IN THE HIGH COURT OF BOMBAY AT GOA

ELECTION PETITION NO. 1 OF 2002.

Chandrakant Uttam Chodankar,
son of Uttam Chodankar,
resident of House No. 581,
Guddem, Siolim, Goa. .... Petitioner.

Versus

1. Shri Dayanand Rayu Mandrekar,
son of Rayu Mandrekar, major in age,
married, r/o House No.353/6B,Oxel,
Chopdem, Siolim, Bardez, Goa, .
2. Christopher Fonseca, major in age,
married, r/o House No.60,
Vale Gongurrem, Assagao, Bardez, Goa, .
3. Pandharinath Vaman Polle, major in
age, r/o H. No.118-1A,
Trimurti Bhavan, Abbas Wado,
Canca, Bardez, Goa,
4. Francis Gregorio Fernandes,
major in age, r/o Sodiem, Siolim.
Bardez, Goa,
5. Gokuldas Surya Naik,
s/o Surya Naik, major in age,
r/o House No. 694,Assagao, Badem,
Bardez, Goa,
6. Albin Fernandes, major in age,
r/o House No.203, Chawadi Vaddo,
Marna, Siolim, Bardez, Goa,
7. Jawaharlal Henriques, major in age,
r/o H.No. 161,
Rodrigues Vaddo, Siolim, Bazrdez, Goa,
8. Sanjay Ganesh Narvenkar,s/o Ganesh
Narvekar, major in age, r/o
223/A, Abbas Vaddo, Canca, Parra,
Bardez, Goa,
9. Kalidas Vinayak Vernekar,
s/o Vinayak Verenkar, major in age,
r/o H.No. 476/7, Oxel, Siolim.,
Bardez, Goa,
10. Mangesh Kaskar,

major in age, r/o Bandir Wada, Shapora, Anjuna, Bardez, Goa.

11. The Returning Officer, 6-Siolim Assembly Constituency, having office at the Office of Dy. Collector, Mapusa, Bardez, Goa.

12. The Chief Electoral Officer, State of Goa, Office of the Chief Electoral Officer Altinho, Panaji, Goa.

13. Election Commissioner, Election Commission of India, having office at "Nirvachan Sadan" Ashoka Road, New Delhi, Pin-110001.

14. Goa Khadi And Village Industries Board, through its Managing Director, with office at Junta House, 2nd Floor, Panaji, Goa.

(Respondents no.11 to 14 deleted vide Order dated 13.09.02 on Exh.2 in Election Application No.1/02) .... Respondents.

Mr. J.E. Coelho Pereira, Senior Advocate with Shri S. Karpe and Shri W. Rodrigues, Advocates for the Petitioner.

Shri V.P. Thali with Ms. G. Pednekar, Advocates for the Respondent No.1.

CORAM: N. A. BRITTO, J.
DATE: 27th MAY, 2005.

JU D G M E N T:

In this election petition filed under the Representation of the People Act, 1951, the petitioner who is one of the unsuccessful candidates at the election held on 30.5.02 for 6-Siolim Constituency in the State of Goa has challenged the election of the respondent No.1 (respondent, for short) the returned candidate, on the ground that the latter was holding an office of profit as contemplated by Article 191(1)(a) of the Constitution, having

been the Chairman of the Goa Khadi and Village Industries Board (Board, for short), constituted under the Goa Khadi and Village Industries Board Act, 1965 (Act, for short), on the date of the nomination as well as on the date of election to the said Constituency.

2. First some undisputed facts are required to be mentioned.

3. By virtue of Notification No.4/12/87-IND dated 8.12.1999, the Board was constituted by the Government and the respondent was appointed as Member/Chairman for a period of three years with effect from 8.12.1999 and by another Notification dated 1.3.2000 the Board was constituted with the names of nine official as well as non-official members and the respondent as Chairman thereof which position the respondent held from 8.12.1999 till he resigned on 8/15.7.02 after the respondent became a Minister for Agriculture on 4.6.02.

4. The respondent was a Member of the State Legislative Assembly. The said Assembly was dissolved on 27.2.02. The elections for the said Assembly were declared on 6.5.02 and the last date for filing of nominations was 13.5.02. The petitioner as well as the respondent filed their nominations which were displayed on 16.5.02. The polling took place on 30.5.02. The counting took place on 1.6.02 and the respondent was declared as the returned candidate on 2.6.02.

5. The petitioner has examined himself and four more witnesses in support of the petition . The respondent has chosen not to examine himself,

but has examined three witnesses. As far as the facts go, it appears that the respondent did not wish to contest the same and for that reason did not examine himself. The witnesses examined on behalf of the respondent could only corroborate the facts, if any, if facts were deposed to by the respondent. In this context I may refer to the case of ***Vadar v. Manik Rao and Another [(1999) 3 S.C.C. 573]*** wherein the Hon'ble Supreme Court has stated that where a party does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. This has been stated by the Hon'ble Supreme Court relying upon a catena of decisions in that regard. I may also refer to the case of ***R. Puainar Alhithan and others v. P.H. Pandian and others*** **[(1996) 3 S.C.C. 624]** wherein the Supreme Court has stated that in an election petition though the trial is like a trial in a criminal case, but unlike in a criminal case where the petitioner has adduced evidence to prove that the returned candidate had committed corrupt practice, the burden shifts on the returned candidate to rebut the evidence, and, after its consideration, it is for the Court to consider whether the election petitioner had proved the corrupt practice as alleged against the returned candidate. The Supreme Court has also stated that the standard of proof required cannot be put in a strait-jacket formula and no mathemetical formula can be led on the degree of proof. The probative value could be gauged from the facts and

circumstances in a given case. Again the case of ***Sushil Kumar v. Rakesh Kumar*** **[(2003) 8 S.C.C. 673]** the Supreme Court has stated that the initial burden to prove the allegation made by the petitioner is on the election petitioner and the onus then shifts on the candidate to prove the facts which are within his special knowledge, but where both the parties adduce evidence, the question of burden of proof becomes academic.

6. Article 191 of the Constitution provides for disqualification for membership. Clause (1) thereof provides that a person shall be disqualified for being chosen as and for being a member of the Legislative Assembly or Legislative Council of a State -

" (a) If he holds any office of profit under the Government of India, or the Government of any State specified in the First Schedule, other than an office declared by the legislature of the State by law not to disqualify its holder;

(b).....

(c).....

(d) .....

(e) .....

Explanation for the purpose of this clause – A person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that

he is a Minister either for the Union or for such State.

(2) ... ”

7. The principle for debarring a holder of office of profit under the Government from being a Member of Legislative Assembly is that such person cannot exercise his functions independently of the executive of which he becomes a part by receiving pecuniary gain. The object of enacting Art.191(1)(a) of the Constitution, as stated by the Supreme Court time and again, is that the 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 a person succumbing to the wishes of the Government. Art.191(1)(a) is intended to eliminate the possibility of a conflict between duty and interest and to maintain the purity of the legislature – (See ***Biharilal Dobray v. Roshan Lal Dobray (A.I.R. 1984 S.C. 385).*** ***I***n the case of ***Shibu Soren v. Dayanand Sahay and Others [(2001) 7 S.C.C. 425]***, on which reliance has been placed by both the parties, the Supreme Court speaking through its three learned Judges stated that Art.191(1)(a) as well as Art.102(1)(a) were incorporated with a view to eliminate or in any event reduce the risk of conflict between duty and interest amongst members of the legislature so as to ensure that the legislator concerned does not come under an obligation of the executive on

account of receiving pecuniary gain or profit from it which may render him amenable to the influence of the executive, while discharging his obligations as a legislator.

8. I will now proceed to examine the case of the petitioner vis-a-vis the case of the respondent in the light of Art.191(1)(a) of the Constitution and various tests laid down by the Supreme Court particularly in the case of Shibu Soren (supra) which was followed by the Constitution Bench of the Supreme Court in the case of ***K. Prabhakaran v. P. Jayarajan [(2005) 1 S.C.C. 754]*** on which reliance has been placed on behalf of the respondent.

9. Was the respondent, as Chairman of the Board holding any office as contemplated by Article 191(1)(a) of the Constitution ? The word "office" has not been defined in the Constitution nor in the Representation of the People Act, 1951, but various pronouncements of the Supreme Court have now given to it a definite meaning. Generally it means a position or place to which certain duties are attached. Rule 11 of the G.D.D. Khadi and Village Industries Board Rules, 1967 (Rules, for short) confers certain powers on the Chairman of the Board and makes him responsible for the proper functioning of the Board and the implementation of its decision and discharge of its duties under the Act and it also provides that the Chairman

shall exercise administrative control over all Departments and officers of the Board. It is therefore obvious that the respondent as Chairman of the Board had certain duties to be performed. Sub-section (5) of S.4 of the Act provides that in the event of any vacancy in the office of a member of the Board by reason of death, resignation or removal, such vacancy shall be filled in by appointment by Government and the member appointed in such vacancy shall hold office for the unexpired term of his predecessor (emphasis supplied). The definition of that word given by Justice Rowlatt in the case of ***Great Western Rly Co. v. Bater*** was accepted by the Supreme Court in the case of **Kanta Kathuria v. Manak Chand Surana [(1969) 3 S.C.C. 268]** and followed in the case of ***M. V. Rajeshekaran and others [(2002) 2 S.C.C70)*** and it was stated that the test to be applied is whether it was subsisting, permanent, substantive which had an existence independent of the person who filled it. Although the respondent contends that he did not hold any office as the Chairman of the said Board, it is also not the case of the respondent that he was appointed to do a particular work or perform specified duties and his Chairmanship would come to an end after that work or those duties were over. In the case of ***Madhukar G.E. Pankakar v. Jaswant Chobbildas Rajani [(1977) 1 S.C.C. 70]*** the Supreme Court stated that holding an office denotes an office and connotes its holder and this duality implies the existence of the office as an independent continuity and an incumbent thereof for the nonce. The

Supreme Court followed the view of the Constitution Bench in the case of Kanta Kathuria v. Manak Chand Surana (supra) that the words “its holder” occurring in Art.191(1)(a) indicate that there must be an office which exists independently of the holder of the office and the fact that the legislature of the State has been authorised by Art.191 to declare an office of profit not to disqualify its holder, contemplates existence of an office apart from its holder. If in yesteryears the respondent was the Chairman of the said Board, today it is someone else who is occupying the said position of the Chairman and this shows that the office of the Chairman of the Board is distinct from its holder and has permanency and continuity. It follows therefrom that the office of the Chairman of the Board is an office which has an independent existence from the person who occupies it and is permanent, substantive as well as subsisting and has certain duties attached to it. Therefore, it is to be concluded, that the office of the Chairman of the Board was an office as contemplated by Art.191(1)(a) of the Constitution.

10. Was the said office of the Chairman of the Board, an office of profit as contemplated under Article 191(1)(a) of the Constitution ? In the case of ***Shiva Murti S. Inamdar v. Veerapa [(1971) 3 S.C.C. 870]*** relied upon on behalf of the respondent, it has been stated that the word 'profit' connotes the idea of pecuniary gain and if there is really a gain, its

quantum or amount would not be material but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carries any profit. In the case of Shibu Soren (supra) the Supreme Court has stated that the expression "office of profit" has not been defined either in the Constitution or in the Representation of the People Act but in common parlance, the expression profit connotes an idea of some pecuniary gain and if there is really some gain, its label - honorarium – remuneration – salary is not material – It is the substance and not the form that matters and even the quantum or amount of pecuniary gain is not relevant – what needs to be found out is whether the amount of money receivable by the person concerned in connection with the office he holds, gives to him some pecuniary gain other than as compensation to defray his out of pocket expenses, which may have the possibility to bring that person under the influence of the executive, which is conferring that benefit on him. The Supreme Court stated that payment of honorarium may not by itself imply payment of any pay, salary, remuneration or emoluments. The Supreme Court further stated that honorarium is a concept different from salary or remuneration and its payment cannot constitute an office of profit unless there is some pecuniary gain for the recipient. The Supreme Court has further stated that the word "profit" for the purpose of Art.191(1)(a) of the Constitution connotes an idea of pecuniary gain though the label under which it is paid nor the

quantum of the amount is material to determine the issue.

Rule 7, sub-rule (1) of the Rules, provides that the Chairman, the Vice-Chairman and other members of the Board would be paid such salary or honorarium and allowances from the funds of the Board as the Government, may from time to time fix. Sub-rule (2) provides that the said Chairman, Vice-Chairman and other members of the Board would also be entitled to draw travelling and daily allowances for journeys performed for attending the meetings of the Board or for the purpose of discharging such duties as may be assigned to them by the Board, in accordance with the Rules and orders issued by the Government from time to time at the highest rate admissible to Government servants of Grade I. Sub-rule (3) provides that the Chairman would be entitled without payment of rent to the use of a furnished residence. The accommodation would be furnished as prescribed by the Government at the total cost not exceeding Rs.500/-. Sub-rule (4) provides that notwithstanding anything contained in sub-rules (1) and (2), the Chairman, Vice-Chairman or any other member of the Board, who is also a member of Parliament or of the Legislature of a State or Union Territory, shall not be entitled to any remuneration other than compensatory allowances as defined in clause (a) of Section 2 of the Parliament of Prevention of Disqualification Act, 1959 or as the case may be other than the allowances, if any, which a member of the legislature of the State or Union Territory may under any law for the time being in force

in the State or Union Territory relating to the Prevention of Disqualification for membership of the State Legislature or Union Territory legislature, receive them incurring such disqualification.

Admittedly, no salary or honorarium was fixed by the Government in terms of sub-rule (1) of rule 7 of the Rules nor any accommodation was provided to the Chairman, the respondent herein, in terms of sub-rule (3) of Rule 7 of the Rules.

However, the petitioner has proved with his own evidence and that of his witnesses that the respondent while he was the Chairman of the Board, enjoyed the following privileges or perquisites or benefits :-

(a) The respondent enjoyed the privilege of a chauffeur driven car with unrestricted use of petrol although the respondent attended office of the Board twice or thrice a week and considering the distance which the respondent had to cover not more than 60 litres of petrol would be required, by him in a month. The petitioner has proved that the respondent consumed 386.88 ltrs. of petrol for the period from 9.2.02 to 28.2.02 at the cost of Rs.10,600/- and 482.45 ltrs. of petrol for the period from 1.3.02 to 31.3.02 at the cost of Rs.12,900/-. The chauffeur /driver was paid about Rs.5038/- per month. No log book was maintained for the said car nor the the officials of the Board insisted for the production of the log book and as stated by one of the witnesses examined by the petitioner, this was because the respondent was the " Chairman of the Board ".

(b) The respondent was sanctioned by the Government by letter No.4/6/90-IND dated 15.2.2000 what was known as staff of the Chairman namely a P.A., a clerk, the said driver and a Peon who were paid a total sum of Rs.20,879/- each for the months of May, 2002 and June, 2002. The evidence shows that although the said Driver was seen in the office of the Board, the said other three members of the staff were not seen at the office of the Board and the salary due to them were drawn by self drawn cheques and the money was handed over either to the respondent or to his P.A. in the office – not the P.A. of the staff of the Chairman.

(c) The respondent was provided with a residential telephone bearing No.270300 with no restriction in the number of calls to be made by the respondent. A sum of Rs.1885/- was paid by the Board for the use of the said telephone for the period from 1.2.02 to 31.3.02 and another sum of Rs.1522/- for the period from 1.4.02 to 31.5.02.

(d) A mobile set purchased by the Board which presumably has not been returned back to the Board by the respondent having No.9822125776. There was no restriction as to the number of calls. Sum of Rs.1892.02 was paid for the month ending 5.4.02 and another sum of Rs.1165.20 for the month ending 5.5.02.

(e) Supply of three newspapers at the respondent's residence though newspapers were also subscribed by the Board in its office. The petitioner has proved that the respondent was paid Rs.255/- for the said newspapers

for the month of February, 2002.

(f) The respondent claimed and was paid a sum of Rs.10,076/- towards the salary of the driver inspite of the fact that the Board's car was surrendered b y the respondent for the said period from 17.4.02 to 10.6.02.

(g) After the Code of Conduct for elections came in force from 17.4.02 and the respondent surrendered the official car of the Board, the respondent claimed a sum of Rs.31,500/- by way of hire charges of a private vehicle for the period from 17.4.02 to 10.6.02 but was paid a sum of Rs.28,500/- by cheque dated 10.7.02. This payment was made not by way of hire charges but by way of petrol charges although the respondent did not have the official car.

(h) The respondent claimed and was paid Rs.13,164/- for his official visit to Mumbai which included additional payment made to the driver.

(i) The respondent was paid with the approval of the Government a sum of Rs.15,471/- as air fare to New Delhi and back at a time when the respondent accompanied by some other Ministers went on a tour to Australia which tour was otherwise not connected with the work of the Board.

(j) A sum of Rs.46,800/- was claimed and paid to the respondent towards the expenditure incurred by him for the said tour to Australia as against his claim of Rs.1,10,000/- which was claimed was spent by him.

11. On behalf of the respondent, it is contended that the payment made to the respondent for a trip to Delhi and back, on his way to Australia, was not pleaded by the petitioner and, therefore, the same could not be met by the respondent in the written statement and being so, no evidence could be allowed to be led on the same. Reliance has been placed on the case of **Ravinder Singh vs. Janmeja Singh & Ors.,** [**(2000) 8 SCC 191**] in which the Supreme Court has stated that no evidence can be led on a plea not raised in the pleadings and no amount of evidence can cure the defect in the pleadings. In my view, even in case this contention is accepted, the same cannot take the respondent anywhere. It is to be noted that the petition is based on the ground that the respondent was holding an office of profit under the Government and to prove the said plea the respondent has proved a number of instances on the basis of which the said plea can be proved. The fare paid to and fro from Delhi is only one instance which has been impliedly admitted by the respondent, since there is no evidence produced to the contrary.

12. As already seen, as per Rule 7 of the Rules, what was payable to the respondent as Chairman was salary or honorarium and allowances to be fixed by the Government time-to-time which, admittedly, were not fixed or paid. Likewise, the respondent as Chairman was entitled to draw travelling and daily allowance for journeys performed for attending the meetings of

the Board and it appears that in lieu of that, the respondent was provided with a chauffeur-driven car belonging to the Board with no restriction on the use of petrol. The respondent was also entitled to rent-free and furnished residence, which was also not provided to the respondent as Chairman. The contention of the respondent is that since the salary or honorarium and the rent-free furnished accommodation in terms of Sub-(1) of Sub-rule (3) of Rule 7 of the Rules, was not provided to the respondent as Chairman, it could not be said that the respondent was entitled to any salary. In this context, reliance has been placed on behalf of the respondent on the case of ***Divya Prakash vs. Kultar Chand Rana & Anr.,*** [(1975) 1 SCC 264], wherein the Supreme Court stated that the fact that the post itself carried a scale of pay is inconsequential for the holding of the `office as it has not resulted in any profit to the holder however small. The Supreme Court made the said observation in the light of the fact that the appointment of Chairman in that case was one made in an honorary capacity, unlike in the case at hand. There is nothing to indicate in this case that the appointment of the respondent as Chairman was in an honorary capacity. In my view, in order to determine whether an office held is an office of profit or not, what is receivable or payable under the Rules as well as what was actually paid or received has got to be considered. After all the question whether a person holds an office of profit is required to be interpreted in realistic manner or with flavour of reality and if necessary, by

showing irreverence to vintage precedents. It should be interpreted in the light of actual realities as against theoretical possibilities. I am supported in this view by several decisions of the Supreme Court in this regard. In the case of ***Shivamurthy Swami Inamdar & Veerabhadrappa Veerappa vs. Agadi Sanganna Andanappa & Chanbasangouda Hanumanthagouda Patil & Anr.*** [**(1971) 3 SCC 870]** the Supreme Court has stated that the amount of money receivable by a person in connection with the office he holds is material in deciding whether the office really carries any profit. Again, in the case of ***Ashok Kumer Bantrabury vs. Ajoy Viswas***, [**(1985)**1 **SCC 151**], the Supreme Court has stated that 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 and that in common parlance the expression "profit" connotes an idea of some pecuniary gain and if there is really some gain, its label such as honorarium, remuneration, or salary, is not material and it is the substance and not the form which matters, and even the quantum of amount of pecuniary gain is not relevant and what needs to be found out is whether the amount of money receivable by the person concerned in connection with the office he holds, gives to him some pecuniary gain other than compensation to defray his out of pocket expenses which has the possibility to bring that person under the opinion of the executive which is conferring that benefit on him. In the case of ***Rabindra Kumar Nayak vs.***

Collector, Mayurbanj, Orissa & Ors., [**(1999) 2 SCC 627**], the Supreme Court has yet again stated that it is immaterial whether a person in fact received any fee or not for the purpose of finding out whether there was income or profit accrued from the office and yet again the Supreme Court in the case of ***Shibu Soren*** (supra) has again stated that what needs to be found out is whether the amount of money so receivable by the person concerned in connection with the office he holds and whether such amount gave him some pecuniary gain other than as compensation, to defray his out of pocket expenses (emphasis supplied). A reading of Rule 7(1) and (3) of the Rules makes it quite clear that the office of the Chairman of the Board was an office of profit. That apart, the petitioner has proved what were the perquisites/privileges/benefits enjoyed by the Respondent as Chairman of the Board, some of which were conferred on the respondent as Chairman, i.e. the personal staff by virtue of specific sanction in that regard issued by the Government and the others which the respondent as Chairman claimed and was paid by virtue of the Chairman having been conferred the status of a Minister of State vide Notification No.19-5-95-GAD dated 26th September, 2000, published on Gazette dated 28th September, 2000, copy of which was produced on behalf of the respondent. The aforesaid perquisites cannot be considered, by any stretch of imagination, as recouping of expenses incurred for discharging the duties of Chairman. They were profits or pecuniary gains of the office held by the Respondent, plain and simple.

They could be termed as loaves and fishes of the office of Chairmanship held by the Respondent. They were in the nature of remuneration. The next contention raised on behalf of the respondent is that the respondent was not entitled to be allotted any personal staff or mobile phone or residential phone or the newspapers at his residence and since he was not entitled for the said perquisites or facilities, it could not be said that the respondent was holding an office of profit as the same were not attached to the office of profit in terms of the Act and the Rules. In my view, the said contention cannot be accepted. I have already said that in lieu of traveling allowance as contemplated by Sub-rule (2) of Rule 7 of the Rules, the respondent as Chairman, was provided with a chauffeur-driven car with unlimited use of petrol and the other perquisites or facilities which have been referred to hereinabove. One does not know, as to when the Respondent came to know that he was not entitled to the said perquisites. It is not the case of the respondent that in case he was not entitled to the said perquisites that he has made it good to the Board after he realized that he was not entitled to the same. The said benefits or perquisites or facilities were conferred upon the respondent as Chairman of the Board by specific orders from the Government and the respondent after having enjoyed the same, cannot turn around and say today, in order to avoid his disqualification, that he was not entitled to the said facilities/perquisites. In my view, the respondent cannot be allowed to approbate and reprobate. In

this context, I may refer to the case of ***R. N. Gosain vs. Yashpal Dhir***, (**AIR 1993 SC 352)**, wherein the Supreme Court has stated that the law does not permit a person to both approbate and reprobate, i.e. "a person cannot say at one time that the transaction is valid and thereby obtain some advantage, to which he could only be entitled to on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage.". The facilities/perquisites receivable under the Rules as well as the perquisites or benefits received by the Respondent and proved by the petitioner, show that the respondent was holding an office of profit. It has been submitted on behalf of the Petitioner and in my view rightly, that the fact that the Respondent did not use the car after the Code of Conduct for elections was enforced shows that he himself perceived that he was holding an office of profit. However, it appears to me that the Respondent felt that the public should not see him using the car but what others could not see, he was free to make us of or claim from the Board ! In fact, the manner the Government went on providing the said benefits or facilities or perquisites to the respondent, shows that the respondent was a pampered officer of the Board by the Government. It is the next contention of the respondent that the said facilities like newspapers, mobile phones, telephone, were granted to the respondent as Chairman, to recoup the expenses incurred and to effectively discharge the functions and duties of his office and, therefore, at the highest, they were in the nature of

compensatory allowances, but not remuneration or any profit. I have already stated that this contention cannot be accepted. By no stretch of imagination can it be said that the said facilities were by way of compensatory allowance as understood in law. However, it can be said that the said facilities were compensatory in nature as understood by people at large in order to keep the respondent pacified to support the Government in power. It is a matter of common knowledge that the electorates return fractured verdicts and not a single party gets a clear mandate to form the Government and it becomes necessary in order to gobble up a Government to find suitable permutations and combinations and in this process even a party with one elected member becomes a claimant for power and such claimant/s have to be offered posts of ministers and the rest have to be kept satisfied with office of different Corporations or rather are kept pacified to support the Government in power. This was bound to come in the way of discharge of functions as an M.L.A.

Here is a case where the respondent as Chairman might have required not more than 60 litres of petrol to travel from his residence to the office of the Board, in a month, but was provided with a chauffeur-driven car with unlimited use of petrol. The respondent as Chairman, was also given one P.A. in addition to the P.A. he had in the office of the Board, a clerk, a driver and a peon, who did no work of the Board and who were also not seen in the Board and who presumably did the work of the

respondent alone and were being paid a sum of Rs.20,879/- per month and they were designated as the personal staff of the Chairman and came with him and were required to go along with him. Likewise, the unlimited use of mobile, the telephone, the supply of newspapers, etc. all show that they were profits or pecuniary gains provided to the respondent as Chairman of the Board and, therefore, it is obvious that the respondent as Chairman held an office of profit as contemplated by Article 191 (1) (a) of the Constitution of India.

13. **Did the respondent as Chairman hold that office of profit under the Government of the State of Goa ?** Admittedly, the respondent was appointed as Member/Chairman by Notification dated 8th December, 1999 and then the Board was reconstituted with nine official as well as non-official members with the respondent as Chairman, by another Notification dated 1st March, 2000. This was apparently done in terms of Section 4 of the Act. The Constitution Bench of the Supreme Court in the case of ***Guru Gobinda Basu vs. Sankari Prasad Bhosal & Ors.***, (AIR 1964 S.C. 254), has stated that for holding an office of profit under the Government, one need not be in the service of the Government and there need not be relationship of master and servant between them. The Supreme Court has stated that the decisive test for determining whether a person holds any office of profit under the Government is the test of

appointment. The Supreme Court has further stated that it is not correct to say that several factors which enter into the determination of this question, the appointing authority, the authority vested with the power to terminate the appointment, the authority which determines the remuneration, the source from which the remuneration is paid and the authority vested with the power to control the manner in which the duties of the office are discharged and to give directions in that behalf – must all co-exist and each must show subordination to the Government and that if one of the elements is absent, the test of a person holding an office under the Government, Central or State is not satisfied. The Supreme Court stated that the circumstance that the source from which the remuneration is paid is not from public revenue, is a neutral factor – not decisive of the question and whether stress will be laid on one factor or the other will depend on the facts of each case. However, where the several elements, the power to appoint, the power to dismiss, the power to control and give directions as to the manner in which the duties of the office are to be performed, and the power to determine the question of remuneration, are all present in a given case, then it must be held that the officer in question holds the office under the authorities so empowered. In the case of ***Biharilal Dobray vs. Roshan Lal Dobray*** **(AIR 1984 S.C. 385)**, the Supreme Court again stated that for holding an office of profit under the Government, a person need not be in the

service of the Government and there need not be any relationship of master and servant between them. An office of profit involves two elements, namely that there should be an office and that it should carry some remuneration, and, the true test of determination of the question is whether a statutory corporation is independent of the Government depends upon the degree of control the Government has 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 the Government (emphasis supplied).

14. Although the respondent does not dispute that the respondent was appointed as Chairman of the Board by the Government, it is the contention of the respondent that the Government had no exclusive power to appoint the Chairman and the appointment of the Chairman required consultation of the Khadi and Village Industries Commission under Section 4(2) of the Act. It is the Respondent's contention that there was no valid appointment in the eyes of law and at the most his appointment may amount to usurpation of office. In my view, this submission cannot be accepted. The Respondent has not taken a plea in his written statement to support the said submission. No doubt, as per Sub-section(2) of Section 4

of the Act, one of the members of the Board is to be appointed as Chairman of the Board in consultation with the Khadi and Village Industries Commission, but the fact remains that such a practice was never followed by the Government in making the appointment of the Chairman or in constituting the Board. In my view, the respondent having acted as Chairman from 8th December, 1999 till about 8th/15th July. 2002 and having enjoyed all the powers and privileges of the office cannot now be heard to say that his appointment was not in accordance with the Act, with a view to avoid his disqualification. Here again, the respondent cannot be allowed to approbate and reprobate at the same time. If the appointment of the respondent as Chairman was made by the Government in terms of Section 4 of the Act, the power to remove such Chairman is given to the Government by virtue of Rule 5 of the Rules. The power of dissolution of the Board is given by Section 37 of the Act and it, inter alia, provides that the Government may dissolve the Board whenever it is expedient or necessary to dissolve the same. The power to reconstitute the Board is given by Sub-section (2) of Section 36 of the Act and Sub-section(4) of Section 36 further provides that any Notification issued or order made by the Government as regards dissolution of the Board, or its reconstitution, etc. under the said Section, shall not be questioned in any Civil Court. A similar submission was made in the case of ***M. Ramappa (A.I.R. 1958 S.C. 937)***. In this case the Supreme Court was dealing with hereditary right to

office under the Mysore Village Offices Act, 1908. The Supreme Court stated that even if the eldest heir in the eldest branch was entitled to succeed, he would not get office till he was appointed by the Government. The Court further held that the appointment being made by the Government, the office to which it is made must be held under it, for there is no one else under whom it can be held. It is the appointment which perfected the right of office. It is therefore obvious that the power of appointment, the power of removal and/or the power of dissolution of the Board are all vested in the Government and that those powers have always been exercised by the Government whenever it is expedient or necessary to do so. It is therefore obvious that the authority of appointment and removal/dissolution of the Board is with the Government.

As far as the functions to be performed by the Board, it may be stated that Section 15 of the Act specifies about the same, namely, to encourage, organise, develop and regulate Khadi and Village Industries and perform such functions as the Government may prescribe, from time to time. It is also evident from Exh.25 - the explanatory memorandum on the planned schemes included in the budget of the Government of Goa laid before the Legislative Assembly in June, 2002, that the Board is the statutory body constituted under the Act and its main aim is to promote Khadi and Village Industries in rural areas and to give publicity and promotion of sales. As per Part !V – Directive Principles of State Policy – of

the Constitution of India, the State is required to endeavour to promote cottage industries on an individual or cooperative basis in rural areas. It has been stated by the respondent's own witness, namely R.W.2, J. B. Singh, that the function of the Board is to promote Khadi and Village Industries for social and economic upliftment of the village and the said function of the Government is carried on through the Board. It is therefore obvious that the Board has been carrying out a governmental function.

15. As regards the funds of the Board, they were entirely provided for by the Government. As can be seen from the said Memorandum, Exh. 42, it is the State Government which has been funding the salary of the staff of the Board, maintenance and other recurring expenditure with a view to look after the development schemes of the Board. Exh.26 shows that the Government provided Rs.7,88,24 crores by way of guarantee for availing loan facilities from Khadi and Village Industries Commission, Mumbai. Exh.36 - the Minutes of the Board meeting held on 11th March, 2002, show that the Government of Goa had provided Rs.2 crores to the Board for the implementation of the schemes. P.W.3, Pradeep Pednekar, has stated that the salaries of the staff were paid from the maintenance grant given by the Government and that the entire maintenance of the Board was done from the maintenance grant given by the Government. P.W.4, Menino Dias, has stated that the Board did not have any income of

its own and the funds for the maintenance of the Board are given by the Government by way of maintenance grants and the schemes operated by the Board are financed by the Khadi and Village Industries Commission, which is an institution of the Central Government. The respondent's witness R.W.3, Rameshwar Mandrekar has stated that the Board had a fund and money for the said fund came from the Government. R.W.4, Meher Wardhan, also stated that budget was prepared and sent for the approval of the Government and based on the same, the Government gave funds to the Board. It is therefore obvious that the payments which were made to the respondent as Chairman were made by the Board from the funds provided by the Government. The one who pays the Bagpiper, is bound to call the tune.

16. As far as the control of the Board by the Government is concerned, it appears that it has been rather all pervasive in nature, inspite of the fact that the Board is a statutory authority under the Act and though it had independent status as a statutory body, in practice, it appears to have been the extension of a Government department or its alter ego. This is not a case of even of attempting to pierce the veil and trying to find out the true nature of something after uncovering it but a case where the subordination of the Board and its Chairman is writ large on the face of the Act. In fact, R.W. 4, Meher Wardhan, who was examined by the

respondent, has stated that he was appointed because the Government had a control over the Board, section 8(3) of the Act provides that the Government may depute one or more officers of the Government to attend the meeting of the Board and take part in the discussion of the Board. Rule 8 of the Rules provides for appointment of the Chief Executive Officer and in fact, the evidence shows that all the Chief Executive Officers of the Board were government servants appointed by the Government on deputation and not only that, such Chief Executive Officers also acted as far as financial aspects were concerned, as head of department and they were also incharge of the administration of the Board, subject to overall administrative control of the Board entrusted to the Chairman in terms of Sub-rule (3) of Rule 11 of the Rules. This has also been stated by P.W.4, Menino Dias. It is not only the Chief Executive Officer who was sent on deputation by the Government, but also the Accounts-cum-Administrative Officer, as stated by P.W.3, Pednekar, and P.W. 4, Menino Dias. P.W.3, Pednekar, has stated that the Department of Industries and Mines controls and coordinates the activities of the Board. The said Chief Executive Officer was appointed by the Government in terms of Section 12(1) (c) of the Act. Clause (b) of Sub-section (1) of Section 12 of the Act requires the Board to take prior approval of the Government to fix the functions, duties and powers of the Chief Executive Officer. Sub-section (1) of Section 19 provides

that every year the Board will prepare and forward to the Government a programme of the work, which programme is to be sanctioned under Section 20 of the Act by the Government in consultation with the said Commission with such modification as the Government may deem fit. Section 21 also makes a provision for supplementary programmes which require Government sanction. Section 22 requires the Board to send a report to the Government in case there is an alteration in the scheme. Section 23 enables the Government to transfer to the Board, buildings, lands or any other property for use and management by the Board on such conditions and limitations as the Government may deem fit for the purpose of the Act. Section 24 requires the Board to have two separate funds and enjoins that the Board will take previous approval of the Government to transfer the excess amount from one fund to the other. Sub-section (2) of Section 26 of the Act requires the Board to take previous sanction of the Government to borrow any sum required for the purposes of the Act. Sub-section (1) of Section 26 of the Act provides for making subventions and grants to the Board for the purpose of the Act on such terms and conditions as the Government may determine in each case. Section 27 of the Act requires the Board to submit two separate budgets for the approval of the Government and in case there is a supplementary budget, section 28 of the Act requires that the Government sanction be obtained for the same. Section 29 of the Act

requires the Board to prepare and forward to the Government the annual report within three months from the end of the financial year giving a complete account of its activities during the previous financial year, alongwith a copy of the annual statement of accounts referred to in Section 31, and, Sub-section (3) thereof requires the Government to lay such report before the Legislative Assembly as soon as it is received by the Government. Section 30 of the Act requires the Board to furnish to the Government and to the said Commission such returns and statements and such particulars in regard to any proposed or existing programme for the promotion and development of the Khadi and Village Industries as the Government or the said Commission may, from time-to-time require. Sub-section (2) of Section 30 of the Act further requires the Board, at the end of each financial year, to submit to Government a report giving a true and full account of its activities, policy and programme during the previous financial year. Section 31 of the Act requires the Board to maintain proper accounts and other relevant records to be audited by such persons as the Government may appoint in that behalf. Sub-section (6) of Section 31 of the Act provides that the Board shall comply with such directions as the Government or the State Commission may, after perusal of the report of the auditor, think fit to issue. As already stated hereinabove, Sub-section (4) of Section 36 of the Act also ensures that no notification issued as regards dissolution or re-constitution of the Board

shall be questioned in any civil court and Sub-section(5) thereof further provides that on the Board being dissolved, all funds and other properties vested in the Board shall vest in the Government and all liabilities, legally subsisting shall be enforceable against the Government to the extent of the funds and properties vested in the Government under Clause (i) of Sub-section (5) of Section 36 of the Act. The aforesaid provisions of the Act do show that the Government exercised almost complete control regarding the functioning of the Board though it is a statutory Body. In my view all the tests laid down to find out whether the office of Chairman is under the State Government have been fulfilled in this case and, therefore, it must be concluded that the office of the Chairman of the Board is an office of profit under the State Government, as contemplated by Article 191 (1)(a) of the Constitution.

17. **Has the office of the Chairman of the Board been declared by the Legislature of the State by law, not to disqualify its holder?** Article 239A of the Constitution provided for creation of local legislatures or council of ministers or both for certain Union Territories and pursuant thereto the Parliament enacted the Government of Union Territories Act, 1963 (Act of 1963, for short), which in terms of Section 3 thereof provided for a Legislative Assembly for the Union Territory of Goa, Daman and Diu. Sub-section (1) of Section 14 of the Act of 1963 provided

that a person shall be disqualified for being chosen as, and for being a Member of the Legislative Assembly of the Union Territory, inter alia, if he holds any office of profit under the Government of India, or the Government of any State, or the Government of the Union Territory, other than the office declared by law made by Parliament, or by the Legislative Assembly of the Union Territory, not to disqualify its holder. Presumably, the then Legislative Assembly of the Union Territory of Goa, Daman and Diu passed what is known as the Goa, Daman and Diu Members of the Legislative Assembly (Removal of Disqualification) Act, 1982, (Act of 1982, for short) to provide for removal of certain disqualifications for being chosen as and for being a member of the Legislative Assembly of Goa, Daman and Diu . In terms of Section 2 of the said Act of 1982, it was provided that a person shall not be disqualified for being chosen as, or for being a member of the Legislative Assembly of Goa, Daman and Diu, merely by reason of the fact that he held any of the offices specified in the schedule appended to the Act. We would be concerned with item no.9 of the said Schedule which read alongwith Sub-section (2) of the 1982 Act would read as follows:-

> "A person shall not be disqualified for being chosen as, or for being , a Member of the Legislative Assembly of Goa, Daman and Diu by reason of the fact that he holds the office of the Chairman, Director or member

of a statutory or non-statutory body or committee of Corporation constituted by the Government of Goa, Daman and Diu:

Provided that the Chairman, Director or Member of any of the aforesaid Committees or bodies or Corporations is not entitled to any remuneration other than compensatory allowance.

Explanation: For the purpose of the aforesaid entries -

(i) "compensatory allowance" means any sum of money payable to the holder of an office by way of daily allowance, such allowance not exceeding the amount of daily allowance to which a member of the Legislative Assembly is entitled under the Goa, Daman and Diu Salary, Allowance and Pension of the Members of the Legislative Assembly Act, 1964 (2 of 1965), any conveyance allowance, house rent allowance, or travelling allowance for the purpose of enabling him to recoup any expenditure incurred by him in performing the functions of that office;

(ii) "statutory body" means any corporation, committee, commission, council, board or other body of persons, whether incorporated or not, established by or under any law for the time being in force;

(iii)"non-statutory body" means any body of persons other than a statutory body."

18. There are two aspects which are to be considered here. One is

required to be considered i.e. on the assumption that the Act of 1982 is in force. The other is whether the Act of 1982 is the Law passed by the State Legislature as contemplated by Art. 191(1)(a) of the Constitution.

19. Regarding the first aspect, admittedly, the office of the Chairman of the Board was not covered under item no.9 of the Schedule to the 1982 Act, because in the case at hand, the respondent as Chairman was allowed to enjoy pecuniary benefits, perquisites, etc. which were profits or monetary gains or remuneration other than compensatory allowances, and, the Legislature of the State visualized this situation, and in my view rightly, and passed Bill No.7/05 while this petition was pending before this Court, in its session held from 10.1.05 to 14.1.05 known as the Goa Members of Legislative Assembly (Removal of Disqualification) (Amendment) Bill 2005, which Bill is yet to receive the assent of the Governor. The said Bill was passed to amend the Act of 1982 so as to amend the Schedule and to include vide item no.11 the office of the Chairman of the Board. Since the Act of 1982 vide Item No.9 of the Schedule excludes only Chairmen who are not entitled to any remuneration other than compensatory allowances which term has also been defined by the Respondent who was entitled to remuneration by way of perquisites would not be excluded from the purview of the Act of 1982.

The other aspect is whether the Act of 1982 is a law passed by the State Legislature within the meaning of Article 191(1)(a) of the Constitution is not really required to be decided because of my conclusion on the first aspect but since both the counsel have placed much emphasis on the same, I proceed to decide this aspect as well.

20. It is the contention of the petitioner that the only immunity which the respondent could claim, if any, would be in case the office of the Chairman of the Board was taken out of the pale of disqualification, by a law made by the State legislature to that effect and since there is no such law enacted by the Legislative Assembly of the State of Goa, after Goa became a State, no exemption is available to the respondent. It is the contention of the petitioner that the Act of 1982 cannot be said to be in force and valid to confer such exemption because the Act of 1982 was passed by the Legislative Assembly of the Union Territory of Goa, Daman and Diu and after Goa became a State, the Legislative Assembly of the State of Goa has not enacted such law, nor has adopted the same after Goa became a State. On the other hand, it is the contention of the respondent that as per Section 66 of the Goa, Daman and Diu Reorganization Act, 1987 (Act of 1987, for short), the Act of 1982 continues to be in force. According to the respondent, Section 12 of the Act of 1987 has made a provision for a Legislative Assembly and Section 13 of the same Act has

provided for the existing Legislative Assembly of the Union Territory to be the Legislative Assembly of the State until a new Legislative Assembly was constituted and summoned to meet for its first session. According to the respondent and it is otherwise common knowledge, the State of Goa came into being on 30th May, 1987, pursuant to the Act of 1987. As per respondent, a Member of the Legislative Assembly of the Union Territory by a fiction of law became Member of the State Assembly. It is the contention made on behalf of the respondent that whenever a new State is formed or there is reorganization of the States, a legislative provision is always made to create a fiction in order to avoid chaotic situation and absurd realities. It is submitted that Section 66 of the Act of 1987 corresponds to Section 119 of the States Reorganization Act, 1956, and the object underlying Section 119 of the States Reorganization Act, 1956 was to effect quick transition without wasting time in an attempt to secure uniformity or laws which would have inevitably delayed the process of reorganization. Section 119 was to provide for the interregnum between the reorganization of the State and the time by which the Legislature of such States suitably amended, altered or modified such laws to make them uniform, and, for the purpose of facilitating the application of the law made by the earlier legislature in relation to the new State, a power was given to the Appropriate Government to make such adaptations and modifications of the laws whether by way of repeal or amendment, as may be necessary or

expedient and thereupon every such law would have effect subject to the adaptation or modification so made until altered, repealed or amended by a competent legislature which is provided by Section 67 of the Act of 1987. It is the respondent's contention that in the light of Section 13 of the Act of 1987, the members of the Union Territory of Goa, Daman and Diu Legislative Assembly, by fiction became the members of the Legislative Assembly of the State of Goa. As per the respondent, the law passed by the members of the Legislative Assembly of the Union Territory of Goa, Daman and Diu by fiction created by Section 13 read with Section 66 of the said Act, became the law of the State Legislature. It is contended that the State of Goa came into being on 30th May, 1987 and in case from 31st May, 1987 an M.L.A. of the Union Territory became an M.L.A. of the State of Goa and in case such an M.L.A. held an office like the case at hand, he would stand disqualified under Article 191, being a member of the State Legislature, in case the interpretation sought to be advanced by the petitioner is to be accepted and this would create a chaotic situation and would lend to absurd results. Reference is made to Article 367 of the Constitution and it is submitted that the General Clauses Act, 1897 is made applicable and the expression “State” appearing in Article 191 (1)(a) of the Constitution could be construed as Union Territory in view of Section 2(58)(b) of the said General Clauses Act. Reliance has been placed on the case of ***Shriram Haribhau Mankar*** v/s. Madhusudan Vairale ***(A.I.R. 1968 Bombay 219***).

21. In my view, the contentions made on behalf of the respondent are to be accepted only to be rejected.

22. Admittedly, and by virtue of the Act of 1987, the Union Territory of Goa, Daman and Diu with effect from 30th May, 1987, was reorganized into the State of Goa and the Union Territory of Daman and Diu. Section 13 of the Act of 1987 made the provisional Legislative Assembly to be the Legislative Assembly of the new State until the Legislative Assembly of the new State was duly constituted and summoned to meet for the first session and as long as the provisional Legislative Assembly was in existence, it was deemed to be the Legislative Assembly of the State of Goa duly constituted under the Constitution and was held to be competent to discharge all the functions of the Legislative Assembly of the State under the Constitution and the members thereof were deemed to be the members of the Legislative Assembly of the State of Goa duly elected under the Constitution.

23. Section 66 of the Act of 1987 deals with the territorial extent of laws, Section 67 deals with power to adapt laws and Section 68 deals with the power to construe laws. Sections 66 and 67 which are important read as follows:-

"**<u>Section 66:</u> Territorial extent of laws -**

The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and the territorial references in any such law to the existing Union territory shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within the existing Union territory before the appointed day.

<u>Section 67 :</u> Power to adapt laws . -

For the purpose of facilitating the application in relation to the State of Goa or the Union territory of Daman and Diu of any law made before the appointed day, the appropriate Government may, within two years from that day, by order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon every such law shall have effect subject to the adaptations and modifications so made until altered, repealed or amended by a competent Legislature or other competent authority."

24. The case of ***Shriram Haribhau Mankar*** (supra) in my opinion, is of no assistance to the case of the respondent. In that case what this Court was concerned was to find out whether the person holding the

office of Deputy Minister of the State incurred any disqualification by reason thereof, from being nominated or becoming a member of the Assembly under Article 191(1)(a) of the Constitution and this Court held that a Deputy Minister must be treated and included in a class of Ministers even though a Deputy Minister was not included in the word "Minister" in Article 191 (2) of the Constitution and this Court further held that a Deputy Minister must be treated and included in a class of Minister even though a Deputy Minister was not included in the word "Minister" in Article 191(2) of the Constitution, because the said office of Deputy Minister was fully protected from challenge by virtue of Section 13 of the Maharashtra Adaptation of Laws Order, 1960, which had provided that a person would not be disqualified for being chosen as or for being a member of the Legislative Maharashtra Assembly or Maharashtra Legislative Council, merely because of the reason of the fact that he holds the office of Deputy Minister.

25. Admittedly, the Act of 1982 was passed by the then Legislative Assembly of Goa, Daman and Diu under Section 14 of the Government of Union Territories Act, 1963, and not under Article 191(1)(a) of the Constitution for the protection of its members, namely the members of the Legislative Assembly of the Union Territory. It was certainly not the law passed by the provisional Legislative Assembly as declared by Section 13 of

the Act of 1987. Admittedly, also there was no adaptation order made by the Government pursuant to the legislative powers given under Section 67 of the Act of 1987. In my humble opinion, the Act of 1982 being a law passed by the Legislative Assembly of the then Union Territory of G.D.D. for the protection of its own members, under section 14 of the Act of 1963 even in case it had a territorial extension by virtue of Section 66 of the Act of 1987, would be insufficient to provide protection from disqualification to the members of the Legislative Assembly of the State of Goa, since it was not the law made by the Legislative Assembly of the State in terms of Article 191 (1)(a) of the Constitution. I am supported in my view by the decision of the Division Bench in the case of ***Shankaragouda vs. Sirur Veerbhadrappa,*** (**AIR 1963 Mys. 81)** on which reliance has been placed on behalf of the petitioner.

26. One of the questions which arose in the case of ***Shankaragouda*** (supra) was whether a law which was continued under Section 119 of the States Reorganization Act and adapted under Section 120 of that Act was the law which could be regarded as one made by the legislature of the State of Mysore for the purpose of Article 191 of the Constitution. Here it may be noted that there were adaptation orders made by the appropriate Governments, both in the case of ***Shriram Mankar*** (supra) and ***Shankaragouda*** (supra) and, while in the case at hand the Government of

the day in this State chose not to issue such order during the transitional period of two years inspite of such an adaptation Order the Division Bench observed that:-

> "The holding of an office of profit under the Government of India or the Government of a State is a disqualification under the provisions of Article 191 of the Constitution for membership of a Legislative Assembly or a Legislative Council. The machinery for the removal of such disqualification is, what is provided by that very Article. It is only when such office of profit is declared by the law of the legislature of the State not to disqualify its holder, that the disqualification ceases to exist.
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> .....
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> The words `legislature of a State' occurring in clause (a) clearly have reference to the Legislative Assembly and the Legislative Council to which Article 191 refers. That being so, the law by which an office of profit could be declared as not to disqualify its holder for the membership of the Mysore Legislative Assembly could have been enacted only by the Legislature of the new State of Mysore. It was for the legislature to make a law as respects that matter, after the reorganization, the consequences of the omission by that legislature to make such a law, would have been that all offices of profit held under the Government of India or under

> the Government of any State, disqualified their holders from being chosen as member of the Legislative Assembly or Legislative Council of the State. "....
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> " A law made by the Hyderabad Legislative Assembly for a purpose concerning itself, even after its adaptation, (here I have my respectful disagreement with the said observation), cannot claim to be a law made by the Legislature of the new State of Mysore for the purpose of Article 191 of the Constitution. Any equiperation of the Hyderabad Act with a law to be made by the Legislature of the new State of Mysore seems plainly impossible. The position would not be different even if the adaptation was within the competence of the Government of Mysore."

The Division Bench therefore concluded stating that the provisions of Section 120 of the Act (power to adapt laws) read with paragraph 6(1) of the Mysore Adaptation of Laws Order did not convert the Hyderabad Act into a law made by the Legislature of the new State of Mysore. As already stated, in the case at hand, the Act of 1982 was neither a law enacted by the provisional Legislative Assembly as declared by Section 13 of the Act of 1987, nor did the Government of the day choose to adapt the same in terms of legislative powers given by Section 67 of the Act. It is to be noted that the power of adaptation is given in order to meet the situation as described

on behalf of the respondent, namely that if on 31st May, 1987, an existing M.L.A. would otherwise stand disqualified after the State of Goa came into being on 30th May, 1987 an adaptation Order could be issued and the situation of disqualification saved. In this context reference could be made to the case of ***Commissioner of Commercial Taxes, Ranchi & Anr. vs. Swarn Rekha Cokes and Colas (P) Ltd.& Ors.***, [(2004) 6 SCC 689], wherein the Supreme Court, with reference to Sections 84 and 85 of the Bihar Reorganization Act, 2000, which are akin to Sections 66 and 67 of the Act of 1987, observed that such provisions are enacted to maintain continuity and, at the same time, authorize the States to make such modifications and adaptations as are considered necessary by some issuance of orders within two years, and thereafter, by legislation or exercise of power by the competent authority. The Government of the day having neither adapted the Act of 1982 under Section 67 of the Act of 1987, nor the Legislative Assembly of the State of Goa having passed a law under Article 191 (1)(a) of the Constitution, the respondent has no one to blame but himself for the consequences which follow in the absence of necessary legislation by the State Legislative Assembly declaring the office of profit of the Chairman of the Board not to disqualify its holder.

27. From the above discussion, it is very clear that the respondent as Chairman of the Board held an office of profit under the State Government, which was not declared by the Legislature of the

State by law not to disqualify its holder as required by Article 191(1)(a) of the Constitution. In my view, the petitioner has satisfied all the tests laid down from time-to-time in finding out whether the office of the Chairman of the Board was an office of profit under the Government of the State. It is, therefore, obvious that the respondent, as on the date of filing of the nomination, as well as on the date the respondent was declared elected to the State Legislature, was disqualified for being chosen as well as for being a Member of the Legislative Assembly, for the respondent then held the Chairmanship of the Board, which is an office of profit under the State government, which was not declared by the legislature of the State of Goa as not to disqualify its holder. The Act of 1982 made by the Legislative Assembly of the Union Territory of Goa, Daman and Diu concerning itself, in the absence of adaptation under Section 67 of the Act of 1987 could not be considered to be the law made by the new State of Goa for the purpose of Article 191(1)(a) of the Constitution. The fact that the Chairman was granted the status of a Minister of State to enable him to claim the perquisites, did not make him a Minister as contemplated under the explanation in Article 191(1) of the Constitution. That was not the case of the Respondent at any time during the trial of the petition.

28. Having considered all the aspects of the controversy in the

light of the high purposes underlying Article 191(1)(a) of the Constitution, I am of the view that the respondent was disqualified for being chosen as and for being a member of the Legislative Assembly as he was holding an office of profit under the State Government and his election, therefore, has to be considered as void and therefore deserves to be set aside. Consequently, I allow the petition and hereby set aside the election of the Respondent to the 6-Siolim Constituency, with costs of Rs.5,000/- (rupees five thousand only) to be paid by the respondent to the petitioner. The Registrar to comply with the provisions of Section 103 of the Representation of the People Act, 1951.

29. Shri Thali, the learned counsel on behalf of the respondent, requests for a stay of the operation of this Judgment for a period eight weeks. On behalf of the respondent, a written application has also been filed. The grant of stay has been opposed by Shri Coelho Pereira, the learned Senior Counsel. Shri Coelho Pereira has placed reliance on the judgment of the Supreme Court in the case of ***Smt. Indira N. Gandhi vs. Raj Narayan*** (AIR 1975 S.C. 1590). Shri Coelho Pereira has submitted that the respondent having been disqualified by this Court, there is no question of a blanket stay, the respondent's election having been set aside and, at the most, a conditional stay could be granted, in the manner granted by the Hon'ble

Supreme Court in terms of Sub-para (iii) of Para 31 in the case of ***Smt. Indira N. Gandhi*** (supra). On the other hand, Shri Thali has submitted that if at all the Hon'ble Supreme Court had granted stay of the operation of the Judgment of the High Court, it was essentially because the matter dealt therein was based on corrupt practices, which is not so in the case at hand. Shri Thali has also referred to Sub-section (2) of Section 116-A of the Representation of the People Act, 1950 and has submitted that the respondent as a matter of right can approach the Supreme Court within a period of 30 days. Without further dilating on the Judgment of the Hon'be Supreme Court in the case of ***Smt. Indira N. Gandhi*** (supra), and considering the totality of the facts of the case at hand, including that at present the Legislative Assembly of Goa is under suspended animation, I am of the view that the Judgment of this Court ought to be stayed for a period of 30 days to enable the respondent to appeal to the Supreme Court and this without any conditions. The petitioner will be at liberty to apply afresh to this Court, for modification of this Order, if permissible under law, in case the proclamation under Article 356 of the Constitution is revoked.

sl. **N.A. BRITTO, J.**