

OFFICE of Profit

Why in News?

Recently 20 MLAs in Delhi were disqualified by President for holding Office of profit

BACKGROUND

In 2015 Delhi government appointed 21 of its legislators as parliamentary secretaries



President disqualified MLAs on the recommendations of ECI that is binding on the President or Governor on the ground that the post of parliamentary secretaries :

- has the potential to yield profit.
- has executive functions akin to that of a minister

Before that Delhi government tried to exempt the office from disqualification by making amendment to Delhi Members of Legislative Assembly (Removal of Disqualification) Act, 1997, with retrospective effect. But it could not be possible



Later the Delhi High Court restored their membership on the ground of failure to comply with the principles of natural justice by Election Commission



WHAT IS OFFICE OF PROFIT?



The term "Office of Profit" has its origin in the English Act of Settlement, 1701. It provides -

- That the person who has "an office of profit under the King, or receives a pension from the Crown, shall not be capable of serving as a member of the House of Commons"

A parliamentary secretary, in the Westminster system, is a Member of Parliament who assists a Minister in their duties. In India, MLAs in Manipur, HP, Mizoram, Assam, Rajasthan, Punjab, Goa have been appointed Parliament Secretaries by the State Government

In India the term "Office of Profit" is not defined anywhere



Article 102 and 191 of Constitution of India provides office of profit as one of the grounds for disqualification for membership of a legislator

- It exempts ministers from disqualification
- It empowers Parliament/State legislation to exempt certain offices as office of profit by making law

Section 15(1) (a) of the Government of National Capital Territory of Delhi Act, 1991, also provides 'holding an office of profit is ground for disqualification'

Section 9 (A) of Representation of People Act 1951 prohibits a government servant from any benefit derived out of a contract on the name of government

Section 3 of Parliament (Prevention of Disqualification) Act, 1959 exempts certain offices from disqualification u/arts 102 & 191. These are

- Minister of Union or State
- Leader of the Opposition in Parliament
- Deputy Chairman of Planning Commission
- Chairperson of the National Commission for Minorities; for Scheduled Castes; for Scheduled Tribes; for Women, ETC

SUPREME COURT ON OFFICES OF PROFIT

In Pradyut Bordoloi vs Swapan Roy (2001) outlined the following guidelines for the test of Office of Profit as:

- Whether the government makes the appointment
- Whether the government has the right to remove or dismiss the holder
- Whether the government pays the remuneration
- What are the functions of the holder
- Does the government exercise any control over the performance of those functions

In Jaya Bacchan case observed - actual 'receipt' of profit is not necessary, the 'potential' to yield profit is sufficient

JOINT COMMITTEE ON OFFICES OF PROFIT

Consists of ten members from the Lok Sabha and five members from Rajya Sabha.

Applies following tests i.e. no disqualification would arise if -

- The office provides only compensatory allowance
- The nature of function of the office is advisory only
- It is not in a position to wield influence and patronage

Reports to both houses on exemption from disqualification for membership of Parliament.

OFFICE OF PROFIT: ISSUES & SOLUTIONS

ISSUES

In democratic setup, MP or MLA holding another office destroys one of the basic structures of constitution i.e. separation of power

It is also the violation of the 91st Amendment of the Indian Constitution that provides the ceiling of 15% (10% in case of Delhi) on the number of ministers in a government

Legislators in such offices participate in high level meetings of the governments and misuses offices by way of patronage

There is no official definition of 'office of profit', it is up to the discretion of the relevant authority to decide. Discretionary powers are prone to misuse

Office like Parliamentary Secretaries are used by state governments to circumvent the constitutional ceiling of 15% (10% in case of Delhi) on the number of ministers in a government

Other issues - drain of public money due to oversized cabinet, arbitrary exercise of legislative power through amending laws, etc.

Unlike ministers, they are not administered Oath of Secrecy, they can misuse official informations which may threaten public interest or national security

SOLUTIONS

Need to enact a comprehensive legislation to include all major issues wrt office of profit

Before creating a new office, like England, in India too, opinion of Law Commission can be taken.