

SUPREME COURT OF INDIA

Shiv Sena

Vs.

Union of India

WP(Civil)No.1393 of 2019

(N.V.Ramana,J., Ashok Bhushan and Sanjiv Khanna,JJ.,)

26.11.2019

ORDER

1. There is no gainsaying that the boundaries between the jurisdiction of Courts and Parliamentary independence have been contested for a *long time*¹. However, there is a need and requirement for recognizing institutional comity and separation of powers so as to tailor judicial interference in the democratic processes only as a last resort. This case pertains to one such situation, wherein this Court is called upon to adjudicate and maintain democratic values and facilitate the fostering of the citizens' right of good governance.

2. Before we pass any orders, we need to make a brief reference to the factual aspects giving rise to the petition herein. It was well own that there existed a pre-poll alliance between the Bharatiya Janata Party [for short 'BJP'] and the Shiv Sena, who contested the Fourteenth Maharashtra Legislative Assembly elections jointly. On 24.10.2019, the results for the aforesaid elections were declared and no single party had the requisite majority in the House. On 09.11.2019, the Governor called upon the BJP to indicate its willingness to form the Government, being the single largest party with 105 seats. However, the BJP declined to form the Government on 10.11.2019, as the alliance with the Shiv Sena allegedly broke down.

3. Subsequently, the Governor invited the Shiv Sena to form the Government. In this regard, the Shiv Sena is said to have shown its willingness to stake a claim to form the Government, claiming to have support of the majority. However, the aforesaid endeavor was not fruitful either. Thereafter, the Governor's effort to seek the Nationalist Congress Party's [for short 'NCP'] willingness to stake a claim to form the Government was also not successful. Ultimately, the Governor recommended President's Rule on 12.11.2019, which was imposed by a Presidential Proclamation on the same day.

4. It is brought to our attention that the Petitioners, i.e., Shiv Sena, NCP and the Indian National Congress [for short 'INC'] were in discussion to form a coalition government during this period, and accordingly, a press conference is supposed to have been held on 22.11.2019 regarding the same.

5. It has been canvassed before us that at 5:47 a.m., on 23.11.2019, the President's Rule was revoked in exercise of powers conferred by clause (2) of Article 356 of the Constitution. Thereafter, the Governor, by letter dated 23.11.2019 invited Respondent No. 3 to form the Government. The oath of office and secrecy was administered accordingly to Respondent Nos. 3 and 4 at around 8.00 a.m. on 23.11.2019 at Raj Bhavan, Mumbai.

6. Aggrieved by the Governor's action in calling upon Respondent No. 3 to form the Government, the Petitioners have approached this Court under Article 32 of the Constitution on 23.11.2019 with the following prayers:

“a. Pass an appropriate writ/order/direction declaring that action/order of the Hon'ble Governor dated 23.11.2019 inviting Shri Devendra Fadnavis to form the Government on 23.11.2019 as unconstitutional, arbitrary, illegal, void-ab-initio, and violative of Article 14 of Constitution of India; and accordingly quash the same;

b. Pass an appropriate writ/order/direction to the Hon'ble Governor to invite the alliance of Maha Vikas Aghadi comprising of the Shiv Sena, Indian National Congress and the Nationalist Congress Party which has the support of more than 144 MLAs to form the Government under the leadership of Shri. Uddhav Thackeray; ??

7. At this juncture, it is necessary to extract some of the prayers for interim directions sought by the Petitioners in the present petition:

“a. Issue appropriate directions in terms of summoning a special session of the Fourteenth Maharashtra Legislative Assembly with the only agenda of administering oath to the MLAs, immediately followed by the holding of a floor test on 24.11.2019;

d. Issue appropriate directions in terms of the order dated 24.02.1998 passed by this Hon'ble Court in Jagadambika Pal (supra) as well as Harish Chandra Singh Rawat (supra) directing that the proceedings of the House be video recorded and a copy of the video recording be placed on record of this Hon'ble Court;

e. Issue appropriate directions appointing a pro- tem Speaker to preside over the conduct of the floor test;”

8. Further, the Petitioners have filed an affidavit indicating the urgency and requirement for hearing the matter on 23.11.2019 itself. Accordingly, the Hon'ble Chief Justice was pleased to place the matter before this Bench and the matter was heard on 24.11.2019 (Sunday) at 11:30 a.m. After hearing the parties, this Court passed the following order:

“Issue notice.

It was brought to our notice by the learned Senior counsels appearing for the

petitioners that they have served the respondents through e.mail. However, there is no representation for Respondent Nos.2, 3 and 4. Mr. Tushar Mehta, learned Solicitor General appearing for the Union of India is willing to produce the relevant record, if necessary, from the Governor also. Mr. Mukul Rohatgi, learned Senior counsel who is appearing for some BJP MLAs and two independent MLAs, who are not parties to this Writ Petition, opposed the entertaining of the Writ Petition as well as passing of any order. We have taken note of all the arguments, particularly the argument that the Governor's decision dated 23-11-2019 inviting the Respondent No.3 to form a Government on 23-11-2019 is unconstitutional. With regard to the second prayer as at b', we are not going to consider the same at present. As adjudication of the issues and also the interim prayers sought by the petitioners to conduct floor test within 24 hours has to be considered after perusing the order of the Governor as well as the letters submitted by Mr. Devendra Fadnavis - Respondent No.3, even though none appeared for the State Government, we request Mr. Tushar Mehta to produce those two letters by tomorrow morning at 10.30 a.m. when the matter will be taken up, so that appropriate order will be passed."

9. When the matter was taken up for hearing on 25.11.2019, the Solicitor General of India, produced the letters in compliance of the order of this Court dated 24.11.2019.

10. Heard the learned counsel appearing for both sides.

11. The learned Senior Counsel for Petitioner No. 1, Mr. Kapil Sibal submitted that prima facie, the action of the Governor revoking President's Rule at 5:47 a.m. and administering the oath of office at around 8:00 a.m. reeks of mala fide. The learned Senior Counsel further submitted that Respondent No. 4 was never authorized to form the alliance with Respondent No. 3. Therefore, Respondent No. 3 must prove his majority on the floor of the House. For this purpose, as per established norms, the senior most member must be called for assuming the role of pro-tem Speaker, after which there must be an open ballot and the same should be captured in a video recording so as to ensure transparency.

12. Agreeing with the aforementioned submissions, learned Senior Counsel Dr. A.M Singhvi appearing for Petitioner Nos. 2 and 3 submitted that the Governor turned a blind eye by accepting the proposal of formation of the Government put forth by Respondent No. 3. The letter presented to the Governor, although allegedly signed by 54 elected members of the NCP, was unaddressed and did not have a covering letter or any other statement promising their alliance to the BJP. In the aforesaid context, the sole reliance on the aforesaid letter to prove majority was not prudent. Moreover, when both sides are agreeable to the conduction of a floor test, and an order directing the conduction of the same is not prejudicial to anyone, then there is no reason to defer the same.

13. On the other hand, learned Solicitor General submitted that the satisfaction of the Governor was based on the material placed before him, wherein it was indicated that Respondent No. 3 enjoyed the support of 105 elected members of the BJP, 54 elected

members of the NCP and 11 independent elected members (170 in total). The Governor had, in his own wisdom, relied upon the letters of the Respondent Nos. 3 and 4 and he had no reason to disbelieve the same. The Governor is not obligated to conduct a roving enquiry into the same. The learned Solicitor General also contended that this Court cannot monitor the proceedings of the House as per the provision of Article 212 of the Constitution.

14. Adding to the aforesaid submissions, learned Senior Counsel Mr. Mukul Rohatgi appearing for Respondent No. 3 submitted that although a floor test is imperative, this Court cannot sit in appeal over the Governor's order to set the dates for the floor test. It must be kept in mind that conducting a floor test is the discretion of the Speaker. In light of the above, no interim order can be passed in the aforesaid matter.

15. Lastly, learned Senior Counsel Mr. Maninder Singh appearing for Respondent No. 4 vehemently contended that the jurisdiction under Article 32 of the Constitution cannot be invoked in the present matter and the Governor's independence should be respected.

16. We may note that, while the learned Solicitor General and learned Senior Counsel Mr. Mukul Rohatgi sought additional time to file affidavits in response, however we are of the opinion that the same might not be necessary at this stage.

17. Having heard the submissions of the learned counsel on the issues of maintainability, extent of judicial review and validity of the Governor's satisfaction, we are of the opinion that they can be adjudicated at an appropriate time. There is no doubt that the contentions have to be answered, as the petitioners have raised questions concerning important constitutional issues touching upon the democratic bulwark of our nation. However, at this interim stage, we may note that it is imperative for this Court to be cognizant of the need to take into consideration the competing claims of the parties, uphold the democratic values and foster constitutional morality.

18. At the outset, we need to emphasize that recently, in the case of *Shrimanth Balasaheb Patil v. Hon'ble Speaker, Karnataka Legislative Assembly*², Writ Petition (C) No. 992 of 2019, this Court had emphasized the requirement of imbibing constitutional morality by the constitutional functionaries. Undemocratic and illegal practices within the political arena should be curtailed.

19. In this context, this Court in *Union of India v. Shri Harish Chandra Singh Rawat*³, , held as follows:

“8. ... This Court, being the sentinel on the qui vive of the Constitution is under the obligation to see that the democracy prevails and not gets hollowed by individuals. The directions which have been given on the last occasion, was singularly for the purpose of strengthening the democratic values and the constitutional norms. The collective trust in the legislature is founded on the bedrock of the constitutional trust.”

20. In a situation wherein, if the floor test is delayed, there is a possibility of horse trading, it becomes incumbent upon the Court to act to protect democratic values. An immediate floor test, in such a case, might be the most effective mechanism to do so. A similar view was expounded by B.P. Jeevan Reddy, J., in the celebrated nine-Judge Bench decision of this Court in *S.R. Bommai v. Union of India*⁴, wherein he held as follows:

“395. The High Court, in our opinion, erred in holding that the floor test is not obligatory. If only one keeps in mind the democratic principle underlying the Constitution and the fact that it is the Legislative Assembly that represents the will of the people — and not the Governor — the position would be clear beyond any doubt.. ..There could be no question of the Governor making an assessment of his own.

The loss of confidence of the House was an objective fact, which could have been demonstrated, one way or the other, on the floor of the House. In our opinion, wherever a doubt arises whether the Council of Ministers has lost the confidence of the House, the only way of testing it is on the floor of the House except in an extraordinary situation where because of all-pervasive violence, the Governor comes to the conclusion — and records the same in his report — that for the reasons mentioned by him, a free vote is not possible in the House.”

(emphasis supplied)

21. This was also the opinion expressed by the Sarkaria Commission, Rajmanna Committee and the unanimous opinion expressed by the Committee of five Governors constituted by the President of India. In the aforementioned judgment, B.P. Jeevan Reddy, J., quoted the observations of the Committee of Five Governors with approval, as below:

“393. ...The five Governors unanimously recommended that “the test of confidence in the Ministry should normally be left to a vote in the assembly . Where the Governor is satisfied, by whatever process or means, that the Ministry no longer enjoys majority support, he should ask the Chief Minister to face the Assembly and prove his majority within the shortest possible time. A Chief Minister’s refusal to test his strength on the floor of the Assembly can well be interpreted as prima facie proof of his no longer enjoying confidence of the legislature..”

22. Ex facie, Article 212 of the Constitution, relied on by the Respondents, would have no application as it relates to validity of proceedings in the Legislature of a State that cannot be called in question in any court on the ground of any alleged irregularity of procedure. Clause (2) states that no officer or member of the legislature of a State, in whom powers are vested by or under the Constitution for regulating the procedure, conduct of business or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of exercise of those powers by him. Sub-Article (2) has no application because no act of any officer or member of the Legislature of the State has been made the subject matter of the present Petition before this Court. This Court, nearly two decades back, in

*Jagdambika Pal v. Union of India*⁵, had passed an order, after hearing counsel for the petitioner and the caveators, directing that a special session of the Uttar Pradesh Assembly will be summoned/ convened after two days on 26.02.1998 with the following directions:

“

(ii) The only agenda in the Assembly would be to have a composite floor test between the contending parties in order to see which out of the two contesting claimants of Chief Ministership has a majority in the House.

(iii) It is pertinently emphasised that the proceedings in the Assembly shall be totally peaceful and disturbance, if any, caused therein would be viewed seriously.

(iv) The result of the composite floor test would be announced by the Speaker faithfully and truthfully.

2. The result is expected to be laid before us on 27-2-1998 at 10.30 a.m. when this Bench assembles again.

3. Ancillary directions are that this order shall be treated to be a notice to all the MLAs, leaving apart the notices the Governor/Secretariat is supposed to issue. In the interregnum, no major decisions would be made by the functioning Government except attending to routine matters, not much of any consequence.” , similar directions were passed by this Court after recording and taking notice of events that had taken place and few developments which were in the offing, as reported in the media, to observe and direct as follows:

“5. Though many a relief has been sought for in the writ petition, as also in the application for grant of ex parte stay, for the present, we are satisfied that a strong prima facie case on the averments made in the petition duly supported by affidavit, has been made out to issue the following interim directions and we order accordingly:

(1) The session of the Jharkhand State Assembly has already been convened for 10-3-2005 on which day the newly elected Members of the Legislative Assembly shall be administered oath. We direct the session to continue and on 11-3-2005 i.e. the next day and on that day the vote of confidence to be put to test.

(2) The only agenda in the Assembly on 11-3-2005 would be to have a floor test between the contending political alliances in order to see which of the political parties or alliance has a majority in the House and hence a claim for Chief Ministership.

(3) It is emphasised that the proceedings in the Assembly shall be totally peaceful, and disturbance, if any, caused therein shall be viewed seriously.

(4) The result of the floor test would be announced by the pro tem Speaker faithfully and truthfully.

(5) This order by the Court shall constitute notice of the meeting of the Assembly for 11-3-2005 and no separate notice would be required.

(6) Till 11-3-2005 there shall be no nomination in view of Article 333 of the Constitution and the floor test shall remain confined to the 81 elected members only.

(7) We direct the Chief Secretary and the Director General of Police, State of Jharkhand to see that all the elected Members of the Legislative Assembly freely, safely and securely attend the Assembly and no interference or hindrance is caused by anyone therein. Dr. A.M. Singhvi, learned Senior Counsel appearing for the State of Jharkhand through the Chief Secretary and the Director General of Police has very fairly assured the Court that even otherwise it is the duty of the State and its high officials to take care to do so and the direction made by the Court shall be complied with in letter and spirit.”

The aforesaid directions were interim in nature and were passed on the basis of averments made in the petition duly supported by an affidavit. Writ petitions were directed to be listed on the date of hearing fixed.

24. Ten years later, in *Union of India v. Sh. Harish Chandra Singh Rawat*, (2016) SCC Online SC 442, again an interim order was passed after the special leave petitions were taken up for hearing, though after concession which was made by Mr. Mukul Rohatgi, the then Attorney General for India, that the Union of India has no objection, which the Court had appreciated, to observe that the floor test should be conducted on a special session of Uttarakhand Legislative Assembly to be summoned/convened in which the only agenda would be the vote of confidence sought by the first respondent and apart from the said agenda nothing will be discussed. Directions were issued to the Chief Secretary and the Director General of Police, State of Uttarakhand, to see that all qualified Members of the Legislative Assembly, freely, safely and securely attend the Assembly and no hindrance is caused to them. The floor test was to commence at 11:00 a.m. and was directed to be completed by 1:00 p.m. There was another direction that the Confidence Motion having been put, a division of the House shall take place and members inclined to vote in favour of the Motion shall sit on one side/wing and those voting against the Motion shall sit on the other side/wing. The entire proceedings were to be video-graphed and video recording was directed to be placed before the Court for being perused. The special leave petitions were directed to be listed thereafter.

25. In *Chandrakant Kavlekar v. Union of India*⁶, the challenge raised was to a press note and communication from a leader of a party to the Governor of the State on the issue relating to whether a particular party had misrepresented the facts. Observing that the sensitive and contentious issue could be resolved by a simple direction requiring holding of

the floor test at the earliest. This would remove all possible ambiguities and would result in giving the democratic process, the required credibility. By order dated 14.03.2017, the Governor of the State of Goa was requested to ensure that a floor test is held on 16.03.2017. Further, it would be the only agenda for the day so as to determine whether the Chief Minister administered the oath of office enjoys the support of the majority. The order further highlights that the floor test should be held as early as possible. wherein identical directions were issued in respect of formation of Government in the State of Karnataka to test whether the Chief Minister so appointed enjoyed the majority support of the House. Noticing the fact that the elected members of the Legislative Assembly, as in the present case, were yet to take oath and the Speaker was also not elected, the following procedure was directed to be followed for conducting the floor test:

“8.

(A) Pro-tem Speaker shall be appointed for the aforesaid purpose immediately.

(B) All the elected members shall take oath tomorrow (19-5-2018) and this exercise shall be completed before 4.00 p.m.

(C) The Pro-tem Speaker shall conduct the floor test on 19-5-2018 at 4.00 p.m. in order to ascertain the majority and it shall not be by secret ballot and these proceedings shall be conducted in accordance with law.

(D) Adequate and sufficient security arrangements shall be made and Director General of Police, State of Karnataka will himself supervise the said arrangements so that there is no lapse on this count whatsoever.”

It was directed that the floor test would be conducted immediately the next date, i.e., the date following the order.

27. We may note that in the present case, oath has not been administered to the elected members even though a month has elapsed since the declaration of election results. In such emergent facts and circumstances, to curtail unlawful practices such as horse trading, to avoid uncertainty and to effectuate smooth running of democracy by ensuring a stable Government, we are of the considered opinion that it is necessary to pass certain interim directions in this case. In this context, it is necessary and expedient to conduct the floor test as soon as possible to determine whether the Chief Minister, who was administered the oath of office, has the support of the majority or not. Since the elected members of the Legislative Assembly are yet to take oath as specified in the III Schedule of the Constitution, and the Speaker is also yet to be elected, we request the Governor of the State of Maharashtra to ensure that a floor test be held on 27.11.2019. The following procedure is to be followed for conducting the floor test:

a. Pro-tem Speaker shall be solely appointed for the aforesaid agenda immediately.

b. All the elected members shall take oath on 27.11.2019, which exercise should be completed before 5:00 p.m.

c. Immediately thereafter, the Pro-tem Speaker shall conduct the floor test in order to ascertain whether the Respondent No. 3 has the majority, and these proceedings shall be conducted in accordance with law. The floor test will not be conducted by secret ballot.

d. The proceedings have to be live telecast, and appropriate arrangements are to be made to ensure the same.

28. Eight weeks time is granted to the learned counsel for the respondents to file their respective counter affidavits. Rejoinder affidavit, if any, is to be filed within four weeks thereafter. The matter to be listed after twelve weeks.

Judgment Referred.

¹*Erskine May, Parliamentary Practice, 25th edition, 321 (2019).*

²*Writ Petition (C) No. 992 of 2019*

³*(2016) SCC OnLine SC 0618*

⁴*(1994) 3 SCC 0001*

⁵*(1999) 9 SCC 0095*

⁶*(2017) 3 SCC 0758*