

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 10.04.2013
Judgment pronounced on : 29.04.2013

+ **W.P(C) No.2249/2013 & CM NO.4277/2013 (stay)**

SAMTA ANDOLAN SAMITI AND ORS. Petitioners

Through : Mr. M.L. Lahoty, Adv. with Mr.
Paban K. Sharma, Ms. Gargi B.
Bharali, Mr. Shobhit Tiwari, Mr.
Lal Pratap Singh, Mr. Umesh
Pratap Singh, Mr. Pradeep
Aggarwal, Mr. Ram Niwas, Adv.
Mr. Gopal Sankaranarayanan, Adv.
for petitioners no.4&5

Versus

UNION OF INDIA & ORS. Respondents

Through : Mr. Rajeev Mehra, ASG with Mr.
Sachin Datta, CGSC, Mr. Dinesh
Sharma, Adv. for UOI

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V.K. JAIN

V.K. JAIN, J.

1. Paragraph 2 of the Tenth Schedule to the Constitution of India, to the extent it is relevant, reads as under:

“2. Disqualification on ground of defection.-(1)

Subject to the provisions of paragraphs 3, 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House-

(a) xxxxxx

(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorized by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.”

The above referred Clause came up for consideration before a Constitution Bench of the Supreme court in **Kihoto Hollohan vs. Zachillhu & Ors.**[1992 Supp.(2) SCC 651], in the context of the contention that if the expression really attracts, within its sweep, every direction or whip of any kind whatsoever, it might be unduly restrictive of the freedom of speech and the right of dissent and, therefore, it should be given a meaning limited to the objects and purposes of the Tenth Schedule. On consideration of the matter, the following view was taken by the Apex Court:

“122. While construing Paragraph 2(1)(b) it cannot be ignored that under the Constitution members of Parliament as well as of the State legislature enjoy freedom of speech in the House though this freedom is subject to the provisions of the constitution and

the rules and standing orders regulating the Procedure of the House. The disqualification imposed by Paragraph 2(1) (b) must be so construed as not to unduly impinge on the said freedom of speech of a member. This would be possible if Paragraph 2(1)(b) is confined in its scope by keeping in view the object underlying the amendments contained in the Tenth Schedule, namely, to curb the evil or mischief of political defections motivated by the lure of office or other similar considerations. The said object would be achieved if the disqualification incurred on the ground of voting or abstaining from voting by a member is confined to cases where a change of Government is likely to be brought about or is prevented, as the case may be, as a result of such voting or abstinence or when such voting or abstinence is on a matter which was a major policy and programme on which the political party to which the member belongs went to the polls. For this purpose the direction given by the political party to a member belonging to it, the violation of which may entail disqualification under paragraph 2(1)(b), would have to be limited to a vote on motion of confidence or no confidence in the Government or where the motion under consideration relates to a matter which was an integral policy and programme of the political party on the basis of which it approached the electorate. The voting or abstinence from voting by a member against the direction by the political party on such a motion would amount to disapproval of the programme of the basis of which he went before the electorate and got himself elected and such voting or abstinence would amount to a breach of the trust reposed in him by the electorate.

123. Keeping in view the consequences of the disqualification i.e., termination of the membership of a House; it would be appropriate that the direction

or whip which results in such disqualification under Paragraph 2(1)(b) is so worded as to clearly indicate that voting or abstaining from voting contrary to the said direction would result in incurring the disqualification under Paragraph 2(1)(b) of the Tenth Schedule so that the member concerned has fore-knowledge of the consequences flowing from his conduct in voting or abstaining from voting contrary to such a direction.”

2. Article 16 (4A) of the Constitution enables the State to make any provision for the reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

3. 117th the Constitutional Amendment Bill, seeking to replace existing Article 16(4A) was laid before the Parliament on 04.09.2012. The proposed clause (4A) seeks to declare that notwithstanding anything contained elsewhere in the Constitution, the Scheduled Castes and the Scheduled Tribes notified under Article 341 and Article 342, respective, shall be deemed to be backward and nothing in this Article or in Article 335 shall prevent the State from making any provision for reservation in matters of promotions, with consequential seniority to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes to the extent of the percentage of reservation provided to the Scheduled Castes and the Scheduled Tribes in the services of the State.

4. The petitioners before this Court have been submitting representation seeking restraint on making any constitutional amendments, with respect to reservation in promotion, without mandate from the people of India, and also opposing issue of Whip by the political parties on the proposed Constitutional amendments. The apprehension of the petitioners is that in violation of the law declared by the Supreme Court in **Kihoto Hollohan** (*supra*), restricting disqualification incurred on account of voting or abstaining from voting by a member to such cases where change of Government is likely to be brought about or is prevented, as the case may be, as a result of such voting or abstinence or when such voting or abstinence is on a matter which was a major policy and programme of which the political party to which a member belongs went to the polls, the respondent No. 5 Indian National Congress and respondent No. 6 Bhartiya Janta Party, both of which are political parties, are likely to issue Whip to their respective members to vote in favour of the proposed 117th amendment to the Constitution. The following are the prayers made in the writ petition:-

(a) pass writ, order or direction declaring that the provisions of Xth Schedule of the Constitution can be exercised for issuance of a whip/direction only for the purpose of vote of motion of confidence or no confidence.

(b) pass writ, order or direction declaring that the expression “any direction issued by the political party” under para (1)(b) of the Xth Schedule of the Constitution does not empower the political party to issue a “party whip” involving Constitutional Amendment.

(c) pass writ, order or direction declaring that no political party issue Whip under the garb of any other provision or custom for the purpose of any constitutional Amendment.

(d) pass such other or further order(s) as this Hon'ble Court may deem fit in the facts and circumstances of the case.”

5. The following issues primarily arose for our consideration in this petition:

(i) whether the writ petition against a political party claiming relief of the nature sought in this petition, is maintainable under Article 226 of the Constitution.

(ii) whether the petitioners have any locus standi to present the writ petition;

(iii) whether there is a reasonable apprehension of a Whip being issued by respondents 5 and 6 directing their respective members to vote in favour of the proposed 117th Constitutional Amendment and if so, whether such a Whip would be contrary to the decision of the Supreme Court in **Kihoto Hollohan** (supra).

(iv) whether in the absence of actual issue of Whip by respondent No. 5 and 6 to their respective members, to vote in favour of the proposed 117th Constitutional Amendment, the writ petition is premature.

(v) whether the declaratory writ sought by the petitioners is really necessary.

Issue No. (i)

6. This issue came up for consideration before a Division Bench of Andhra Pradesh High Court in M. Baga Reddy vs. Sonia Gandhi and others [2001 (3) ALD 636]. The issue involved in the above referred writ petition was whether Indian National Congress (INC) is State within meaning of Article 12 of Constitution of India and whether a writ petition would be maintainable against it. The contention of the petitioner before the Andhra Pradesh High Court was that the activities of a political party, of the nature of Indian National Congress, must be held to be within the public sphere and therefore it would be amenable to the writ jurisdiction of the Court. It was also contended on behalf of the petitioner that since the political parties have been given constitutional recognition in terms of the Tenth Schedule, of the Constitution, the internal affairs of the party cannot be said to be a private affair. It was also urged on behalf of the petitioner that a political party must so regulate its procedure in terms of constitutional amendment and if it fails to take any action in relation thereto, a writ of mandamus would issue. Rejecting the contention of the petitioner and dismissing the writ petition, the High Court, *inter alia*, observed and held as under:

4.....A writ of mandamus as is well known must issue to a person who has a public duty to perform. Public law elements or public law character must be considered to be the basis for issuance of such writ. All India Congress Committee is a society. It has its own bye-laws. Such bye-laws are not framed in terms of the provisions of a statute. The Constitution and rules of Indian National Congress pertain to the character of the bye-laws similar to those framed by the Co-operative Societies

registered under the Co-operative Societies Act or societies registered under the Societies Registration Act or companies registered under the Companies Act. Although in terms of the provisions of the said Acts the Co-operative Societies, societies and the companies are entitled to frame their own rules and bye-laws, such rules and bye-laws do not have any statutory flavour.

5. A political party of the magnitude of Indian National Congress may have some public function but it has nothing to do with the sovereign function nor its activities satisfy the public law element. The State within the meaning of Article 12 of the Constitution must perform sovereign function of the State....

6. Even a right to vote is not a fundamental right but in merely a statutory right although the edifice of democracy is based upon such rights. The Constitution of Indian National Congress as noticed hereinbefore is framed by it for its own guidance. By reason of such constitution it merely controlled its own activities vis-a-vis its members and/or its commitments to the people of India. By any stretch of imagination a political party does not undertake any sovereign function although its activities may involve public activities.

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10..... So far as internal matters of a political party are concerned the same have nothing to do with Constitutional functions. The affairs of the party may although relate to public in general its internal affairs would be treated to be a private affair. The Courts cannot intermeddle therewith nor for that matter a writ of mandamus can issue....

11. By no stretch of imagination in our considered view the action of a political party comes within the purview of the legislative act of the State, executive act of the State or an instrumentality or a person, authority imbued with public law element. If the submission of Mr. Kannabiran is accepted, as indicated hereinbefore even any Co-operative Society, or a society registered under the Societies Registration Act or a company registered under the Companies Act would also be amenable to writ jurisdiction. The said organisations although are governed in accordance with the provisions of statute, they have not been and cannot be considered to be State within Article 12 of the Constitution....”

7. In **Pradeep Kumar Biswas and ors vs. Indian Institute of Chemical Biology and Ors.** [(2002) 5 SCC 111], a Seven Judges Bench of the Supreme Court, while interpreting Article 12 of the Constitution, after considering its earlier decision on the subject including its decision in **Ajay Hasia v. Khalid Muib** AIR 1981 SC 487, *inter alia*, held as under:

“40. The picture that ultimately emerges is that the tests formulated in **Ajay Hasia** are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be whether in the light of the cumulative facts as established, the body is financially functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12.

On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.”

The respondents no.5 and 6, both of which are political parties, are not controlled by the Government, financially, administratively or functionally. They are entitled in law to frame their own rules and regulations and there is no legislative control on their activities. In the absence of any finance, administratively or statutory control of the Government over these political parties, mere registration with Election Commission of India, in our opinion, would not make them ‘State’ within the meaning of Article 12 of the Constitution, or ‘authority’ within the meaning of Article 226 of the Constitution.

In our opinion though the activities of the political parties such as respondents no.5 and 6 before us are in public domain and they are expected to adopt and follow such policies as would subserve the interest of the common man, they do not perform any sovereign function nor do they discharge any public duty while issuing whip to their respective members. In our opinion, issue of whip to its members is entirely an internal matter of a political party, which does not come within the realm of discharging any constitutional or sovereign functions. Therefore, such activities of a political party are not amenable to the writ jurisdiction of a High Court.

Issue No. (ii)

8. As noted earlier, Supreme Court while interpreting the expression ‘Direction’ or ‘Whip’ in the context of para 2 (1) (b) of the 10th Schedule

has clearly stated that a Member of Parliament, who is also a Member of a political party, can be disqualified on account of voting or abstaining from voting in violation of a Whip or Direction issued by his party only where such a Whip or a Direction relates to a case where a change of Government is likely to be brought about or prevented as a result of such voting or abstinence or where such voting or abstinence is on a matter of major policy and programme of the political party to which the member in question belongs. If a political party issues a Whip or a direction on a matter other than where a change of the Government is sought to be brought about or prevented by way of voting or abstaining from voting or a matter relating to a major policy and programme, on which the concerned party went to polls, without claiming that violation of the said Whip or direction would entail disqualification, no exception to such a whip or direction can be taken. If, however, the political party also notifies to its members that violation of even such a Whip would attract disqualification, it would be open to Members to whom such a Whip or a Direction is issued to challenge such an action of his political party. The outsiders such as the petitioners before this Court, however, would have no locus standi to challenge such a Whip or a Direction issued by the political party to its members. A Member of Parliament who is a member of a political party and to whom a Whip or a Direction in violation of the law laid down by the Supreme Court in **Kihoto Hollohan** (*supra*), is issued, is free, in law, not to act upon such a Whip or a Direction since, he cannot be subjected to any disqualification on account of voting or abstaining from voting in violation of such a Whip or a

direction issued by his party. The question as to whether a Member of Parliament has incurred disqualification or not can be decided only by the Speaker of Lok Sabha if he happens to be a Member of Lok Sabha and Chairperson of Rajya Sabha if he happens to be a Member of Rajya Sabha. Neither of these high Constitutional Functionaries is likely to disqualify a Member of Parliament, who votes or abstains from voting, in violation of a Whip or a direction, which, in terms of the law declared by the Supreme Court does not attract disqualification. Even if a Member of Parliament is held disqualified for voting or abstaining from voting in violation of such a Whip or a direction which does not entail disqualification, the decision holding him disqualified from the membership being amenable to judicial review, is liable to be struck down.

Considering the legal position as enunciated by the Supreme Court, no Member of Parliament is likely to vote or abstain from voting solely in compliance of a Whip or a direction issued by his party, except in cases where change of Government is likely to be brought about or is prevented or where such a voting or abstinence is on a matter which is a major policy and programme on which the political party to whom he belongs went to polls, unless he of his own volition wants to vote or abstains from voting in the same manner in which a Whip or a Direction issued by his party requires him to do, because he knows that he cannot be disqualified in violation of such a Whip or a Direction issued by his political party. Therefore, no element of public interest, in our opinion

would be involved in matters of this nature. Consequently, in our view, the petitioners have no locus standi to file this petition.

Issue No. (iii) & (iv)

9. This is not the case of the petitioners that a Whip or a Direction has already been issued by respondents 5 and 6 to their respective Members to vote in favour of the proposed 117th Constitutional Amendment. There is no material before us which would indicate intention, either of respondent No. 5 or of respondent No. 6 to issue a Whip of the nature apprehended by the petitioners. Respondent No. 5 and 6 being responsible political parties, it is expected that they would conduct themselves in consonance with the law declared by the Supreme Court in **Kihoto Hollohan** (*supra*). Hence, there is no cause for an apprehension that a Whip or a direction of the nature which, in view of the decision of Supreme Court in **Kihoto Hollohan** (*supra*), does not attract disqualification will be issued by respondents 5 and 6 to their respective members and simultaneously they would also tell their members that by voting or abstaining from voting in violation of the said whip or direction, they would incur disqualification. Therefore, the writ petition at this stage is premature.

Issue No. (v)

10. In terms of Article 141 of the Constitution of India, the law declared by the Supreme Court is binding on all Courts within the territory of India. Once the law on a particular issue is declared by the Apex Court, there would be no necessity of a declaratory writ being

issued by the High Court on the same subject. Even if this Court issues a writ or order as sought in the petition, that, in our opinion, would be wholly unnecessary considering the law already declared by the Supreme Court in this regard in **Kihoto Hollohan** (*supra*). A person need not be a party to the writ petition before being required to follow the law declared by the Supreme Court and to this extent the reliefs sought in the writ petition, in our opinion, are wholly unnecessary.

11. As noted earlier by us, a whip or direction which entails disqualification of the member of Parliament who is also a member of a political party can be issued not only in a case where a change of government is likely to be brought about or is sought to be prevented, as a result of the voting or abstinence, but also in the case where such voting or abstinence is on a matter which was a major policy and programme of the political party to which a member in question belongs went to the polls. We do not have any material before us to verify whether the proposed 117th Constitutional Amendment is a matter relating to a major policy and programme on which the respondents no.5 and 6 went to polls. If the proposed amendment is in consonance with such a policy and programme, disqualification on account of violation of a whip or direction issued by the respondents no.5 and 6 requiring their respective members to vote in favour of the said proposed amendment would not be in contravention of the law declared by the Supreme Court in **Kihoto Hollohan** (*supra*). We, therefore, cannot issue the writs sought by the petitioners.

For the reasons stated hereinabove, we find no merit in this petition. The petition is accordingly dismissed. There shall be no orders as to costs.

V.K.JAIN, J

CHIEF JUSTICE

APRIL 29, 2013/*rd*

