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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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CASE ANALYSIS: SUBHASH DESAI V. PRINCIPAL SECRETARY, GOVERNOR OF MAHARASHTRA AND ORS. (AIR 2023 SC 2406)

AURTHORED BY - DEVANGI HEMANT GODBOLE

Introduction

The case is based on a historical event in the political history of the Maharashtra state, that is the bifurcation of one political party into two claiming for the name and symbol of the original political party, 'Shiv sena' founded in the year 1996 and recognized by the Election commission of India as the state political party. The following type of dispute had arisen for the first time in the political and election history of Maharashtra, which included quite substantial questions of law and the matter was finally interpreted and decided by the Hon'ble Supreme Court of India. The case is mainly based on the Tenth Schedule of the Constitution of India and other provisions of the Constitution and statutes such as the Symbol Order, etc.

Summary of the facts

Date	Event
23.01.2018	Organizational election for the political party for the term January 2018 to January 2023 was held and Mr. Uddhav Thakeray was elected as the Party President or the Paksh Pramukh.
October, 2019	The election for the 14 th Legislative Assembly of Maharashtra was held.
November 2019	Shiv Sena, NCP and INC formed a post-poll alliance that is, the Mahavikas Aghadi. The MVA successfully claimed government and Mr. Uddhav Thakeray sworn in as the Chief Minister.
25.11.2019	Sixty-five MLAs of the Shiv Sena issued a communication to the speaker of the Maharashtra Legislative Assembly intimating him that Mr. Eknath Shinde was appointed as the Group Leader of the Shiv Sena Legislature party and Mr. Sunil

	Prabhu appointed as the Chief Whip of the SSLP. At that time, functions of the Speaker were being carried out by the Dy. Speaker Mr. Narhari Zirwal.
21.06.2022	MLAs of Shiv Sena, present in the meeting, passed a resolution removing Mr. Eknath Shinde from the position of group leader of SSLP and appointing Mr. Chaudhari in his place. This decision communicated to DY Speaker, approved by the him.
22.06.2022	Appointment of Mr. Eknath Shinde as the group leader was reaffirmed. Thirty four MLAs along with Mr. Shinde issued a notice to Mr. Zirwal that he no longer enjoyed their support and calling upon him to move a motion for his removal from the office and Mr. Gogawale appointed as the Chief Whip of Shiv Sena in place of Mr. Sunil Prabhu.
23.06.2022	Mr. Prabhu filed petitions under Para 2(1)(a) of the tenth Schedule of the Constitution for disqualification of Mr. Shinde and fifteen other MLAs of Shiv Sena.
25.06.2022	Dy. Speaker issued notices regarding disqualifications.
27.06.2022	Jurisdiction of the Hon'ble Court invoked by the Respondents challenging the notices.
28.06.2022	The Governor of Maharashtra, on letter by opposition leader Mr. Fadnavis, issued a letter to the then Chief Minister, Mr. Thakeray to face floor test.
29.06.2022	Mr. Thakeray resigned.
30.06.2022	The Governor administered oath to Mr. Fadnavis and Mr. Shinde along with other MLAs of the parties on claim of majority. Mr. Shinde became the Chief Minister whereas Mr. Fadnavis was appointed as the Dy. Chief Minister. Mr. Thakeray removed Mr. Shinde along with other MLAs as office bearers of the party.
04.07.2022	Mr. Rahul Narwekar of the BJP elected as the Speaker of the Maharashtra Legislative Assembly. Motion of confidence moved on floor of Maharashtra Legislative Assembly and the house expressed confidence in Mr. Shinde. As a consequence, Mr. Prabhu filed fresh petitions for disqualification of thirty-nine MLAs led by Mr. Shinde for violating whip, similarly Mr. Gogawale filed petitions for disqualification of fourteen MLAs of Shiv Sena led by Mr. Thakeray under para 2(1)(a) of the Tenth Schedule.

17.10.2022	The ECI passed an order granting the 'Bow and arrow' symbol to the group led by Mr. Shinde.
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Abstract of the analysis

The Hon'ble Supreme Court while dealing with substantial issues regarding power of the governor to give conduct a floor test, giving oath to the leader of a faction against which disqualification proceedings are pending, that is, Mr. Shinde as a Chief minister only through majority criteria, effect of resignation of the former Chief Minister that is, Mr. Thakeray on result of the floor test and alternative option of passing no-confidence in the House, has cleared doubts regarding many of these issues. The ambiguity regarding issues such as the possession of the name and symbol of the political party by the sections splitting against each other due to the legislation stating definition of the political party.

The Tenth Schedule that is, the anti-defection law gives definition of the original political party as the political party of which the defecting member was a member. Therefore, the original party is Shiv Sena, which holds the disputed name and the symbol. However, after reconciliation of the Tenth Schedule and the Symbol Order, the Court came to conclusion that the social, economic, political effect of the policies of the party and the agendas for which the people in democracy vote a particular political party should be given considerable value than the majority of members in a given section of the party. Hence, the court relied upon the decision of the Election Commission of India and the ECI found it accurate that the name Shiv Sena and the symbol of the Bow and Arrow should be possessed by the faction led by Mr. Shinde. Even though it would be found inappropriate that just because on the request of the faction led by Mr. Shinde and opposition leader Mr. Fadnavis and other MLAs contending to be having majority, the Governor exceeded the authority by issuing order to prove majority in the floor test during pendency of the disqualification petitions, the Court assessed the practical result of the decision of the Governor that the test would not have affected the composition of the Maharashtra State Legislative Assembly as Mr. Thakeray had already resigned the post of Chief Minister. This was very important approach taken by the Court.

Judgement and rationale

The Hon'ble court has addressed the following issues and given its judgement and ratio decidendi as follows:

Issue 1: whether a notice for removal of a speaker restricts them from continuing with disqualification proceedings under Tenth Schedule of the Constitution?

The petitioners addressing the case of Nabam Rebia¹, contended that the Constitutional Bench of the Hon'ble Supreme Court had held that while notice of intention of removal has been given, the speaker is not permitted to adjudicate upon disqualification petitions. In the Kihoto Hollohan v. Zachillhu case², the constitutional bench cannot interfere in disqualification proceedings at interlocutory stage except in exceptional circumstances. Therefore, it was contended by the Petitioners that the case would be referred to seven judge bench.

The court had substantial question that the speaker had no remedy whereas the members may avail judicial review if the disqualification is unjust. Controversy between the two cases put responsibility on the court to decide whether the speaker has role of Tribunal as independent adjudicating officer or the Officer of State Legislature to adjudicate upon dispute mentioned in the Tenth Schedule.

The Respondents contended that it is on both hands important that the speaker should have powers of the Tribunal under the Tenth Schedule only when he enjoys confidence of the Assembly and if he is unjustly removed from the office, he may get re-elected and if the Nabam Rebia precedent is adhered to, MLAs can also get right to judicial review. Therefore, the said decision is based on ethical considerations. Hence, it was decided by the Hon'ble court that whether the case to be referred to larger constitutional bench shall be subject to the merits of the case.

Issue 2: Merits of the case

As per contention of the Petitioners, a per se case of disqualification against faction of Mr. Shinde under Paragraph 2(1)(b) of the Tenth Schedule³ for violation of the whip, appointment of Mr. Shinde as the Leader of the SSLP without attending meeting of the recognized political party, appointment

¹ Nabam Rebia and Ors. Vs. Deputy Speaker and Ors. (2017) 13 SCC 332

² Kihoto Hollohan vs. Zachillhu and Ors. (AIR 1993 SC 412)

³ Constitution of India- Schedule Tenth

of Mr. Gogawale as the Chief Whip and Mr. Narwekar as the Speaker could be made out. Hence, the decision of the Speaker while disqualification proceedings were going on should be set aside for irregularity of proceedings and not giving right to be heard. The Respondents could not avail defence of split as it has been deleted from the Tenth Schedule by the 91st Amendment Act, 2003. Chief Whip and the Speaker has to be appointed by the political party and not the legislature party as per Para 2(1)(b) of the Schedule, this view was affirmed by the Court in the case *Mayavati v. Markandeya Chand*⁴. A majority group should not be interpreted as the political party. As per Section 23 of the Maharashtra Legislature Members Act, 1956⁵, the Chief whip in relation to Maharashtra Legislative Assembly means a member of the House declared as the whip by party forming the government. Due to the procedural irregularity, judicial review is justifiable. The Governor recognized the split, he does not have the authority to do so. Hence, the faction may undergo re-election and the trust vote should be declared illegal.

While as per the contentions of the Respondent, by paragraph 6 of 10th Schedule and Article 212(1) of the Constitution⁶, validity of state legislature proceedings and the decision of the speaker cannot be called in question. The members under disqualification proceedings are entitled to adequate representation. Members should still be able to participate in the proceedings of the house.

The Court on this issue held that the speaker should recognize chief whip elected by the majority in the floor test taken by Governor is valid as the former Chief minister had resigned and government formation by the Mr. Shinde by claiming majority in the test. There cannot be automatic disqualification of the members under Tenth Schedule. Any act of expression of dissent cannot be called to be voluntary giving up membership. The speaker has no authority to take cognizance of split.

Therefore, considering merits of the case, it was held that the matter would be dealt with by seven judge constitutional bench.

⁴ *Mayavati vs. Markandeya Chand and Ors.* (AIR 1998 SC 3340)

⁵ Maharashtra Legislature Members Act, 1956

⁶ Article 212(1) of the Constitution

Issue 3:harmonizing Tenth Schedule with Para 15 of the Symbols Order-

The Court relied upon ECI to decide whether the original Shiv Sena political party or the faction shall be entitled to the symbol of Bow and Arrow, hence the ECI held that the symbol shall be given to the faction led by Mr. Shinde. The Court has in the case given different tests to decide who should receive the symbol used in different cases. The Court earlier ordered that the symbol could be allotted only after final proceedings under the Tenth Schedule. The proceedings before one constitutional authority cannot be pending for the other to proceed. There can arise complications before the ECI if elections commence. It is general practice of the ECI to freeze symbols even for rival groups and allotting interim symbols. The ECI, instead of relying upon test of majority while adjudicating upon the case under Para 15 of the Symbols Order⁷, may take into considerations tests such as evaluation of majority in organizational wings of the political party, analysis of provisions of party constitution, etc. The decision of the ECI shall have retrospective effect if the disqualification proceedings are based on decision of the ECI otherwise decision of ECI has prospective effect. The ECI shall allot the symbol to the groups based on their agendas, political and economic aspirations, etc.

Issue 4:exercise of discretion by the Governor in directing Mr. Thakeray to face floor test

The Governor of Maharashtra received dissent of signatory MLAs to form alliance with the INC and the NCP political parties and he received letter from Mr. Fadnavis and other seven MLAs requesting to direct Mr. Thakeray to face floor test. Immediately after the order of the Governor to take floor test, Mr. Thakeray resigned from the office of Chief minister. It was doubted that lives of some MLAs were in danger. Hence the Governor was confident that the Thakeray government did not enjoy confidence of the House. The Court while dealing with this issue cited the S.R. Bommai case⁸. In this case, it was held that the governor has no authority to decide whether the Chief minister enjoys confidence of the MLAs but has to take floor test to find that out and if the MLAs do not impose confidence in the Governor, then the Governor should refer the matter to the Chief Minister of the state.

The Court on the current issue held that the result of the floor test can be subjected to judicial review. There should be reasonable and sufficient reasons for the Governor to call for floor test. Article 174

⁷ Election Symbol Order, 1968

⁸ S.R.Bommai and Ors. Vs. Union of India and Ors. (AIR 1994 SC 1918)

⁹gives power to Governor to summon the House on aid and advice of the Council of Ministers. If the Speaker and Government attempt to circumvent a no-confidence motion, the Governor would be justified in exercising power under Article 174 without aid and advice of the Council of Ministers. This extraordinary power should be used in rare circumstances as to protect parliamentary democracy. The governor should use objective material to find out if the government enjoys confidence of the House. Once a government is elected democratically, there is assurance that the government enjoys confidence of the House. The floor test should not be used to resolve intra-party disputes as there is difference between party not supported by the people and section of party expressing discontent towards the other group. The Governor should act in bounds set by the constitution as he is the constitutional authority. The Governor cannot infer from the letters by the dissenting MLAs stating that they did not want to function in accordance with the corrupt MVA(as per stated by the MLAs in the letters to the Governor) and that the policies of the Shivsena party were not agreed with by them, that they do not impose confidence in the Chief Minister and the Council of Ministers. This is actually intra-party dispute which was dealt with by the Governor through floor test. Therefore, the Governor has committed error in comprehending that the government of Mr. Thakeray lost support of the House. Lack of security to the MLAs has no bearing on question whether Government enjoys confidence of the House.

The dispute arising out of exercise of the legislature should not be handled by the Governor, which is in the ambit of the legislature and the court. Therefore, consideration of letter by Mr. Shinde to the Governor stating that appointment of Mr. Chaudhari was illegal, is invalid in eyes of the law. These letters did not show that Mr. Thakeray had lost confidence of the House. Hence, Mr. Fadnavis and other supporting MLAs should have moved no-confidence motion in the House and not to give letter to the Governor. Therefore, the exercise of the Governor in this matter is not valid by law. The remedy to reinstate status quo ante could not be given to Mr. Thakeray as he had resigned from the post and the court could not quash the resignation submitted voluntarily. Here, the actual floor test was not held, therefore, contradicting the previous order of the Court, the Hon'ble Supreme Court held that the decision of the issue of validity of floor test does not depend upon the final outcome of the petitions.

⁹ Constitution of India-Article 174

As per the contentions of the petitioners, the floor test ought to have resulted in postponement of the floor test. However, pendency of the proceedings have no effect on participation and functioning of MLAs in the House. Every MLA has right to participate in the floor test. The option of initiating a no-confidence motion after adjudication of disqualification proceedings is vested in the MLAs. However, the result of disqualification proceedings may alter the composition and number of MLAs in the Assembly, causing effect on the floor test conducted. Even if it were so, the Court held that the Governor should use objective reasoning to decide whether it is valid to use floor test as means against no-confidence shown by the MLAs towards the existing government.

Issue 5: Exercise of discretion by the Governor in inviting Mr. Shinde to be the Chief minister-

The Court based its findings on 2 grounds put forth by the Petitioner:-

1. Is Mr. Shinde's appointment barred by Article 164(1B) of the Constitution?

It was contended by the Respondent that the Article gives provision regarding ministers of the Legislative Assembly or the Legislative Council and not the Chief Minister. Hence, the appointment of Mr. Shinde was valid though the disqualification petitions were pending. The court took into consideration, cases such as D. Sanjeevayya v. Election Tribunal¹⁰, Shrimant Balasaheb Patil case¹¹, etc. The court in this issue held that unless defection has taken place before the date of resignation by Mr. Thakeray, the taint of disqualification does not wash away on resignation in the election of the returned candidate. The petition of defection relates to the date when the act of defection was committed and therefore the MLAs cannot escape the petitions. The Court held that if the Speaker finds that Mr. Shinde has to be subjected to disqualification under Paragraph 2 of the Tenth Schedule, then he is not entitled to be qualified for the post of the Chief Minister. However, Mr. Shinde's appointment is not subjected to bar under the Article 164(1B) of the Constitution.¹²

2. Did the Governor exceed the scope of authority?

The Court held that the Governor was not empowered to recognize legitimacy of one faction over the other that is, the intra-party dispute. The ECI was the proper authority to decide which faction constitutes Shivsena. Mr. Fadnavis claimed to be having one hundred and six MLAs of BJP to be

¹⁰ D. Sanjeevayya Vs. Election Tribunal, Andhra Pradesh and Ors. (AIR 1967 SC 1211)

¹¹ Sabarimala case vs. Indian Young Lawyers Association and Ors.(SC 1558/2019)

¹² Article 164(1B) of the Constitution.

supporting Mr. Shinde. In addition to this, eight independent candidates stood for Mr. Shinde to form government along with the MLAs of Shinde-led faction. Hence Mr. Shinde requested to the Governor to call them to form the government. Governor within a period of seven days asked to prove majority on the floor of Legislative Assembly. Hence, the formation of the Government and exercise of the power by the Governor was held to be valid.

Analysis of the judgement-

1. Importance of the speaker in Assembly and finality of his decision-

The Constitution through Schedule Ten of the Constitution has vested the Speaker of Parliament and the State Legislative Assembly to adjudicate upon the matter of disqualification of members of the House. The Constitution has expected Speaker to have sufficient power to adjudicate upon utmost important matter mentioned under Tenth Schedule, hence it is expected that the Speaker shall exercise his powers in the way of a Tribunal. This can be seen clearly through the Paragraph 7 of the Tenth Schedule- the word 'Notwithstanding anything contained in the Constitution' has to be given considerable importance, which excludes all the constraints that might come in the way of exercise of the power of the speaker. This provision is strictly added to the Constitution to avoid confusion and power play of the political parties. Though the Apex Court has held in the *Kihoto Hollohan v. Zachillhu* case, that, in exceptional circumstances the constitutional bench can interfere at the interlocutory stage, the circumstances depend upon facts of the case. However, when there is not a merger of the original political party but a majority number of members of the Assembly show intention of removal to the Speaker, it is definitely an exceptional circumstance and in such a situation, it is important to protect the interest of majority and the minority membership of the State Legislative Assembly.

Until now, the defection cases have noticed merger of one political party with another or formation of an outright new party with its own name and symbol. However, this case has proved to be unique as the SSLP group demanded that they were the original party, who wanted the Bow and Arrow symbol of Shiv Sena. Hence, it finds to be appropriate that there is requirement of the Hon'ble Court to interfere in the matter even at the interlocutory stage where the disqualification proceedings are pending.

However, the decision of the court made it very clear that the split shall not be taken into cognizance by the speaker as it has been deleted from the Tenth Schedule, which is based on dissent of intra-political party.

2. Original political party-

As per comprehension of the Tenth Schedule, the original political party is the party of which the outgoing MLA was a member. Hence, in this case, original party is Shiv Sena from which the faction along with Mr. Shinde split and the members that retained in the political party should legally be members of the original political party. Here, it seems to be appropriate that if the Tenth Schedule is considered, the original party i.e. Shiv Sena has been recognized by the Election Commission and the same is recognized if the party is in government. This has been recognized by the 52nd Amendment Act¹³ allotting importance to party political democracy. Therefore, it seems to be appropriate that the political party should appoint leader.

3. Per se disqualification of the members-

The word 'shall' has been used in the Tenth Schedule and not 'may'. This provision has been inserted to give only the power of administration to the Speaker of the House on the given criteria. The whole purpose is to avoid biasness and injustice to the original political party. Therefore the proceeding of disqualification is expected to be commenced automatically after the cause of action arises.

4. Validity of floor test conducted by the Governor-

It seems to be irregular that the governor called for floor test, the political parties when the faction was not separated from the MVA and that the Governor was calling upon the existing political party along with non-recognized faction. Therefore, until the symbol proceedings asserts the case, the faction should not be able to avail defence under the Tenth Schedule. The floor test would have been appropriate if the faction were not claiming to be the original political party. Even though it was so, the court considered the golden rule here which made it expeditious to resolve the dispute in sense that the former Chief Minister had already resigned from the post and hence, it was clear that he did not have majority support in the House. Had he not resigned from the post, the only resort which

¹³ the 52nd Amendment Act, 1985

could be availed would be to commence no-confidence motion in the House. However, waiting for disqualification proceedings to be ended and after the result of the petitions, to start no-confidence motion would be time consuming. However, this option would not have changed the outcome of the floor test even if the floor test were conducted after the result of the disqualification proceedings as Mr. Thakeray made it clear that his government enjoyed no confidence, by giving resignation. Hence, in order to continue smooth functioning of the proceedings of the Assembly, the Court left the matter to objective discretion of the Governor. Hence, without strictly adhering to the procedure of the House, the Governor was directed by the court to prioritize the functioning of the House.

5. Allotment of symbol-

The quintessential question in this case was that whether the original political party of Shiv Sena along with former Chief Minister Mr. Thakeray or the faction of MLAs led by the later SSLP leader Mr. Shinde will be entitled to the symbol of the Bow and Arrow. The court has given permission to the ECI under the Symbol Order to even formulate a new test if the ECI thinks it to be suitable for finding the purpose and majority of the political party. The decision shall prove to be important for the defecting members who, for the sake of their own interest of power, split the political party and claim themselves to be own political party. However, the test of finding out the purpose for which the political party had come into existence, is important to be retained. Hence, even if the majority of members leave the party, the economic and social effect of political party functioning has to be retained.

Conclusion

The extensive judgement of the case Subhash Desai V. Principal Secretary, Governor Of Maharashtra And Ors, the Hon'ble Apex Court addressed different issues along with the rights of factions of the Shivsena political party to possess the name Shiv Sena and the symbol of Bow and Arrow. The case has become precedent for many of the cases in the field of election petition, anti-defection cases. The Court in this case brought about clarity to the extent of power of the Governor of the State, Speaker of the Legislative Assembly and of the Parliament. The Hon'ble Court took into consideration, the legality as well as the rights of the parties along with the socio-economic factors of the decision of the Court on the case.