

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 26.02.2019

CORAM

THE HONOURABLE MR. JUSTICE V.PARTHIBAN

W.P. NO. 30102 OF 2011

AND

M.P. NO. 1 OF 2011

P.Veldurai, Ex. M.L.A.

.. Petitioner

- Vs -

1. Tamil Nadu Legislative Assembly
Secretariat, rep. By its Secretary
Fort St. George, Chennai - 9.

2. The Returning Officer
220, Cheranmahadevi Assembly
Constituency, Revenue Divisional
Officer, Cheranmahadevi
Tirunelveli District.

3. The Chief Engineer
Highways (NABARD) Department
Chennai.

.. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorari to call for the records on the file of the 1st respondent in Letter No.8032/2011-2, TNLAS (T.A.III) dated 22.8.2001 and quash the same.

For Petitioner : Mr. P.L.Narayanan

For Respondents: Mr. S.R.Rajagopal, AAG, assisted by
Mr. J.Pothiraj, Spl. G.P.

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ORDER

The present writ petition has been filed for issuance of a writ of certiorari to call for the records on the file of the 1st respondent in Letter No.8032/2011-2, TNLAS (T.A.III) dated 22.8.2001 and quash the same.

2. The facts and circumstances necessitating the filing of the present writ petition are as hereunder :-

The petitioner was a former Member of the Legislative Assembly (for short 'MLA') representing the Indian National Congress and was elected to the Tamil Nadu Legislative Assembly during the 13th Legislative Assembly Elections held during the year 2006. On 3.3.06, notification was issued for the 13th Tamil Nadu Legislative Assembly Election, which was scheduled to be held on 8.5.06. Nominations commenced from 13.4.06 and the last date for filing of nomination was 20.4.06. The scrutiny was slated on 21.4.06. The petitioner, representing the Indian National Congress, filed his nomination on 17.4.06. Along with the petitioner, 8 other persons had also filed their nominations.

3. The petitioner, at the relevant point of time was a registered contractor with the Highways Department, Government of Tamil Nadu. Since he had chosen to contest the Assembly Election, his continuance as a registered contractor with the Government of Tamil Nadu would entail disqualification under the provisions of the Representation of Peoples Act, 1951 (for short 'RP Act'), he submitted a representation to the Superintending Engineer, Public Works Department, Project Circle, Madurai, to remove his name from the list of registered contractors maintained by him and terminate his contract forthwith. Based on the request of the petitioner, the Superintending Engineer removed the name of the petitioner from the list of registered contractors by his letter dated 12.4.06. However, on 17.4.06, the Superintending engineer addressed another letter to the petitioner advising him to take steps to cancel all pending works from the respective Division, wherever contract was in force.

4. On the basis of the advice given by the Superintending Engineer, the petitioner addressed a letter to the Divisional Engineer, Nagercoil, on 17.4.06, to terminate his contract in respect of the work, which came under the control of the said Divisional Engineer as that work alone was in progress at that point of time. The petitioner had also identified the alternative contractor to do the balance work as required under G.O. Ms. No.4682 dated 16.11.1951 and the alternative contractor, identified by the petitioner, also accepted to complete the work originally contracted to the petitioner. Ultimately, the contract of the petitioner came to be terminated and the same was also ratified by the Superintending engineer on 26.04.06.

5. While the matter stood thus, one of the candidates, who filed nomination along with the petitioner had filed an objection regarding the qualification of the petitioner on the ground that he was a Government contractor. However, the objection was overruled by the 2nd respondent. In the

meanwhile, the petitioner got elected as a member of the 13th Legislative Assembly from Cheranmadevi Assembly Constituency in the election held on 8.5.06 and the results were declared on 11.5.06. Thereafter, he served as MLA from 2006 and completed his term for a period of five years till 2011.

6. One of the defeated candidates in the constituency, where the petitioner was elected eventually, had filed an election petition, E.P. No.2/06 before this Court seeking to set aside the election of the petitioner on the ground that he suffered disqualification u/s 9-A of the RP Act. The ground on which the petition was filed inter alia that the contract of the petitioner was not terminated as per G.O. Ms. No.4682 dated 16.11.1951. Ultimately, this Court, having found no merits in the election petition, dismissed the same. As against the order of this Court, Special Leave Petition was filed in C.A. No.4129/09 and the Hon'ble Supreme Court, vide its order dated 13.04.11, allowed the appeal and set aside the election of the petitioner on the ground that the petitioner suffered disqualification u/s 9-A of the RP Act. According to the Hon'ble Supreme Court, neither the Superintending Engineer, nor the Divisional Engineer was competent to cancel the contracts and, therefore, the cancellation of the petitioner's contract was of no consequence. The Hon'ble Supreme Court has ultimately held that the petitioner was disqualified from filing the nomination papers and contest the election and, therefore, his eventual election was declared as illegal, null and void.

7. By the time the order passed by the Hon'ble Supreme Court, i.e., on 13.4.11, the next general election was notified to the Tamil Nadu Legislative Assembly and the petitioner has also completed his tenure for a full five year period as MLA.

8. It appears that the petitioner was aggrieved by the order passed by the Hon'ble Supreme Court and, therefore, a review petition was filed. However, the same was rejected by the Hon'ble Supreme Court and, thereby confirmed its earlier order passed in C.A. No.4129/09 dated 13.4.11. Thereafter, the 1st respondent issued a show cause notice on 7.7.11 directing the petitioner to refund a sum of Rs.21,58,823/- including a penalty of Rs.500/- per day for attending the Assembly sessions on 201 days, as debt due to the Government. After obtaining a reply from the petitioner herein, final order was passed by the 1st respondent on 22.8.11 directing the petitioner to remit the amount as the review petition filed by the petitioner had also been rejected by the Hon'ble Supreme Court. As against the said order, the present writ petition has been filed.

9. On behalf of the petitioner herein, number of legal objections have been raised in assailing the order passed by the

1st respondent seeking to recover the amount of Rs.21,58,823/-, which amount was paid to the petitioner as salary and allowances when the petitioner acted as a Member of the Legislative Assembly.

10. Mr. P.L.Narayanan, learned counsel appearing for the petitioner, at the outset, submitted that the disqualification suffered by the petitioner ultimately by the orders of the Hon'ble Supreme Court was not due to any conviction for any offence u/s 8 or 8 (A) or any other sections of the RP Act for corrupt practices. It was a disqualification only u/s 9 (A) of the RP Act, which deals with a person having subsisting contract with the Government, who suffers disqualification to contest the election. For better clarity, Section 9 (A) is extracted hereunder :-

"9A. Disqualification for Government contracts, etc. -A person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by, that Government."

11. According to the learned counsel for the petitioner, the disqualification suffered by the petitioner was not on account of any serious lapses on his part nor he attracted disqualification for his corrupt practice or being convicted of any serious criminal offence. That being so, the impugned order directing the petitioner to refund the amount, which also represent the salary and other allowances paid to him during the years when the petitioner had participated in the proceedings of the Assembly is wholly unsustainable. Since the petitioner has earned the salary and allowances for his participation in the proceedings of the Assembly, the question of refund of the money earned by him would not arise at all.

12. In support of the above contention, learned counsel for the petitioner drew the attention of this Court to Section 98 of the RP Act, which deals with declaration of election as void by High court, which includes the Hon'ble Supreme Court. Section 98 of the RP Act reads as under :-

"98. Decision of the High Court.-At the conclusion of the trial of an election petition 2 [the High Court] shall make an order-

- (a) dismissing the election petition; or
- (b) declaring the election of [all or any of the returned candidates] to be void; or
- (c) declaring the election, of [all or any of the returned candidates] to be void and the

petitioner or any other candidate to have been duly elected."

13. Learned counsel further drew the attention of this Court to Section 107 of the RP Act, which deals with the effect of orders of the High Court in such matter. For useful reference, Section 107 of the RP Act is quoted hereunder :-

"107. Effect of orders of the High Court.-7[(1) Subject to the provisions contained in Chapter IVA relating to the stay of operation of an order of the High Court under section 98 or section 99, every such order shall take effect as soon as it is pronounced by the High Court.

(2) Where by an order under section 98 the election of a returned candidate is declared to be void, acts and proceedings in which that returned candidate has, before the date thereof, participated as a member of Parliament or as a member of the Legislature of a State shall not be invalidated by reason of that order, nor shall such candidate be subjected to any liability or penalty on the ground of such participation."

14. According to the learned counsel for the petitioner sub-section (2) of Section 107 of the RP Act, the acts and participation of a candidate, who is a Member of the Legislative Assembly, shall stand protected even in the event of his subsequent disqualification and he shall not be subjected to any liability or penalty on the ground of such participation. It is therefore submitted by the learned counsel for the petitioner that the act and participation of a Legislator in the Assembly, even if he is disqualified subsequently, is protected and the salary and allowances, which became payable to the Member of the Legislative Assembly for his act and participation cannot be sought to be recovered, despite the fact that he has been subsequently disqualified. According to the learned counsel, the factum of his participation and his act of voting cannot stand erased as his participation and act of voting and other business transactions in the Assembly had gone on record and remain as it is. Therefore, sub-section (2) of Section 107 provides protection to the Members of the Legislative Assembly or Parliament in such contingencies for a larger purpose to protecting public interest. Learned counsel for the petitioner emphasised the fact that sub-section (2) of Section 107 deals with the liability or penalty, which cannot be pressed into service against the candidate concerned in such eventuality.

15. Learned counsel for the petitioner also fairly submitted that at worst, the petitioner is liable to pay only penalty,

which is envisaged under Article 193 of the Constitution of India. For better clarity, Article 193 of the Constitution of India reads as under :-

"193. If a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State before he has complied with the requirements of article 188, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament or the Legislature of the State, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the State."

16. According to the learned counsel for the petitioner, overall, the petitioner is liable to pay only a penalty of Rs.500/= as debt due to the State for each day on which he sits or votes in the Assembly. Learned counsel for the petitioner submitted that the petitioner is willing to make good the penalty as provided under Article 193 of the Constitution of India. However, in regard to the salary and allowances, which were paid to him during his tenure as Member of the Legislative Assembly between 2006 and 2011, the same cannot be demanded to be returned by the 1st respondent, since such demand was without the authority of law. According to the learned counsel, neither under the Constitution of India nor under the provisions of the RP Act, any such refund is indicated or provided, either explicitly or implicitly and, hence, the present impugned demand by the 1st respondent cannot be countenanced in law.

17. Learned counsel for the petitioner, in the conspectus of his submissions as aforementioned relied on the decision of the Apex Court in Gokaraju Rangaraju - Vs - State of A.P. (1981 (3) SCC 132). In the said decision, the Hon'ble Supreme Court has held that even if subsequently a person's appointment is found to be invalid, his act during the period of his service cannot be invalidated. The Hon'ble Supreme Court has dealt with, in extenso, in regard to the distinction between a 'Judge defacto' and a 'Judge disjure'. Ultimately, the Hon'ble Supreme Court has come to the conclusion that so long as the office was validly created, it matters not that the incumbent was not validly appointed. It is therefore emphasised by the learned counsel that likewise, in the present case, the fact that the petitioner had acted as MLA and participated in the sessions of the Assembly and, therefore, his actions as a Member of the Legislative Assembly stood protected u/s 107 of the RP Act and

such protective cover will also extend to the actual salary and allowances earned by him on such discharge of duties. Para-17 to 19, on which reliance is placed, is quoted hereunder :-

"17. A judge, de facto, therefore, is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a judge de jure. Such is the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief. There is yet another rule also based on public policy. The defective appointment of a de facto judge may be questioned directly in a proceeding to which he be a party but it cannot be permitted to be questioned in a litigation between two private litigants, a litigation which is of no concern or consequence to the judge except as a judge. Two litigants litigating their private titles cannot be permitted to bring in issue and litigate upon the title of a judge to his office. Otherwise so soon as a judge pronounces a judgment a litigation may be commenced for a declaration that the judgment is void because the judge is no judge. A judged title to his office cannot be brought into jeopardy in that fashion. Hence the Rule against collateral attack on validity of judicial appointments. To question a judged appointment in an appeal against his judgment is, of course, such a collateral attack.

18. We do not agree with the submission of the learned Counsel that the de facto doctrine is subject to the limitation that the defect in the title of the judge to the office should not be one traceable to the violation of a constitutional provision. The contravention of a constitutional provision may invalidate an appointment but we are not concerned with that. We are concerned with the effect of the invalidation upon the acts done by the judge whose appointment has been invalidated. The de facto doctrine saves such acts. The de facto doctrine is not a stranger to the Constitution or to the Parliament and the legislatures of the

States. Article 71(2) of the Constitution provides that acts done by the President or Vice-President of India in the exercise and performance of the powers and duties of his office shall not be invalidated by reason of the election of a person as President or Vice-President being declared void. So also Section 107(2) of the Representation of the People Act, 1951 (43 of 1951) provides that acts and proceedings in which a person has participated as a member of Parliament or a member of the legislature of a State shall not be invalidated by reason of the election of such person being declared to be void. There are innumerable other Parliamentary and State legislative enactments which are replete with such provisions. The twentieth amendment of the Constitution is an instance where the de facto doctrine was applied by the constituent body to remove any suspicion or taint of illegality or invalidity that may be argued to have attached itself to judgments, decrees, sentences or orders passed or made by certain District Judges appointed before 1966, otherwise than in accordance with the provision of Article 233 and Article 235 of the Constitution. The twentieth amendment was the consequence of the decision of the Supreme Court in Chandra Mohan v. State of U.P. [AIR 1966 SC 1987 : (1967) 1 SCR 77 : (1967) 1 LLJ 412] that appointments of District Judges made otherwise than in accordance with the provisions of Articles 233 and 235 were invalid. As such appointments had been made in many States, in order to pre-empt mushroom litigation springing up all over the country, it was apparently thought desirable that the precise position should be stated by the constituent body by amending the Constitution. Shri Phadke, learned Counsel for the appellants, argued that the constituent body could not be imputed with the intention of making superfluous amendments to the Constitution. Shri Phadke invited us to say that it was a necessary inference from the twentieth amendment of the Constitution that, but for the amendment, the judgments, decrees etc. of the District Judges appointed otherwise than in accordance with the provisions of Article 233 would be void. We do not think that the inference suggested by Shri Phadke is a necessary inference. It is true that as a

general rule the Parliament may be presumed not to make superfluous legislation. The presumption is not a strong presumption and statutes are full of provisions introduced because abundans cautela non nocet (there is no harm in being cautious). When judicial pronouncements have already declared the law on the subject, the statutory reiteration of the law with reference to particular case does not lead to the necessary inference that the law declared by the judicial pronouncements was not thought to apply to the particular cases but may also lead to the inference that the statute-making body was mindful of the real state of the law but was acting under the influence of excessive caution and so to silence the voices of doubting Thomases by declaring the law declared by judicial pronouncements to be applicable also to the particular cases. In Chandra Mohan case [AIR 1966 SC 1987 : (1967) 1 SCR 77 : (1967) 1 LLJ 412] this Court had held that appointments of District Judges made otherwise than in accordance with Article 233 of the Constitution were invalid. Such appointments had been made in Uttar Pradesh and a few other States. Doubts had been cast upon the validity of the judgments, decrees etc. pronounced by those District Judges and large litigation had cropped up. It was to clear those doubts and not to alter the law that the twentieth amendment of the Constitution was made. This is clear from the Statement of Objects and Reasons appended to the Bill which was passed as Constitution (20th Amendment) Act, 1966. The statement said:

"Appointments of District Judges in Uttar Pradesh and a few other States have been rendered invalid and illegal by a recent judgment of the Supreme Court on the ground that such appointments were not made in accordance with the provisions of Article 233 of the Constitution.... As a result of these judgments, a serious situation has arisen because doubt has been thrown on the validity of the judgments, decrees, orders and sentences passed or made by these District Judges and a number of writ petitions and other cases have already been filed challenging their validity. The functioning of the District Courts in Uttar Pradesh has practically come to a

standstill. It is, therefore, urgently necessary to validate the judgments, decrees, orders, and sentences passed or made heretofore by all such District Judges in those States...."

19. In our view, the de facto doctrine furnishes an answer to the submissions of Shri Phadke based on Section 9 of the Criminal Procedure Code and Article 21 of the Constitution. The judges who rejected the appeal in one case and convicted the accused in the other case were not mere usurpers or intruders but were persons who discharged the functions and duties of judges under colour of lawful authority. We are concerned with the office that the Judges purported to hold. We are not concerned with the particular incumbents of the office. So long as the office was validly created, it matters not that the incumbent was not validly appointed. A person appointed as a Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge, would be exercising jurisdiction in the Court of Session and his judgments and orders would be those of the Court of Session. They would continue to be valid as the judgments and orders of the Court of Session, notwithstanding that his appointment to such Court might be declared invalid. On that account alone, it can never be said that the procedure prescribed by law has not been followed. It would be a different matter if the constitution of the court itself is under challenge. We are not concerned with such a situation in the instant cases. We, therefore, find no force in any of the submissions of the learned Counsel."

18. Learned counsel for the petitioner further relied upon the decision of the Hon'ble Supreme Court in Amrinder Singh - Vs Punjab Vidhan Sabha & Ors. (2010 (6) SCC 113). Particular reference was made to paras 33 & 34 of the decision of the Constitution Bench of the Hon'ble Supreme Court, which is quoted hereunder for reference :-

"33. Since the scope of "powers, privileges and immunities" available under Articles 105(3) and 194(3) has not been codified by way of statute till date, it is open for us to consider the principles and precedents relatable to the British House of Commons.

34. In Raja Ram Pal case [(2007) 3 SCC 184]

C.K. Thakkar, J. in his concurring opinion had described parliamentary privileges as those fundamental rights which the House and its members possess so as to enable them to carry out their functions effectively and efficiently. It was observed:

"519. In its creative sense, in England the House did not sit down to build its edifice of the powers, privileges and immunities of Parliament. The evolution of the English parliamentary institution has thus historical development. It is the story of conflict between the Crown's absolute prerogatives and the Common's insistence for powers, privileges and immunities; struggle between high-handed actions of monarchs and people's claim of democratic means and methods. Parliamentary privileges are the rights which the Houses of Parliament and Members possess so as to enable them to carry out their functions effectively and efficiently. Some of the parliamentary privileges thus preceded Parliament itself. They are, therefore, rightly described by Sir Erskine May as 'fundamental rights' of the House as against the prerogatives of the Crown, the authority of ordinary courts of law and the special rights of the House of Lords."

(emphasis in original)

19. This Court need not be drawn too deep into the findings of the Constitution Bench on the subject matter, which is in consideration, since such extensive analysis is not required for the purpose of rendering a decision on the issue raised in this writ petition.

20. Learned counsel for the petitioner also relied upon the decision reported in Jugal Kishore Patnaik- Vs - Ratnakar Mohanty (1977 (1) SCC 567), wherein, an unparalleled erudite Judge of the Hon'ble Supreme Court, while concurring with the majority judgment, has given a separate narrative in para-19, which is quoted hereunder :-

"19. Yet another legislative insufficiency surrounding Section 9-A of the Act needs to be highlighted. This provision, as has been explained earlier by my learned brother, disqualifies a person from being a candidate if there subsists a contract entered into by him in the course of his trade or business with the

appropriate government for the supply of goods to, or for the execution of any works undertaken by, that government. It is followed by an explanation which is more or less a legal fiction. The rugged edges of ambiguity of Section 9-A especially as to how long and in what sense can a contract be said to be subsisting envelop the disbarment provision with subtle legal questions. The common man of India is the potential candidate and is he to risk his candidature on the niceties of the law of contracts? In this context we must remember that the vast and various developmental works undertaken by the State and its subsidiaries and executed by a large number of little construction contractors make it very desirable that the disqualificatory net should not be cast too wide to disfranchise innumerable persons and must be easy of ascertainment if uncertainty is not to overhang elections in our political system. In this very case several problems were mooted, somewhat difficult to answer. How long does a contract subsist? Is every liability arising on a breach of contract, a claim under the contract attracting the lethal coils of Section 9-A? If government money is involved in the execution of the work, does the contract necessarily become one with government? A host of other questions may mystify the legal import of the taboo Section 9-A sets out and yet every layman is imperilled by this vague provision in the exercise of his electoral right. Such a brooding fear and haunting provision is counter-productive and may perhaps have to be redrafted in the light of experience in court. These are problems not of high-sounding law but affecting the common man in the exercise of his most democratic right. Nietzsche once said: "The great problems are in the streets". The inaugural error in the drawing up of our election law, as is illustrated by this case, is that sophisticated provisions amenable to logico-linguistic feats or subtle interpretation of civil law ill suit a regulatory area of the political process where the small individual offers himself for electoral contest. I choose to make these observations and draw the attention of the concerned instrumentalities only because in my humble view the court has an activist role to tell the nation, through its

judgment or other designated channels where the law misfires, or how the law stands in need of reform. This case therefore induces me to make what may be regarded as obiter:

"The little case, the ordinary case, is a constant occasion and vehicle for creative choice and creative activity, for the shaping and on-going reshaping of our law. [Quoted in (1961-62) Yale Law Journal p 259 (Vol. 71)] "

21. The above erudite observation by the learned Judge of the Hon'ble Supreme Court has been relied on to highlight the fact that overall the petitioner herein could not have anticipated that his election would be ultimately declared as null and void on the basis of application of hyper technical reasoning, viz., the authorities whom the petitioner addressed representation for cancellation of the contract were not the competent authorities under the Government Order in G.O. Ms. No.4682 dated 16.11.1951.

22. Learned counsel for the petitioner, once again, reiterated the fact that the recovery of allowances and wages would arise only when a fraud is played upon the authorities concerned by the person, who chose to contest the election and ultimately get elected on such fraudulent representation. In this case, no such fraud has been played by the petitioner, as he had taken all earnest steps to have his contract terminated, being aware of the provisions of the RP Act. Unfortunately, his effort to have the contract terminated, though fruitful, ultimately, it was found to be of no consequence by the Hon'ble Supreme Court. Therefore, the petitioner's case cannot be dealt with the same yardstick that is applied to case of Member of the Legislative Assembly involving in fraudulent activities or corrupt practices or convicted for serious criminal offences.

23. In the above circumstances, learned counsel for the petitioner implores this Court that the order impugned in the writ petition does not have the backing of any rule, regulation or law, not to speak of the Constitution of India and in which case, it is submitted, that the same is liable to be interfered with.

24. Per contra, learned Addl. Advocate General appearing for the 1st respondent submits that once the Hon'ble Supreme Court has declared the election of the petitioner as null and void, even though the verdict has come after the completion of the tenure by the petitioner, status quo ante is restored under which even the petitioner became disentitled to salary and

remuneration earned during the period. According to the learned Addl. Advocate General, the petitioner has committed a fraud by dishonestly nominating himself for the subject election even though he was having a subsisting contract with the Government and on account of which he suffered disqualification u/s 9 (A) of the RP Act. In this regard, he drew the attention of this Court to the final conclusion by the Hon'ble Supreme Court as found in paras 51 to 58 of its order, which is extracted hereunder :-

"51. The argument that the contracts were validly terminated by the Divisional Engineer, which action was subsequently ratified by the Superintending Engineer and, therefore, it should be held that there were no subsisting contracts on the date of submission of the nomination papers, has no merits and cannot be accepted. On true interpretation of the Government Order dated 16-11-1951 this Court has held that only the Chief Engineer was competent to terminate the contracts and, therefore, the termination of the contracts by the Divisional Engineer, which was subsequently ratified by the Superintending Engineer, cannot be treated as valid termination of contracts.

52. The record of the case shows that on 10-4-2006, the respondent had addressed a letter to the Divisional Engineer, NABARD informing him about his intention to contest the Assembly election and requesting him to cancel the contracts immediately. In the said letter a request was made to issue a certificate indicating that the contracts entered into by the respondent with the Government were cancelled. Obviously, the Divisional Engineer had no authority to cancel the contracts and, therefore, he had forwarded the letter of the respondent to the Superintending Engineer immediately for necessary action.

53. The record shows that in view of the request made by the respondent, an order was passed by the Office of the Superintending Engineer cancelling the registration of the respondent as a contractor permanently and the respondent was informed that if any work was pending on his side, he should obtain a separate work cancellation order for the work pending from the Highways Division concerned. It was also informed to the respondent that the cancellation of registration of contractor would be final only after obtaining such separate work cancellation

order from the division concerned and the order passed for cancellation of registration as contractor from the register would not be treated as work cancellation order for any pending work.

54. The proceedings of the Divisional Engineer (Highways), NABARD and Rural Roads, Nagercoil dated 17-4-2006 mention that the contracts were absolutely terminated as per the Government Order dated 16-11-1951 and the respondent was informed that the works entrusted to him would be got executed at his risk and cost and that orders for entrustment of the works to the new contractor would be issued separately. It was also mentioned in the said letter that the deposits available in favour of the respondent for the works, which were determined, were frozen and forfeited for crediting the same into government account.

55. Thereafter, the Divisional Engineer had addressed a communication dated 18-4-2006 to the Superintending Engineer informing that as the respondent was desirous to contest Assembly election and had requested to cancel the contracts in the present position and issue termination certificate for the said works, he had conducted proceedings for cancelling the contract on 17-4-2006. By the said letter the Divisional Engineer had requested the Superintending Engineer to accord ratification to the order dated 17-4-2006 for cancelling the contracts.

56. The record shows that thereafter by an order dated 26-4-2006 the Superintending Engineer (Highways), NABARD and Rural Roads, Tirunelveli had ratified the order dated 17-4-2006 by which the Divisional Engineer (Highways), NABARD had terminated the contracts entered into by the respondent with the Government. The Superintending Engineer had informed the respondent that the Divisional Engineer was competent to terminate the contracts. However, it is an admitted position that the contracts were entered into by the respondent with the Superintending Engineer and under the terms and conditions of the contracts, the Superintending Engineer was competent to terminate the contracts. The Government Order dated 16-11-1951 nowhere provides that the Divisional Engineer was competent to terminate the contracts. Having noticed the Government Order dated 16-11-1951 the

Superintending Engineer could not have informed the respondent that the Divisional Engineer was competent to terminate the contracts entered into by him with the Government nor was the Divisional Engineer competent to terminate the contracts entered into by the respondent with the Government.

57. Normally, the Superintending Engineer would be competent to terminate the contracts when breach of the terms and conditions is committed by a contractor. However, in the present case the Court finds that the contracts were to be brought to an abrupt end because the respondent was intending to contest the election. Such an eventuality was never contemplated under the contracts and the contracts entered into by the respondent with the Government could have been terminated only as per the terms and conditions stipulated in the Government Order dated 16-11-1951. Therefore, neither the Divisional Engineer had the authority to terminate the contracts nor had the Superintending Engineer any authority to terminate the contracts. Thus, the action of the Superintending Engineer in ratifying the cancellation of the contracts made by the Divisional Engineer is of no consequence.

58. The net result of the above discussion is that on the date of submission of nomination papers by the respondent as well as on the date of scrutiny of the nomination papers, the contracts entered into by the respondent with the Government were subsisting and, therefore, the respondent was disqualified from filing the nomination papers and contesting the election. The respondent having incurred disqualification under the provisions of Section 9-A of the Act, his election will have to be declared to be illegal. Accordingly, it is declared that the respondent had incurred disqualification under Section 9-A of the Act and, therefore, his election from the constituency in question is declared to be illegal, null and void."

25. In this regard, learned Addl. Advocate General drew the attention of this Court to Section 95 of the RP Act, wherein sub-section (b) provides for declaration of election to be void. The relevant portion is quoted hereunder :-

- "95. Answering of criminating questions and certificate of indemnity.-(1)
(2) When a certificate of indemnity has been

granted to any witness, it may be pleaded by him in any court and shall be a full and complete defence to or upon any charge under Chapter IXA of the Indian Penal Code, 1860 (45 of 1860), or Part VII of this Act arising out of the matter to which such certificate relates, but it shall not be deemed to relieve him from any disqualification in connection with an election imposed by this Act or any other law."

26. Learned Addl. Advocate General also drew the attention of this Court to Section 100 (a) and (b), which reads as under :-

"100. Grounds for declaring election to be void.-8[(1) Subject to the provisions of sub-section (2) if [the High Court] is of opinion-

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act 9[or the Government of Union Territories Act, 1963 (20 of 1963)]; or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent;

....."

27. According to the learned Addl. Advocate General, once the Court has declared the election to be void, on the grounds as stated u/s 100 and in furtherance of Section 98 of the RP Act, the petitioner has lost the status of being a legitimately elected member of the Assembly and, therefore, his entitlement to salaries and allowances for being a member of the Assembly stand negated. The effect of disqualification by the Hon'ble Supreme Court must be relatable to foregoing of salaries and allowances earned by the member, as otherwise, the declaration of the election of the petitioner as null and void by the competent court will be meaningless at the end of the day. According to the learned Addl. Advocate General, the penalty, as provided under Article 193 of the Constitution of India is in addition to the salaries and allowances to be refunded by the petitioner and not penalty alone, as canvassed by the learned counsel for the petitioner. Learned Addl. Advocate General also submitted that the expression 'penalty' used in Section 107 of the RP Act is contrary to the Constitution, particularly Article 193 and, therefore, the provisions of the statute has to be read down.

28. In support of his contention, learned Addl. Advocate

General relied on the judgment of the Supreme Court in Raja Ram Pal - Vs - Hon'ble Speaker, Lok Sabha (2007 (3) SCC 184). Attention of this Court was drawn to paras 151 to 154 of the said judgment, which reads as under:-

“(ii) Provisions relating to salary, etc. and the right to a fixed term

151. It was further argued by the petitioners, that provisions in the Constitution relating to salary and the term for which they serve in the House are constitutional rights of the Members and the power of expulsion, by terminating their membership violates these constitutional rights.

152. The relevant provisions in the Constitution are Article 106 on the subject of salaries and Article 83(2) in relation to the duration of the Houses of Parliament.

153. The petitioners have relied on these above constitutional provisions and submitted that an expulsion of a Member of Parliament would result in the violation of the above rights guaranteed to him. The claim of the other side is that the decision to expel does not violate these rights. Firstly, it has been argued that the article laying down the duration of the House does not guarantee a term for the Member. Various circumstances have been pointed out under which the term held by a Member can be much less than five years, regardless of what is stated in Article 83(2). Secondly, it has been argued that Article 106, which lays down provisions for the salary of the Member, is dependent upon the person's membership. It is only as long as the person continues to be a Member that he can draw the salary. When the membership terminates, the provisions of Article 106 become inapplicable.

154. Similar arguments were made in K. Ananda Nambiar v. Chief Secy., Govt. of Madras [AIR 1966 SC 657 : 1966 Cri LJ 586] . In that case, certain Members of Parliament were detained by the Government of Madras and one of the grounds on which they challenged their detention was the violation of their constitutional rights. In support of this contention, the petitioners relied on various provisions relating to Members and proceedings of Parliament including Articles 79, 85, 86 and 100. They claimed that they continued to exercise all the “constitutional rights” that flow from membership unless the member is disqualified. The contention was that:

"If a Member of Parliament incurs a disqualification, he may cease to be such Member, but if he continues to be qualified to be a Member, his constitutional rights cannot be taken away by any law or order."

This Court rejected this argument holding that:

"... they are not constitutional rights in the strict sense, and quite clearly, they are not fundamental rights at all".

(emphasis supplied)

29. According to the learned Addl. Advocate General, it has been clearly held by the Hon'ble Supreme Court in the above judgment that is neither a constitutional or a fundamental right to be a Member of the House or to receive salary and allowances for the same.

30. Learned Addl. Advocate General drew the attention to the judgment of this Court in the case of V.C.Chandhira Kumar & Ors. - Vs - Tamil Nadu Legislative Assembly Secretariat & The Hon'ble Speaker (MANU/TN/0797/2013) in which a learned Judge of this Court has held that denial of salary and other privileges like voting in an election are not constitutional or fundamental rights. The relevant portion of the judgment is extracted hereunder :-

"53. In 2012 (3) CTC 449 (cited supra), identical question arose for consideration before this Court and this Court in the above judgment held that placing an elected member under suspension is the cause and all other things are its consequences. After referring to Raja Ram Pal's case, the learned Judge who decided Vijayakant's case held that an elected member who is de-barred by virtue of an order of suspension from discharging his duties and functions, may have to suffer all the consequences that go with the office. Therefore, the argument that the impugned proceedings violate Article 195 and Sections 12 and 12(A) of the Tamil Nadu Payment of Salaries Act are untenable and unacceptable.

54. Similarly, the reliance placed on by the learned Senior Counsel for the petitioners on the decision of the Hon'ble Supreme Court in AIR 1980 SC 2147 (Para-72) is also not applicable to the facts of the present case and therefore, the findings of the Hon'ble Supreme Court in para-72 of the above judgment are not useful to the case

of the writ petitioners herein.

55. Similarly, contending that the impugned proceedings are ultra-virus to Article 80(4) and 191 read with provisions relating to Representation of People's Act, 1951, is also not acceptable for the simple reason that placing a member under suspension is the cause and all other things are its consequences. Once it is held that the House has the power and privilege to expel or suspend a member for committing breach, then, it is for the house to decide what would be the punishment that should be given to the member. Once a punishment is given and a resolution is passed thereafter and there is no violation of any constitutional and fundamental rights affecting the person who is to be suspended, then he / she has to face the consequences including the denial of salary, attending the House, function as a member of the House, etc. Once a Member is suspended for a period and during the period, if any intervening circumstances arise, then, as a suspended member, he is not entitled to participate in those events in his capacity as a member of the House. Denial of salary and the other privileges like voting in an election are not constitutional rights nor the fundamental rights and in such circumstances, it is not open to the petitioners to contend that as these rights are affected, the impugned proceedings are violated and are liable to be set aside. Therefore, the arguments advanced on behalf of the petitioners in this regard are rejected."

31. Learned Addl. Advocate General drew the attention of this Court to the judgment of a Division Bench of this Court, which was an appeal filed against the order of the learned single Judge in V.C.Chandira Kumar's case (supra). The Division Bench of this Court, in the appeal, held that it is within the right of the Assembly to withhold the salary and other benefits payable to the Member of the Legislative Assembly during the period of suspension. The relevant portion of the order of the Division Bench is extracted hereunder :-

"4.31. QUESTION No. (d) :

Whether the privilege is restricted to things happened inside the Assembly, and whether it can travel beyond the four walls of the Assembly?

4.32. The learned Senior Counsel appearing for the appellants, contended that the denial of salary and other benefits to the appellants,

during the period of suspension, is ultra vires of Article 195 of the Constitution read with the provisions of the Tamil Nadu Payment of Salaries Act, 1951. According to the learned Senior Counsel appearing for the appellants, the payment of salary and other benefits that enures to a Member of the Legislative Assembly, is a constitutional right prescribed under the above said Act, and it can be withdrawn only in a manner provided under that statute, and the above said Act did not provide for any such situation to withhold the salary or other benefits and under the guise of breach of privilege, the right of a Member to receive the salary and other benefits have been unjustly taken away and it also amounts to double punishment.

4.33. The said issue was also considered in Vijaykant's case, reported in 2012 (3) CTC 449 (cited supra), and the learned Judge has taken into consideration paragraph Nos.151 to 159 of the decision rendered in Raja Ram Pal's case, and held that an elected Member, who is debarred by virtue of an order of suspension, from discharging his duties and functions, may have to suffer all the consequences that go with the office and therefore, the contention put forth that suspension for a period spilling over to two sessions, would tantamount to exercise of a power beyond the four walls of the Legislature and that therefore, it is impermissible, cannot be accepted.

4.34. The payment/receipt of salary and other allowances is by virtue of a person occupying the position of a Member of the Legislative Assembly and once he is suspended for a particular period, the natural corollary or consequence would be the denial of salary and other privileges and in the case on hand, the recommendation was also made by the Privilege Committee in its report, and it was put to vote and by majority opinion, the resolution was passed including the withholding of salary and other benefits. The provisions of Tamil Nadu Payment of Salaries Act, 1951, do not speak about the order of suspension of a Member of the Legislative Assembly and the consequence thereof and under Section 13(1) of the Act, any person entitled to salary or allowances under the said Act, may at any time, during the time of his respective office, relinquish the whole or any such portion of the salary or allowance payable

to him. As per the above said provision, it is a voluntary act on the part of the Member of the Legislative Assembly, who can relinquish his salary or other allowances, and under sub-section 2 of Section 13, such relinquishment may be cancelled by him also. In the case on hand, by virtue of the suspension of the appellants for a period of six months from participating the proceedings of the Legislative Assembly, the Privilege Committee made a recommendation for withholding of salary and other allowances also and it was put to vote and accepted by the Assembly by means of majority decision."

32. It is therefore submitted by the learned Addl. Advocate General that once the petitioner has been declared disqualified on contesting the election, the disqualification itself dates back to the date of the nomination and his subsequent election and, therefore, the salaries and allowances earned by the petitioner during the disqualified period have to be returned as any further retention by him would be an illegal enrichment.

33. Learned Addl. Advocate General drew the attention of this Court to the Full Bench decision of the Patna High Court in Rita Mishra & Ors. - Vs - Director, Primary Education, Bihar & Ors. (MANU/BH/0368/1987) and submitted that once the position is obtained illegally by misrepresentation or fraud, the person, who makes such misrepresentation or indulge in fraud has no right to seek for a direction for payment of salary and allowances for the period he has worked. For better clarity, the relevant portion of the judgment is extracted hereunder :-

12. I may at the very outset narrow down the field and pinpoint that herein we are dealing with public service alone and not a private one. It is by now well settled that governmental or public service though originating in contract becomes wholly statutory in status when the appointee enters the portals thereof. It is unnecessary to dilate on this aspect because it is well settled both on the principle and on an unbroken line of binding precedent. Way back in AIR 1967 SC 1889, (Roshan Lal Tandon v. Union of India) the Constitution Bench had held as follows:-

"..... It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his

rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest."

13. It is manifest from the above that the rights to salary, pension and other service benefits are entirely statutory in nature in public service. Therefore, these rights, including the right to salary, spring from a valid and legal appointment to the post. Once it is found that the very appointment is illegal and is non est in the eye of law, no statutory entitlement for salary or consequential rights of pension and other monetary benefits can arise. In particular, if the very appointment is rested on forgery, no statutory right can flow from it.

14. In this context it is, perhaps, equally well to recall that forgery is a serious public crime in the Indian law from the very beginning, and, in particular, since the enforcement of the Indian Penal Code, 1860, for now more than a century and a quarter. Chapter XVIII of the said Code deals with crimes of this nature. Both forgery under S. 463 and the making of a false document under S. 464 are couched in the widest terms. Equally well it is to recall the earlier definition of 'valuable security' in S. 30 of the said Code. This wide ranging definition denoting

it, (which is important for our purpose) as a document, whereby any legal right is created, extended, transferred, extinguished or relinquished, is again framed so broadly that a letter of appointment creating a legal right to the post would come within its ambit. How gravely the law disfavors the serious aspects of the crime is manifest from the fact that more grievous forms of forgery under Ss. 467, 474 and 475 are made punishable with imprisonment for life. Once that is so, could it possibly be said that a person, who is guilty of a crime of this nature and is liable to punishment therefor, can, nevertheless, come in the writ jurisdiction and claim the right to salary on the basis of a document which steeps him in serious guilt? The answer must obviously be rendered in the negative."

34. The Full Bench of the Patna High Court has held that no legal right could stem from a crime herein because of the original factum of forgery. Such a person is not an employee at all, far from being a public servant in the eye of law. In such a backdrop, it is submitted by the learned Addl. Advocate General that the above reasoning of the Full Bench of the Patna High Court will hold good for the present case as well. According to the learned Addl. Advocate General, if a person were to approach this Court for direction for grant of salary and other allowances for the period he had worked in a job, which had been obtained by him fraudulently, whether the Court would oblige him with such direction? Certainly not and in such case, the position will also be the same for a person, who had illegally earned salary and allowances and, therefore, the impugned order directing him to refund the amount cannot be faulted with.

35. Reliance was also placed by the learned Addl. Advocate General on the decision of the learned single Judge of the Patna High Court in the case of Yogendra Prasad Mandal - Vs - State of Bihar & Ors. (2009 (2) PLJR 843), wherein the learned single Judge of the Patna High Court, following the above Full Bench decision in Rita Mishra's case (supra), held as under :-

"11. To put it picturesquely, a person must first validly and lawfully cross the threshold to enter the arena of the civil service of the State or the Union to claim the umbrella or shelter of Article 311. If the very entry or the crossing of the threshold is put in issue and the door is barred against him, the cloak of protection under Article 311 is not attracted or

available.

* * * * *

13.The view taken by this Court in the above Division Bench and Full Bench decisions have been approved by the Supreme Court in the case of R. Vishwanatha Pillai v. State of Kerala: (2004) 2 SCC 105, para 15 of which is quoted below:-

"This apart, the appellant obtained the appointment in the service on the basis that he belonged to a Scheduled Caste community. When it was found by the Scrutiny Committee that he did not belong to the Scheduled Caste community, then the very basis of his appointment was taken away. His appointment was no appointment in the eye of law. He cannot claim a right to the post as he had usurped the post meant for a reserve candidate by playing a fraud and producing a false caste certificate. Unless the appellant can lay a claim to the post on the basis of his appointment, he cannot claim the Constitutional guarantee given under Article 311 of the Constitution. As he had obtained the appointment on the basis of a false caste certificate, he cannot be considered to be a person who holds a post within the meaning of Article 311 of the Constitution of India. Finding recorded by the Scrutiny Committee that the appellant got the appointment on the basis of a false caste certificate has become final. The position, therefore, is that the appellant has usurped the post which should have gone to a member of the Scheduled Castes. In view of the finding recorded by the Scrutiny Committee and upheld up to this Court, he has disqualified himself to hold the post. The appointment was void from its inception. It cannot be said that the said void appointment would enable the appellant to claim that he was holding a civil post within the meaning of Article 311 of the Constitution of India. As the appellant had obtained the appointment by playing a fraud, he cannot be allowed to take advantage of his own fraud in entering the service and claim that he was holder of the post entitled to be dealt with in terms of Article 311 of the Constitution of India or the Rules framed thereunder. Where an appointment in a service

has been acquired by practising fraud or deceit, such an appointment is no appointment in law, in service and in such a situation Article 311 of the Constitution is not attracted at all."

13. It is evident from a consideration of the facts of the present case that they are fully covered by the law laid down by the aforesaid Division Bench and Full Bench decisions of this Court and that of the Supreme Court in Vishwanatha Pillai's case (supra). When an appointment is based upon fraud, forgery, crime or illegality, no rights can be claimed by such an employee as a public servant or as one holding a civil post under the State. Hence, there can be no question of the application of the provisions of Article 311 of the Constitution or the Service Rules to hold full scale departmental enquiry before a major punishment is imposed upon the public servant. Such rights can only flow to a person whose entry into the service is on the basis of a valid appointment. Where the appointment itself is void from its inception, it is open to the authorities to cancel the same on grounds which have been held in numerous decisions of this Court and the Supreme Court, as valid and legal for the said purpose including fraud, forgery, crime or illegality. In such circumstances, no benefit can be derived by the petitioner from the cases of Ugra Nath Jha or Vijay Kumar Srivastava which were based on entirely different facts and circumstances in the context of misconduct committed in the course of service by regular employees of the State or Semi-Government body."

36. To sum up, learned Addl. Advocate General submits that though the amounts that were paid to the petitioner were termed as salary and allowances, but certainly the same cannot be equated to that of a salary earned by a Government servant on a proper time scale of pay and in such circumstances, the effect of disqualification cannot be equated with dismissal of service of a government servant. Learned Addl. Advocate General further submitted that Section 107 of the RP Act provides for protection of acts and participation of the Member of the Legislative Assembly, which cannot be stretched to protect the salaries and allowances earned by the disqualified member. The protection, as provided u/s 107 of the RP Act is in furtherance of a larger constitutional and public purpose and certainly such purpose cannot be extended to cover the salary and allowances earned by

the petitioner.

37. Learned Addl. Advocate General also readily agreed that there are no direct judicial precedents on this aspect in regard to the factual matrix of the present case and in any event, he would urge this Court to appreciate the fact that the order passed by the Hon'ble Supreme Court disqualifying the petitioner must relate back to the date of his nomination and in such event, the consequence of retrospective disqualification would automatically ought to befall the petitioner.

38. Heard the learned counsel for the petitioner and the learned Addl. Advocate General appearing for the 1st respondent and perused the decisions on which reliance was placed and also the relevant Sections of the RP Act and the relevant Article of the Constitution of India to which this Court's attention was drawn.

39. The issue placed for consideration before this Court is rather interesting where this Court finds no erudite answer from any past judicial precedents. In this circumstance, the Court is constrained to tread in an almost virgin or uncharted territory in order to find a meaningful solution to the polemics raised in the writ petition. This Court, in pursuit of a constitutional solution, in the absence of any direct provision as such under the Constitution, has explored the maze of decisions rendered by the High Courts and the Hon'ble Supreme Court on the aspect, which is the subject matter of consideration and finally it was able to lay its hands on two decisions, which touch upon the issue from where a cue could be taken from the said decisions towards enabling this Court to render a decision in this matter.

40. It is found that a plain reading of the provisions does not have a ready answer. The Court has to do lot of judicial exploration by walking an extra mile to glean the impact of disqualification much after the election or in the alternate after the end of the period of 5 years.

41. This Court, after considerable search, was able to lay its hands on two decisions, which touch upon the aspect of the effect of a Member being disqualified by the Courts. One is the decision rendered by the Allahabad High Court in Smt. Anita - Vs - Election Tribunal, District Muzaffar Nagar & Anr. (2012 SCCOnline All 1395 - Writ (C) No.13595/2012 - dated 09.07.2012), wherein the High Court has held that when an office is acquired fraudulently and dishonestly, it should be treated as if the incumbent never came to the office validly in law and, therefore, is open to restore the monetary benefits and cost of perks, etc., to the public exchequer. The observations, as is

found in paras 12 to 17 of the said judgment, are extracted hereunder :-

"12. This Court however cannot desist from observing that a candidate if has contested an election and succeeded to hold a public office by filing false affidavit and contravening the statutory provisions (in this case Act, 1960), he/she must be liable to face such action, civil or criminal, as the case may be, and there should be no doubt or reservation about it. No doubt it is true that enjoyment of the office already experienced may not be withdrawn but a candidate who has benefited himself/herself by such false declaration etc. can be made to refund monetary benefits and/or the value of perks, allowances, salary, etc, it had obtained/enjoyed while serving in public office in an illegal manner. There are several consequences which may follow and it is not necessary to mention them exhaustively herein.

13. The experience has shown that a returned candidate whenever faces an election petition, tries to delay its final disposal and take all steps so as to allow it to be decided on merits, at least till the term he/she is elected is exhausted. All sorts of technical and other objections are raised and no stone is left untouched which may help such a candidate in delaying the proceedings. It is very rarely that an election petition is decided on merits and on such occasion, this Court finds in history, when political scenario of the entire country got changed when this Court allowed an election petition resulting in unseating of a returned candidate from the office of Member of Parliament who was also holding the office of Prime Minister of the country at that time. After that judgment tendency has increased to delay and prolong such proceedings, more in practice, and an all out efforts is made to ensure that election petition on merits is not decided till the term for which the candidate has been elected is over.

14. The candidates who challenge the election also loses interest after the elected candidate no more remains in office. This is how the system of election petition permitting judicial scrutiny has been made mere a mockery than a substantive procedural remedy against such scrupulous, dishonest and unqualified persons checking them from coming to the office by manipulations etc.

It also cannot be disputed that now an elected office in various ways enjoy considerably high level of several perks and benefits besides monetary gains.

15. Such office if acquired fraudulently, illegally and dishonestly, should be treated as if the incumbent never came to office validly in law. Therefore, he is bound to restore the monetary benefit and the costs of perks etc. to public exchequer. Time has come to take care of all such direct, ancillary and incidental aspects in election matters relating to election petition so that this remedy proved to be an effective measure and may also prevent such unwarranted persons from coming to public office by fraudulent and illegal means.

16. Whenever fraud etc. is proved, appropriate direction of criminal and civil action must also be taken. Purity of democratic system can be maintained by adhering to a process which would ensure an honest and valid election. Filing of an affidavit disclosing various facts is a statutory requirement which presupposes declaration of correct facts therein. If a candidate has made a false declaration there should be no hesitation in inferring that such candidate has contested election illegally, fraudulently and by misrepresentation. This would amount to contesting the election in contravention of the provisions of the Act and Rules and Regulations framed thereunder. The consequences, therefore, must have to follow.

17. In my view, the reliefs sought in the election petition, considering in the above circumstances, cannot be said to have rendered infructuous in their entirety though partially some of the reliefs claimed by respondent No. 2 cannot obviously be granted having rendered infructuous due to efflux of time. I, therefore, find no reason to interfere with the impugned order passed by the Election Tribunal taking a similar view."

42. In the case of Moti Ram - Vs - Param Dev & Anr. (AIR 1993 SC 1662), the Hon'ble Supreme Court held that in a situation where the tenure of office of the Legislative Assembly had come to an end, the question of qualification or disqualification would not become academic, since invalidation eventually may give rise to liability to refund the allowance

received by a Member of the Legislative Assembly. The observations of the Hon'ble Supreme Court in this regard is extracted hereunder :-

"3. Before we proceed to deal with the appeals on merits, it may be mentioned that during the pendency of these appeals before this Court, the Himachal Pradesh Legislative Assembly has been dissolved. This raises the question whether the matters in issue in these appeals have ceased to be living issues and have become wholly academic. The effect of dissolution of the legislature on a pending election appeal has been considered by this Court in Loknath Padhan v. Birendra Kumar Sahu [(1974) 1 SCC 526 : (1974) 3 SCR 114]. In that case, the election of the returned candidate was challenged before the High Court on the ground that there was a subsisting contract entered into by the respondent in the course of his trade and business with the State Government for the execution of works undertaken by the Government and he was, therefore, disqualified under Section 9-A of the Representation of the People Act, 1951. The election petition was, however, dismissed by the High Court and while the appeal against the said decision was pending in this Court, the Legislative Assembly was dissolved. A preliminary objection was raised on behalf of the respondent to the appeal that in view of the dissolution of the assembly it was academic to decide whether or not the respondent was disqualified under Section 9-A. Upholding the said preliminary objection, this Court has held that the court should not undertake to decide an issue unless it is a living issue between the parties and if an issue is purely academic, in that its decision one way or the other would have no impact on the position of the parties, it would be a waste of public time and indeed not proper exercise of authority for the court to engage itself in deciding it. In that case, this Court drew a distinction between a case where the challenge to the election is on a ground confined to the validity of that election only and having no consequences operating in future and a case involving challenge to the election on a ground which would entail electoral disqualification for the future, such as, charge of corrupt practice. It was held that if the election is challenged on the ground of

commission of a corrupt practice the dissolution of the legislature would not have any effect on the pendency of an election petition or an appeal arising therefrom and the said petition will have to be considered on its merits whereas a challenge to the election on any other ground which does not entail future disqualification would raise an academic issue only and in view of the dissolution of the legislature the election petition or the appeal arising therefrom would not survive because it would be futile and meaningless for the Court to decide an academic question the answer to which would not affect the position of one party or the other.

4. Although in the instant case the election is not challenged on the ground of commission of any corrupt practice and a finding would not result in electoral disqualification in future but the present case differs from the case of Loknath Padhan v. Birendra Kumar Sahu [(1974) 1 SCC 526 : (1974) 3 SCR 114] in the sense that in the Loknath case [(1974) 1 SCC 526 : (1974) 3 SCR 114] the election petition was dismissed whereas in the present case the election petitions against the election of the appellant have been allowed and the election has been set aside. It has been submitted by Shri A.K. Ganguli, the learned senior counsel appearing on behalf of the appellant, that in view of the fact that the decision of the High Court set aside his election, the appellant may be required to refund the various allowances that he has received while he was functioning as a member of the Legislative Assembly after his election till the decision of the High Court. It would thus appear that invalidation of the election of the appellant may give rise to the liability to refund the allowances received by the appellant as a member of the Legislative Assembly. It cannot, therefore, be said that the questions arising for consideration in this appeal are purely academic in nature. In these circumstances, it becomes necessary to go into the merits of these appeals."

43. From the above two decisions it could be deduced that the aspect of return of the perks, salaries or allowances, whatever they are nomenclatured as they are, the return of the same was never construed to be alien to legal parlance.

Therefore, these decisions could be taken to be a precedence while deciding the challenge posed by the petitioner in this writ petition.

44. Ordinarily, when a government servant is dismissed for any misconduct from service, as per service jurisprudence he may lose his terminal benefits. But he may not be held liable to refund the salaries earned by him during the period in which he rendered his service. Equally, if an employee with a public authority lost the benefit of such employment when the community certificate stood cancelled, the legal position is that no matter whether he was guilty of fraud or fabrication or been wrongly given the benefit of the same, the terminal benefits will be lost for good (Vide - Chairman & Managing Director, FIC - Vs - Jagadish balaram Bahira - dated 6.7.2017 (SC)). However, the salary already received by the said individual cannot be directed to be refunded.

45. A Member of the Legislative Assembly is also a public servant. He has a fixed tenure upon being elected. There are identified salaries, emoluments and benefits payable to him while he lasts as member of the House. They are his legal rights. It may also seem that he renders 'service' to 'earn' the benefits. If analogously a government servant is entitled to the 'salaries earned' while in service and cannot be asked to refund the same upon being dismissed or terminated from service, does it not answer to logic and common sense that the Member of the Legislative Assembly would also be entitled for such a protection.

46. Superficially, the argument is attractive. However, the post and position of a Member of the House as a representative of the people returned in hustings is totally different from being selected as an employee in government service. One is an employee and the other is a constitutional position, that of being a member of the House. It makes all the difference and ought to, in the eye of this Court. The Member of the House stands in the election either as an independent or as a member of a party, campaigns on the basis of a manifesto or in its absence and wins the trust and confidence of the voter to represent the constituency on behalf of 'We the People'. The Member becomes MLA or Member of Parliament with pure and simple service motive. He does not apply for a job, nor is interviewed but is selected to the post in a specific category with a fixed or designated salary structure. Further, the MLA gets elected upon a promise to serve the people as their representative and the remuneration or emoluments he gets paid cannot be equated to 'salary' of a government servant, even if it is termed as such. It is a compensation paid to the elected representative for spending his time and efforts for the benefit of the people.

47. Surely, no MLA or MP stands in an election to get elected to the 'post' for the 'salary' on offer. The benefits attendant on becoming a member of the House may be attractive and worthwhile. But that is no reason for any candidate to stand in the elections to represent and serve his constituency. His representation to the voter is totally different and, therefore, this court is not inclined to equate the services of a MLA or MP and the emoluments received or paid as akin to salaries earned by a government employee. The two are different and distinct even if the nomenclature runs as 'salaries', that is being paid to the Member of the House. Even the members of the House may not like to suggest that they became MLA or MP to 'make a living'. Unlike a government servant, who joins employment for livelihood and thus dependent on the salary paid for his services, a member of the House will not belittle his position for the economic benefit available while occupying the seat. Even the members of the House may deem it to be demeaning to the larger purpose of public service they have in mind when they stand in elections to represent the people of the country.

48. Coming to the specific argument relating to the 'liability and penalty' adverted to in Section 107 of the RP Act, the counsel for the petitioner is missing the wood for the trees. That no 'liability or penalty' shall visit the member of the House, who is disqualified, by reason of his functioning or acts as such member of House until his election was set aside, is to protect the public interest arising from the decisions of the Member of the House. They are not intended to protect the member as in the case of salaries or emoluments paid and received. The member is insulated from liability/penalty because when he serves as member of the House, he is as much a Member of the House as any other and all his acts/decisions as Member of the House may have public consequences like a vote in the House on No Confidence Motion or vote for a Bill or vote it out or such acts as Member of the House, until the disqualification became final by virtue of the orders of the Hon'ble Supreme Court. This protection to insulate the member from liability or penalty as envisaged is to ensure the member of the House is meant to protect the decisions he had taken as Member since he was serving the cause of people as such member. If the decisions were called into question and/or the Member of the House is visited with liability or penal consequences, then the decisions taken by him as such member may also become invalid and void. Hence, the protective shield is for the public at large u/s 107 of the RP Act and not meant to protect the Member of the House facing the consequences of disqualification, as in this case; and certainly not to ward off the necessity to refund salaries or emoluments availed as member of the House, which he was not entitled to at all.

49. When the State has sought refund of the emoluments paid to the Member of the House it is not a liability or penalty visiting the member within the meaning of Section 107 of the RP Act. The member, having been disqualified, is disqualified from day one of his election. In fact, his candidature itself is struck down. If so, he cannot and could not have become a member of the House. That being so, then all the emoluments received by him as such member are not legitimate sums in his hands. It is not liability or penalty imposed on him. Penalty in law is only and can only be Rs.500/- per day for the days he had attended as member of the House, as contemplated under Article 193 of the Constitution. The refund of the emoluments paid is not a liability or penalty imposed. A person who was not qualified to stand got elected and by operation of law lost the status. If so, the attendant benefits stand withdrawn for all practical purposes.

50. If so, logically, the member himself should be graceful and willing to refund the sums, even without the State seeking a refund. That will add to the wisdom and status of those fighting for such public offices. Instead, to agitate as if he had earned his salaries for services rendered - would reduce the status and position of the office of a Member of Legislature - a constitutional position - to that of a government servant - an employee - being selected to a post does not sound or seem good. By no stretch of imagination the member of the house is an employee. If at all, they can claim to be employees of the people. In a case, where the member is disqualified and his candidature itself goes, all the benefits he had by such election are not due to him at all. It was not salary paid for any services rendered, but compensation given to him for the time spared to serve the cause of the people. It is a recognition by 'We the People' to keep the member of the House compensated for sparing his time for public service. It is not a public employment the member of the House sought and obtained. If that be so, it does not sound good for the member to impugn the order seeking refund of the emoluments received by him as Member of the House. Persons like the petitioner ought to be more than willing to refund such emoluments which they are held to be not entitled to due to their disqualification.

51. To become a member of the House is not given to any and many. Only a select few are given the privilege. Fighting elections in India does not come easy. In such a scenario, the political class must realise that they are fighting elections not to earn a living like a candidate seeking public employment, but they were entering the arena of public service to serve the cause of the people whom they seek to represent. There is inevitable and unavoidable sacrifice involved and extensive

mobility and work attendant to serve as a member of the House. But the expectation of the member of the House is not the salary that he is entitled to. They get paid emoluments to give them the comfort to be able to devote more time for public interest. Viewed thus, this Court is not inclined to accept the submissions of the counsel for the petitioner to set aside the orders seeking refund of the salaries and allowances paid to him.

52. In a case like this where the delay in disposal of the election petition has almost taken away the effect of the disqualification, the disqualified member cannot be allowed to take advantage of the passage of time which allowed him to enjoy the power and privilege of the office of MLA for a full term. In a complex judicial process, delay in dispensation of final verdict is inevitable and such delay ought not enure to the benefit of the disqualified member. On the other hand, the effect of disqualification must relate to the date he filed his nomination and his subsequent election and ought to befall him with consequences of refunding the salaries, allowances plus penalty, save his acts and participation in the Assembly proceedings in terms of Section 107 of the RP Act. Otherwise, such disqualified individuals can make full use of the judicial rigmorale and come out unaffected and unscathed, notwithstanding his eventful disqualification achieved through judicially protracted route. In case of a legal delay, the petitioner ought not to be allowed to have the last laugh at the justice delivery system much to the chagrin of public trust and faith reposed in him where he was voted to represent the public cause. The justice delivery system, which is being nurtured and protected by a constitutional courts, cannot afford to expose itself to be outwitted by a wily litigant and rendering the institution ineffective and impotent. Courts should be wary of the fact that verdict delayed cannot allow the adverse effect of the verdict nullified by reason of long delay. The loser in the legal battle cannot triumphantly hoodwink the judicial system by methodical procrastination, as that would only lead to travesty of justice. In a case of this nature, the effect of adverse order should not be symbolic or notional, but it should be real, tangible and exemplary.

53. In view of the above narrative and on a combined consideration of the provisions of the RP Act, 1951 and Article 193 of the Constitution and the decisions of the Allahabad High Court in Anita's case (supra) and the Hon'ble Supreme Court in Moti Ram's case (supra), this Court is of the considered view that the Member of the House himself ought not to have questioned the order seeking refund of the emoluments paid to him. To question the order as if he was a government employee on a salary and having been dismissed from service and seeking to protect the salaries paid to him for the services rendered

does not augur well for the status and reputation of those seeking to become a member of the House, a constitutional position, to serve the cause of the people.

54. For the aforementioned reasons, this Court does not see merit in this case. The Member of the House has a duty to refund the emoluments received by him as he has been visited with the consequence of disqualification, which has become final. As held by the Patna High Court in Rita Mishra's case (supra), an employee after removal cannot seek to enforce a mandamus to seek emoluments, equally it falls within logic to suggest that a Member of the House cannot refuse to refund the emoluments when he has been disqualified. Retention of the emoluments, with a Member of the House, now disqualified, may not behove well for the stature and reputation of those who enter the electoral field to serve the cause of the people.

55. For the reasons aforesaid, this Court finds that the writ petition is devoid of merits and substance and, accordingly, the same is dismissed. The petitioner is directed to refund the amount as claimed in the impugned order within a period of four weeks from the date of receipt of a copy of this order. Consequently, connected miscellaneous petition is closed. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS)

//True copy//

Sub Assistant Registrar

GLN

To

1. The Secretary
Tamil Nadu Legislative Assembly
Secretariat,
Fort St. George, Chennai - 9.
2. The Returning Officer
220, Cheranmahadevi Assembly
Constituency, Revenue Divisional
Officer, Cheranmahadevi
Tirunelveli District.

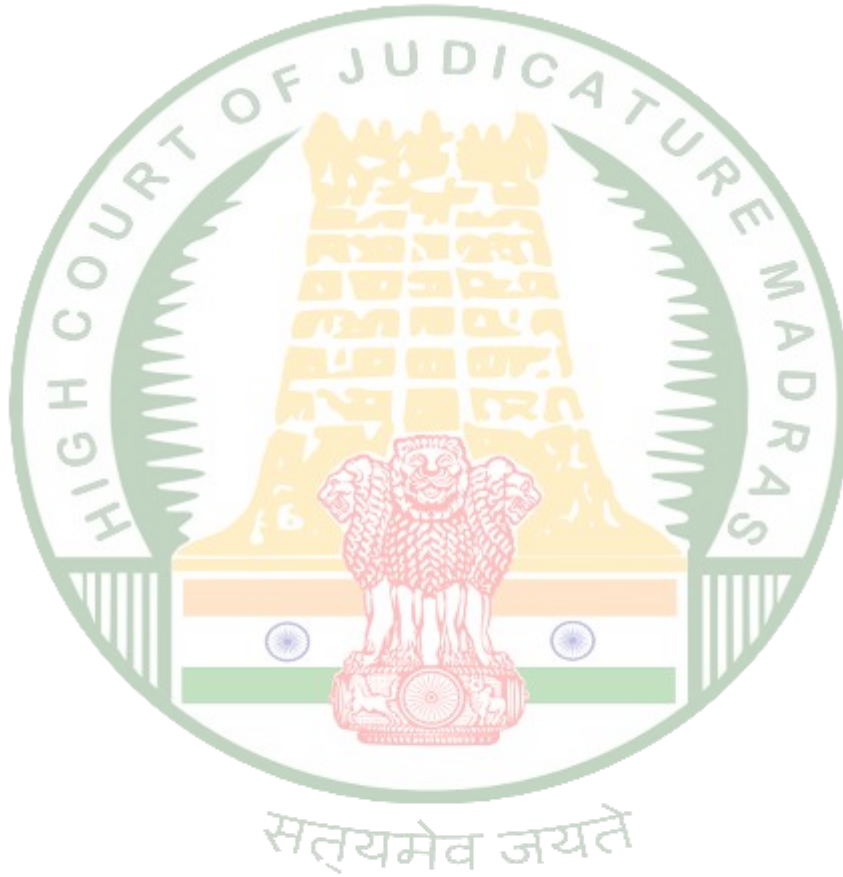
3. The Chief Engineer
Highways (NABARD) Department
Chennai.

+2ccs to Mr.PL.Narayanan, Advocate SR.No.17876,17358

+2ccs to Government Pleader SR.No.18219,18253

W.P. NO.30102 OF 2011

AD(CO)
GMY(13/03/2019)



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