

JUDICIAL INTERPRETATION OF THE ANTI-DEFECTION LAW: A REVIEW

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Abstract: The disqualification of nine dissident Congress MLAs in Uttarakhand in the year 2016 and the disqualification of 18 AIADMK MLAs by Tamilnadu Speaker as again become a topic of discussion among political circles. The Speaker's power under the Anti-Defection law and the way it is exercised by Speaker of different Legislative assemblies need to be re-looked. This article discusses the principles set forth in various cases before various high courts and interpretation of various provisions by the apex Court under the Anti-Defection Law.

Keywords: Tenth Schedule, Anti-Defection Law.

I. INTRODUCTION

The Tenth schedule of the Constitution of India was added with an objective to counter the evil of political defections. Many members for personal considerations and for political reasons frequently were changing party loyalty by crossing the floor. Many coalition Government did not succeed in the long run as legislators by switching sides from one party to another toppled existing Government. It was at this moment of need to save democracy then Government headed by Sri. Rajiv Gandhi decided to insert Tenth schedule to the Constitution of India. Election law even though can't be enforced as that of contract law but still the pledge made by the party before the electorate as to be followed by the successful candidate in election. Hence he should remain loyal throughout to his party and abide by party discipline and directions given from time to time. Instead if he defects, chooses to leave voluntarily the party from which he successfully contested and won, he must lose his membership also. Therefore the logic is that since party plays a vital role in election in getting their candidates elected, Anti-Defection law is a must to punish defecting members. Since Government is accountable to the House, stability of the government is very important and in turn members are accountable to their party and voters also.

II. PRINCIPLES SET FORTH

It was ruled by the Punjab and Haryana High Court that Tenth Schedule is constitutionally valid excluding paragraph 7 which ousts the jurisdiction of courts. [1] The ruling of the Punjab and Haryana High Court was upheld by the Constitution bench of the Apex Court by majority. Paragraph 7 was declared invalid since it was not ratified in accordance with Article 368(2) of the Constitution. Tenth schedule (52nd amendment) excluding Paragraph-7 which ousted Jurisdiction of Courts was struck down. [2] While deciding on petition filed seeking disqualification of a member of a house the Speaker has power to decide and declare about a member on doubts about to which party he belongs to. No provisions in paragraph of Anti-Defection Law bars jurisdiction to the Speaker of the house in deciding such questions which are crucial for making a decision on disqualification.[3] The tenth schedule added by the constitution 52nd Amendment Act recognises existence of political parties to determine questions of disqualification when a member defects from a political party.[4] The Supreme Court has held that the Speaker acts as a tribunal while deciding on petitions seeking disqualification. If at all to call an authority as a Tribunal, the necessary tests are (i) it should be constituted by a State. (ii) It should have power to function judicially and such powers should be vested in it.[5] The Speaker should detach himself and maintain impartiality while performing his role under the Tenth Schedule.[6] The court held that expelled members of a political party will be left completely vulnerable to the whips and fancies of the leaders of their parties. There is a need to re-look the decision in Viswanathan Case.[7] Criticising a political party in a public openly to which a member belongs can be deemed to have given up membership voluntarily under paragraph 2(1)(a) of Tenth Schedule. When a political party has sponsored a candidate on its ticket and later after winning he should remember he is elected because of the party manifestos and programs including other aspects and hence he cannot criticise his own party in public forum. [8]

Giving public speech by members where many people have participated in a public meeting that he heartily belongs to another political party is a clean case of membership given up voluntarily by such member of his elected party.[9] The high court of Uttarakhand at Nainital as held that when a joint memorandum is given by members of a house with the opposition members an inference can be drawn that membership of the party is given up under paragraph 2(1)(a) of the Tenth Schedule.[10] Only because sloganeering was done in the house jointly with members of opposition or travelling together through a road, flight will not attract Article 2(1)(a) of the Tenth Schedule of the Constitution.[11] Criticising the functioning style of the Chief Minister or the Speaker of a house does not attract provision 2(1)(a) of Tenth Schedule.[12] Expressing reservations or dissent about their party candidates contesting in Rajya Sabha Election will not attract paragraph 2(1)(a) of Tenth Schedule. The disqualification under Tenth Schedule in exercise of powers confined under Article 191(2) is not for five years.[13] It was held by the Madras High court that letter given to the Constitutional Head of a state i.e. Governor stating that support is withdrawn to the Chief Minister and Constitutional Process should be initiated can be treated as the membership of the party is given up voluntarily which can be

implied upon unless such letter shows that withdrawal does not result in un-stability of the Governments Survival.[14] It was held that there is no infirmity if the Speaker while deciding questions on disqualification of a member relies on a newspaper article. Reliance made by the Speaker on a report published in a newspaper was upheld. [15]

The Speaker can constitute a committee to make preliminary enquiry on a disqualification petition presented and on receiving the report proceed in accordance with the Law.[16] Privilege Committee should follow Principle of Natural Justice.[17] If fair and independent considerations are made by a decision-making authority which also is in consonance with the preliminary enquiry made by a subordinate authority, then it is valid and no error is caused in Law.[18]

Doctrine of Necessity applies to a Speaker while deciding a matter under the Tenth Schedule even though he is appointed by members of the house on majority.[19] Doctrine of necessity is an exception to principles of Natural Justice. When an adjudicator has to decide on the ground that no other person is competent or authorised to adjudicate a matter giving way to necessity is applied for administration of Justice.[20] Whenever doctrine of necessity is applicable strict compliance of the two pillars of Natural Justice can be excluded. The decision of the Supreme Court was based on a passage from Wades Administrative Law.[21]

It was held by the High Court of Madras that Deputy Speaker has no authority to set aside an order passed by Speaker under the Tenth schedule of the Constitution of India.[22] It was held by the High Court of Goa that a stay order passed by a High Court is binding on the Speaker. Interim order passed by High Court by exercising supervisory jurisdiction under Article 227 of the Constitution of India is binding on the Speaker. [23] Orders once passed by a Speaker of a house on disqualification, review of the same order by Speaker himself cannot be done under the Anti-Defection Law. [24] A member elected on a party ticket which had sponsored him remains to be the member of that party until the term of his office as such political party member in the house expires. Hence even on expulsion by reason of indiscipline from the party he continues to be a member of the political party for the purpose of tenth schedule of the Constitution. [25] The expression “unattached member” is outside the Anti-Defection Law, but explanation in paragraph 2(1) is binding. Treating a member or calling a member so is just for convenience.[26] The word or expression ‘Finality’ mentioned in the Constitution of India with respect to an order passed by a disciplinary authority does not exclude jurisdiction of courts but indicates very clearly that the jurisdiction is limited.[27] Paragraph 6(2) of the Anti-Defection law contains deeming fiction and immunity as mentioned in article 122(1) and 212(1) of the Indian Constitution as explained in Keshav Singhs Case.[28]

II. INDEPENDENT MEMBERS AND APPLICABILITY OF TENTH SCHEDULE

If independent candidates want to extend support to a Government, there is also no bar to join the Ministry. [29] Independent candidates cannot be disqualified under Paragraph 2(1) (a) of the Tenth Schedule only because they have extended support to a government and on withdrawal of the same.[30] In the instant case the orders of Speaker was held to be vitiated by malafides. Speaker is bound to face the test when there is a possibility for passing a resolution to remove him. In such a situation, proceedings under Tenth Schedule should be taken up only after that.[31] When a Independent member did not belong to any Political Party nor there is any evidence to show the he had joined another political party the Tenth Schedule of the Constitution would not be applicable[32]

III. RULINGS ON PRINCIPLES OF NATURAL JUSTICE AND TENTH SCHEDULE

It is very important that whether an authority is a judicial or quasi-judicial authority it should follow principles of natural justice. The researcher likes to point out some of the judgements of the Supreme Court with regard to principles of natural justice and its violation. The Speaker while deciding a petition seeking disqualification under tenth schedule necessarily should keep in mind the judgements of the Supreme Court and High Courts. An attempt has been to know the importance of Principles of Natural Justice and its Applicable with respect to the Tenth Schedule of the Constitution. Once time is provided to file interim replies for two times with a rider attached that no further time will be granted, further opportunity not provided does not result in violation of Principles of Natural Justice.[33] If a document is not used against a party charged with, non-supply of the same does not result in violation of the Principles of Natural Justice.[34] When a document is not supplied on even after request is made, but the same is used in recording the findings them principles of Natural Justice is said to have been violated.[35] There is no universal rule of application laid down with respect to Principles of natural justice and it depends on circumstances of each case.[36] It was held that violation of principles of natural justice depend on the facts and circumstances of each case.[37]

Violation of Principles of natural justice has to be tested on the concrete facts of each case and whether reasonable opportunity was provided or not depends on the facts and satisfaction of the courts and Principles of natural justice cannot be treated as sacred scriptures.[38] “The principle and what rule to be applied with respect to natural justice in a given case must depend to one extent on the facts and circumstances of that case, the frame work of the law under which the enquiry is held and the body of persons appointed for that purpose.”[39]

The rules of Natural Justice are not embodied rules. The requirements of natural justice and the procedure met, whether adopted and followed depends on the facts and circumstances of the case in point, the Constitution of the tribunal and the rules under which the Tribunal functions.[40] Even though the statute does not provide for compliance of Natural Justice they have to be strictly followed.[41] Only because oral hearing was not given before passing the order which was reasonable in law Principles of natural justice was not notated.[42] If there is no possibility that the decision on merits would change, then principles of natural justice just for the sake of ritual of hearing need not be followed.[43] No doubt that natural justice principles have to be followed to do substantial justice but if there will be no change in arriving to a decision the same may be given a go-by for the sake of convenience.[44]

On account of non-supply of a copy report whether prejudiced is caused or not should be considered on the facts and circumstances of each case.[45] Unless it is shown that prejudice is caused resulting in miscarriage of justice due to non-supply of report, automatically it cannot be said that an order made is null and void.[46] Even though procedural requirements are not followed, the action taken does not become void or unlawful unless it is shown that because of that prejudice had been caused.[47] Only because a procedure is breached counts can't act as a remedy unless there is a substance behind it which has been lost by the failure to follow procedure. The courts do not act in vain. [48]

Even though decision was taken without providing a reasonable opportunity of hearing the test is whether prejudice is been resulted.[49] Non-issuance of notice before sending communication, if no prejudice is caused and only was a formality then principles of natural justice is not violated.[50] After issuing notice to a Person, if he chosen to remain absent, he cannot later take a claim that enquiry was held in his absence and hence it bad in Law.[51] Only because the proceedings were conducted hurriedly and a decision was taken no inference can be made as long as reasonable opportunity was given.[52] It was held in the instant case that rule being framed by the Speaker of Legislative Assembly and if the same are not strictly followed by the Speaker, only on the ground of mere breach of the rules made by him cannot be a ground for setting aside the order of the Speaker.[53] It was also held by the court that Indian Evidence Act which speaks about degree of proof required is not applicable strictly in case of disqualification proceedings before the Speaker.[54] Only because the Speaker of a house has not followed due procedure, it is not a ground for bias against the Speaker nor such mere irregularities in following procedure do not disclose biasness on the Speaker while functioning under the Anti-Defection Law[55] It was also held that provisions under the tenth schedule do not exclude the attraction of paragraph 2(1)(a) in respect of a coalition government and the same can be understood by the language employed in the tenth schedule[56] It was held by the Hon'ble High Court of Goa bench, that the Speaker while exercising his power under paragraph 6(1) of the Tenth Schedule should take proper care of the constitutional right which a member of a house accrues. A fixed tenure enjoyed by a member of a house should not be curtailed by the Speaker by passing a order of disqualification which suffers from malafides, perversity and not consistent with the Principles of natural Justice and such an order should not be passed by the Speaker in violation of a Constitutional mandate. [57]

IV. RE-APPRECIATION OF EVIDENCE

The court cannot sit as a appellate authority when exercising Judicial review under Article 226 of the Constitution of India. If there are no allegations of procedural irregularities or illegality or violation of statutory rules the court cannot re-appreciate the entire evidence founded and recorded by the enquiry officer. The Supreme Court set aside the order passed by division bench of Andhra Pradesh High Court. [58]

The court in this case re-appreciated the evidence by exercising its judicial review under Article 136 of the Constitution of India on the ground that the high court committed patent error of law thereby resulting in miscarriage of justice. The court also made it very clear that only in exceptional cases re-appreciation of evidence is permitted. [59] When a decision is arrived by a authority based on evidence then while exercising judicial review by courts, does not act as appellate court and the evidence cannot re-appreciated by powers of Judicial review.[60] Application of Indian Evidence Act does not apply to enquiries conducted by a Tribunal.[61]

Fundamental procedural requirements and to correct errors of law so that it does not lead to manifest injustice is what the courts look into while exercising judicial review.[62] Even in ordinary course, evidence recorded ex-parte on failing to appear even after serving notice is valid and contention that it was done in his absence cannot be entertained.[63] Relying upon the admission made is the best evidence, decision of the matter should be based on this, unless the admission is withdrawn or the same is proved to be erroneous, admission made even though not conclusive but is decisive.[64] Cross-examination is to be allowed when witness have been examined by the other side or else it results in violation of principles of natural justice.[65] The person from whom it was alleged that enquiries were made should be produced to enable for cross-examination is not necessary in all cases.[66] The Principles of Natural Justice does not require that examination should be done in the presence of Complainant in exceptional matters.[67] Cross examination and opportunity to lead evidence can be treated as integral part of all quasi-judicial adjudications.[68] Unless opportunity is given for calling his explanation on a material the same cannot be relied upon against him. Failure to provide a copy of video recording when sought for by them, but relying on such video recording when order is made is a clear violation of Principles of Natural Justice. [69] Not affording opportunity to see the video-recording when sought for to explain or interpret it differently itself result in violation of Principles of Natural Justice. [70]

V. PARAMETERS FOR DECISION MAKING

The validity of administrative order or discretion can be reviewed by applying the Wednesbury test to find whether the decision was arrived at lacked procedural improprieties or was illegal or irrational.[71] Relevant materials should be taken into consideration and not irrelevant materials to arrive at a decision.[72] Decision made should not be absurd or perverse. It has been held that it leads to perverse finding if relevant materials are ignored by the authority while deciding a issue but irrelevant and extraneous materials are taken to consideration to arrive a decision. [73]

VI. POWER OF GOVERNOR TO TAKE ACTION UNDER TENTH SCHEDULE

It would be Constitutional impropriety for a Governor to take action on the basis of proceedings initiated under Tenth Schedule.[74] Governor has been assigned no role to act upon looking into the provisions of the Tenth Schedule in matter of disqualification of a member.[75] Governor must keep himself aloof and should not try to say who should be the leader of the Legislature Party or try to resolve disputes within a political party.[76] If fall of Government is likely on withdrawal support by a ruling party member and calling for initiation of Constitutional process attracts disqualification under provision Paragraph 2(1)(a)

of the Tenth Schedule.[77] The letter given to the Governor withdrawing support whether attracts disqualification under tenth schedule depends on its impact on the Government's stability.[78]

VII. WHEN TWO VIEWS ARE POSSIBLE

Courts should not look in to the correctness of alternatives available before the decision making authority. [79]

While exercising writ jurisdiction under Article 226 of the constitution courts should not interfere with a decision passed by a authority where two views are possible, only because the courts refers the other view.

The Speaker is the best judge to decide whether acceptance of resignation is to be decided first or whether disqualification petition is to be decided first. The court was of the opinion that the Speaker can decide on resignation and disqualification individually or together, if both these issues are interwoven inextricably. The court refused to give any direction to the Speaker with respect to the issue to be decided first. [80]

When no reference has been made to the Speaker under Paragraph 3(1) of the Tenth Schedule with Paragraph 6 of the tenth schedule to recognize split in a political party or to decide on questions involving disqualification of a member, the Speaker will get no jurisdiction at all to decide or recognize split. In the absence of reference made to the Speaker no question can be raised with respect to non-compliance of the provision of the defection rules. [81] A member elected by the house to decide on questions raised with respect to whether Speaker is to disqualified under paragraph 6(1) of the Tenth Schedule gets substantive jurisdiction to hear the dispute against a person alleged to have defected even in spite of him ceases to be Speaker later-on. Even if the Speaker resigns, the member can continue his jurisdiction to decide until the inquiry is disposed of by a ruling made by him.[82] If at all any order passed under tenth schedule of the constitution is to be challenged such challenge against the impugned order relied upon should be prompt and forthwith.[83]

Only because a claim of split is made, the same cannot be accepted unless proof is advised before the Speaker. On the basis of the materials placed before the Speaker, the Speaker can decide the claim of split. The Speaker while functioning under tenth schedule if abandons fair play which is in violation of the Principles of natural Justice, the court while exercising review can set aside such order. Asserting materials before coming to a conclusion the Speaker should not act with partisan attitude. [84]

It was held in the instant case that only because there are no rules enacted with respect to the manner in which whip is to be served on a member of a house publishing the same in the newspaper as a substituted service was not valid without serving the whip directly or through indirect means by way of pasting the same or sending it through Registered Post or no attempts being made, only substituted service claimed by publishing the same in the local news paper cannot be considered valid. The court set aside the order passed by the Hon'ble Speaker concluding that the house under paragraph 2(1)(a) of the tenth schedule of the Constitution.[85] Where a disqualification petition is filed before Speaker under paragraph 6(1) of the Tenth Schedule, as per the defection rules the petition should be signed and verified as per the Provisions of the Civil Procedure code for verifying the pleading order VI Rule 15 of the Civil Procedure Code is to be followed the petition should be supported by an affidavit.

If at all the Speaker goes ahead without satisfying himself about the compliance of the rules, the same is to be treated as a procedural irregularity and only because of its non-compliance it cannot be said that the Speaker will not get jurisdiction to decide on the petition. The petition will not involved and Speaker can assume jurisdiction and further proceedings can be initiated to decide the petition.[86] A whip issued by a Political Party should be only limited to cases where there is a vote of confidence tabled, policy and programme of the Party when motion is taken up, and in such cases disqualification order passed attracting paragraph 2(1)(b) of the Tenth Schedule is to be upheld.[87]

In the instant case the question which came up for consideration was whether high court under its writ jurisdiction by exercising power under Article 226 of the Constitution issue a writ of mandamus directing the Speaker to hold an enquiry into allegations declaring merger under paragraph 4 of the Tenth Schedule. It was held by the court that once a Speaker decides that there was merger, court cannot issue a writ of mandamus directing the Speaker to hold enquiry as regards disqualification of the MLAs who have been declared to be merged with another Political Party and recognized by the Speaker.[88] Judicial review is not available when discussion taken is part of assembly proceedings or because of the house.[89] In the instant case writ petition filed under Article 226 of the Constitution of India was dismissed on the ground that only because the Speaker has issued show-cause notice the petition is not entitled to invoke writ jurisdiction. However the court directed the Speaker to grant further time for the petition who is alleged to have voted contrary to the Whip issued by the party. [90]

Before the Speaker of a house makes a decision, judicial review at a stage when still notices are issued to the respondents by the Speaker is not available. Writ petition filed apprehending that the Speaker may wrong fully take a decision under Tenth Schedule which may go against the petitioner is not available. [91]

CONCLUSION

Anti-Defection Law has not made democratic Institutions un-democratic by regulating voting rights of members, it is very important at the same time for having such a law in India, looking at the parliamentary form of government in the country. Members elected with party support and on the basis of party manifestoes should remain loyal to the party policies by ensuring party discipline. If one should get something he should be ready to lose something". Democratic Institutions being 'temple of democracy' the speaker who presides the House have failed to function impartially and live up to the high tradition of that august office which deserves high respect in the minds of the people.

Not only political parties but few speakers are also contributory to the evil of defections. Anti-Defection Law should become very strict by curbing effortless enrichment of some members on one way or another. The Doctrine of Unjust Enrichment should strictly apply to members of the House as democratic Institutions are guardian of society and defections being contempt of society.

The recent case seeking disqualification of Vishwajith Pratap Singh Rane in Goa has raised new issue with respect to loop holes in the present Anti-Defection Law. The matter is now pending before Supreme Court. If Speakers follow the law declared by the Apex Court correctly while deciding disqualification petitions the allegation of bias on the functioning of Speaker which is always a topic for discussion can be prevented and dignity of such office will be looked high in the future.

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