

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8807 OF 2019

Bhagwat s/o Digambarrao Uphad,
Age-38 years, Occu-Agriculturist
and Social work,
R/o Net, Tq. And Dist.Jalna

– PETITIONER

VERSUS

1. The State of Maharashtra,
Through Secretary, Rural Development
Department, Mantralaya,
Mumbai,

2. The Additional Commissioner,
Aurangabad Division, Aurangabad,

3. The Chief Executive Officer,
Zilla Parishad, Jalna,
Ambad Naka, Gut No.488,
Old Jalna, Jalna,

4. Block Development Officer,
Panchayat Samiti, Jalna,
Near Moti Baug, Old Jalna,
Jalna,

5. Project Implementation Agency
and Circle Agricultural Officer,
Ner Taluka Agricultural Office,
Tq. And Dist. Jalna,

6. Vikram s/o Hanumantrao Uphad,
Age-35 years, Occu-Agriculturist
and Social Work,
R/o Ner, Tq. And Dist. Jalna

– RESPONDENTS

Mr.S.S.Tope, Advocate for the petitioner.

Mr.S.R.Yadav, AGP for respondent Nos.1, 2 and 5.

Mr.V.D.Salunke h/f Mr.V.A.Bagal, Advocate for respondent No.6.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 31/07/2019

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. I have heard the submissions of the learned Advocates on 19/07/2019, 22/07/2019, 25/07/2019 and today.

3. The petitioner is aggrieved by the order dated 09/07/2019 delivered by the Additional Divisional Commissioner, Aurangabad, respondent No.2 herein thereby allowing an application filed by respondent No.6, original complainant by which he had sought disqualification of the petitioner u/s 16(1)(h) of the Maharashtra Zilla Parishad and Panchayat Samitis Act, 1961. The said authority has concluded that the petitioner has incurred a disqualification since he has occupied an office of profit while he was elected as a Councilor of the Zilla Parishad.

4. The submissions of the petitioner can be summarized as under :-

[a] He was recommended by the entire Village Gram Sabha on 26/01/2013 to be nominated as a “Secretary” of the *Panlot Samiti*, which can be termed in English as a Watershed Management Committee, under a circular dated 18/02/2010.

[b] The said Committee accepted the recommendation and the petitioner was engaged as a Secretary with an honorarium/ stipend of Rs.3,000/- per month.

[c] He resigned as the Member of the Village Panchayat on 24/02/2017. His resignation was accepted and he ceased to be the member of the Village Panchayat w.e.f. March 2013.

[d] On 21/03/2017, the petitioner defeated respondent No.6/ original complainant in the elections to the Zilla Parishad and was elected as a Member of the said local authority.

[e] In January 2019, respondent No.6 lodged a complaint contending that the petitioner has incurred a disqualification u/s 16(1)(h) for having occupied an office of profit with the Watershed Committee.

[f] The authority below has concluded that since the petitioner was being paid Rs.3,000/-, the said amount was by way of a salary and the petitioner had incurred the disqualification.

[g] The Rural Development and Water Conservation Department of the State issued a circular on 27/09/2012 altering the formation of

the Watershed Committee under the Integrated Watershed Management Programme.

[h] The new formation of the Watershed Committee is as under :-

या निर्णयानुसार पाणलोट समितीची सुधारित रचना : खालीलप्रमाणे असेल.

- १) पाणलोट समिती (WC) : अध्यक्ष : सरपंच, ग्रामपंचायत
 - २) पाणलोट समितीचे ३ सदस्य : ग्रामपंचायतीचे सदस्यामधून
 - ३) पाणलोट समितीचे ४ सदस्य : स्वयंसहाय्यता गटांमधून (महिला सदस्या किमान १)
 - ४) पाणलोट समितीचे ४ सदस्य : उपभोक्ता गटांमधून (महिला सदस्या किमान १)
 - ५) पाणलोट समितीचा १ सदस्य : अनुसूचित जाती/अनुसूचित जमाती समूह
 - ६) पाणलोट समितीचा १ सदस्य : पाणलोट विकास गटाचा-कृषि/वन/सामाजिक वनीकरण प्रतिनिधी
 - ७) पाणलोट समिती सचिव : ग्रामसभेने ठरविलेला
- १) पाणलोट समितीच्या अध्यक्षांचा कालावधी हा त्यांच्या सरपंच पदाच्या कालावधी एवढाच राहील.
 - २) पाणलोट समितीमधील ग्रामपंचायतीचे सदस्य यांचा कालावधीही त्यांच्या सदस्यपदाच्या कालावधी एवढाच राहील.
 - ३) सुदूर शासन निर्णय तात्काळ अंमलात येत असून ज्या पाणलोट समित्यांचे अध्यक्षपदी सरपंचाव्यतिरिक्त ग्रामसभेने निवडलेली ग्रामपंचायती मधील अन्य व्यक्ती असतील त्या गावातील पाणलोट समित्यांचे त्यांचे अध्यक्षपद तात्काळ संपुष्टात येईल.
 - ४) ज्या गावात पाणलोट समितीचे अध्यक्ष हे सरपंच आहेत अशा पाणलोट समितीच्या अध्यक्षपदी सरपंच हे त्यांच्या पदाच्या कालावधी पर्यंत तसेच कायम राहतील.
 - ५) पाणलोट समितीतील अन्य सदस्य व पाणलोट समितीचे सचिव हे पूर्वी नियुक्त केल्यानुसार त्यांच्या पदावर कायम राहतील.
 - ६) पाणलोट समिती, अध्यक्ष व सचिवासह १५ सदस्यांची असेल.
 - ७) पाणलोट समिती ही ग्रामविकास समितीची/ग्रामपंचायतीची उपसमिती म्हणून कार्य करेल.
 - ८) ज्या पंचायतीमध्ये एकापेक्षा अधिक गावे समाविष्ट आहेत, ती ग्रामपंचायत संबंधित गावामधील पाणलोट विकास प्रकल्पाची व्यवस्था करण्यासाठी प्रत्येक गावाकरिता स्वतंत्र उपसमिती स्थापन करील.
 - ९) ज्या ठिकाणी पाणलोट प्रकल्पामध्ये एकापेक्षा जास्त ग्रामपंचायतीचा समावेश होतो, त्या ठिकाणी प्रत्येक ग्रामपंचायतीकरिता स्वतंत्र पाणलोट समिती स्थापन करण्यात येईल.
 - १०) पाणलोट समितीचे अध्यक्ष यांच्याकडून कर्तव्यात कमूर, दुर्लक्ष, योजनेच्या अंमलबजावणीत मंदगती, योजनेत अफरातफर गैरव्यवहार आढळल्यास, चौकशी अंती अध्यक्षास पदावरून काढून टाकण्याचे अधिकार मुंबई ग्रामपंचायत अधिनियम, १९५८ कलम ३९ नुसार विभागीय आयुक्त यांना राहतील.
 - ११) पाणलोट समितीचे अध्यक्ष दीर्घ आजारी पडल्यास अथवा शारीरिक दृष्ट्या अकार्यक्षम झाल्यास उपसरपंच हे पाणलोट समितीच्या अध्यक्षपदाची कामे पाहतील.
 - १२) पाणलोट समितीची बैठक दरमहा घेण्यात यावी.

[* only Marathi version is available.]

[i] The Secretary of the Committee would be such a person who has been recommended by the Gram Sabha. The Chair Person of the Committee would be the Sarpanch of the Gram Panchayat and his tenure would be co-terminus with the tenure of the Sarpanch. In

short, the day he ceases to be a Sarpanch, he would cease to be the Chair Person of the Committee.

[j] The Rural Development and Water Conservation Department issued a new GR dated 18/04/2013 observing that the Committee already constituted prior to 2012, would continue to function in view of the interim orders passed by this Court on 05/12/2012 in WP No.8683/2012 and the order dated 13/02/2013 passed on CA No.16118/2013.

[k] The same Department once again issued a GR dated 19/08/2014 by which the tenure of the Watershed Management Scheme was restricted to 5 years. Such a Watershed Committee under the scheme would discuss/consult the Gram Panchayat and if the Gram Panchayat decides to have a Gram Vikas Committee, they would be at liberty to prepare /constitute such a Committee.

[l] Annexure 'A' to the 2014 GR then reconstitutes the Watershed Committee as under :-

सर्वसाधारणपणे पाणलोट समितीची रचना : खालीलप्रमाणे असेल.

१) पाणलोट समिती अध्यक्ष	:	ग्रामसभेने ठरविलेला
२) स्वयंसहाय्यता गटाचे सदस्य	:	४ (महिला सदस्या किमान १)
३) उपभोक्ता गटाचे सदस्य	:	३ (महिला सदस्या किमान १)
४) अनुसूचित जाती/अनुसूचित जमाती समूह	:	१
५) पाणलोट विकास गटाचा सदस्य (WDT)	:	१
६) ग्रामपंचायतीचे सदस्य	:	४
७) पाणलोट समिती सचिव	:	ग्रामसभेने ठरविलेला

[* only Marathi version is available.]

[m] The Secretary of the Committee would be the person who would be nominated by the Gram Sabha.

[n] A meeting was held in November 2006 in which the National Rainfall Area Authority (NRAA) has participated.

[o] The Honorarium paid to the petitioner cannot be termed as a salary.

[p] The Central Government contributes 90% of the expenditure under D.O.L.R.

[q] The State of Maharashtra contributes 10% under the State Level Vasundhara Watershed Development Agency.

[r] The Village Panchayat or the Zilla Parishad has no role to play except recommending the members of the Watershed Committee.

[s] Any person who is 12th standard qualified from the particular village, can seek a nomination from the Gram Sabha.

[t] The Gram Sabha would be convened for recommending a Secretary of the Committee.

[u] The petitioner is one amongst several such villagers who had applied and since he already was a member of the Gram Panchayat, the Gram Sabha nominated him by popular choice.

[v] The Watershed Committee accepted the nomination and appointed him on an honorarium of Rs.3,000/-.

[w] It was specifically provided that this was not an employment and he would not have any right to continue as a Secretary.

[x] The term of such committee was initially between 4 to 7 years and subsequently it was modified by the 2014 GR vide which the said Committee was to implement the scheme at one place for a maximum period of 5 years.

[y] The petitioner was neither an employee of the Gram Panchayat nor of the Zilla Parishad or the Government.

[z] The Project Officer was empowered to pay the honorarium of the petitioner from the 10% budget which was dedicated to administrative expenses including the honorarium of the petitioner.

[aa] Reliance is placed upon the following judgments :-

{a} *State Election Commissioner, Bihar Patna and others Vs. Janakdhari Prasad and others* [2018 AIR (SC) 3320 = 2018(8) SCC 1]

{b} *Manohar Pandhari Deulkar Vs. Commissioner, Nagpur Division and others* [2003(2) Mh.L.J. 209 = 2003(6) Bom.C.R.462]

{c} *Pradyut Bordoloi Vs. Swapan Roy* [2001 AIR (SC) 296 = 2000 AIR (SCW) 4457]

{d} *Maulana Abdul Shakur Vs. Rikhab Chand and another* [1958 AIR 52 = 1958 SCR 387]

{e} *Srimati Kanta Kathuria Vs. Manak Chand Surana* [1970 AIR (SC) 694 = 1969(3) SCC 268]

{f} *Satruchar Lachandra Sekhar Raju Vs. Vyricherla Pradeep Kumar Dev* [1992 AIR (SC) 1959 = 1992(4) SCC 404]

{g} *U.C.Raman Vs. P.T.A. Rahim and others* [2014 AIR (SC) 3477 = 2014 AIR (SCW) 4673]

{h} *Anokh Singh Vs. Punjab State Election Commission* [2011 AIR (SC) 230 = 2011(11) SCC 181]

{i} *Som Lal Vs. Vijay Laxmi and others* [2008 AIR (SC) 2088 = 2008(11) SCC 413]

{j} *Shivamurthy Swami Inamdar : Veerabhadrappa Veerappa Vs. Chanbasangouda Hanumanthagouda Patil : Agadi Sanganna Andanappa* [1971 (3) SCC 870]

{k} *Purno Agitok Sangma Vs. Pranab Mukherjee* [2013 AIR (SCW) 1]

5. Mr.Salunke, learned Advocate appearing on behalf of respondent No. 6/original complainant submits as under :-

[a] The Soil Conservation, Watershed Area Management and Agriculture Commissionerate issued a circular on 18/02/2010 recommending the manner in which the Watershed Committee was to be constituted.

[b] The Committee was to meet once in a month.

[c] The Committee was to open a bank account in a Nationalized Bank so as to deposit the funds supplied by the Central Government.

[d] The Gram Sabha was to nominate a person to be engaged as a Secretary of the Committee and this person was distinct and different

from the Secretary of the Gram Panchayat and would be a salaried person.

[e] The assistance to be rendered by the Secretary to the Watershed Committee was the prescribed work profile and no other responsibilities were cast upon the Secretary.

[f] The Agriculture Department/Circle Officer, who would officiate as a Project Officer, was given the authority to decide the quantum of wages and which were not to exceed Rs.3,000/-.

[g] The selection of the Secretary was to be done by the Gram Sabha and the Project Officer was to grant an approval.

[h] Such a person had to enter into a contract with the Committee and he would not have any right of employment and such engagement would be brought to an end when the period of the Watershed Project would conclude.

[i] The payment to the Secretary would be termed as an honorarium as per clause 5 of the 2010 circular.

[j] The petitioner was properly selected by the Gram Sabha and he was appointed as a Secretary on 26/01/2013.

[k] His resignation as a Member of the Gram Panchayat was accepted on 28/02/2017 and he was elected as a Councilor of the Zilla Parishad on the same date i.e.28/02/2017.

[l] Reliance is placed upon the judgment of the Hon'ble Apex

Court in the matter Ramana Dayaram Shetty Vs. The International Airport Authority of India and others [AIR 1979 SC 1628].

[m] The definition of the “**salary**” as per the Law Lexicon is, “the fixed payment made periodically as compensation for regular work and to be paid on regular basis in each month”.

[n] An “**honorarium**” implies a gratuitous payment and means a fee service rendered and it means a voluntary donation in consideration of the services which admit of no compensation in money.

[o] The responsibilities of the petitioner as a 'Secretary' of the Committee are as under :-

पाणलोट समिती सचिवांच्या जाबाबदाऱ्या :

१. पाणलोट क्षेत्र विकास प्रकल्पाच्या संदर्भातील निर्णय घेण्याच्या प्रक्रियेमध्ये सहभागी होण्याकरिता ग्रामसभा आयोजित करण्यासाठी ग्रामसेवकास कळविणे. पाणलोट समितीच्या प्रत्येक बैठकीमध्ये मागील खर्चाचा आढावा, झालेला खर्च योग्य आहे का याची तपासणी बँक खातेपुस्तकावरून करणे, तसेच झालेला खर्च व नोंदविलेला खर्च बरोबर आहे का याबाबतचे सर्व दस्तावेज पाणलोट समितीच्या बैठकीत सादर करणे. पाणलोट समिती बैठक बोलावण्यासाठी सभेची नोटीस ८ दिवस अगोदर काढणे.
२. बैठकीतील निर्णयांच्या अनुषंगाने कार्यवाही बाबत पाठपुरवा व समन्वय करणे.
३. पाणलोट समिती (Watershed Committee : WC) व पाणलोट विकास प्रकल्पाकरिता असलेल्या इतर संस्था यांच्या बैठकांमधील कार्यवाही बाबतचे सर्व अभिलेख अद्ययावत ठेवणे.
४. घेतन व इतर वित्तीय व्यवहारांची नोंद करणे.
५. पाणलोट समितीच्या वतीने पाणलोट विकास पथकातील कृषि / सामाजिक वनीकरण / वन विभागाच्या निर्देशित व्यक्ती बरोबर धनादेशावर संयुक्त स्वाक्षरी करणे.
६. कामाची आखणी करणे, कामे करून घेणे व कामावर देखरेख ठेवणे.
७. प्रकल्प कार्यान्वयन यंत्रणेच्या सूचनेप्रमाणे मंजूर सविस्तर प्रकल्प अहवालानुसार प्रकल्पातील कामाची अंमलबजावणी करणे, तसेच आवश्यक ती माहिती उपलब्ध करून देणे.
८. प्रकल्प कार्यान्वयन यंत्रणेच्या निर्देशानुसार सचिव कार्यक्रमाच्या अंमलबजावणीमध्ये भाग घेईल.
९. उपभोक्ता (UGs) व स्वयंसहाय्य गटांना (SHGs) त्यांचे लेखे ठेवण्यास मदत करणे.
१०. लेखाविषयक ठरवून दिलेले सर्व दस्तावेज अद्ययावत ठेवणे. तसेच पाणलोट समिती कार्यालयास सचिव हा पूर्ण जबाबदार असेल.

[* only Marathi version is available.]

6. The learned AGP has strenuously supported the impugned order of disqualification and his submissions can be summarized as under :-

- [a] The Central Government provides for 90% of the budget.
- [b] The State Government provides only 10%.
- [c] The Panchayat Samiti or the Zilla Parishad have no role to play.
- [d] The petitioner is rightly disqualified as he was earning a stipend of Rs.3,000/- per month.
- [e] No formal appointment order was issued and though there was a contract prescribed, no contract was signed.
- [f] He was paid from May 2013 to May 2017 .
- [g] He was in the employment of the Government as the funds of the Government were being utilized for such a scheme.
- [h] His payment of Rs.3,000/- per month was through the 10% of the budget sanctioned purely for the administrative functions of the Committee.
- [i] The petitioner was expected to perform certain duties.
- [j] He had no right to seek continued employment or continuity or regularization as a secretary.
- [k] The last meeting of the Committee was held on 16/09/2016 and since then, no meeting has been convened. This statement is

made on instructions from respondent No.5 / Project Officer, present in the Court.

7. In the above factual backdrop, the following aspects need to be considered in the light of the judgments delivered by the Hon'ble Apex Court, which have been cited :-

[a] Whether the nomination of the petitioner can be said to be an appointment made in public employment and whether a complete selection procedure, as is required to be done in public employment, was followed ?

[b] Whether the appointment of the petitioner would amount to occupying an office of profit under the Government ?

[c] Whether there is any employer-employee relationship between the petitioner and the Government ?

[d] Whether the amount of Rs.3,000/- paid to the petitioner can be termed to be a salary and if so, the said amount is settled under what pay scale ?

8. All the litigating sides have conceded that this case does not involve an issue as to whether the petitioner can be said to be in employment of the Gram Panchayat or the Zilla Parishad and that the only issue which is required to be considered is as to whether he was in employment under the Government.

9. Section 16(1)(h) of the Zilla Parishad Act, 1961 reads as under :-

*“16. **Disqualification** :- (1) Subject to the provisions of sub-section (2), a person shall be disqualified for being chosen as, and for being, a Councillor -*

(h) if he holds any office of profit under a Panchayat or Zilla Parishad or under or in the gift of the Government ; or”

10. The Integrated Water Shed Management Programme was suggested by Professor C.H.Hanumantha Rao. This scheme was to be implemented in the Drought Prone Area (D.P.A.P.) and under The Desert Development Programme (D.D.P.). The recommendations were aimed at eliminating the deficiencies in the D.P.A.P. and D.D.P. A blue print was prepared to bring the D.P.A.P., D.D.P. and the I.W.M.P. under one roof with the intention of increasing the green belts and for raising the ground water table so as to reduce the drought prone area and ensure growth of greenery and reduce dry areas and soil erosion.

11. SELECTION OR NOMINATION BY POPULAR CHOICE :- It is undisputed that the scheme prescribes that any person from the particular village in which area the scheme is to be implemented for a

period of only 5 years, can make an application to the Gram Panchayat for seeking a nominated as a Secretary of the Watershed Committee. Public advertisement has not been recommended in any of the documents cited. No selection Committee of experts has been constituted for conducting any selection. It is nowhere prescribed that the Gram Sabha would conduct interviews or conduct a particular selection process for appointing or recommending the appointment of a Secretary.

12. What has actually happened is that the petitioner has applied alongwith several other persons and the Village Gram Sabha recommended his name to respondent No.5 as a Secretary of the Committee. A private contract is recommended to be signed between respondent No.5 and the person recommended. No such document has been placed before the Court to indicate as to whether any specific contract was signed by the Project Implementing Agency/ respondent No.5. As such, going strictly by the records, there is no contract 'for employment' or 'of employment' between the petitioner and respondent No.5.

13. None of the learned Advocates have canvassed any submission on 'Gift of the Government' as this issue has not been invoked by the

original complainant/respondent No.6.

14. Even if it is assumed that the petitioner had been inducted in employment, the question would be as to whose employment and who would be the employer. The Central Government has not played any role in the engagement of the petitioner as a Secretary. The State Government has also not participated in any such selection process. The manner in which the Secretary is to be engaged, has been prescribed in the government resolutions indicating that any villager, whose residence is in the said village, in which area the scheme is to be implemented and is 12th standard educated, could apply to the Gram Panchayat. The said applications would be placed before the entire Gram Sabha, which consists of all the villagers who gather in the meeting of the Gram Sabha alongwith the village Panchayat Members. Any one person amongst the applicants, is proposed by the Gram Sabha on the strength of majority. The Gram Panchayat would recommend a candidate for the position of Secretary. It is conceded that the Gram Sabha consisting of the villagers and by popular choice, have recommended the petitioner to be the Secretary of the Watershed Committee. This can hardly be said, by any stretch of imagination, that the petitioner has undergone a selection process and was selected in employment.

WHO IS THE EMPLOYER

15. After such nomination by the Gram Sabha, the Watershed Committee is constituted by the Gram Sabha inclusive of the chairperson. It is after such nomination that the contract has to be signed between the petitioner and respondent No.5. Then the issue would be as to whether such a Committee could be termed as being appointed members or whether the Secretary would alone be singled out to mean an employee. If that be so, the question would be as to whose employment, has the petitioner entered into. If the Gram Sabha has selected the petitioner, would he be an employee of the Gram Sabha ? Whether the Gram Sabha pays the salary to the petitioner ? The answer to both these questions is in the negative. Respondent No.5 releases the payment of the petitioner through the 10% of the total funds earmarked for administrative expenditure. The respondents contend that this amount shall be termed as being the salary of the petitioner. Then the question would arise as to whether respondent No.5 is the employer of the petitioner. The answer is again in the negative.

16. In the above backdrop, the learned AGP specifically submits that though he may not submit that the the petitioner is the employee of the State Government, the funds for administrative

expenses earmarked under the scheme is contributed to the extent of 10% by the State Government and this Court may conclude appropriately as to who is employer of the petitioner. Mr.Salunke submits that as the money is paid to the petitioner from the funds, he should be declared as being the employee under the Government u/s 16(1)(h) of the Act, be it the Central or the State.

OFFICE OF PROFIT

17. It is undisputed that an office of profit is in connection with a conflict of interest of a candidate. Respondent No.2 has disqualified the petitioner for having purportedly occupied an office of profit with the Government. The said authority has not dealt with the aspect as to whether he is employed by the Central Government or whether by the State Government. Respondent No.2 has hardly applied his mind to this issue, though he has unmindfully noted that for the purpose of disqualification of the petitioner, it has to be concluded that he holds an office with the Government. I find from the impugned order that in a single paragraph, which is about a page of his analysis, the authority has only concluded that the petitioner should have resigned as the Secretary of the Watershed Committee and since he has not done so, he would incur the disqualification u/s 16(1)(h).

18. In the judgment cited by Mr.Salunke in the matter of Ramana Dayaram (supra), he relies upon paragraph No.13 and 14 which read as under :-

*“13. Now, it is obvious that the Government which represents the executive authority of the State, may act through the instrumentality Or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions. In the early days, when the Government had limited functions, it could operate effectively through natural persons constituting its civil service and they were found adequate to discharge governmental functions, which were of traditional vintage. But as the tasks of the Government multiplied the advent of the welfare State, it began to be increasingly felt that the framework of civil service was not sufficient to handle the new tasks which were often of specialized and highly technical character. The inadequacy of the civil service to deal with these new problems came to be realized and it became necessary to force a new instrumentality or administrative device for handling these new problems. It was in these circumstances and with a view to supplying this administrative need that the public corporation came into being as the third arm of the Government. As early as 1819 the Supreme Court of the United States in *Mac Cullough v. Maryland*(1) held that the Congress has power to charter corporations as incidental to or in aid of governmental functions and, as pointed out by Mathew, J., in *Sukhdev v. Bhagat Ram* (supra) such federal corporations would ex-hypothesi be agencies of the Government. In Great*

Britain too, the policy of public administration through separate corporations was gradually evolved and the conduct of basic industries through giant corporations has now become a permanent feature of public life. So far as India is concerned, the genesis of the emergence of corporations as instrumentalities or agencies of Government is to be found in the Government of India Resolution on Industrial Policy dated 6th April, 1948 where it was stated inter alia that "management of State enterprises will as a rule be through the medium of public corporation under tile statutory control of the Central Government who will assume such powers as may be necessary to ensure this." It was in pursuance of the policy envisaged in this and subsequent resolutions on Industrial Policy. that corporations were created by Government for setting up and management of public enterprises and carrying out other public functions. Ordinarily these functions could have been carried out by Government departmentally through its service personnel, but the instrumentality or agency of the corporations was resorted to in these cases having regard to the nature of the task to be performed. The corporations acting as instrumentality or agency of Government would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself, though (1) 4 Wheat 315 in the eye of the law, they would be distinct and independent legal entities. If Government acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori that Government acting through the instrumentality or agency of corporations should equally be subject to the same limitations.

But the question is how to determine whether a corporation is acting as instrumentality or agency of Government. It is a question not entirely free from difficulty.

14. A corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the [Companies Act 1956](#) or the [Societies Registration Act 1860](#). Where a Corporation is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government. But ordinarily where a corporation is established by statute, it is autonomous in its working, subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matter. So also a corporation incorporated under law is managed by a board of directors or committee of management in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or agency of Government ? Is the holding of the entire share capital of the Corporation by Government enough or is it necessary that in addition, there should be a certain amount of direct control exercised by Government and, if so, what should be the nature of such control ? Should the functions which the corporation is charged to carry out possess any particular characteristic or feature, or is the nature or the functions immaterial ? Now, one thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating

that the corporation is an instrumentality or agency of Government. But, as is quite often the case, a corporation established by statute may have no shares or shareholders, in which case it would be a relevant factor to consider whether the administration is in the hands of a board of directors appointed by Government, though this consideration also may not be determinative, because even while the directors are appointed by Government, they may be completely free from governmental control in the discharge of their functions. What then are the tests to determine whether a corporation established by statute or incorporated under law is an instrumentality or agency of Government ? It is not possible to formulate an all-inclusive or exhaustive test which would adequately answer this question 'there is no cut and dried formula, which would provide the correct division of corporations into those which are instrumentalities or agencies of Government and those which are not.'

(Emphasis supplied)

19. He, therefore, submits that the Central Government may create a body like the Watershed Committee under the I.W.M.P. and funds generated for the implementation of the scheme to such Committee, can be said to be the funds being generated for employing the service of the Secretary as a part of the expenses permitted for performing administrative work. I find it from the record available and the

conditions prescribed under the guidelines dated 18/02/2010 that the Watershed Committee has been formed for a social purpose, only for 5 years, to inculcate water conservation activities with the active participation of the villagers.

20. The learned AGP points out that the situation was altered to some extent by the GR dated 19/08/2014 which permits the Gram Sabha to constitute a Committee and such Committee can be registered under the Societies Registration Act, 1860. Such a Watershed Committee, including the petitioner as its Secretary, was registered under the Societies Registration Act on 30/04/2015 and the Assistant Registrar (Societies) has issued such a certificate. The entire Committee is therefore registered as a Co-operative Society. The learned AGP hastens to add that such registration would last only upto the period of 5 years, during which the scheme would be implemented. In this backdrop, I do not find that a person, who is a member of this Committee, which is registered as a Society under the Societies Registration Act, 1860, could be termed as an employee either of the society or of the Government.

21. Though the learned Advocate for the petitioner has cited a long list of judgments, I would refer to only those judgments which can

advantageously be considered while deciding the issue as to whether the petitioner was occupying an office of profit. In the matter of Janakdhari Prasad (supra), the Hon'ble Apex Court concluded in paragraph Nos.15, 28 and 33 as under :-

“15. The Court referred to the decision in Maulana Abdul Shakur v. Rikhab Chand and another, AIR 1958 SC 52. In the said case, the question arose before a Constitution Bench whether the returned candidate was holding an office of profit, for he was the manager of a school run by a committee of management formed under the provisions of Durgah Khwaja Saheb Act, 1955. It was contended before the Court that the Government of India had the power of appointment and removal of the members of the committee of management, as also the power to appoint the administrator in consultation with the committee and, therefore, the returned candidate was under the control and supervision of the Government and hence, he was holding an office of profit under the Government of India.

The Court repelled the submission by drawing a distinction between the holder of an office of profit under the Government and the holder of an office of profit under some other authority subject to the control of Government. The Court expressed its opinion thus:

“No doubt the Committee of the Durgah Endowment is to be appointed by the Government of India, but it is a body corporate with perpetual succession acting within the four corners of the Act. Merely because the Committee or the

members of the Committee are removable by the Government of India or the Committee can make bye-laws prescribing the duties and powers of its employees cannot in our opinion convert the servants of the Committee into holders of office of profit under the Government of India. The appellant is neither appointed by the Government of India nor is removable by the Government of India nor is he paid out of the revenues of India. The power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of Government revenues are important factors in determining whether that person is holding an office of profit under the Government though payment from a source other than Government revenue is not always a decisive factor. But the appointment of the appellant does not come within this test."

The aforesaid passage lucidly states what basically constitutes an office of profit.

28. The aforesaid being the position, we may presently focus on what constitutes a service. In State of Assam and others v. Kanak Chandra Dutta, AIR 1967 SC 884, Bachawat, J., speaking for the Constitution Bench, held that a person holding a post under a State is a person serving or employed under the State. There is a relationship of master and servant between the State and a person holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A

relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post.

33. Eventually, the Court analyzing the test of Article 14, opined:

In our opinion, the wide sweep of Article 14 undoubtedly takes within its fold the impugned circular issued by the State of U.P. in exercise of its executive power, irrespective of the precise nature of appointment of the Government Counsel in the districts and the other rights, contractual or statutory, which the appointees may have. It is for this reason that we base our decision on the ground that independent of any statutory right, available to the appointees, and assuming for the purpose of this case that the rights flow only from the contract of appointment, the impugned circular, issued in exercise of the executive power of the State, must satisfy Article 14 of the Constitution and if it is shown to be arbitrary, it must be struck down. However, we have referred to certain provisions relating to initial appointment, termination or renewal of tenure to indicate that the action is controlled at least by settled guidelines, followed by the State of U.P., for a long time. This too is relevant for deciding the question of arbitrariness alleged in the present case.

The aforesaid passages clearly show that the Court went by the concept of public element attached to the office or post of

Government Pleader. It has not expressed the opinion that they are under the Government service. Be that as it may, as has been held by the learned single Judge and rightly so, there is no master-servant relationship and the respondent was not amenable to any disciplinary proceeding. He has correctly expressed the view that the conduct of the advocate is subject to the discipline of the Bar Council. As we notice, there is nothing on record to show that he was getting any remuneration. Even if some remuneration is attached to the office, he cannot be treated to be under the service of the State Government. The aspects which are essential for establishing a relationship of master and servant are absent. Therefore, the returned candidate could not have been treated to be in service under the State Government.”

(Emphasis supplied)

22. It was thus held that what is required to be considered is whether a person is a holder of an office of profit under the Government or under any authority which is subject to the control of the Government. For determination of whether a person is holding an office of profit under the Government, the payment from the Government revenue is not a decisive factor. The existence of relationship of an employer and an employee must indicate that the State has right to select and appoint the holder of the post, it has a right to suspend or dismiss him, it has a right to control the manner

and method of his work performance and the relationship of master and servant must be established by the presence of all or some of these *indicia* in conjunction with other circumstances. It is, therefore, a question of fact as to whether there is such a relationship between the Government and the holder of a post.

23. The learned Advocate for the petitioner as well as respondent No.6 relied upon the judgment of the learned Division Bench of this Court in the matter of Manohar Deulkar (supra) and the Court relied upon the judgment of the Hon'ble Apex Court in the matter of Pradyut Bordoloi (supra) and upon the observations of the Hon'ble Apex Court, which are in paragraph No.12 as under :-

"12. Dismissing the appeal from the above judgment, the Apex Court in the aforesaid case was pleased to hold as under : -
"The phrase "office of profit" is not defined in the Constitution. Posed with the perplexed problem--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 basis determinative test having failed. If the answer be a positive one, further probe has to go on finding answers to questions framed in Shivamurthy case viz. (1) whether the Government makes the appointment; (2) whether the Government has the right to

remove or dismiss the holder; (3) whether the Government pays the remuneration; (4) what are the functions of the holder? Does he perform them for the Government; and (5) does the Government exercise any control over the performance of those functions? In Guru Gobinda Basu case the Supreme Court pointed out several factors entering into the determination of the question which are (i) the appointing authority, (ii) the authority vested with power to terminate the appointment, (iii) the authority which determines the remuneration, (iv) the source from which the remuneration is paid, and (v) the authority vested with power to control the manner in which the duties of the office are discharged and to give directions in that behalf. But all these factors need not coexist. Mere absence of one of the factors may not negate the overall test. It has to be searched for as to how many of the factors pointed out in Guru Govinda Basu case do exist? The totality of the facts and circumstances reviewed in the light of the provisions of relevant Act, if any, would lead to an inference being drawn if the office held is under the Government. The inquisitive overview-eye would finally query : On account of holding of such office would the Government be in a position to so influence him as to interfere with his independence in functioning as a Member of Legislative Assembly and/or would his holding of the two offices--one under the Government and the other being a member of Legislative Assembly, involve a conflict of interests inter se? This is how the issue has to be approached and resolved

In the present case the Government of India does not exercise any control on appointment, removal, service conditions and

functioning of the respondent. The respondent does not hold an "office" and there is "profit" attaching with the office, but such office of profit is not "under the Government of India". He being a Clerk in Coal India Ltd. does not and cannot bring any influence or pressure on him in his independent functioning as a Member of Legislative Assembly. The finding that the respondent was neither a managing agent nor a manager nor a Secretary under Coal India Ltd. though the company has 100% share-holding of the Government, was not seriously disputed. Even otherwise, the respondent was merely a Clerk Grade I. Occasionally in the absence of his senior officer on account of leave or absence, he exercised some supervisory function over his subordinates, but this would not make him a manager of the Company. Therefore, the respondent was not holding an office of profit under the Government of India and therefore no disqualification attached to him under [Article 19\(1\)\(a\)](#) of the Constitution. The respondent did not incur a disqualification under Section 10 of RPA also. As the respondent's nomination was improperly rejected, the appellant's election was liable to be declared void without proof of the result of the election, insofar as it concerns the returned candidate, having been materially affected.

(Emphasis supplied)

24. Mr.Salunke submits that the petitioner is covered by the clause pertaining to determination of his remuneration. The petitioner performs work for the Government and authority is vested in

respondent No.5 to remove the petitioner. In my view, the said conditions cited would not be sufficient to hold that the petitioner is holding an office of profit under the Government. Issues like whether the Government made the appointment, whether the Government exercises control over the petitioner, whether the Government is the appointing authority, whether any authority is vested in the Government to terminate his service, are absent in the case of the petitioner herein.

25. In Pradyut Bordoloi (supra), it was held in paragraph Nos.9 and 10 as under :-

“9. In Satrucharla Chandrasekhar Raju Vs. Vyricherla Pradeep Kumar Dev & Anr., (1992) 4 SCC 404, this Court has articulated the object underlying Articles 102 (1)(a) and 191 (1)(a) of the Constitution in the following words: in order to eliminate or reduce the risk of conflict between the duty and interest amongst the members of the Legislature and to ensure that the Legislature does not contain persons who have received benefits from the Executive and who consequently being under an obligation might be amenable to its influence. Thus the object is to see that such an elected member can carry on freely and fearlessly 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 remunerations 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. Therefore this object must be borne in mind in interpreting these Articles. Under these provisions the right to contest is being taken away on the ground of the said disqualification. Such a ban on candidature must have a substantial and reasonable nexus to the object that is to be achieved namely the elimination of possibility of misuse of the position. It is from this point of view that the right to appoint and right to remove the holder of the office in many cases becomes an important and decisive test.

10. A variety of situations have come up for the consideration of this Court wherein the Court was called upon to apply the determinative tests so as to find out whether a case of holding an office of profit under the Government was made out or not. It will be advantageous to have a brief resume of such cases. In *D.R. Gurushanthappa Vs. Abdul Khuddus Anwar & Ors.*, (1969) 3 SCR 425, a Government undertaking was taken over by a Company incorporated under the [Indian Companies Act](#), 1956 as a going concern and the employees working in the undertaking were also taken over. As a result of the transfer of the undertaking, the employees of the Government became the employees of the Company and were covered by the definition of workman under the [Industrial Disputes Act](#), 1947. It was held that such a workman ceases to be Government servant and is not disqualified to be a candidate for election to State Legislative Assembly under [Article 191 \(1\)\(a\)](#) of the Constitution. The Court refused to accept the proposition that the mere fact that the Government had control over the Managing Director or other

Directors as well as the power of issuing directions relating to the working of the company can lead to the inference that every employee of the company is under the control of the Government.”

(Emphasis supplied)

26. The Honble Apex Court, therefore, relied upon Satruchar Lachandra (supra), and agreed with the view that the test would be to see whether such an elected member can carry on freely and fearlessly his duties in employment 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 functioning, there is every likelihood of such person succumbing to the wishes of the Government.

27. In Satruchar Lachandra (supra), the Hon'ble Apex Court held that the appellant candidate was directly under the control of the Project Officer. The Government had the control over the appointing authority but not over the teachers and therefore such a teacher cannot be said to be holding an office of profit under the Government and would not incur disqualification to be elected as a member of the

legislative assembly. The appellant Satruchar was appointed as a teacher in a primary school operated under the Integrated Tribal Development Agency by its Project Officer. Though the Project Officer was the District Collector, it was held that he acted in a different capacity and the power to appoint or remove the teacher was not with the Government, but with the Project Officer.

28. In the instant case, respondent No.5 is the Circle Agricultural Officer and is leading the Project Implementation Agency. Even if the GR's of 2012 and 2014 are interpreted to mean that respondent No.5 can terminate the engagement of the petitioner, it cannot be said that the power to disengage the petitioner vests with the Government. In fact, neither respondent No.5 has appointed the petitioner, nor has the Government so done.

29. In fact, the facts of this case are quite peculiar. The entire Committee is formed by the Gram Sabha meaning thereby that barring the Sarpanch, who is the automatic choice to be the Chair Person of the Committee, 3 (now 4 members as per the 2014 GR) of the elected Gram Panchayat Members and the other members as well as the Secretary are nominated on the Committee by popular choice. There is no dispute that the Gram Sabha actually voice voted

without a formal motion, to nominate these persons on the Committee.

30. In Satruchar Lachandra (supra), the Hon'ble Apex Court then proceeded to conclude in paragraph Nos. 22 and 23 as under :-

“22. It is also necessary to bear in mind that the Government is undertaking several projects and activities including commercial activities through the corporations and local bodies exercising some control over such corporations or bodies. In that view of the matter they may come within the meaning of the "State" envisaged in [Article 12](#) but that may not be a decisive factor in deciding the issue. As a matter of fact [Section 10](#) of the Representation of People Act as well as [Article 58\(2\)](#) of the Constitution of India do indicate that all persons employed in such undertakings, corporations or local bodies cannot be deemed to suffer disqualification for contesting the elections except to the extent indicated therein. This aspect also has been considered in some of the above-mentioned decisions. If a strict and narrow construction is to be applied that amounts to shutting off many prominent and other eligible persons to contest the elections which forms the fundamental basis for the democratic set-up. Therefore several factors as indicated above depending upon the facts of each case have to be taken into consideration in deciding whether a particular person is disqualified by virtue of his holding an office of profit before concluding that such an office is under the Government. In

Madhuker G.E. Pankakar's case, as to what should be the approach, it was observed thus:

After all, all law is a means to an end. What is the legislative end here in disqualifying holders of 'offices of profit under government'? Obviously, to avoid a conflict between duty and interest, to cut out the misuse of official position to advance private benefit and to avert the likelihood of influencing government to promote personal advantage. So this is the mischief to be suppressed. At the same time we have to bear in mind that our Constitution mandates the State to undertake multiform public welfare and socio-economic activities involving technical persons, welfare workers, and lay people on a massive scale so that participatory government may prove a progressive reality. In such an expanding situation, can we keep out from elective posts at various levels many doctors, lawyers, engineers and scientists, not to speak of an army of other non-officials who are wanted in various fields, not as full-time government servants but as part-time participants in people's projects sponsored by government? For instance, if a National Legal Services Authority funded largely by the State comes into being, a large segment of the legal profession may be employed part-time in the ennobling occupation of legal aid to the poor. Doctors, lawyers, engineers, scientists and other experts may have to be invited into local bodies, legislatures and like political and administrative organs based on election if these vital limbs of representative government are not to be the monopoly of populist politicians or lay members but sprinkled with technicians in an age which belongs to technology. So, an

interpretation of 'office of profit' to cast the net so wide that all our citizens with specialties and know-how are inhibited from entering elected organs of public administration and offering semi-voluntary services in para-official, statutory or like projects run or directed by Government or Corporation controlled by the State may be detrimental to democracy itself. Even athletes may hesitate to come into Sports Councils if some fee for services is paid and that proves their funeral if elected to a Panchayat! A balanced view even if it involves judicious irreverence to vintage precedents, is the wiser desideratum.

23. What emerges from the above discussion is that the Government has some control over the ITDA which is set up as a project, since it provides funds and sanctions the posts: the District Collector is appointed as Project Officer and some officers are ex-officio members of the ITDA which carries out the object of providing the compulsory education in tribal areas. But the ITDA is a registered Society having its own constitution. Though the Project Officer is the District Collector, he acts as a different entity. The power to appoint or to remove teachers is not with the Government but with the Project Officer. The Government may have control over the appointing authority but has no direct control over the teachers. The small post that appellant holds in ITDA is only that of a Teacher who is directly under the control of the Project Officer. In such a situation the question of any conflict between his duties and interests as an elected member does not arise since it cannot be said that he, as a teacher, can be subjected to any kind of pressure by the Government which has neither the power to appoint him nor to

remove him from service. Taking a practical view of the substance of these factors into consideration, we are of the view that the appellant cannot be held to be holding an office of profit under the Government. Accordingly the Order of the High Court is set aside and the appeal is allowed. Parties are directed to bear their own costs throughout.”

(Emphasis supplied)

31. I find that the Law laid down in Satruchar Lachandra (supra) would squarely apply to the case of the petitioner. Similar to the facts in the said case, respondent No.5 has been entrusted with a task of monitoring the Committee. He has no choice to exercise in the selection or appointment of the Secretary, which is decided by popular choice by the Gram Sabha. He only has the scope of overlooking the activities of the Secretary and remove him by terminating the contract. Neither the Central nor the State Government has any direct control over such Secretary. He has no security of employment. He cannot work as per the service conditions applicable to the Government employees. He has no service tenure and retirement age and at best it can be said to be an election by the Gram Sabha. The Secretary earns a stipend @ Rs.100/- per day for meeting his out of pocket expenses.

IS A STIPEND OR HONORORIUM, WAGES ?

32. In U.C.Raman (supra), the Hon'ble Apex Court has observed in paragraph Nos. 15 to 20 which read as under :-

“15. Learned counsel for the first respondent has placed reliance upon the following judgments of this Court to further illustrate as to what are the essential requirements for determining whether the office in question is an ‘office of profit’ or not.

1. Gajanan Samadhan Lande v. Sanjay Shyamrao Dhotre, (2012) 2 SCC 64

2. Shivamurthy Swami Inamdar etc. vs. Agadi Sanganna Andanappa etc., 1971 (3) SCC 870

3. Ravanna Sabanna vs. G.S. Kaggeerappa, AIR 1954 SC 653

16. Paragraph 12 of judgment in the case of Ravanna Subanna discloses that a small amount of Rs.6/- for each sitting of Committee for the Chairman deserved to be treated as consolidated fee for the out-of-pocket expenses which he has to incur for attending the meetings of the Committee and is not meant to be a payment by way of remuneration or profit.

17. In the case of Shivamurthi Swami also a similar view was taken in paragraph 17 by treating Rs.16/- per day payable to the member of the concerned Board as a payment for the purpose of reimbursing the expenses incurred by the members and hence it was held to be a compensatory allowance and not a profit.

18. In the case of Gajanan Samadhan Lande to which one of us (Justice R.M. Lodha)(as His Lordship then was) was a member,

it was succinctly explained that :

“..... one of the essential necessities in determining the question whether the office is an “office of profit” or not is whether such office carries remuneration in the form of pay or commission. As an elected Director, the amount paid to the returned candidate by way of allowances, by no stretch of imagination, can be said to be “remuneration” in the form of pay or commission. It is only a sort of reimbursement of the expenses incurred by the returned candidate. The essential condition that the office carries remuneration in the form of pay or commission is also not satisfied.”

19. The aforesaid judgments relied upon by the learned advocate for the first respondent clearly support the view taken by the High Court and fortify the judgment under appeal.

20. The plea raised by Mr. Andhyarujina, learned senior advocate for the appellant that the word ‘profit’ should include even status and influence etc., besides the pecuniary profits, is not found acceptable in view of long line of judgments of this Court, some of which have been cited by both the parties and have been noticed above. This Court has given categorical clarification on more than one occasion that an ‘office of profit’ is an office which is capable of yielding a profit or pecuniary gain. The word ‘profit’ has always been treated equivalent to or a substitute for the term ‘pecuniary gain’. The very context, in which the word ‘profit’ has been used after the words ‘office of’, shows that not all offices are disqualified but only those which yield pecuniary gains as profit other than mere compensatory

allowances, to the holder of the office. There is no requirement to make a departure from the long line of established precedents on this issue. If the submissions of learned counsel for the appellant were to be accepted, it would add a great amount of uncertainty in deciding whether an office is an 'office of profit' or not. In the aforesaid factual and legal premises, we find no option but to dismiss the appeal. We order accordingly. However, parties shall bear their own costs, so far as this appeal is concerned."

(Emphasis supplied)

33. In U.C.Raman (supra), it was considered as to whether a stipend or an honorarium would be amounting to salary or wages. The judgment delivered by this Court (Coram : Justice R.M.Lodha, as His Lordship then was) in the matter of Gajanan Samadhan Lande Vs. Sanjay Shyamrao Dhotre [2012(2) SCC 64] holds that one of the essential necessities in determining the question whether the office is an office of profit or not, is whether such office carries a remuneration in the form of a pay or commission. As an elected Director, the amount paid to him by way of allowances, was held to be no remuneration in the form of a pay. It was also concluded that consolidated stipend can only be interpreted to mean some amount paid to enable the candidate to meet out of pocket expenses.

34. Mr.Salunke has relied upon Anokh Singh (supra) cited by Mr.Tope. It was held by the Hon'ble Apex Court in paragraph nos.21 to 26 as under :-

"21. The High Court has rejected the submission that such an honorarium would not fall within the ambit of the term 'office of profit'.
The High Court has concluded that -

"In the instant case, the Lambardars are being appointed by the official of the Government and they can be removed by the official of the Government. Their appointments are under the statute and are in overall control of the Government. They are also receiving monthly honorarium which cannot be said to be compensatory in nature [Emphasis supplied]. The facts of this case are fully covered by the aforesaid tests laid down for finding out whether the office of profit is an office under a Government."

22. In our opinion, the High Court has erroneously distinguished the observations of this Court in the case of Shivamurthy Swami Inamdar Vs. Veerabhadrappa Veerappa, 1971(3) SCC 870. In the aforesaid case, this Court laid down some of the tests that may be relevant to determine as to whether a particular office can be said to be an 'office of profit'. These tests are :-

"(1) Whether the Government makes the appointment;

(2) Whether the Government has the right to remove or dismiss the holder ;

(3) Whether the Government pays the remuneration;

(4) What are the functions of the holder? Does he perform them for the Government; and

(5) Does the Government exercise any control over the performance of those functions?"

All the five tests would be relevant to determine that whether a particular office is an office under the Government. For determining whether such an office is also an 'office of profit', tests 3, 4, 5 assume importance. It is, therefore, necessary to evaluate the nature and the importance of the functions performed. It would be essential to determine whether it would be necessary for the person holding an office under the Government to incur any expenditure in performance of the functions. These matters would then have to be correlated to any honorarium, allowance or stipend that may be attached to the office. Without examining any of these issues, the High Court concluded that the honorarium received by the Lambardar is not compensatory in nature. We are unable to endorse the approach adopted by the High Court.

23. Bearing in mind these tests, we may now examine whether the office of Lambardar is an 'office of profit'.

It would be apparent from the facts that though the Lambardar may not be holding a civil post, he would be holding an office under the Government. The Lambardar is not paid any salary but is entitled to receive an honorarium of Rs.900/- per month. He receives no salary, emoluments, perquisites or facilities. Is that sufficient to conclude that he holds an 'office of profit'? This seems to be the conclusion reached by the State Election Commissioner, whilst issuing the impugned

circular dated 30.4.2008. The High Court affirmed the aforesaid conclusion.

24. The term 'office of profit' has not been defined in the Constitution, Representations of Peoples Act, Punjab State Election Commission Act or the Panchayati Raj Act. It is one of those rare terms which is not even defined in the [General Clauses Act](#), 1897. It has, however, been judicially considered in numerous judgments of this Court. We may notice here some of the judgments.

25. In *Gatti Ravanna, son of Gatti Subanna, Gubbi Taluk, Mysore State Vs. G.S.Kaggeerappa, Merchant, Gubbi*⁶ considered whether a person holding the position of the Chairman of Gubbi Taluk Development Committee, could be said to be holding an 'office of profit' under the Government. In that case, the Chairman was entitled to a fee of Rs.6/- for each sitting of the aforesaid Committee. It was clearly held by this Court that a fee of Rs.6/- which the Chairman was entitled to draw for each sitting of the Committee was neither meant to be payment by way of remuneration nor it could amount to profit; and the fee was paid to the Chairman to enable him to meet "out of pocket expenses, which he has to incur for attending the meetings of the Committee." It was held as under:-

"The plain meaning of the expression seems to be that an office must be held under Government to which any pay, salary, emoluments or allowance is attached. The word "profit" connotes the idea of pecuniary gain. If there is really a gain, its quantum or amount would not be material; but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the

office really carries any profit.

From the facts stated above, we think it can reasonably be inferred that the fee of Rs 6 which the non-official Chairman is entitled to draw for each sitting of the committee, he attends, is not meant to be a payment by way of remuneration or profit, but it is given to him as a consolidated fee for the out-of-pocket expenses which he has to incur for attending the meetings of the committee. We do not think that it was the intention of the Government which created these Taluk Development Committees which were to be manned exclusively by non-officials, that the office of the Chairman or of the members should carry any profit or remuneration."

26. The High Court gives no reason for concluding that the honorarium received by a Lambardar is not compensatory in nature. The High Court erred in not analyzing the real and substantive nature of the honorarium. The High Court failed to take notice of the fact that the respondents had placed no material on the record to establish that the honorarium of Rs.900/- would result in a net gain to the Lambardar. In other words, the out of pocket expenses for attending to the duties of a Lambardar would be less than Rs.900/- per month. This court in S.Umrao Singh Vs. Darbara Singh & Ors.. 1969(1) SCR 421 has clearly held :-

"5. The payment to a Chairman, Panchayat Samiti, under Rule 3 is described in the rule as a monthly consolidated allowance in lieu of all other allowances for performing all official duties and journeys concerning the Panchayat Samiti within the district, including attending of meetings, supervision of plans, projects, schemes and other works,

and also for the discharge of all lawful obligations and implementation of Government directives. This provision in very clear language shows that the allowance paid is not salary, remuneration or honorarium. It is clearly an allowance paid for the purpose of ensuring that the Chairman of a Panchayat Samiti does not have to spend money out of his own pocket for the discharge of his duties. It envisages that, in performing the duties, the Chairman must undertake journeys within the district and must be incurring expenditure when attending meetings, supervising plans, projects, schemes and other works and also in connection with the discharge of other lawful obligations and implementation of Government directives. No evidence has been led on behalf of the appellant to show that a Chairman of a Panchayat Samiti does not have to perform such journeys in the course of his official duties and to incur expenditure in that connection. The State Government, which was the competent authority, fixed the allowance for a Chairman of a Panchayat Samiti at Rs 100 per month, obviously because it was of the opinion that this sum will be required on an average every month to meet the expenses which the Chairman will have to incur in this connection. In these circumstances, the burden lay on the appellant to give evidence on the basis of which a definite finding could have been arrived at that the amount of Rs.100 per month was excessive and was not required to compensate the Chairman for the expenses to be incurred by him in the discharge of his official duties as envisaged in the rule. That burden clearly

has not been even attempted to be discharged by the appellant.

(Emphasis supplied)

35. It is thus obvious that the consolidated honorarium prescribed in the scheme implemented by the IWMP, is aimed at not providing a living wage or a fair wage to the Secretary, but was a token of Rs.3,000/- per month, which is Rs.100/- per day in order to avoid such Secretary spending from his pocket while performing various activities under the scheme. Rs.3,000/- in 2013 to 2017 is not even 25% of the aggregate of the minimum wages payable to the Class IV workmen in the Engineering industry under the Minimum Wages Act. A person can hardly maintain his mind, body and soul together and sustain the livelihood of his dependents' with Rs.100/- per day. It would be barely enough for avoiding his starvation and of his family. This Secretary has to travel and move around while maintaining the records of the activities of the Watershed Committee. He receives no perquisites for this.

36. In the light of the above, I do not find that the impugned order can be sustained. The said order is passed without application of

mind and is a perverse and erroneous order by virtue of which an elected peoples representative to the Zilla Parishad has been unseated casually. This petition is therefore allowed. The impugned order dated 09/07/2019 is quashed and set aside and the application CR 13/2019 filed by respondent No.6 stands rejected.

37. The petitioner shall stand reinstated as the Member of the Zilla Parishad forthwith. Since the disqualification is set aside, this judgment naturally would be operative from the date on which the petitioner was disqualified and any subsequent act of the State Government or the State Election Commission based on the disqualification of the petitioner, shall stand nullified with immediate effect.

38. The learned Advocate for respondent No.6 prays for staying the effect of this judgment for 2 weeks. Learned Advocate for the petitioner submits that an important election for the position of Member of the Legislative Council has been declared and the voting would occur on 20/08/2019.

39. In this backdrop, it would be inappropriate to deprive the petitioner of a valuable right of voting to which he is legally entitled to

and hence the request made by respondent No.6 stands rejected.

40. Since the dictation of this order has concluded in open Court at 6.45 p.m., after the learned advocates concluded their submissions at 4.00 p.m., the litigating sides would act on the basis of the operative part of the order made available to them forthwith and shall not put forth a plea that the copy of this entire judgment was not readily available. The learned AGP shall communicate this judgment to the District Collector, Aurangabad as well as the District Collector, Jalna, forthwith.

41. I find it appropriate to record my compliments to Mr.Tope, Mr.Salunke and the learned AGP Mr.Yadav Lonikar for their admirable assistance in this matter.

(Ravindra V.Ghuge, J.)