



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2024 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Case Comment: Analyzing the Sena v Sena Battle: The Case of Subhash Desai v Principal Secretary, Governor of Maharashtra

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Received 13 January 2024; *Accepted* 08 February 2024; *Published* 12 February 2024

INTRODUCTION

The recent political shift in the State government of Maharashtra is one of the prominent instances relating to Anti-defection law.¹ Recent years have witnessed numerous cases of political breakdown all over the country. There may be various factors behind such an act, yet no reason can justify it. In simple terms, Anti-defection deals with legislators shifting their support from one political party to another after being elected from a particular political party. Such act of legislators disturbs the structure and composition of the house (both Parliament and State legislatures) leading to the government's fall. In mid-2022 Maharashtra witnessed a similar situation where a faction of the then Chief Minister's political party separated to call themselves the 'real party.'² This situation involved certain complex issues concerning the conduct of the

¹ Constitution of India 1950, sch 10

² 'Disqualification Proceedings against Maharashtra MLAs' (*Supreme Court Observer*)

<<https://www.scobserver.in/cases/challenge-to-mla-disqualification-proceedings-against-eknath-shinde-and-others/>> accessed 09 January 2023

respondent political party, the governor, the functioning of the house, the application of the 10th Schedule and Symbols Order,³ and other concepts covered in detail below.

FACTS OF THE CASE

*Subhash Desai v Principal Secretary, Governor of Maharashtra and Others*⁴ is a writ petition filed before the Hon'ble Supreme Court of India in June 2022. In October 2019, the elections for the 14th Legislative Assembly of Maharashtra were conducted wherein Bhartiya Janata Party (hereinafter referred to as BJP) secured 106 out of a total 288 seats. Other political parties like Shiv Sena, National Congress Party (hereinafter referred to as NCP), and Indian National Congress (hereinafter referred to as INC) secured 56, 53 and 44 seats respectively. Since the majority to form the government was 145 and no single political party had a clear majority, a coalition government, Maha Vikas Aghadi (hereinafter referred to as MVA) was formed by Shiv Sena, NCP, and INC along with some independent members. Mr. Uddhav Thackarey was appointed as Chief Minister, Mr. Eknath Shinde was appointed as Group leader of Shiv Sena Legislative Party (hereinafter referred to as SSLP) Mr. Sunil Prabhu was appointed as Chief Whip.

On 21 June 2022, Mr. Prabhu issued a whip for all Members of the Legislative Assembly (hereinafter referred to as MLA) to attend the meeting scheduled at the residence of the Chief Minister. Thirty-four MLAs including the Group leader of SSLP in a separate meeting passed a resolution to continue to keep Mr. Shinde as the Group leader. This was done in response to the resolution passed by the members present at the residence of CM to remove Mr. Shinde from his post and appoint Mr. Ajay Choudhari. During this time the Legislative Assembly did not have a Speaker elected, thus all the functions of the Speaker were carried by Deputy Speaker⁵ Mr. Narhari Zirwal. The main contention here was the date when the Deputy Speaker received the notification of resolution. With it, the other faction claiming that Mr. Narhari did not enjoy the support of the majority also sent the notice for removal of the Deputy Speaker from office.⁶

³ The Election Symbols Order 1968

⁴ *Subhash Desai v Principal Secretary, Governor of Maharashtra and Others* (2023) SCC OnLine SC 607

⁵ Constitution of India 1950, art 180(1)

⁶ Constitution of India 1950, art 179(c)

Subsequent meetings were organized which were not attended by the Shinde-led group since they claimed they were the 'real Shiv Sena'. This led to the filing of petitions under the tenth schedule against the 34 MLAs by Mr. Sunil Prabhu.

Along with this the then Leader of Opposition, Mr. Devendra Fadnavis communicated to the Governor via letter that the present government did not enjoy a majority in the house. On such intimation, the Governor issued a letter to Mr. Thackeray to face the floor test on 30th June 2022. During this time the house was not in session, thus a special session of the assembly was organized. But before facing the floor test, the CM resigned from his post. With this, the Shinde-led faction approached the governor of Maharashtra asserting that they had a majority in the house by allying with the BJP. Thus, the governor invited the Shinde faction to form a government. Further, since the post of speaker was vacant the elections for the post of speaker were conducted, in which Mr. Rahul Narwekar was elected. The speaker approved Mr. Shinde as the leader of SSLP in the house and recognized Mr. Bharat Gogawale as chief whip. Later Mr. Gogawale issued a whip for all members of Shiv Sena to vote in favour of the confidence motion. With a successful confidence motion, Mr. Narwekar and Mr. Gogawale filed petitions under the tenth schedule against members of the opposing party.

ISSUES INVOLVED

After accepting the petition and setting up a constitution bench (5-judge) to deal with the issues concerning substantial questions of law⁷ certain issues were formed. They are as follows;

- i. Whether the notice of removal of a Speaker bars him from continuing the disqualification proceedings filed under the tenth schedule as per *Nabam Rebia*.⁸
- ii. Can a petition under Article 32 or 226 respectively be filed for dealing with disqualification of members?
- iii. What is the status of the proceedings of the house while the petition for disqualification is pending?
- iv. What is the impact of repealing the third Para of the tenth schedule?

⁷ Constitution of India 1950, art 145

⁸ *Nabam Rebia & Bamang Felix v Dy. Speaker, Arunachal Pradesh Legislative Assembly* (2016) 8 SCC 1

- v. What is the extent of discretion and power of the governor to invite a person to form the government and whether the same is amenable to judicial review?
- vi. What is the scope of powers of the Election Commission in determining the split within the party?

The present case largely involves the constitutional aspect wherein the tenth schedule of the Constitution dealing with Anti-defection laws, Chapter III,⁹ Election Symbols (Reservation and Allotment) Order, 1968, and Maharashtra Legislature Members (Removal of Disqualification) Act, 1956 were involved.

ANALYSIS OF JUDGMENT

Referring Nabam Rebia Case to a larger bench: The present case involved an in-depth analysis of various laws and topics concerning Anti-defection, this can be seen when the argument from petitioners highlighted the need to refer Nabam Rebia's judgment to a larger bench of seven judges. The major reason for such appeal was the conflict between two precedents namely *Kihoto Holohan v Zachilu*¹⁰ and *Nabam Rebia*. The first case where the 10th schedule was questioned was the case of *Kihoto Hollohan* on the grounds of the 52nd Constitutional Amendment Act¹¹ being unconstitutional. The Hon'ble Supreme Court declared the amendment constitutional while asserting that the provision barring a court from having jurisdiction in case of disqualification of any member¹² is not valid, since it disbarred Judicial Review which was a Basic Feature of the Constitution¹³. Along with it, the court held that the power of judicial review shall be utilized to a limited extent since Para 6 provides the Speaker of the House, the power to adjudicate upon disqualification proceedings. Thus, it means that the Judiciary shall not interfere except for incomparable circumstances. On the other hand, the *Nabam Rebia* case held that when a notice for removal of the Speaker is pending, the disqualification proceedings shall be brought to a halt.

⁹ Constitution of India 1950

¹⁰ *Kihoto Hollohan v Zachillhu* (1992) Supp 2 SCC 651

¹¹ Constitution of India 1950, sch 10

¹² *Ibid*

¹³ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225

This decision can be misused by the defectors to avoid disqualification proceedings, thus the Supreme Court's 5-judge bench decided to refer the case to a larger bench to avoid conflict of established cases.

Governor and his Role: Secondly, questions were being raised on the action of the Governor to direct Mr. Uddhav Thackarey to face the floor test and the successive act of calling the Shinde-led group to form the government. If the precedents are considered then the *S.R. Bommai v State of Karnataka*¹⁴ and *Shivraj Singh Chauhan v Union of India*¹⁵ held that the option of facing the floor test is the most appropriate one when there is uncertainty of the council of ministers along with the Chief Minister enjoying confidence of the house. This becomes complex when the governor directs the Chief Minister to face floor tests while the house is not in session and there is no substantial piece of evidence showing that the house has lost confidence in the government. In the instant case, the governor only had a letter from the then-opposition leader stating that the government had lost confidence in the government.

The Governor is expected to rationally decide such situations with the help of any objective proof. Thus, the decision of the Governor comes in conflict and is thus important. The post of Governor is a Constitutional post carrying lots of responsibility, it has to be an independent authority. The governor is the part of State Legislature since the executive act of the house is carried out in the name of the Governor.¹⁶ The court held that the governor cannot decide the question of whether the council of ministers has lost confidence in the house, after exhausting all the means and resources the governor should call for a floor test for members to determine.¹⁷ Additionally, it was held that except under the situation of exigency or unavoidable circumstances, the governor should not disturb the established flow of process of the house. And the decision of the governor to call for is subject to judicial review if challenged.¹⁸

In the instant case, the act of the governor to call for a floor test could have been in question, if the Chief Minister had not resigned. Since the then CM Mr. Uddhav Thackarey had submitted

¹⁴ *S.R. Bommai v Union of India* (1994) 3 SCC 1

¹⁵ *Shivraj Singh Chouhan v M.P. Legislative Assembly* (2020) 17 SCC 1

¹⁶ Constitution of India 1950, art 162

¹⁷ *S.R. Bommai v Union of India* (1994) 3 SCC 1

¹⁸ *Shivraj Singh Chouhan v M.P. Legislative Assembly* (2020) 17 SCC 1

his resignation without facing the floor test, the direction of the Governor became repugnant. Thus, the plea to reinstate the government in the state also remains void.

The next concern under this heading is the act of the governor inviting Mr. Shinde to form the government. Art 164(1B) of the Constitution states that, if the member of the legislative assembly or legislative council as the case may be, is disqualified under the Tenth Schedule then such person shall be disqualified from the house for a period till the date when his term in office expires or till he contests the election again. Here this provision can not be applied since the Members are not yet disqualified, the petitions for their disqualifications are filed and are yet to be adjudicated. Adding to it since the then CM refused to face the floor test and resigned the act of the Governor to invite Mr. Ekanth Shinde to form the government was within its limits.²⁰⁰

Speaker's Power: Next, the question was related to the authority of the speaker to deal with disqualification petitions under the Tenth schedule. Since in this case, the party in dispute had elected the speaker, it was contended that the speaker may act in an impartial and biased manner. The watershed moment with this issue was observed in *Rajendra Singh Rana v Swami Prasad Maurya*,¹⁹ wherein the petition for disqualification was filed against 13 members of BSP. The situation split among the political parties was observed and a new party emerged. The speaker first accepted the split and later merged among the party and thus the disqualification petitions were disregarded. The Hon'ble High Court ordered the Speaker to reconsider his decision. Concerning the same matter in an appeal in the Apex Court, the court observed that it would not be proper for it to pronounce its decision without the appropriate authority i.e. Speaker giving its decision. Yet, in that case, the Supreme Court dealt with the issue because of certain reasons like the speaker failing to act in time time-bound manner, determining the split or merger without considering the disqualification of the members, etc.

Like any other high post office, the office of the speaker also holds significant importance. Thus, it would be not correct to distrust the office of the speaker, merely on the grounds of alleged to have discharged their functions incorrectly or partially.²⁰ In the instant case, the Speaker was

¹⁹ *Rajendra Singh Rana v Swami Prasad Maurya* (2007) 4 SCC 270

²⁰ *Kihoto Hollohan v Zachillhu* (1992) Supp 2 SCC 651

duly elected after following the provisions specified in the Constitution and the Maharashtra Assembly rules. The decision of the speaker to accept the new whip from the Shinde faction also nowhere allows the court to interfere with the disqualification proceedings. Thus, the court concerning this issue considered it appropriate for the Speaker of the Maharashtra Assembly to decide on the petitions.

Interplay of Tenth Schedule, Symbols Order, and Maharashtra Legislature Members (Removal of Disqualification) Act 1956: Fourthly, the other concerning issue was the harmonious functioning of the tenth schedule, Symbols Orders, and 1956 rules regarding the issuance of whip/ chief whip by political party. On reading the tenth schedule in detail, both the words political party and legislative party are used but in different perceptions, there is a minor yet significant difference in those terms. The legislative party²¹ is defined as any political party (for para 2) and any member belonging to the political party (for para 4). An 'original Political party'²² is explained as the political party to which the member belongs. After this, the two provisions of the tenth schedule are at a crossroads i.e. para 2(1)(b) of the Tenth Schedule specifies that the member shall be disqualified if he votes or abstains from voting contrary to the directions issued by the political party. Para 4(2) dealing with the exception to the application of disqualification due to merger states that the proceedings of the merger shall be considered if at least 2/3rd members of the legislative party have agreed. Now in this case the chief whip from both sides had filed the disqualification petition.

The term 'whip or chief whip' is not defined in this schedule, but it is defined in Maharashtra Legislature Members (Removal of Disqualification) Act, 1956 as 'Explanation.- (1) The expression 'Chief Whip' or 'Whip', in the Maharashtra Legislative Assembly, means that Member of the House who is, for the time being, declared by the party forming the Government to be the Chief Whip or Whip in that House and recognized as such by the Speaker; and includes a member of the House, who is for the time being, declared as such by the party having at least ten percent of the total number of the House and recognized as such by the Speaker'²³ on understanding all these it is clear that such direction issued is from the political party and not a

²¹ Constitution of India 1950, sch 10

²² *Ibid*

²³ Maharashtra Legislature Members Act 1956, sch 1

legislative party. In one of the cases, the speaker rejected the petition of disqualification under Para 2(1)(b) because it was not clear whether the order issued by the person had the authority. The court also upheld the decision of the speaker and it was reiterated that the political party and legislative party have different meanings.²⁴ In *Kuldip Nayar v UOI*,²⁵ the court applied logical interpretation and derived that since the 52nd amendment was introduced to curb the defection of members in the political party, thus the power to appoint whip/ chief whip has to be with the political party.

The court also rejected the argument from the respondent asserting that the political party and legislative party are the same. It is important to note that, the tenth schedule gives more emphasis on political party. The legislative party is given importance only while the defence from disqualification is claimed. Similarly, the qualifications to form a political party are established and it is mandatory to register with the Election Commission of India.²⁶ As per the Symbols Order, there is a need for the party to have returning members or a total percentage of votes gained for it to be recognized as a state party or national party. Thus it is made clear that the whip/ chief whip is elected by a political party and thus the act of the speaker to recognise Mr. Gogawale as chief whip is invalid since there was no evidence of it being a decision of a political party, whereas the court held the declaration of Mr. Chaudhari as the whip was valid. The speaker must conduct an independent inquiry to determine whether it was the decision of the political party and not only rely on the submission made by the faction.

Role of Election Commission of India in such cases: Lastly, the other important issue was related to the decision of the Election Commission of India and the Hon'ble Court. The ECI is empowered to examine the dispute between the rival sections of a political party and later recognize the real political party and allot symbols.²⁷ The decision of the Commission establishes the real political party and the other party has to follow the process according to Section 29A of the Representation of People Act. In this case, the court has discussed the possible tests that can

²⁴ *Mayawati v Markandeya Chand* (1998) 7 SCC 517

²⁵ *Kuldip Nayar v Union of India* (2006) 7 SCC 1

²⁶ Representation of the People Act 1951, s 29A

²⁷ Election Symbols Order 1968

be used by the ECI to determine the real political party; these observations of the court are in no way binding on the ECI. There are no tests stated in any law for ECI to follow, but in general parlance, there are three broad tests recognized. The first and most prominent test used is the majority enjoyed by the legislature and organizational wing of the party also known as the 'Test of Majority.'²⁸ The other two tests are by examining the provisions of the constitution, and to examine which of the two groups adheres to the aims and objectives as laid in the constitution of parties.

It is believed that in the instant case along with the test of majority, the test of examining the adherences of aims and objectives of the party would also have helped in achieving the aim. Although the ECI decided this case in favor of Mr. Eknath Shinde by allotting them the status of 'Real Shiv Sena' and 'Bow and Arrow.' There may be a conflict because of the 10th Schedule and Symbols Order's decision. If in a hypothetical situation, the decision of ECI is declared before the decision on disqualification and a party is declared real, the members of that party are later declared disqualified, or vice versa.

There can be no established order or sequence that has to be followed by either ECI or Speaker. Both the offices are constitutional and have the power to determine their case independently. There is no obligation on either of the officers to abide by the decision of the other, the only necessity is that the decision must be rational and without any bias.

CONCLUSION

The situation before the 14th Assembly elections in the state of Maharashtra was completely different from the 2019 elections. BJP-led Devendra Fadnavis won the 2014 elections, claiming 122 out of 288 seats. The BJP formed a government with Shiv Sena and the office of CM was held by the leader of the largest party i.e. BJP. There was cordiality between both parties until the next elections when Uddhav Thackarey's party decided to shift alliance with NCP and INC. What happened next is already stated above.

²⁸ *Sadiq Ali v Election Commission of India* (1972) 4 SCC 664

Defections in various states have increased even after having a law in that regard. Maharashtra witnessed a similar situation in July 2023 when Ajit Pawar left the NCP with 8 other MLAs to join the ruling government. The defection petition has been filed before the Speaker and a petition before the Hon'ble Supreme Court. Ajit Pawar claimed to be real-NCP to which the Supreme Court held²⁹ that the defences claimed by the political parties must be in line with the tenth schedule. The tenth schedule earlier provided the defence of split but now if NCP wishes to get the defence they need to prove it under the defence of merger.³⁰ On 30 October 2023, the Supreme Court directed the speaker of Maharashtra to decide the disqualification petition of the Shinde faction and Ajit Pawar faction by 30 December 2023 and 31 January 2024 respectively.³¹

From all these developments it is clear that the legislators are defecting from their political party for their personal gain and are breaching the morality that the constitution has imposed on them as the representatives of the people. It is important to acknowledge that the existing law might not provide the right to raise its opinion to the legislator while discussing the House, since such an act may come under voluntarily giving up membership.³² The Judiciary has tried to answer all the possible questions arising in a defection case and unless the existing law is not re-examined and reintroduced the situation of defections may continue.

²⁹ *Jayant Patil v The Speaker Maharashtra State Legislative Assembly* WP (C) No 1077/2023

³⁰ Constitution of India 1950, sch 10

³¹ Padmakshi Sharma, 'Decide Disqualification Petition over Shiv Sena rift by December 31; NCP by Jan 31: Supreme Court directs Maharashtra Speaker' *Live Law* (30 October 2023) <<https://www.livelaw.in/top-stories/breaking-decide-disqualification-petitions-over-shiv-sena-rift-by-dec-31-ncp-case-by-jan-31-supreme-court-directs-maharashtra-speaker-241177>> accessed 08 January 2024

³² Constitution of India 1950, sch 10