A CASE THAT SCANS THE WORKING OF THE ANTI-DEFECTION LAW

The Hindu

Paper-II
(Indian Polity)

A five-judge Bench of the Supreme Court of India is presently hearing a set of cases popularly known as the "Maharashtra political controversy cases". These cases arose out of the events in June last year, when the ruling Maha Vikas Aghadi (MVA) coalition (the Shiv Sena, the Nationalist Congress Party and Congress) lost power after an internal splintering of the Shiv Sena party. A faction led by Eknath Shinde then joined hands with the Bharatiya Janata Party (BJP) to form the new ruling coalition. The disputes between the various parties have been continuing since then, with the most recent development being an Election Commission of India (ECI) order declaring that Eknath Shinde's faction is entitled to the party name and symbol.

While questions have been raised about whether the situation is now fait accompli, and whether the Court can "turn the clock back" if it wanted to, the judgment of this case will have consequences not merely for State politics in Maharashtra but far beyond as well. This is because the case raises certain fundamental issues about the working of India's "anti-defection law".

The Tenth Schedule, past and present

The anti-defection law was introduced into the Constitution via the Tenth Schedule, in 1985. Its purpose was to check increasingly frequent floor-crossing; lured by money, ministerial berths, threats, or a combination of the three, legislators were regularly switching party affiliations in the house (and bringing down governments with them). The Tenth Schedule sought to put a stop to this by stipulating that if any legislator voted against the party whip, he or she would be disqualified from the house. While on the one hand this empowered party leadership against the legislative backbench, and weakened the prospect of intra-party dissent, the Tenth Schedule viewed this as an acceptable compromise in the interests of checking unprincipled floor-crossing.

Fast-forwarding 40 years to the present day, we find that the working of the Tenth Schedule has been patchy, at best. In the last few years, there have been innumerable instances of governments being "toppled" mid-term after a set of the ruling party or coalition's own members turn against it. That this is power-politics and no high-minded expression of intra-party dissent is evident from the well-documented rise of "resort-politics", where party leaders hold their "flock" more or less captive within expensive holiday resorts, so as to prevent the other side from getting at them.

Indeed, politicians have adopted various stratagems to do an end-run around the anti-defection law. Recent examples involve mass resignations (instead of defections) to force a fresh election, partisan actions by State Governors (who are nominees of the central government) with respect to swearing-in ceremonies and the timing of floor tests, and equally partisan actions by Speakers (in refusing to decide disqualification petitions, or acting in undue haste to do so). The upshot of this is that, in effect, the Tenth Schedule has been reduced to a nullity: governments that do not have clear majorities are vulnerable, at any point, to being "toppled" in this fashion.

The Court has a challenging task

This is where the role of the Supreme Court becomes crucial. Disputes over government formation and government toppling invariably end up before the highest court. It must immediately be acknowledged that such cases place the Court in an unenviable position: the Court has to adjudicate the actions of a number of constitutional functionaries: Governors, Speakers, legislative party leaders, elected representatives, many (if not all) of whom, to put it charitably, have acted dubiously. But the Court does not have the liberty of presuming dishonesty: it must maintain an institutional arm's-length from the political actors, and adjudicate according to legalities, even as political actors in anti-defection cases do their best to undermine legality. This is a challenging task.

But it is a challenge that the Court has, with due respect, not always risen to. This is one of those situations where the proof of the pudding is in the eating: despite the fact that the Court's intervention has been sought in every one of these

Why does the anti-defection law have to be brought?

In fact, between 1957 and 1967, MPs and MLAs changed parties 542 times and before the 1967 general elections, MPs and MLAs changed parties 430 times. At the same time, after 1967, a record was also created, in which the governments of 16 states fell within 16 months due to defections. In 1967 itself, Haryana MLA Gayalal changed the party three times in 15 days and from here the proverb 'Aaya Ram, Gaya Ram' started, which is still prevalent today.

Anti -defection law

In 1985, Rajiv Gandhi's government made a provision regarding disqualification on the basis of defection from one political party to another by the 52nd Constitutional Amendment Act. For this, changes have been made in four articles of the Constitution (Articles 101, 102 and Articles 190, 191) and a new schedule "Tenth Schedule" has been added to the Constitution. This Act is commonly called the 'Defection Law'. Articles 102(2) and 191(2) are related to the Tenth Schedule, in which there is a provision to disqualify MPs and MLAs on the basis of defection.

Disqualification on the ground of defection

Members of political parties: An elected member of Parliament or a State Legislature, who has been elected as a candidate set up by a political party, shall be disqualified on the ground of defection-

- if he voluntarily gives up his membership of that political party, or if he votes or abstains from voting contrary to the directions of his political party at a poll in that House, and for that purpose he You don't even get pardon from the party within fifteen days.
- All in all, it means that a member who has been elected on a party ticket must continue to be a member of that party and follow the instructions of that party. Otherwise his membership may go away.
- Independent Member: An Independent Member of Parliament or State Legislature shall be disqualified for membership of either House if he joins any political party after that election.
- **Nominated Member:** A nominated member shall be disqualified for membership of the House if he joins any political party six months after he has taken his seat in that House.

cases, and despite the fact that in recent years the Supreme Court has handed down multiple substantive judgments on anti-defection, the toppling of governments remains as frequent as ever. While one may (partially) put this down to wily politicians finding loopholes in Supreme Court judgments, much like they find loopholes in the Tenth Schedule, this is not all there is to the situation: some of these loopholes were easily foreseeable at the time, but were, unfortunately, not addressed by the Court.

An example of this is the Court's judgment in the Karnataka political controversy, which effectively sanctified resignations as an end-run around the anti-defection clause. But it is the present case (the Maharashtra political controversy) that presents an interesting case study. One will recall that the crisis, so to say, began when a set of legislators from the Shiv Sena rebelled against Uddhav Thackeray, and were soon ensconced in a resort on Guwahati (with allegations of State political intervention). The Deputy Speaker (there was no Speaker at the time) moved to disqualify the "rebels" who in turn moved the Court, arguing that there was a pending no-confidence motion against the Deputy Speaker, and therefore, as per the Supreme Court's judgment in Nabam Rebia, he was disqualified from deciding on the disqualifications while it was pending.

The Supreme Court's vacation Bench stayed the Deputy Speaker's hand, but in what can only be described as a very curious set of orders, also directed a floor test. The upshot of this was that the "rebel

Exemption from disqualification of defection

The above disqualification on the ground of defection does not apply in the following two cases:-

1. When a legislature party decides to merge with another party and such a decision is supported by two-thirds of its members, it will not be called defection. Although earlier it was only one-third, it was removed by the 91st Constitutional Amendment Act 2003 and a provision of two-thirds was included.
2. If a member voluntarily withdraws from the membership of his party on being elected the Presiding Officer of the House and then rejoins the membership of the party after his term. This is not considered a disqualification.

Who decides on defection disputes?

- All questions relating to disqualification arising out of defection are decided by the Speaker of the House to which the matter belongs. For example, if a member of the Lok Sabha has defected, then all the decisions to disqualify him will be taken by the Speaker of the Lok Sabha.
- Initially according to this law, the decision of the Speaker was final and it could not be questioned in any court. But in Kihoto Hollohan v. Zachillhu case (1992), the Supreme Court declared this provision as unconstitutional on the ground that it was an attempt to evade the jurisdiction of the Supreme Court and the High Court.

Breaking the anti-defection law

- A law was made to stop the change of party, but the leaders also found a way out of it. There was also a provision in the law that came in 1985 that if two-thirds of the MLAs or MPs of a party change party, then their membership will not be lost. In 2003, this law was tightened, under which ineligible members were prohibited from being made ministers.
- However, the leaders took a break from this too. The parties started the game of toppling the state governments by breaking two-thirds of the MLAs. Apart from this, there is another way to avoid it. That is, the MP-MLA first resigns from his membership, then leaves the party.
- We have seen many such examples in recent years. In July 2019, 14 Congress MLAs and 3 Janata Dal Secular MLAs resigned in Karnataka. After the resignation of the MLAs, BJP's BS Yeddyurappa staked claim to form the government and formed the government. Similarly, in March 2020, 22 Congress MLAs rebelled in Madhya Pradesh as well. After this, the Kamal Nath government, which came in a minority, had to resign and BJP's Shivraj Singh Chouhan became the Chief Minister.

MLAs" (who may or may not have subjected themselves to disqualification) were able to vote in this floor test, and voted to bring the government down (in turn altering a fluid political situation and skewing the balance of power). The new government was swiftly sworn in (by the Governor), and appointed its own Speaker, thus effectively creating a fait accompli with respect to the pending disqualification petitions. To top it all, the Supreme Court's orders were "interim" in nature, and therefore, no reasons were provided.

In perspective

These orders, the correctness of which is now being considered by the five-judge Bench, albeit in the context of a changed political situation that itself is the consequence of those very orders, reflect how judicial interventions, if not carefully thought through, can hasten the toppling of a government and contribute to turning the Tenth Schedule into a dead letter. If, for example, it is held that a Speaker cannot decide a disqualification petition while under a notice for removal themselves, and that a floor test can be ordered in the interim (by the Governor or the court), the consequences are obvious: a "rebel MLA" can move a notice for removal, incapacitate the Speaker from taking action, and leave rebel MLAs free to bring down the government without consequence.

How the Supreme Court will untangle or cut this Gordian knot in the Maharashtra political controversy is anyone's guess. But ultimately, the Court will be subject to the verdict of history: the use of money and indeed threats and inducements of prosecution or immunities therefrom to "turn" MLAs is a truth that is evident to all with the eyes to see. The Court's judgment can act as a counterweight to political power, and infuse a dose of constitutionalism into the politics of government formation and toppling. But equally, the Court's judgment could make toppling governments even easier for those with the means to do so. Only time will tell which of the two it will be.

Expected Question

Que. Consider the following statements-

1. Changes have been made in four articles i.e. Articles 101, 102 and Articles 190, 191 by the 52nd Constitutional Amendment Act, 1985.
2. The decision of the Speaker on the question of disqualification arising out of defection is final and cannot be questioned in any court.

Which of the above statements is/are not correct?

(a) Only 1

(b) Only 2

(c) Both 1 and 2

(d) Neither 1 nor 2

Answer : B

Mains Expected Question & Format

Que.: Mention the main provisions made in the anti-defection law and looking at the recent events, write whether there is a need for amendment in this law? analyze

Answer Format :

- State the provisions of the anti-defection law.
- Giving examples of recent incidents, write whether there is a need for amendment in this law.
- Give a balanced conclusion.

Note: - The question of the main examination given for practice is designed keeping in mind the upcoming UPSC mains examination. Therefore, to get an answer to this question, you can take the help of this source as well as other sources related to this topic.