

Serial No. 01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP(C) No. 229 of 2022

Date of Decision: 05.12.2022

Shri. Brightstarwell Marbaniang & Ors. Vs. State of Meghalaya & Ors.

Coram:

Hon'ble Mr. Justice H. S. Thangkhiew, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. H.R. Nath, Adv.

For the Respondent(s) : Mr. A. Kumar, AG with
Mr. H. Abraham, GA
Mr. A. Kharwanlang, GA
Ms. S. Laloo, GA.

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

JUDGMENT AND ORDER

1. The petitioners before this Court are Assistant Professors in various Government Aided Colleges. Their grievance is with the amendment to the Employees Rules under which they are governed, in

this case, the Aided College Employees Rules, 1960, which has been adapted from the Assam Aided College Employees Rules, 1960, whereby, they have been disallowed from holding office in any political organization or local bodies, or to take part in any election activities. The petitioners have prayed that, orders be passed for restoration of the provisions, which allow them to engage in political activities or to take part in elections.

2. Mr. H.R. Nath, learned counsel for the petitioners submits that as per the unamended rules namely Rules 6 and 7 of the Aided College Employees Rules, 1960, in the part concerning Conduct and Discipline, the petitioners were permitted, subject to meeting certain conditions, as provided in Rule 7, to take part as a candidate to a legislative body, or hold an office in a political organization. The learned counsel has questioned the decision making process, which has arrived at such a policy that has taken away a right, which they have always enjoyed. He submits that this decision has been arrived at, without any considered opinion being taken into account, as in the draft State Education Policy, this aspect does not find mention, but however, in the approved Meghalaya State Education Policy notified on 26.09.2018, at Clause – 7.4.3, it has been stated that government and Government Aided College/University teachers, will be barred from taking part in political

activities and political associations. Learned counsel submits that every citizen has a right to contest elections, and has referred to Section 5 of Chapter II of The Representation of the People Act, 1951, which deals with qualifications for membership of a legislative assembly, to emphasize his points.

3. It has also been argued by the learned counsel for the petitioners, that the office of Assistant Professors/Teachers and employees in an Aided Government Educational Institutions, do not fall within the purview of 'Office of Profit', as the Constitutional bar only applies to persons who hold any office under the Government of India or State. The petitioners he contends, receiving a salary that is, disbursed by the Governing Body of the college, and their services being under the Governing Body, there is no element of occupying an 'Office of Profit', which would debar them from contesting elections or being part of a political organization.

4. Learned counsel has then referred to a judgment of the Hon'ble Supreme Court, in the case of *Rajbala & Others vs. State of Haryana & Others*, reported in (2016) 2 SCC 445, wherein he submits, the right to contest has been discussed in great detail. He submits that any restriction that may be imposed has to be reasonable, and cannot be arbitrary and operate as a complete ban, taking away all the rights that they have

enjoyed all along. With regard to the contention that, the aided college teachers are not directly under the Government of Meghalaya, reliance has been placed in the judgment dated 07.12.2005, passed in Writ Appeal No. 14 of 2001, in the case of *State of Meghalaya vs. Dr. B.J. Bhattacharjee*, passed by the Gauhati High Court, wherein he submits, it has been clearly shown that, the college teachers of such aided colleges are not treated as Government employees. He therefore submits, the restriction being unreasonable, the amendment made to the rules are patently unsustainable and illegal.

5. The learned Advocate General for the respondents in reply, has firstly submitted that, the rules which are under Article 309 of the Constitution, if validly made, the absence of the restriction not being mentioned in the proposal for amendment, is of no consequence. He submits that the State exercises pervasive control over the services of all the teachers of Government Aided Educational Institutions, as their appointment and termination are subject to governmental approval. He contends that, the right to contest can be controlled, inasmuch as, the service of the petitioners comes within the meaning of 'Office of Profit', and has referred to the tests of 'Office of Profit' which he submits is; whether the government makes the appointment; whether the government can remove or dismiss the holder; whether the government pays

remuneration that is, budget provided by the State; and whether the holder is performing a government function.

6. He submits that, the service of the petitioners is hit by all the tests of 'Office of Profit', as such, by constitutional mandate, they are ineligible to take part in political activities and have no right to contest elections. The learned AG has referred to a compilation of judgments in support of his case, more notably the case of *Biharilal Dobray vs. Roshan Lal Dobray* reported in (1984) 1 SCC 551, and has also relied on the same case cited by the petitioner that is, in the case of *Rajbala & Others vs. State of Haryana & Others (supra)*, and submits that, there can be no unfettered right under Article 19(1) and that the amendments were necessary, to provide for a reasonable restriction. He further submits that, the teachers of government and Government Aided Schools are holding an Office of Profit, and that under Article 102 and 191 of the Constitution, an elected member holding Office of Profit, under the government either of State or Union, can be disqualified. However, he submits the States can declare any office as not an Office of Profit by law, and in this regard, the State of Meghalaya in the Prevention of Disqualification (Members of the Legislative Assembly of Meghalaya) Act, 1972, has provided an exemption only in respect of part-time Professor, Lecturer, Instructor or Teacher in Government Educational Institutions, and as, the petitioners

are not covered under this exemption, they are therefore, occupying Office of Profit. He lastly submits that, the petitioners do not have any legally enforceable rights, to maintain the writ petition and the prayers made therein, run contrary to the various judgments of the Supreme Court. He therefore, prays that the writ petition be dismissed with costs.

7. I have heard the learned counsel for the parties. The point in issue as raised before this Court, is the justifiability of the amendments made to the Aided College Employees Rules, 1960, adapted from the Assam Aided College Employees Rules, 1960, whereby, the petitioners by amendment of Rule 6 and 7 of the said Rules, are no longer allowed to hold office in any political organization or local body, or to take part in any election activities. The impugned Notification dated 23rd March, 2021, it is seen, has amended the existing Rule 6, omitted the proviso to Rule 6 and omitted Rule 7. For the sake of convenience, Rule 6 and 7, as they stood before the amendments in the Chapter dealing with Conduct and Discipline, read as follows;

“6. No employee shall offer himself as a candidate for election to a Legislative Body or for holding office of any political organization except in accordance with the provisions of Rule 7.

Provided that an employee may seek election as an independent candidate of a Panchayat with the previous

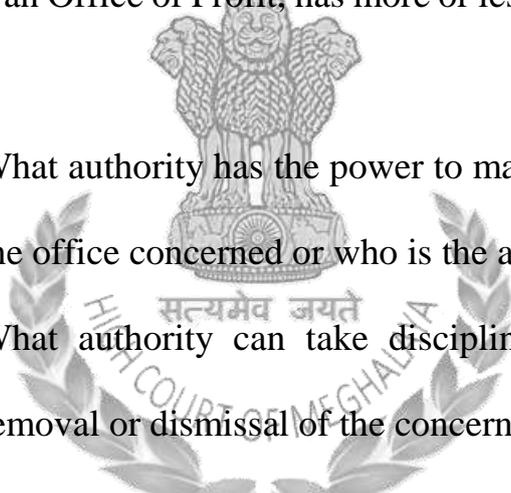
approval of the Managing Committee as the case maybe, but he shall not be entitled to accept any office thereunder except in accordance with the provisions of Rule 7.

7. Any employee desiring to seek election to Legislative Body or to hold office of any Political Organization or Local Bodies shall be on compulsory leave without pay from the date of filing his nomination till the end of the next academic session or till the termination of the term of his office to which he may be elected, as the case may be. Such employee, however, shall not be allowed to retain a lien on his post for a period exceeding five years.”

8. Before the amendments came into being, teachers in Government Aided Colleges, were permitted to take part in elections or to hold political office, subject to the conditions imposed by Rule 7. However, with the amendments, the teachers in such institutions, could no longer engage in political activities as given in proviso to Rule 6 and Rule 7. The questions therefore, that are to be decided, is whether this amendment would qualify to be a reasonable restriction under Article 19(1) (6) of the Constitution, and whether the post held by the petitioners or teachers in these Government Aided Institutions, can be termed as an ‘Office of Profit’. On these premises, it would however be more expedient, if the nature of the post held by Aided College Teachers is

looked at first, as to whether, it would come within the definition of an 'Office of Profit'. The term 'Office of Profit' is not defined anywhere, but Article 191 of the Constitution, speaks about disqualification from being a member of the Legislative Assembly, if a person holds any Office of Profit, under the Government of India or the Government of any State.

9. The term 'Office of Profit' however has been discussed in numerous judgments of the Supreme Court, and the tests to determine whether a post is an Office of Profit, has more or less crystallized into the following:-

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- i) What authority has the power to make an appointment to the office concerned or who is the appointing authority.
 - ii) What authority can take disciplinary action, such as, removal or dismissal of the concerned employee.
 - iii) By whom and from what source is the remuneration paid.

The case of the petitioners is that, as they are employees of an Aided College, the selecting and appointing authority is a Governing Body of the College itself, and the role of the State is only to accord approval to their appointment. Further, it has been contended that, the State has no role, as far as, disciplinary matters are concerned and that the same is within the domain of the Governing Body, and only the removal or dismissal of a teacher by the Governing Body, is to be approved by the

State. It has also been contended that; the petitioners are receiving salary which is disbursed by the Governing Body from the grants received from the State.

10. In the case of *Satrucharla Chandrasekhar Raju vs. Vyricherla Pradeep Kumar Dev & Anr.* reported in (1992) 4 SCC 404, which has exhaustively examined the many decisions on this aspect, the Supreme Court at Para – 11, has further refined the tests and has laid down as follows;

“11. On a careful examination of the ratio laid down in the above-mentioned cases some of the tests or principles that emerge for determining whether a person holds an office of profit under the Government, may be summarised thus:

(1) The power of the Government to appoint a person in office or to revoke his appointment at its discretion. The mere control of the Government over the authority having the power to appoint, dismiss, or control the working of the officer employed by such authority does not disqualify that officer from being a candidate for election as a member of the Legislature.

(2) The payment from out of the Government revenues are important factors in determining whether a person is holding an office of profit or not of the Government. Though payment from a source other than the Government revenue is not always a decisive factor.

(3) The incorporation of a body corporate and entrusting the functions to it by the Government may suggest that the statute intended it to be a statutory corporation independent of the Government. But it is not conclusive on the question whether it is really so independent. Sometimes, the form may be that of

a body corporate independent of the Government, but in substance, it may just be the alter ego of the Government itself.

(4) The true test of determination of the said question depends upon the degree of control the Government has over it, the extent of control exercised by very other bodies or committees, and its composition, the degree of its dependence on the 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 the Government.”

11. By the same judgment itself, at Para – 12, which is also reproduced hereinbelow, the finer point of the meaning of an ‘Office of Profit’ has been discussed, wherein the object of enacting Articles 102(1) (a) and 191(1) (a), have been highlighted.

“12. It can be seen that one of the main tests of determination of the question is the degree and extent of control i.e. direct or remote over the ITDA by the Government particularly with reference to making the appointment of the persons in office or to revoke the same at its discretion. In this context it is necessary to refer to some later decisions of this Court which are directly on this point and some of which have not been cited before the High Court. Before doing so we may, however, usefully refer to the object underlying Articles 102(1)(a) and 191(1)(a) of the Constitution. These two Articles deal with disqualifications of a person being chosen as a member of the Parliament or the State Legislatures respectively on the ground of holding of office of profit under the Government. Generally it is understood that an office means a position to which certain duties are attached. An office of profit involves two elements namely that there should be such an office and that it should carry some remunerations. It is not the same as holding a post under the Government and therefore for holding an office of profit under the Government, a person need not be in the service of the Government. It is well-

*settled now that the object of enacting Articles 102(1)(a) and 191(1)(a) is that there should not be any conflict between the duties and interests of an elected member and to see that such an elected member can carry on freely and fearlessly his duties without being subjected to any kind of governmental pressure, thereby implying that if such an elected person is holding an office which brings him remunerations and if the Government has a voice in his functions in that office, there is every likelihood of such person succumbing to the wishes of the Government. These Articles are intended to eliminate the possibility of such a conflict between duty and interest so that the purity of legislature is unaffected. In *Bihari Lal Dobray v. Roshan Lal Dopray* this Court observed thus: (SCC p. 555, para 5)*

“The object of enacting Article 191(1)(a) is plain. A person who is elected to a legislature should be free to carry on his duties fearlessly without being subjected to any kind of governmental pressure. If such a person is holding an office which brings him remuneration and the Government has a voice in his continuance in that office, there is every likelihood of such person succumbing to the wishes of Government. Article 191(1)(a) is intended to eliminate the possibility of a conflict between duty and interest and to maintain the purity of the Legislatures.”

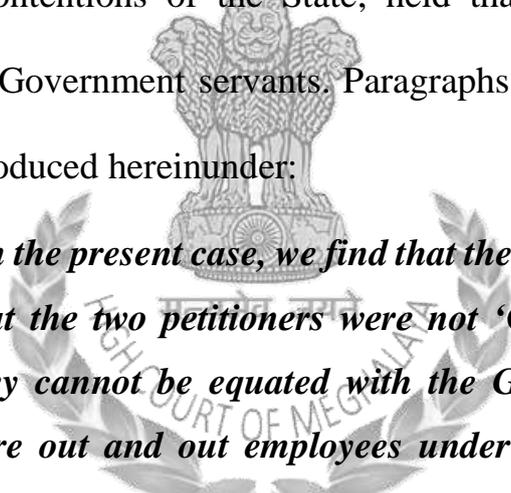
*In *Ashok Kumar Bhattacharyya v. Ajoy Biswas* this Court observed as under: (SCC p. 158, para 16)*

“The true principle behind this provision in Article 102(1)(a) is that there should not be any conflict between the duties and the interest of an elected member.”

12. Other decisions which have a bearing in the instant matter, such as, the case of *Rajbala & Others vs. State of Haryana & Others* (*supra*), wherein, the constitutionality of imposing limitations on the right to contest, depending upon the office, has reiterated the settled position, that

the 'Right to Vote' and 'Right to Contest' though not fundamental rights, however, are constitutional rights and not only statutory rights of the citizens.

13. Significantly however, a Division Bench judgment dated 07.12.2005, passed in Writ Appeal No. 14 of 2001, in the case of *State of Meghalaya vs. Dr. B.J. Bhattacharjee*, by the Gauhati High Court, the erstwhile jurisdictional High Court, has by a definite finding based on the materials and contentions of the State, held that the Aided College teachers are not Government servants. Paragraphs 10 and 13 which are relevant are reproduced hereinunder:



“10. In the present case, we find that there is no dispute at the Bar that the two petitioners were not ‘Government servant’ and they cannot be equated with the Government servants. They are out and out employees under the college and the Government is to provide grants to the college as per their own scheme and as the Government was required to make financial assistance it was kept under some sort of control in the matter of creation of posts and approval of appointments etc. so that the liability is not increased without their knowledge. Merely because the Government’s approval is required to be taken in the matter of appointments, we hold that an appointee cannot be termed to be a Government employee.”

13. *Thus there is no dispute at the Bar that the petitioners being college teachers in respondent's colleges, are entitled to pension for the services rendered by them. As a matter of fact the contributory pension scheme was applicable to them and they are governed by the said scheme. However, the dispute arose when the petitioners wanted to change the scheme to another scheme. The learned Single Judge proceeded under the presumption that the State Government being the employer of the petitioners is liable to implement the scheme and provide necessary fund so that the petitioners can get benefits. We hold that the State of Meghalaya was not the employer in respect of the petitioners and as such the liability to pay pension cannot be fastened around them in the line of the State Government employees.*

[Emphasis Supplied]

14. Another aspect that has been flagged, is that the State can declare any office as not an Office of Profit by law, as has been done under the Prevention of Disqualification (Members of the Legislative Assembly of Meghalaya) Act, 1972. Point 5 of the Schedule which speaks of exemption for certain officers reads as under:

“5. The Office of the part-time Professor, Lecturer, Instructor or Teacher in Government Educational Institution of which term shall include Additional Government Pleader, Government Advocate, Additional Public Prosecutor, Assistant Government Pleader, Assistant Public Prosecutor

and any other advocate or Pleader specially appointed by the Government to conduct State cases before any Court or Tribunal.”

A plain reading of this provision, however shows that, the exemption is only with regard to part-time Professor, Lecturer, Instructor or Teacher in Government Educational Institutions, and the contention of the State respondents that, the same will apply to the petitioners herein, is rejected, as the provision aforementioned makes no mention to Aided Colleges.

15. In this backdrop therefore, and by applying the tests and circumstances aforementioned, the post or office, held by the petitioners cannot come within the definition of being an ‘Office of Profit’ for the following reasons.

- i) The power of appointment and removal of the petitioners’ vest in the respective Governing Bodies of these Aided Colleges, and the only function that the government exercises is in the approval of such appointment and removal. There is no direct control of the government over the services of the petitioners.

- ii) The payment comes in the form of aid to the College, and there is no direct remuneration from the government to the petitioners.
- iii) The Governing Body of these Aided Colleges, being governed by the Assam Aided College Employees Rules, 1960 (as amended), function autonomously in administering the colleges, and the role of the government is limited only to deciding appeals, preferred by a Governing Body against an order of the Director of Public Instruction or by an employee against an order of a Governing Body. [Rule 12(1) and (2)].
- iv) The petitioners do not discharge any governmental function, nor does the government exercise any control over their activities, or over the functions of the Governing Body. The degree of control, as is apparent from the Rules itself, vests the Governing Bodies with great autonomy in the administration of the colleges.
- v) The participation in political activities by the petitioners on being elected to public office, will not give rise to any conflict between the duties and the interest thereof, as

they are not under direct government control, as regards, the post they are holding in Aided Colleges.

16. The other aspect with regard to the restrictions that have been imposed, have been grounded on the argument that, the same was done by exercising the power as given in Article 19(6) of the Constitution, in the interest of general public. With this object in mind, it has been contended by the State that, Clause 7.4.3 in the Meghalaya Education Policy, 2018, was incorporated and the impugned notification dated 23.03.2021 issued, to restrict the Aided College Teachers from taking part in political activities and political associations. It has also been advocated that, the said restrictions have been imposed to instill discipline and order in the recognized schools, and to ensure healthy environment for the growth of children studying in the schools of Meghalaya. Clause 7.4.3 of the Meghalaya Education Policy, 2018, referred to above, reads as follows;

“7.4. Regulation of Higher Education Institutions and Determination of Fees.

7.4.1.

7.4.2.

7.4.3. Government and government aided college/university teachers will be barred from taking part in political activities and political associations.”

17. A perusal of the above quoted policy, clearly shows that the said policy decision which culminated in the impugned amendment, is directed only against teachers serving in government aided college/university. The arguments put up by the respondents that, the impugned amendments are as per the Meghalaya School Education Act, 1981, is misplaced, inasmuch as, the Meghalaya School Education Act, deals specifically with schools, and has no bearing on aided private colleges. The entire defense put up, by way of the affidavit by placing reliance on the Meghalaya School Education Act, 1981, is therefore, not taken into consideration and is disregarded.

18. It is further to be noted that, the impugned notification amends only the portion of the Aided College Employees Rules, 1960, dealing only with the Conduct and Discipline of the employees of aided educational institutions, as given therein. A conjoint reading therefore of Clause 7.4.3, of the stated policy and the impugned notification dated 23.03.2021, clearly displays that the amendment is specifically directed only against the teachers of aided colleges and universities.

19. As has been held, in the cases of *People's Union for Civil Liberties (PUCL) & Anr. vs. Union of India & Anr.* reported in (2003) 4 SCC 399 and *Javed & Ors. vs. State of Haryana & Ors.* reported in (2003) 8 SCC 369, the 'Right to Vote' and 'Right to Contest' are constitutional rights of the citizens, which has also been noted in the case of *Rajbala & Others vs. State of Haryana & Others (supra)*, which however, has held that, in the facts of the said case which dealt with Panchayat elections, the restrictions imposed were reasonable. The instant case therefore, also has to be viewed from this legal perspective, by keeping in mind the Constitutional Scheme.

20. Therefore as per the discussions made hereinabove and taking into account the settled legal position, the petitioners in the considered view of this Court, are not found to hold an Office of Profit, and if, they satisfy the other conditions as laid down in Articles 102(1) and 191(1), cannot be debarred by the rules as amended from contesting in elections or holding political office. Further the contention that the government exercises deep and pervasive control over the services of the petitioners and the institutions has not been borne out by the materials on record.

21. For the aforesaid reasons, the impugned amendments as given in the impugned notification dated 23.03.2021, amending the Aided College Employees Rules, being the product of a flawed decision making

process, are held to be unsustainable, and as such, the impugned notification is set aside and quashed.

22. This writ petition is accordingly allowed and disposed of.

23. No order as to costs.

Judge

Meghalaya
05.12.2022
"D.Thabah-PS"

