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Case Comment: Subhash Desai v Principal Secretary, Governor of Maharashtra & Ors - Unravelling the Importance of Schedule X of the Indian Constitution

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INTRODUCTION

A political upheaval that took place in Maharashtra in June 2022 will be forever remembered as one of the most dramatic upturns of events in the political history of the country. The then CM of Maharashtra, Uddhav Thackeray had to resign from his post due to the division of MLAs within the Shiv Sena party which was led by present CM Eknath Shinde. In response to the power shift of the government, the Shiv Sena led by Uddhav Balasaheb Thackeray filed a writ petition in the Apex court under Article 32 of the Constitution of India for declaring the government unconstitutional and also to declare that the appointment of Shinde as the leader of the Shiv Sena legislative party was invalid as well as whip of Sunil Prabhu was the valid whip. The highly awaited judgment of the Hon'ble Supreme Court in the matter of *Subhash Desai*

*v Principal Secretary, Governor of Maharashtra & Ors.*¹ was delivered on May 11, 2023, by the constitutional bench headed by CJI D.Y. Chandrachud.

FACTS OF CASE

Bhartiya Janata Party and Shiv Sena have been in a 35-year-old alliance. They came together to contest the elections for the first time in the Vidhan Sabha elections of Maharashtra in 1984 due to an anti-Congress front. Both the parties had similar ideologies and people viewed them as one post-election even if they contested separately. The alliance first came into power in 1995 due to the Babri Masjid demolition and communal riots which happened in the early 1990s.

In 2014, both parties contested the elections separately and BJP emerged victorious, as the party with the majority. The then CM of Maharashtra Devendra Fadnavis invited Shiv Sena to form the government together. The alliance applied the same formula in the 2019 elections. The alliance was victorious but there was disagreement between the parties regarding the portfolio allotment as well as the chief ministership. Due to the disagreement, the alliance broke and the Nationalist Congress Party (NCP), the Indian National Congress, and other parties collaborated with Sena to develop the 'Maha Vikas Aghadi'. The chief minister of the government was Uddhav Thackeray. In the middle of June, several Shiv Sena MLAs vanished in addition to Eknath Shinde. The organization asserts that the MVA coalition rejects the Shiv Sena doctrine.

On June 21, 2022, the chief whip of Shiv Sena, Sunil Prabhu issued a whip directing all MLAs to attend the meeting at Mr Thackeray's residence. The Shinde faction did not attend the meeting and as a result, Eknath Shinde was removed from the post of group leader of SSLP and instead, Ajay Choudhari was appointed in his place. Concurrently, the thirty-four MLAs of Shiv Sena organized a separate meeting and passed a resolution that stated that Eknath Shinde continues to be the group leader of the SSLP. The chief whip of Sunil Prabhu was also canceled and, in his place, the whip of Bharat Gogawale was appointed.

¹ *Subhash Desai v Principal Secretary, Governor of Maharashtra & Ors* (2023) SCC OnLine SC 607

A series of meetings took place of the Shiv Sena led by UBT and the Sena led by Eknath Shinde between the 21st and 22nd of June 2022. In line with Article 2(1)(a) of the Tenth Schedule of the Constitution, Sunil Prabhu from Shiv Sena led by UBT filed petitions on June 23, 2022, seeking the disqualification of Mr. Eknath Shinde and fifteen other MLAs.

On June 28, 2022, the leader of the opposition, Devendra Fadnavis, sent a letter to the governor claiming that he did not believe the then-chief minister had a majority in the legislature. The governor asked Thackeray to prove his majority on the floor. Sunil Prabhu requested that the Supreme Court overlook the floor test in a writ petition he submitted on June 29, 2022, citing the pending disqualification lawsuits against 42 Shiv Sena MLAs. The court declined to stay the trust vote. Uddhav Thackeray resigned on the same day.

On June 30, 2022, Devendra Fadnavis sent a letter to the governor outlining his desire to join a coalition with the Eknath Shinde-led Shiv Sena. The governor administered the oath on the same day. On July 19, Eknath Shinde submitted a petition to the ECI requesting that, in line with the Election Symbols (Reservation and Assignment) Order of 1968, Shiv Sena's 'bow and arrow' emblem be assigned to the organization he managed. On October 17, 2022, the ECI granted the 'bow and arrow' emblem to the group led by Eknath Shinde.

LEGAL ISSUES

1. If an individual has sparked a division in the party, what power does the governor have to ask them to form the government?
2. How does the speaker choose the whip and leader of the legislative party's house, and whether it is the whip of a political party or legislative party?
3. Does the speaker have to decide for a court to rule that a member is deemed disqualified based on their actions?
4. Does the speaker's notice of dismissal prevent him from pursuing the process for disqualification under the 10th Schedule of the Indian Constitution?

DECISION

The petitioners i.e. Shiv Sena led by UBT had relied on the judgment passed in *Nabam Rebia*². The court said that the decision given in *Nabam Rebia* cannot be applied in this particular case as the factual matrix and the situation of the present case with the former case have a lot of differences. The apex court also propounded that the judgment in *Nabam Rebia* conflicts with the judgment in *Kihoto Hollohan*³ because the judgment in the latter case holds that there is no reason to doubt the independence and impartiality of the Speaker when adjudicating the disqualification proceedings under the tenth schedule, whereas in the former case, the court doubted the ability of the speaker to remain neutral while deciding the disqualification petitions.

Due to the doubts raised in *Nabam Rebia*, the court referred the case to a larger bench. The incumbent speaker of the Maharashtra Legislative Assembly Mr. Narvekar had been duly elected by the MLAs in terms of the procedure laid down under the Maharashtra Assembly Rules 1960. The speaker's decision to remove Sunil Prabhu's recognition has also been challenged in the ongoing proceedings. Even if the court reverses Narvekar's choice to remove Prabhu's designation as a candidate based only on merit, it would not suffice. The court concluded that the speaker of the Maharashtra Legislative Assembly is the competent decision-maker to determine whether to disqualify a candidate under the Tenth schedule. The court also made it clear that the deputy speaker cannot select the disqualification because he is not the competent authority to do so. The deputy speaker may only adjudicate the duties when the chair of the speaker is vacant.

Secondly, the court determined that a political party and a parliamentary party cannot be compared. Based on the court's interpretation of the 1956 Act, the 1986 rules, and the provisions of the tenth schedule, the whip and leader must be chosen by the political party. In this scenario, it was the Shiv Sena led by UBT who had the right to choose the whip and leader of the political party. The anti-defection statute's goal is to stop defections from the political party, hence it stands to reason that the political party alone has the power to select the whip. The legislative

² *Nabam Rebia & Bamang Felix v Deputy Speaker, Arunachal Pradesh Legislative Assembly & Ors* (2016) 8 SCC 1

³ *Kihoto Hollohan v Zachillhu & Ors* (1992) Supp 2 SCC 651

party cannot appoint the whip. The entire structure of the tenth schedule rests upon this process. The speaker's decision to choose Bharat Gogawale as the Shiv Sena's chief whip was deemed illegal by the court since it was based only on a faction's resolution and no attempt was made to determine whether it was the political party's decision. Speaking on the powers vested with the governor the apex court said that the decision of whether the house has lost confidence in the council of ministers must be made on the house floor rather than by the governor. The court in *Shivraj Singh Chouhan*⁴ determined that the Governor had the authority and discretion under the constitutional structure to request a trust vote from a 'running assembly' and that this choice was susceptible to judicial scrutiny. The Court concluded that the decision to request a floor test must be supported by factual information and considerations that are pertinent to the exercise of discretion and not unrelated to it. The court highlighted that the governor should not use their discretion to depose or undermine democratically elected administrations.

Lastly, the court ruled that it was impossible to reestablish both the pre-existing situation and Uddhav Thackeray's government at the same time. This court may have considered reinstating the administration Thackeray headed if he hadn't resigned from his post as Chief Minister. The court also directed the Election Commission of India to use a test applicable to the present matter for allotting the symbol to the disputed parties. The court in its final decision said that the speaker and the ECI, separately, have the power to rule on petitions for disqualification presented before them under the 10th schedule and paragraph 15 of the symbolic order.

ANALYSIS

The apex court in this matter clarified the applicability of the 10th schedule of the constitution. The order specifically addressed the powers vested in the governor, the speaker, the political party, and the Supreme Court itself. It also dealt with the patterns of internal conflict, splits, etc. The court held that the speaker cannot decide the whip of the political party just because the legislative party has the majority. It is the 'political party' which decides the whip of the party. To allow the legislative party to act independently from the political party contradicts the

⁴ *Shivraj Singh Chouhan & Ors v Speaker Madhya Pradesh Legislative Assembly & Ors* (2020) 17 SCC 1

constitutional system of governance. The speaker is the authority for deciding the disqualification petition under the 10th schedule which lays down the anti-defection law. While deciding the petitions, the speaker must take into consideration the constitution of the political party. The speaker should also decide the matter in a reasonable amount of time. The MLAs may participate in a house debate regardless of the outcome of a vote. The court emphasized the importance of the floor test and the power vested in a governor. A floor test is to be conducted by the governor only on obtaining objective material to show the administration was no longer trusted by the house. In the case of *Rameshwar Prasad v Union of India*⁵, it was held that the governor should follow an order of preference in which the governor ought to call for the formation of government. In the present instance, there was no order in which the governor called for the formation of the government. From the facts, it can be inferred that the governor acted with a bias towards the BJP government. Former Maharashtra governor, Bhagat Singh Koshyari was not right in calling Uddhav Thackeray for a floor test as there was no objective material to show that the administration was no longer trusted by the house. The governor cannot enter the political trifles of the parties and then base his decision on that. Lastly, the Supreme Court held that as Uddhav Thackeray voluntarily gave his resignation and did not face any floor test, the court cannot reinstate the government headed by him.

CONCLUSION

This judgment holds significant value as it clarifies the position of the tenth schedule. The whole point of the tenth schedule is to prevent anti-defection and horse-trading of the MLAs. People elect a particular person as the MLA mainly because of the party they are associated with. If the MLA after winning the elections switches parties, then it wholly defeats the purpose of elections. The court also gave directions to the ECI on allotment of the symbols and suggested tests that can be undertaken by them. It also gave us the distinction of powers of the governor, speaker, and deputy speaker of the legislative assembly. In addition to these major problems, the court also considered the legality of the House's processes between the MLA's improper behavior and the speaker's decision regarding the disqualification petition. It was decided that a member of

⁵ *Rameshwar Prasad v Union of India* (2006) 2 SCC 1

the House only loses the ability to take part in House proceedings after being disqualified. The speaker's choice has nothing to do with the day an MLA engaged in prohibited behavior. The speaker's choice and any repercussions of disqualification are prospective. The top court also highlighted the importance of a political party in maintaining a strong and fair democracy. Further, the court clearly stated that a governor cannot topple a democratically elected government. The governor can only call a floor test when he has valid reasons that the government no longer enjoys the support of the majority of the house. The petitions for disqualifications are to be decided by the speaker only as it is the power vested to him under the 10th schedule of the constitution. The judgment was mainly focused on upholding the morality and integrity of the Constitution. We can conclude from this landmark judgment that though the decision favored Eknath Shinde's side it was ethically and morally wrong on the part of the governor to topple the government in that manner. This is because the governor is an essential part of the proper and smooth functioning of any government. The governor is supposed to be unbiased in his decision-making. This not only sets a bad precedent but also raises doubt in people's minds regarding the functioning of the government machinery.