



"Office of profit" as a disqualification for legislates under the Indian constitution

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Abstract: *The concept of office of profit is related to the theory of separation of powers. The principle was propounded by French jurist Montesquieu in his book "Spirit Of Laws" 1748. The law signifies the fact that one person or body of persons should not exercise all the three powers of the government Viz. legislative, executive and judiciary. According to the theory each organ should restrict itself to its own sphere without transgressing the province of other. Later it is known as principle of Checks and balances.*

Key words: *separation of powers, Parliamentary Secretaries, mutatis mutandis*

Introduction:

Under Article 102 (1), person shall be disqualified for being chosen as, and for being, a member of either House of Parliament- Article 102(1)(a) if he holds an office of profit under the government of India or the government of any state, other than an office declared by Parliament by law not to disqualify its holders. Therefore the parliament as well as state legislatures were empowered to disqualify any members who occupy office of profit under article 102(1)(a) and 191(1) (a), which are mutatis mutandis the same¹. Though general disqualifications prevailed under the Constitution specific exemptions were granted from it under a law of Parliament². The concept of office of

profit once again came into limelight with the disqualification of 20 MLA's from Aam Admi Party on January 22, by the President on recommendation of Election commission of India, who are elected as Parliamentary Secretaries in March 2015³. The Delhi High Court set aside the appointments in 2016 on the ground that the Lieutenant Governor had not given his approval. The key question was whether the post was an office of profit even after the Delhi Government made it clear that parliamentary secretaries would not be eligible for any remuneration or perquisites. They were only allowed the use of government transport for official uses and office space in the respective ministries. But the Election Commission answered the question in the affirmative, and the President has acted on it.

Origin and development:

The origin of the office of profit can be traced back to the Succession to the crown Act 1707. Section 24 of the Act enacted that persons holding any office or

¹ The Hindu, Monday, 22 January 2018.

² The Parliament (Prevention of Disqualification) Act, 1959 listed various categories of offices the holders of which would not be disqualified for membership of Parliament. In case of office other than those exempted under the Act, the final word on Whether it is an 'office of profit' or not rests with the courts.

³ The Hindu Editorial, January 22, 2018.



place of profit under the Crown created after October 25, 1705 should be incapable of being elected as members of the House. Further a Select Committee was appointed by House of commons to decide on the question of office of profit. It made certain recommendations in 1941.

During beginning of the 18th century 3 important principles were laid for the development of the office of profit are

1. Incompatibility of certain non-ministerial offices with membership of the House of Commons .
2. Need to limit the control or influence of the executive government over the House by means of an undue proportion of office-holders being members of the House; and,
3. The essential conditions of a certain number of ministers being members of the House for the purpose of ensuring control of the executive by Parliament.

The above three principles laid the basis of the Indian law on the "office of profit" . Thus the Act of 1707 was the first effective attempt to establish these principles in an Act of Parliament in England. On recommendations of this Committee The House of Commons Disqualification Act, 1957 was enacted. The main object of the Act is to replace the statutory and common law provisions on disqualification by a single and simple code⁴.

Montesquieu Theory of separation of powers and concentration of Authority:

3. (Erikson May, The Law , Privileges, Proceedings and Usage of Parliament 45 (1976) cited from R.S. Gae "Office Of Profit Under the Government" 48, JILI,(2006), Page 400 at page 401.

The concept of office of profit is related to the theory of separation of powers. The principle was propounded by French jurist Montesquieu in his book "Spirit Of Laws" 1748. The law signifies the fact that one person or body of persons should not exercise all the three powers of the government Viz. legislative, executive and judiciary. According to the theory each organ should restrict itself to its own sphere without transgressing the province of other. Later it is known as principle of Checks and balances. The concentration of power in one person will lead to anarchy and chaos so each organ of the government should work independently⁵.

The Indian constitution does not express strict doctrine of separation of powers. The nature of the Indian constitution is "Quasi-federal state: as coined by Prof K.C. Wheare. In Kesavananda Bharati Vs. state of Kerala⁶. The court observed "Separation of powers between the legislative, executive and the judiciary is a part of the basic structure of the constitution, this structure cannot be destroyed by any form of Amendment".

Office of Profit:

'Profit ' does not necessarily mean any remuneration in cash but it certainly means some kind of advantage or gain, which can be perceived. "The Office of Profit " means to which some benefit derived or reasonably expressed to be made by the holder of the office. Profit means pecuniary Material gain.⁷ There is

⁵Tej Bahadur Singh " Principle of Separation of Powers and Concentration of Authority" 2001, AIR at P.163.

⁶ AIR 1973, SC 1461, Pg. 1535.

⁷. S..S. , Inamdar V. A.S. Andanappa (1971) 3 SCC 870.



no express provision with regard to expression " Office of Profit" under the Indian Constitution or Representation of people Act 1951, or the Parliament (Prevention of Disqualification) Act 1959. The amount of profit is immaterial, amount of monetary benefit may be a material deciding factor. The Bhargava Committee on Office of Profit stated that the emoluments attached to offices may be in the nature of pay, salary, honorarium, fees, daily allowance, travelling allowance. Where salary is attached to an office it immediately and indisputably makes the office an office of profit.⁸

The Parliament (Prevention of Disqualification) Act 2006, included a new list of offices under section 3, not to disqualify the members occupying those offices. A debate is made on this amendment and President returned the Bill for reconsideration to the parliament. In view of this the Speaker appointed Joint parliamentary committee to examine constitution and legal position relating to the office of profit. The Joint committee laid down the following criteria in regard to office of profit for deciding the question of disqualification for being a member of parliament⁹.

1. Whether the holder draws any remuneration like sitting fee, honorarium, salary etc., i.e. any remuneration other than the 'compensatory allowance' as defined in section 2(a) of the parliament (prevention of Disqualification) Act, 1959.

⁸ Committee on Offices of Profit (Bhargava Committee), 1955, Part 1 at 11.

⁹ Journal of Indian Law Institute, Vol 48:3, page 415. (Notes and Comments)

2. Whether the body in which an office is held exercises executive, legislative or judicial powers or confers powers of disbursement of funds, allotment of lands, issue of licenses etc, or gives power of appointment, grant of scholarships, etc; and
3. Whether the body in which the office is held wields influence or power by way of patronage.

If any of the above questions is laid in affirmative then the offices in question will entail disqualification.

An "Office of Profit" ordinarily means an " office' capable of yielding some profit to the holder of the office. The disqualification arises when a person-

1. Holds an office;
2. The office is under the Central or State Government ; and
3. The office is one of profit.

Thus if a person does not hold an 'office' he is not disqualified even if he is making a profit. For example, a lawyer engaged by the government to appear in a case on its behalf and paid fees by it ¹⁰.

If the office is under the government it should satisfy the following tests:

1. Whether the government makes appointment.
2. Whether the government has right to remove or dismiss the holder of office.
3. Whether the government pays the remuneration.
4. Whether the functions performed by the holder are carried on by him for the government and
5. Whether government has control over the duties and functions of the holder

¹⁰ Ibid, pg 1



“for determination of the question whether a person holds an office of profit under the government each case must be measured and judged in the light of the relevant provisions of the Act”¹¹.

While explaining the meaning of office of profit the Supreme Court stated that “an office of profit is an office which is capable of yielding a profit or pecuniary gain” . Further “ for deciding the of question as to whether one is holding an office of profit or not, what is relevant is whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtained a Monetary gain. If the pecuniary gain is receivable in connection with the office then it becomes an office of profit irrespective of whether such pecuniary gain is actually received or not. If the office carries with it or entitles the holder to, any pecuniary gain other than reimbursement of out of pocket, actual expenses, then the office will be an office of profit for the purpose of Article 102 (a)(1).

In Jaya Bachan Vs. Union of India¹²: Jaya Bachan, a member of Parliament , Rajya Sabha was appointed as chair person of the Film Development Council. The Parliament (Prevention of disqualification) Act 1959, did not exempt the said office of profit from the disqualification under Article 102(1)(a) of the constitution. Under the office she was entitled with a monthly honorarium of Rs.5000, entitlement expenditure of Rs.

10,000/-, staff car with driver, telephones at office and residence, free accommodation and medical treatment facilities to self and family members, apart from other allowances. On this ground the petitioner membership was challenged. The Supreme court held that the petitioner’s disqualification from the membership of the Rajya Sabha was valid. The petitioners challenged the order by saying that she did not receive benefits given by state government.

In Election Commission of India V. Bajarang Bahadursingh and Umasankar Singh¹³, The petitioner was held for holding “Office of Profit” and disqualified Under Representation of people 1951, as they entered into four “Culprit Contracts” with the state of Utter Pradesh in the year 2013 after his election to the legislative Assembly. The Governor of U.P. on the recommendation of Lok Ayukta disqualified Shri Umashankar Singh from 6-3-2012 and Shri Bajarang Bahadur Singh from under exercising power under Article 192(1) of constitution of India from membership of U.P. state Legislative Assembly.

Recently 20 AAP’s MLA’s disqualified as holding office of profit by the President on recommendation of Election Commission, who were appointed as Parliamentary Secretaries. The MLA’s challenged the order of the president saying that they were denied hearing and alleges political motives behind the action which is contrary to principle of Natural Justice, ‘Hear the other side’.

¹¹ M.P.Jain, Indian Constitutional Law, Vth edition, 2008, page 31.

¹² AIR 2006 SC 2119.

¹³ SLP, 2015, [HTTP://indiakanoon.org](http://indiakanoon.org), visited on 19-5-2018.



In Election Commission v Aam Admi Party¹⁴, the 20 MLA's who were disqualified were reinstated retrospectively with effect from 20th January i.e. from the date of the notification of the President's order to the Delhi Assembly setting aside the disqualification by the order of Delhi High Court. The court also directed election commission to here the matter afresh¹⁵.

In disqualifying 20 Aam Admi party MLA's in Delhi, saying it as a scathing indictment of the Election commissions functioning, in handling the complaint that they held offices of profit while serving as parliamentary secretaries criticising the principle and procedure the court ruled that the EC violated the principle of natural justice while adjudicating a lawyer's complaint against the legislators. It failed to offer an oral hearing on the merits of the complaint and issued summons issued by the EC to MLA's to respond on occupying offices of profit. The court further stated that it is a basic future of judicial or quasi-judicial processes that someone who does not hear a matter does not decide on it. Further the High Court has acknowledged the EC's "Latitude and Liberty" in matters of procedure, but cautioned that any procedure should be sound, fair and just in proceedings that may result in unseating elected representatives, fairness of procedure is no less important than finding an answer to the question whether they have incurred disqualification¹⁶.

In the following cases the court stated that there is no "Office Of Profit" involved.

In Balakram v. Badri prasad¹⁷ the appellant was appointed as Adjutant under executive orders issued prior to coming into force of U.P. Home Guards Adhinyam (29 of 1963), held to holding not considered as office of profit under Article 191, under Government State Legislature Members Prevention of Disqualifications Act (U.P. Act 19 of 1951) S.3. Here the payment is made either periodically from month to month nor paid specifically for a certain period for attending parades. The payment is only to meet his pocket expenses. Further he was not holding office for full time. So the court held the appellant is not holding office of profit.

Similarly in Madhukar v. Jaswant¹⁸

A Medical Practitioner working as a panel doctor appointed under the Employees State Insurance Scheme does not hold "office of profit" under State Government, so as to attract disqualification under Section 16 (1) (g), Maharashtra Municipalities Act (40 of 1965). The Supreme court held that 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. These are people who are qualified and can contribute effectively to the

¹⁴. ibid ar page 1

¹⁵. The Hindu, Sunday March 24, 2018, at page 7.

¹⁶. The Hindu, Tuesday, March 27, 2018, Editorial, at page 8.

¹⁷ AIR 1969, Allahabad 88 (V 56 C 17)

¹⁸ AIR 1976 SC 2283. Cited from JILI 48, (2006), page 400 at page 409.



governance of the country. The court held the panel Doctor was not holding office of profit.

Again in Biharilal Dubroy V. Roshanlal Dobray¹⁹ The elected candidate was originally employed as an Assistant Teacher in a Basic Primary School run by the Zilla Parishad in U.P. On coming into force of the U.P. Basic Education Act, 1972 he became an employee of the Board of Basic Education under S.9(1) of the Act. While holding the post of the assistant Teacher he filed his nomination, He was elected and his election was questioned by the unsuccessful candidate. The High court dismissed the election petition and in appeal before supreme court, it was contended that the elected candidate at the time of filing holding office of profit.

The Supreme held that merely because a body is incorporated, it is not conclusive of the question Whether the body is really independent of the government. Sometimes, the form may be of a body corporate independent of the government but in substance it may just be the 'alter ego' of the government itself. " The true test for determination of the question depends upon the degree of control the government as over it, the extent of control exercised by the several other bodies or committees over it and their composition, the degree of its dependence on government for its financial needs and the functional aspect, namely, Whether the body is discharging any important governmental function or just some function which is merely

optional from the point of view of government".²⁰

Likewise in Ashok Kumar Bhattacharya v. Ajoy Biswas²¹ The Supreme court held that the Accountant-in-charge of Agartala Municipality does not hold office of profit under the government of Tripura and is not disqualified from being a member of the Parliament merely because his appointment is subject to the confirmation by the Government and just by reason of this condition an employee of a local authority does not cease to be an employee of the Municipality . Local authority and any other authority is an independent entity separate from the Government.

Again in Satrucharla Chandrasekahar Raju vs. Vyricherla pradeep Kumar Dev²²

The appellat candidate appointed as school teacher by Integrated Tribal Development Agency (ITDA) by its project officer who was the district collector. The object of the society was to provide free and compulsory education in tribal areas. The project officer has power to appoint and remove the teachers. The Appellant was suspended by the tribal welfare officer for some irregularities and there after he was elected to the State Legislative Assembly. In an election petition filed against him the High court held that though society was registered under Societies Registration Act, its activities were controlled by the government officials and society's funds came from government grant. Hence the candidate holding an office of profit under the Government and disqualified for

¹⁹ AIR 1984 SC 385 at 395

²⁰ M.P. Jain. Constitutional Law of India, V Edition (2008), at page 35.

²¹ AIR 1985 SC 211.

²² AIR 1992 SC 1959



contesting election for legislative assembly. But Supreme Court Held that Government may have some control over the society which is the appointing authority but has no direct control over the teachers themselves. The court ruled that the appellant was not holding an office of profit under the government.

In Bhanu Kumar Jain V Kumar Gupta²³

In this case Election of Mayor to Municipal Corporation cannot be set aside on ground that returned candidate was member of Assembly. Member of Legislative Assembly though is office of profit, it is not office of profit under Government. MLA is not a government employee or removed from his office though salary and allowances paid by the government. Though the remuneration, fees, salary or allowances are paid which may be said to be paid by the Government but the Government does not exercise any control over the performance of his functions. Moreover in the case of MLA only one test is applicable regarding the payment from the government funds the second test also can be said to be that now he is a public officer and performs public duties as per sub-section (Viii) of clause (C) of Section 2 of the new prevention of Corruption Act of 1988 the office of Member of Parliament is an office, therefore, it can be held that now the office of MLA is an office of profit but certainly it cannot held that it is an office under Government because it does not satisfy the other tests. Further if one also considers the question of accountability, it seems to be important that an MLA is accountable directly to the people or voters of his constituency. He is not accountable to the executive

government and ultimately the votes of the constituency are responsible to decide the fate of their representatives.

Similarly, with regard to the powers, privileges and immunities enjoyed by the MLAs and also going through various Acts regarding payments of salary, allowances and pension to the members of the Legislative Assembly and the various facilities and benefits extended to them for holding office and for discharging public duties, the court held that the MLA holds an office of profit, but it cannot be held that his office is under the Government. Therefore the court held, for the purposes of the Article 191(1)(a) of the Constitution he does not hold an office of profit under the government.

Conclusion

In Britain, there is no general theory that a disqualification arises from holding an office of profit under the Crown. There disqualifications are specific and disqualification arises only when a person holds a disqualifying office so declared under a parliamentary legislation. The House of Commons Disqualification Act, 1975 lists the offices the holders of which are disqualified from membership of House. The position is, different in India as there prevails a general disqualification under the Constitution, and specific exemptions may be granted from it under a law of Parliament.²⁴

Further The Parliament (Prevention of Disqualification) Amendment Act, 2006 has exempted under S.3 the office of chairperson of the National Advisory council previously held by Sonia Gandhi. Also exempted are the offices of the

²³ AIR 2004, Madhya Pradesh 25

²⁴ M.P.Jain, Indian Constitutional Law, V Edition, 2008, at page 36.



Sriniketan Santiniketan Development Authority and the Uttar Pradesh Film Development Council held by Somnath Chatterjee and Jaya Batchan respectively , which nullified the effect of the action of the President and benefited the holders of the office by this amendment. The new list of exempted offices of profit shows us clearly that no specific criterion has been followed in exempting the offices. The amendment passed by government diluted the spirit of the Indian Constitution.