agricultural lands and has also developed

and is operating a tourist resort in Rajasthan and is the developer of colony of Budh Vihar and is involved in running charitable hospitals and schools in Delhi.

11. The first question to be adjudicated is as to the maintainability of the present petition. My findings thereon are as under:

A. There is no merit in the contention of the petitioner that an election petition under Section 15(2) of the DMC Act can be preferred by a rival candidate only and the remedy of Section 15 is not available to any other person desirous of challenging election of a Councillor. Section 15(2) allows remedy of an election petition under Section 15(1), not only to a rival candidate, but also to any elector of the ward concerned and to any other Councillor also. The petitioner is admittedly a Councillor and thus had the remedy of election petition available to him.

B. Since according to the petitioner also, the respondent no. 4 was disqualified under Section 9(1)(g) of the DMC Act from being chosen even as a Councillor, Section 33 of the DMC Act, which as per the

dicta of the Supreme Court in *Consumer Education and Research Society* (supra) applies only to cases where disqualification is incurred after election, has no application.

C. The remedy of an election petition under Section 15 and of vacation of the seat of Councillor under Section 33 is thus not applicable to a case, where a challenge is to “being a Councillor” within the meaning of Section 9 of the DMC Act for the reason of disqualification, even if in existence on the date of election. Section 21(2) of the DMC Act & Article 243-ZG of the Constitution only apply to a challenge to a election but do not apply to challenge to “being a Councillor” and for which challenge a writ remedy is available. Any other interpretation would make the words “being a Councillor” in Section 9 otiose. This Court in *Meera Kanwaria* (supra) also held a writ remedy available for the said reason. However, after holding so, it was held that in the facts of that case, remedy under Section 33 of the DMC Act was available to the petitioner and a factual controversy was required to be adjudicated,

which was left to be adjudicated in accordance with the procedure in Section 33(3) & (4) of the DMC Act. Reference in this regard was also made to Article 243-V of the Constitution providing that a question of disqualification for being a member of the municipality shall be referred to the decision of such authority and in such manner as the legislature of the State may by law provide. However, the words “becomes subject to any disqualification.....” in Section 33(1)(a) were interpreted qua Articles 190-193 of the Constitution in *Election Commission Vs. Saka Venkata Subba Rao* AIR 1953 SC 210 and *Brundaban Nayak Vs. Election Commission of India* AIR 1965 SC 1892 (not noticed in *Meera Kanwaria*) and recently qua Article 101(3) in *Consumer Education and Research Society* (supra), as incurring a disqualification after the election. In that light, the remedy under Section 33 of the DMC Act cannot be said to be available qua disqualification existing on the date of the election. The legislature, in fact needs to look into this aspect, so that the mechanism contemplated under Article 243-V(2) is available under

the DMC Act. Be that as it may, the remedy under Section 33 of the DMC Act being not available to the petitioner, the writ remedy cannot be said to be barred for the reason thereof.

D. If it were to be found that the respondent no.4 is disqualified from being a Councillor and such disqualification is apparent and unequivocal on the face of the record and without requiring any investigation therein (as in this case), then this Court would cut through the technicalities and not allow a person to occupy the office of the Mayor, which he / she is not qualified for. This Court would not allow any person to hold an office, for holding which he/she does not satisfy the basic/primary qualification and strike at the root of the illegality.

E. The Supreme Court recently in ***Kurapati Maria Das v. Dr. Ambedkar Seva Samajan*** (2009) 7 SCC 387 held that where a ward is reserved for Scheduled Caste and a person who is elected as a Scheduled Caste candidate renounces his caste after the elections by conversion to some other religion, then a valid writ petition for *quo*

warranto would certainly lie because then it is not the election of such person which would be in challenge but his subsequently continuing in his capacity as a person belonging to a particular caste. The Supreme Court a decade earlier in ***K. Venkatachalam v. A. Swamickan*** (1999) 4 SCC 526 had held that where a person lacks a basic qualification (in that case of a person to be elected from an Assembly Constituency to be an elector of that Constituency) and is thus disqualified from being an MLA and there is no dispute about the said position, the High Court would be justified in exercising the powers under Article 226 of the Constitution of India notwithstanding that election petition had not been filed because there can be no fraud on the Constitution and allowing such a person to function would be a fraud on the Constitution.

F. For the same reason, there is no merit in the argument that the challenge is to the election to Mayor and not to being a Councillor. A mere lack of apposite and astute drafting of a petition cannot come in the way of a challenge, if otherwise crystal clear, as in this case and

when no prejudice therefrom is caused to the opposite party.

I thus conclude the present petition to be maintainable.

12. The question falling for adjudication then really is, whether the respondent no.4 admittedly employed till the filing of the petition as Reader / Lecturer in the University of Delhi, was holding any office of profit under the Government or Central Government within the meaning of Section 9(1)(g).

13. Though it was held in *Guru Gobinda Basu v. Sankari Prasad Ghosal* AIR 1964 SC 254 and *Satrucharla Chandrasekhar Raju v. Vyricherla Pradeep Kumar Dev* (1992) 4 SCC 404 that office of profit is not to be confused with and not a post or service in the Government, but in the light of *Govt. of Nct of Delhi v. Shyam Sunder Goel* MANU/DE/2725/2010 & *Satrucharla Chandrasekhar Raju* (supra) there can be no doubt that drawing salary, as the respondent no.4 was, will be holding an office of profit, if the Delhi University were to be held to be Government or Central Government. The question for determination thus is, whether employment with Delhi University is employment with Government.

14. The DMC Act till the amendment with effect from 1st October, 1993 did not in Section 2 define “Government”; with effect from the said date, Government has been defined as the Government of National Capital Territory of Delhi. The said definition is of no help. Similarly, the General Clauses Act, 1897 also in Section 3(23) defines Government as including both Central Government and State Government. Significantly, holding an office of profit under MCD (Section 9(1)(f)) and under the Government (Section 9(1)(g)) only is a disqualification and not holding an office of profit in any other organization.

15. The reason is not far to fathom. The purport of such disqualification is that there should be no conflict between the duties and interest of an elected representative and to see that such an elected member can freely and fearlessly carry out his duties without being subjected to any kind of Governmental pressure, thereby implying that if such an elected person is holding an office which brings him remuneration and if the Government has a voice in his functions in that office, there is every likelihood of such person succumbing to the wishes of the Government. The subject

disqualification is intended to eliminate the possibility of such a conflict between duty and interest so that purity of municipality is unaffected. The counsel for the petitioner has neither made any attempt to demonstrate as to how employment of respondent no.4 in the Delhi University affects her functioning as member of MCD nor, inspite of the respondent no.4 for the last four years being both, a lecturer in Delhi University and a Councillor, are there any pleadings as to how it has affected her functioning as Councillor.

16. A perusal of Delhi University Act, 1922 shows that objective thereof is establishment and incorporation of a teaching and affiliating University at Delhi; under Section 3(2) of the said Act, the University has a perpetual succession and a common seal and is to sue and be sued in the said name; under Section 4(7) of the Act, the University has been empowered to appoint Professors, Readers, Lecturers and Teachers in the University; under Section 21, the Executive Council is the Executive body of the University with constitution and the terms of office of the members of the Executive Council being prescribed by the Statutes of the University within the meaning of

Section 28 of the Act. The Statute of the University in Clause 5 thereof prescribes the composition of the Executive Council of the University.

17. A Division Bench of this Court in *Anwer Raza Rizvi v. Jamia Millia Islamia* ILR (1972) 2 Del 799 on an analysis of the constitution of the Jamia Millia Islamia University, though holding the University to be amenable to writ jurisdiction nevertheless held that a teacher in the said University could not be said to be a holder of a public office. It was held that Professors and Readers of the University could not be said to be exercising any Governmental functions or invested with the power or charged with the duty of acting in execution or enforcement of law and are mere employees of a statutory body. Similarly in *J.S. Khanna v. University of Delhi* ILR (1980) 2 Del 1404, qua Lecturers, Readers, Professors of Delhi University it was held that the qualification for appointment, the scales of pay and conditions of service are regulated by the University Ordinances even though scales of pay are subject to approval of Central Government; that Delhi University is an autonomous statutory body though funded by Government; that the scheme of Ordinances of Delhi University do not leave any role for the

Government to play in the fixation of scales of pay or abolition of posts and grades of University appointed teachers because the University does not have to obtain approval of the Government. The Supreme Court however in ***Satrucharla Chandrasekhar Raju*** has gone to the extent of holding that the mere control of the Government over the authority having power to appoint, dismiss or control the working of officer employed by that authority does not disqualify that officer for holding an office of profit under the Government.

18. Moreover, the Full Bench of this Court in ***Mohd. Khan Durrany v. Principal, Shivaji College*** ILR (1970) 2 Delhi 414 held an employment of a Lecturer in the Delhi University to be dominantly contractual and not statutory or having a legislative status. Per contra, the Supreme Court in ***Roshan Lal Tandon v. Union of India*** AIR 1967 SC 1889 held that though origin of employment in Government is contractual but once appointed, acquires a status and rights and obligations are no longer determined by consent of parties but by statute or statutory rules. For this reason also, an employee of the Delhi University cannot be said to be holding an office of

profit under the Government.

19. Reference may also be made to the First Report of Joint Committee of the 14th Lok Sabha on Offices of Profit laid in Lok Sabha and Rajya Sabha on 13th December, 2005 (The Supreme Court in ***Consumer Education and Research Society*** had recorded that since recommendation of Bhargava Committee Report in November, 1955, a constitutional convention has evolved when every Lok Sabha has a Joint Committee for purposes of identifying and classifying office of profit and whenever any office has to be exempted from the disqualification rule, the Joint Committee's opinion is sought on the question whether the said office was an office of profit or not so as to conflict with duty of an elected representative; only on a report by such Joint Committee recommending exemption, is such office exempted). The said Joint Committee reported, after examining appointment procedure and functioning *inter alia* in the Delhi University that Government does not exercise any control even in appointment of Chancellors of Central University (as the Delhi University is) and thus recommended that the Chancellor of Central Universities cannot be said to be holding office profit

under the Government.

20. In the aforesaid circumstances, the law as laid down in the judgments supra relied upon by the senior counsels for the respondent MCD and respondent no.4 is found to be more apposite than the judgment of the Apex Court in *Biharilal Dobray* cited by the counsel for the petitioner. Moreover a reading of the said judgment shows that the employment in that case was found to be in connection with the affairs of the State and the appointment also was by the State Government. That is not the position here.

21. Moreover, it cannot be lost sight of that higher education though earlier largely in public domain, in recent past has witnessed private participation also and thus merely because the Delhi University in the present case was established by the Government would not qualify the employees of the Delhi University as the Government employees.

22. There is thus no merit in the petition; the same is dismissed. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

October 03, 2011/bs