NORTHERN INDIA
PATRIKA
MONDAY, JUNE 27, 2016

Akhilesh wins

The tussle going on behind the scenes between the young Chief Minister and some members of the older generation of the ruling family finally came to an end on Saturday with Akhilesh Yadav emerging as the victor. "There will be no merger of Qaumi Ekta Dal (QED)in the Samajwadi Party…this has been decided at the parliamentary board meeting." This is what the Chief Minister wanted. Akhilesh was deadly opposed to this merger because of the criminal record of the founder of the QED. In the context of the forthcoming Vidhan Sabha elections, the Chief Minister's firm belief is: "If party workers perform their responsibilities, then there will be no need of another party."

This announcement about the reversal of the decision to admit QED in the party was made by the Samajwadi Party's national general secretary Ram Gopal Yadav after the meeting of the party's highest policy-making body. The announcement of the merger, it may be recalled, was made on June 21 by Cabinet Minister Shivpal Yadav, who is brother of Akhilesh's father and party chief Mulayam Singh Yadav. The latest decision is a strong signal that indicates that Chief Minister Akhilesh Yadav is henceforth not going to be browbeaten by the elders in the party. This was essential to dispel the impression that Akhilesh was a puppet in the hands of his uncles.

It need hardly be stressed that hitherto the impression that had gained ground was that the young Chief Minister was working in the shadow of his father Mualayam Singh Yadav and uncles Ramgopal Yadav and Shivpal Yadav. But the 42-year-old chief minister clarified his position by saying: "If my uncle helps me and I accept his suggestion what is wrong in it?'. At the same time he asserted emphatically, "I don't take decisions after taking permission of uncle." The episode also clearly reveals that Mulayam the father has prevailed over Mulayam the brother. Or, in other words, it may be said that Mulayam has finally convinced himself that the mantle of the responsibility of running the party should now be transferred from the old to the new generation. But there are some who could be viewing the whole thing as a drama of expedience before election time, their argument being: Didn't Akhilesh take a similar tough stand on the inclusion of mafia-turned-politician DP Yadav before the 2012 elections? However, Akhilesh now has almost five years of experience running the state and his uncles too have become five years older.

SNIPPETS

Now Modi's Ministers will have to give details of what all they have done during the last two years. This might be followed by an interview which could be tougher than the one encountered by IAS candidates-provided Modi is the Chairman of the Ministerial interview board!

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In the US senate too some Democratic MPs sat on a Dharna. So Gandhiji's weapon of Satyagraha has reached American Parliament too!

…

Gurdas Kamat, the veteran Maharashtrian leader, has come back to the Congress fold after remaining out for two weeks. BJP may quip: 'He must have failed to secure entry into any rival political party!'

…

Kejriwal has now dragged Lt Governor Jung into the Delhi Khan murder case. BJP may say that this shows Kejriwal wants to hit the headlines by hook or by crook!

…

But AAP can't be half as daring as Dr Swamy who years ago called Atal Behari Vajpayee a 'drunk Foreign minister'!

…

And in 1999, at a tea-party meeting with Sonia and Jayalalithaa, it was Dr Swamy who had instigated the Tamilnadu Chief Minister to withdraw support to the 13-day Atal Government!

…

Dr Subramanyam Swamy now says that Jaitley's confidante Aravind Subramanyam is enemy of Narendra Modi. Is he trying to say that Jaitley is acting against PM through Aravind?

JUDICIAL PANORAMA: Parmanand Pandey

Status of Parliamentary Secretaries vis-a-vis 'Office of Profit'

The Bill for the appointment of the 21 Parliamentary Secretaries by Arvind Kejriwal's Government of Delhi, which has since been rejected by the President of India, is certainly going to be a case of big constitutional fight. The question will hover around whether these Parliamentary Secretaries, who have been appointed from among the MLAs, hold the post of profit or not. If they hold the office of profit, then there is no choice left for them but to be sacked from the membership of the Legislative Assembly. As on today after the rejection of the Bill by the President of India these MLAs stand disqualified because it has been presumed that they hold the office of the profit.

Let us look at Article 239 AA (4) of the Constitution of India, which limits the number of ministers to 10% of the total strength of the Assembly. Parliamentary Secretaries have been considered within the meaning of Article 239AA (4) of the Constitution, that was the reason the Bill was rejected by the President of India. However, Arvind Kejriwal's Government says that they are not ministers and therefore, the Bill should not have been rejected.

The Supreme Court of India has been juggling with the issue of the 'office of profit' right from the early fifties almost immediately after the first Parliamentary and State Assembly elections were held in 1952. The Post of Parliamentary Secretary is to be considered as the post of profit or not has been dealt with three High Courts namely; Himachal Pradesh, Calcutta and Bombay. These High Courts have clearly said: "parliamentary secretaries being holders of public office, it is not open to any individual to evolve a private arrangement whereby, by his whims he would administer oath because any such private arrangement not having the sanction of law would not cast upon parliamentary secretaries the corresponding obligation of maintaining secrecy as well as resultant legal consequences of their being exposed to the rigours of penal law if the oath is ever violated."

Clause (a) of the Article 102 of the Constitution of India says that a person shall be disqualified for being chosen as, and for being, a Member of either House of Parliament if he holds any office of profit under the government of India or the government of any State, other than an office declared by Parliament by law not to disqualify its holder. The object of the provision is to secure independence of the members of Parliament and to ensure that Parliament does not have members who receive favours or benefits from the executive and who, consequently, being under an obligation to the executive, might be amenable to its influence. In other words, the provision appears to have been made in order to eliminate or reduce the risk of conflict between duty and self-interest amongst the members of Parliament.

While Article 102 speaks of Parliament Article 191 corresponds to the State Assemblies. Both Articles 102(1)(a) and 191(a) were incorporated with a view to eliminating 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 exercising his obligations as a legislator.

The expression "office of profit" is not defined in the Constitution or in the Representation of the People Act, 1951. It is, however, clear that before a person can be held to be disqualified under Article 102(1)(a) four things must be proved: (i) that he held an office; (ii) that it was an office of profit;(iii) that it was an office under the Government of India or the State Government and (iv) the office should be other than an office declared by Parliament by law not to disqualify its holder.

Now the question arises what construes the 'office'? An 'office' embraces the elements of tenure, duration, duties and emoluments but the element of emolument is not essential to the existence of an 'office'. It means a fixed position for performance of duties.Does the word 'office' necessarily imply that it must have an existence apart from the person who may hold it. The Supreme Court has held in Mahdeo v. Shantibai and Kanta Kathuria v. Manak Chand Sharma that the words 'its holder' occurring in the article indicate that there must be an 'office' which exists independently of the holder of the office. So that an office or an employment is an office or employment which is subsisting, permanent and a substantive position which has an existence independent from the person who filled it, which goes on and is filled in succession by successive holders; and if you merely have a man who is engaged on whatever terms to do duties which are assigned to him, his employment to do those duties does not create an office to which duties are attached. He merely is employed to do certain things and that is the end of it; and if there is no office or employment existing in the case as a thing, the so-called office or employment is merely an aggregate of the activities of the particular man for the time being.

Similarly, the Supreme Court clarified the meaning of 'Profit'. In Shivamurthy Swami Inamdar v. Agadi Sayanna Anandanappa, the Supreme Court observed that the 'office of profit' means an office capable of yielding a profit or from which a man might reasonably be expected to make a profit. The actual making of profit is not necessary. Profit means pecuniary gain or any material benefit. If there is really a gain, the quantum or amount of such gain is immaterial. But the amount of money receivable by a person is connection with the office he holds may be material in deciding whether the office really carries any profit. "If the 'pecuniary gain' is 'receivable' in connection with the office then it becomes an office of profit, irrespective of whether such pecuniary gain is actually received or not." Laying down this proposition and upholding the disqualification in Jaya Bachchan v. Union of India, of the petitioner who held the office of the Chairperson of U.P. Film Development Council with entitlement to honorarium and several allowances and perquisites even though the petitioner claimed to have received none, the Court held that "where the office carries with it certain emoluments then it will be an office of profit even if the holder of the office chooses not to receive/ draw such emoluments."

The 'office of profit' must be held "under the Government of India or the Government of any State". What are the principal tests for deciding whether an office of profit is held under the government? The Supreme Court has laid down in Shivamurthy's case the following five tests which would apply to determine if an office is held under the government: (i) whether government makes appointment to the office;(ii) whether government has the right to remove or dismiss the holder of office;(iii) whether government pays the remuneration;(iv) whether the functions which the holder of the office performs are for government;(v) does the government exercise any control over the performance of those functions?

But it is not necessary that all these factors must coexist. Even if one of the elements is absent, the test of a person holding an office under the government may still be satisfied. Whether stress will be laid on one factor or the other will depend upon the facts of each case. Thus the circumstance that the source from which the remuneration is paid is not be public revenue is not decisive of the question. In Abdul Shakur v. Rikhab Chand, the facts that were held to be decisive were: (i) the power of the government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion; and (ii) payment out of government revenues.In M. Ramappa v. Sangappa, the question arose as to whether the hold of a village office who has a hereditary right to it is disqualified under Article 191 of the Constitution, which is the counterpart of Article 102 in the matter of membership of the State Legislature. The Court observed "the government makes the appointment to the office though it may be that it has under the stature no option but to appoint the heir to the office if he has fulfilled the statutory requirements. The office is, therefore, held by reason of the appointment by the government and not simply because of a hereditary right to it. The fact that the government cannot refuse to make appointment does not alter the situation."

In Guru Gobinda Basu v. Sankari Prasad Ghosal, the appellant was a partner of the firm of G. Basu and Company who were auditors for Durgapur Projects Ltd. and Hindustan Steel Ltd., both of which were government companies within the meaning of the Companies Act, 1956. He fought and won an election to the Lok Sabha which was challenged on the ground that the appellant was holding an office of profit under the government and was disqualified for being a member of Parliament. The Court held that in deciding the question the material provisions which had to be considered were those relating to appointment, remuneration, and removal or dismissal. It further pointed out that stress might shift from one point to another according to the facts of a particular case. In the instant case, it came to the conclusion that as the appointment was made by the government and his remuneration was fixed by the government and as he was also removable or dismissible at the instance of the government, he was holding an office of profit under the government. The Court also pointed out that he was under the control of the Auditor and Comptroller-General who was, in his own turn, a holder of an office of profit under the government so that he also satisfied the test of control. The indirect control exercisable by the government in a government-owned company because of its power to appoint the directors and to give general directions to the company cannot be held to make the office of the director an office of profit under the government.

It has further been held that the word 'Government' in Article 102(1)(a) and the corresponding Article 191(a) is to be interpreted liberally so as to include within its scope the legislature, the executive and the judiciary. In Biharilal Dobray v. Roshan Lal Dobray, after an examination of the earlier decisions and the provisions of the U.P. Basic Education Act, 1972 the Supreme Court held that an Assistant Teacher employed in a Basic Primary School run by the U.P. Board of Basic Education holds an office of profit under the Government of the State. Similarly in Shibu Soren v. Dayanand Sahay, the election of the appellant as Member of Rajya Sabha was invalidated by the Court because at the time of his election he was holding (i) an office of profit insofar as he was drawing an honorarium in addition to daily allowance and other perquisites like rent free house and chauffeur-driven car and (ii) an office the Government of the State insofar as he was appointed chairman of the Jharkhand Area Autonomous Council by the Governor of the State and held office during his pleasure.

Here in the case of Delhi Government's Parliamentary Secretaries, the constitutionality and morality both factors stare in face of the Bill with equal force. The Delhi Government's argument rests heavily on the technicality but that will undoubtedly blunt and tarnish the image of a government, which came to power by giving more emphasis to the morality and integrity than technicality.

Letting them off easy

Manju Menon & Kanchi Kohli

The Ministry of Environment, Forest and Climate Change (MoEF) has issued a draft notification seeking to amend the Environment Impact Assessment (EIA) of 2006, allowing those who violate this law to continue work with an Environment Supplement Plan (ESP). This is the first step towards killing the EIA process in India. This newly proposed notification, along with a few others that the Ministry has drafted in the recent months, exhibit the MoEF's thinking about the environment. Unlike its controversial decision last week to slaughter 200 foraging Nilgai, an act that was captured on camera, this notification bears no other name on it except that of the Ministry.

The EIA process has its origins in the 1992 Rio Earth Summit where over 170 countries committed to balancing environmental concerns and economic needs. The EIA was a tool to do this. In India, it has been in place since 1994 and is also called the environment clearance process. It is the law that mandates that detailed studies be carried out before implementing projects that carry social risks and could damage the environment. The studies are discussed at public hearings before being evaluated by a set of identified experts who then recommend a decision to the Ministry or State government on the project.

Though implemented in breach, the EIA process has been the only official forum to bring to view the fact that land and water are not simply resources to be allocated to thermal power plants, ports, and mines. As more and more projects have been proposed on forests, common lands, coastal areas, and freshwater lakes over the years, citizens have brought to bear on this clearance process, values of aesthetics, attachment, sustenance, risk and trusteeship. Unsurprisingly, this complicates decision-making on big-ticket projects, and has earned this law many epithets such as 'stumbling block', 'bottleneck' and 'green hurdle'. Political parties, irrespective of their ideological moorings, have failed to recognise its value, and the government no longer has any legitimacy or finesse to mediate these nuanced debates. As a result, cases have piled up in courts, especially at the National Green Tribunal (NGT) that was set up to look into complaints regarding the environment clearance process.

The Bharatiya Janata Party government declared when it came to power that it would simplify laws. Within months it set up the TSR Subramanian and Shailesh Nayak Committees. Their mandates included, among others, the revision of the EIA and Coastal Regulation Zone (CRZ) laws that deal with environmental approvals to large projects. While the Ministry was recently charged with deliberately withholding public disclosure on the CRZ review report, the TSR Committee report showed that this government's term will be remembered for culling of a different sort. In the newly proposed draft

notification, the Ministry offers a way out to those who have violated environmental norms. It seeks to provide an ESP for projects that have already initiated construction activity and expansion before going through an EIA process. As a result, it seeks to repeat the trick that keeps all the political parties going: "regularising" corporate illegalities. While the amended notification aims to protect and improve the quality of the environment for which "the process should be such that it deters non-compliance and the pecuniary benefit of non-compliance, and damage to environment is adequately compensated for…", it merely ends up providing illegally operating project developers an ESP as a license to violate.

The ESP will draw up an assessment and cost of damages which the project developer is expected to pay up. This sounds less like an environmental fine — an important component among a slew of mechanisms to deter projects from violating environmental norms — and more like a crude form of 'pay and use' service. If violations are routinely struck off the Ministry's register upon payment of money, where is the Ministry's own stated goal of sustainable development? Those who have been working in the environment field will confirm that projects never pay up. Take the case of the fine of Rs.200 crore on the Adani SEZ in Gujarat, or Rs.5 crore for the Art of Living event on the Yamuna floodplains. Even if one were to be more optimistic about these collections, the government's ability to use these resources to restore the environment, or provide justice to scores of affected people, is severely lacking. The example of crores of rupees collected to compensate for forest loss, and the Comptroller and Auditor General's damning report on how these monies have been spent, will help change one's mind.

The Ministry states that this notification has its basis in two judgments, one by the NGT and the other by the Jharkhand High Court. It leads one to believe that this draft notification is not a product of government conviction but legal diktat. The more than 200-page long judgments show that the Ministry has either been deliberately misled or is being dangerously disingenuous. In a long case involving a mining project, the State government and the Central government, the Jharkhand High Court judgment observed that any "alleged violation" should be investigated separately from the approval process. Neither does the judgment condone EIA violations in general nor does it prescribe a way out of these for erring companies. The NGT judgment actually quashed two office memoranda dated 12/12/2012 and 24/6/2013 of this Ministry in which it had tried to do precisely what it is doing through this notification. The NGT had observed that the office memoranda "provide benefits to the class of the project or activity owners who have started construction in violation of law, i.e. prior environment clearance." Environmental issues in India have been politicised by democratic ideals for good. By killing the EIA process, it is the government that will lose its claim to sustainable development. The choice is theirs to make.