

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.18807 of 2014

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1. Gyanendra Kumar Singh, S/o Late Kamla Prasad Singh, resident of 23, Bailey Road, P.O. + P.S.- Shashtri Nagar, District- Patna.
 2. Rabindra Rai, S/o Late Sone Lal Rai, resident of Village + P.O. + P.S. - Mahua, District- Patna.
 3. Neeraj Kumar Singh, S/o Ram Kishore Singh, resident of 10, Birchand Patel Path, Patna, District- Patna.
 4. Rahul Kumar, S/o Jagdish Sharma, resident of 15, Hardinge Road, P.S.- Secretariat, District- Patna.

.... Petitioner/s

Versus

1. The Bihar Legislative Assembly, Patna through the Secretary.
2. Shri Shravan Kumar, S/o Not known to the petitioners, Chief Whip of ruling party, Bihar Legislative Assembly, presently residing at 12A, Bailey Road, P.O.- GPO, PS- Secretariat, District- Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Vinod Kumar Kanth, Sr. Adv. with
Mr. S.B.K. Manglam
Mr.Chandan and
Mr. Ravi Ranjan, Advocates

For the Respondent No.1 : Mr. Y.V. Giri, Sr. Advocate with
Mr. Ashish Giri, Advocate

For the Respondent No2. : Mr. Lalit Kishore. Sr. Adv. (PAAG) with
Mr. Ranjit Kumar, AC to PAAG and
Mr. Piyush Lal, AC to PAAG.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
C.A.V. JUDGMENT

8 06-01-2015 The four sitting Members of the 15th Legislative Assembly of the State of Bihar have invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India praying for the following reliefs:

- i) For issuance of an appropriate writ in the nature of CERTIORARI for quashing the judgment and order dated 01.11.2014 (Annexure-13) passed by the Respondent No.2 in exercise of his powers under the



Tenth Schedule of the Constitution, whereby and whereunder the Respondent No.2 has been pleased to disqualify the writ petitioners to continue as the members of the Bihar Legislative Assembly under paragraph 2(1)(a) of the Tenth Schedule of the Constitution and has also directed that as a consequence of this order, the writ petitioners would not be entitled to any benefit as an Ex-Member of the House.

- ii) Consequent upon the quashing of the order impugned, passed by the Respondent no.2, this Hon'ble Court may further direct the respondents for the reinstatement of the writ petitioners as the Members of the Bihar Legislative Assembly and for consequential benefits for which the writ petitioners would have been entitled if they would not have been declared disqualified by the impugned order passed by the Respondent no.2.
- (iii) For issuance of any other appropriate writ/writs, order/orders, direction/directions for which the writ petitioners is entitled under the facts and circumstances of the case.



Pursuant to the order impugned in the writ petition, a formal notification bearing number 1695 dated 1.11.2014 has been issued and a copy of which has been produced during the course of hearing of the writ petition. Since the notification is merely consequential in nature, it is taken on record.

Facts of the case are in a very narrow compass. The four petitioners who contested the 15th Vidhan Sabha election as Members on the symbol of the Janta Dal (United) party have been declared disqualified under paragraph 2(1)(a) of the Tenth Schedule of the Constitution of India, inter alia, on grounds of voluntary surrender of their membership of the party on whose symbol they have been elected.

As I have already mentioned, pursuant to the order impugned in the writ petition, a formal notification bearing number 1695 dated 1.11.2014 has been issued under the orders of the Speaker a copy of which has been produced during the course of hearing of the writ petition and which has been taken on record.

With the consent of the parties the writ petition has been considered at the stage of admission with a view to its final disposal by way of this judgment.

Mr. Vinod Kumar Kanth, learned senior Advocate has appeared on behalf of the writ petitioners, while the

Legislative Assembly is represented by Mr. Y.V. Giri, learned senior Advocate and the Chief Whip/Convener of the Janta Dal (United) Party is represented by Mr. Lalit Kishore, learned Senior Advocate and Principal Additional Advocate General.

Mr. Kanth began his arguments by referring to the preamble of the Constitution of India to submit that being a sovereign, socialist, secular democratic republic the repository of power rests in the citizens of India. He submits that being the repository of power, the citizens of India possess Constitutional right to elect its representatives for securing a sovereign, secular and democratic republic and with reference to Article 19(1) (a) and (c) it is contended that a right to speech and expression would include a right to elect its representative. He submits that this right got translated under the Representation of People's Act, 1951(hereinafter referred to as 'the RP Act') whereunder a statutory right is vested in the citizens of this country to elect its representatives. Again referring to the fundamental right guaranteed under Article 21 of the Constitution of India he submits that though the provision is couched in one sentence but its reflection is widespread and a right to life and personal liberty would guarantee the right to elect such representatives who conform to the faith reposed by the electorates. Mr. Kanth



in support of his submission has referred to a judgment of the Supreme Court reported in **(2003)4 SCC 399 (People's Union for Civil Liberties vs. Union of India)** and with reference to paragraphs 94, 96 and 97 thereof it was submitted that the Supreme Court has recognised the right of an electorate to vote for the candidate of his choice which is the essence of the democratic politic. He thus submits that even though the right to elect is a statutory right under the Act, the expression which is translated into a vote is a constitutional right guaranteed under Article 19(1) (a) of the Constitution of India. According to Mr. Kanth, whereas an electorate in a general election relatable to the Assembly/Lok Sabha is free to exercise his franchise in favour of any of the candidates, it is only in connection with elections relatable to the Legislative Council/Rajya Sabha that such right comes under scrutiny. While making such submissions it was argued by Mr. Kanth that even in such cases, so long a member of a party votes in favour of a candidate who belongs to the same party even if he is not declared as an official candidate, there lies no occasion for any proceeding for disqualification since the member is free to exercise his discretion which is the very foundation for a democratic society. He submits that an election of a member of Rajya Sabha is not



on the floor of the house and thus any directive/whip issued by a party would not be binding in such cases nor can be a basis for disqualification of such members who act contrary to such directives. Advancing his arguments on the right vested in an electorate to vote as per his conscience and to elect a person of his choice, it was submitted that a similar occasion arose way back in 1969 when late Smt. Indira Gandhi defied the party's decision to field late Shri N. Sanjeeva Reddy as a candidate for the post of President of India. It was submitted that though the official candidate of the Congress Party was Shri N. Sanjeeva Reddy but late Smt. Gandhi dissenting from the party's decision set up Mr. V.V. Giri as a candidate and exhorted the members of the party to vote from their conscience. He submits that in the election so held, the party's candidate lost and Mr. V.V. Giri was elected the President of India which is now a history and for such act of late Smt. Gandhi there were no issues on disqualification.

Adverting to the case in hand he has submitted that in the present case the party fielded outsiders which had no backing of the Parliamentary Board of the party and of the 3 candidates so fielded by the party to contest the Rajya Sabha election the petitioners while agreeing to the candidature of



party President Mr. Sharad Yadav did not toe the party line to vote for the remaining two candidates. It was submitted that a mere discretion exercised by these petitioners of not supporting the candidates fielded by the party cannot be termed as an act of voluntary surrender of membership by the petitioners. Mr. Kanth in this context referred to a judgment of the Supreme Court reported in **(2007)4 SCC 270 (Rajendra Singh Rana Vs. Swami Prasad Maurya)** to canvass that the conduct of a legislator is the backbone for any decision on the issue of disqualification. He submits that a mere expression of dissent by these petitioners to the candidates fielded by the party can in no circumstance be a conduct reflective of voluntary surrender of the membership of the party. It was submitted that these petitioners have never left the party nor their conduct in any manner shows surrender of their membership and hence their act did not fall within the parameters of paragraph 2(1)(a) of the Tenth Schedule. He further submits that since these petitioners were not supportive of the two out of three candidates fielded by the party nor were these candidates approved by the Parliamentary Board of the party, a mere act of dissent will not invite a disqualification.

Mr. Kanth next questioned the order of



disqualification as attended with mala-fides. With reference to a judgment of the Supreme Court rendered in the case reported in **(2012)2 SCC 708 (D.Sudhakar (2) vs. D.N. Jeevaraju)** putting stress on paragraph 77 of the judgment it was submitted that just as in that case, the Speaker was in a hurry to disqualify the legislators, even in the present case though the allegation is directed against 18 members of the Janta Dal (United) but the proceedings were drawn only against 10 of which four have faced the consequences and are before this Court, the other four are awaiting the obvious while the proceedings as against two of the members, namely, Ms. Annu Shukla and Ms. Renu Kumari who openly defied the party's decision, has taken a back seat. Learned counsel has referred to a show cause issued in respect of Ms. Renu Kumari placed at Annexure-7 to the writ petition to support his arguments. Mr. Kanth referring to the complaint placed at Annexure-4 series of the writ petition submits that the allegation against all the four petitioners is identical. Mr. Kanth referred to show cause reply filed on behalf of these petitioners in the proceedings and with reference to paragraphs 16 and 17 of the reply it was submitted that the attention was drawn of the Hon'ble Speaker that voting in a Rajya Sabha is a proceeding outside the house and thus the provisions of the Tenth Schedule



would not be applicable in such matters. Learned counsel in support of his submission has referred to a judgment of the Supreme Court reported in (2006)7 SCC-1 (**Kuldeep Nayar vs. Union of India**) and with reference to paragraph 378 of the judgment in which the stand taken by the Union of India is discussed, he submits that similar is the position in the present case. Mr. Kanth with reference to a Press Note issued by the Election Commission of India dated 17.7.2007 placed at Annexure-14 to the writ petition submits that the confusion as to whether a member of political party voting in defiance to the decision of the party would attract disqualification under the Tenth Schedule whatsoever, stands removed.

Mr. Kanth next turned to the very foundation for the disqualification to submit that since the petitioners' actions were in dissent of the party's decision that they have been subjected to the present disqualification. Mr. Kanth referred to the deposition of the Chief Convener of the party who is the complainant and the applicant to the disqualification proceedings present at Annexure-11 to the writ petition. With reference thereto it was submitted that whereas in a democratic set up each electorate is free to exercise his right of franchise, any direction issued by the party to vote for a particular candidate would not only mean



influencing such right but would also amount to a corrupt practice. It was submitted that the right to choose a candidate is vested in the Parliamentary Board of the party and there is nothing on record to suggest that any such decision was taken by the Parliamentary Board to field these candidates. He submits that a plain reading of the complaint present at Annexure-4 read with the evidence of the complainant reflects perversity and substantiates that it is actuated with ill will. According to Mr. Kanth, the very materials to constitute a disqualification under paragraph 2(1) (a) of the Tenth Schedule was lacking in the case of the petitioners. Mr. Kanth reading from the book authored by Dr. Subhash C. Kashyap on “Anti-Defection Law and Parliamentary Privileges” referred to Chapter-VI thereof to explain the meaning and functions of ‘whip’ and ‘issuance of whip’. It was submitted that a ‘whip’ could only be issued for an event taking place on the floor of the house and would not be attracted to any event which takes place outside the floor of the house. He submits that since the voting to elect a member of Rajya Sabha is an event taking place outside the floor of the house hence the provisions of disqualification as found under the Tenth Schedule would not be attracted. According to Mr. Kanth, even if the members of a party while voting against party’s



candidates may subject themselves to disciplinary action by the party, such action is not a reflection of their surrender of membership. It was submitted that an election of a member of Rajya Sabha is not by way of secret ballot rather is by way of open voting and each member of the legislature is required to show in whose favour he has tendered his vote. It was submitted that since the election is through open voting, nothing is a secret and a voting in favour of a candidate other than the party's candidate would be in tune with the constitutional freedom of speech and expression vested in an electorate. Learned counsel in support of his submission referred to paragraph 53 of the judgment reported in **1992 Supp. (2) SCC 651 (Kihoto Hollohan vs. Zachillhu)** and paragraph 11 of a judgment reported in **1994 Supp. (2) SCC 641(Ravi S. Naik vs. Union)**. On the strength of these judgments it was sought to be argued that a mere act of voting in favour of a candidate who is not the party's candidate cannot be a reason for disqualification on grounds of voluntary surrender of membership until such time that the conduct of such legislator is such which leaves no room for any other opinion. Mr. Kanth next referred to a decision of the Lok Sabha Speaker placed at Annexure-1 to submit that it has been held that the activities which take place outside the

house cannot be a subject-matter of disqualification under paragraph 2(1) (a) of the Tenth Schedule which opinion of the Speaker of Lok Sabha was followed by the Speaker of the Bihar Legislative Assembly in a similar matter placed at Annexure-2 to the writ petition.

Mr. Kanth next addressed on the issue of discrimination not only by the party but also by the Speaker. It was submitted that although the office of a Speaker is put on a very high pedestal and he is recognised to be above all party politics but such is not the case in hand and whereas the party has singled out the petitioners and some others for proceeding against for disqualification of membership under paragraph 2(1)(a) of the Tenth Schedule, they have not chosen to proceed against some others and even the Speaker has permitted the Party to function as they like, which is manifest from the fact that of the 10 persons against whom the proceedings were initiated, he has decided to keep the proceedings initiated against Ms. Annu Shukla and Ms. Renu Kumari in abeyance while taking the proceedings in respect of the petitioners to its finality and four others are awaiting similar decision. It was submitted that the two candidates in question hold membership of the party and since they contested as independents hence they required 10



proposers each. With reference to the nomination placed at Annexure-3 series it was submitted that of the proposers, 7 are common in both the nominations, while one is independent and rest 12 are members of the Janta Dal (United) party. It was submitted that proceedings have been drawn only against 8 members and which by itself reflects a discriminatory action. Mr. Kanth referred to the findings of the Speaker to submit that the order is silent on the issue of discrimination.

Concluding his arguments Mr. Kanth referred to the findings at paragraph 25 of the impugned order to submit that even when the Speaker has admitted that voting against a party candidate cannot be a subject-matter of disqualification, the reasons assigned for passing the impugned order is that since the petitioners were proposers to the independent candidates, they acted as their election agent and also canvassed against the party's candidate, their conduct reflected voluntary surrender of their membership. Mr. Kanth submits that though the petitioners never admitted that the candidates fielded by the party were official candidates but it has been incorrectly mentioned as such by the Speaker. According to Mr. Kanth, a mere act of being proposers to a candidate other than the party's candidate and any act which shows a dissent to the candidates fielded by the party,



more particularly in circumstances where such candidate fielded by the party is not as per the decision of the Parliamentary Board, cannot be the basis for disqualification. He further submits that the Speaker has failed to explain as to why of the proposers only 8 have been proceeded against while 2 of them, namely, Gajanan Shahi and Daud Ali were not subjected to any proceedings. He thus submits that the decision of the Speaker is attended by all the five postulates mentioned at paragraph 109 of the judgment rendered in the case of **Kihoto Hollohan** (supra).

The arguments of Mr. Kanth have been contested by Mr. Giri who though objected to the impleadment of the Speaker but while representing the respondent-Assembly has in fact canvassed for and on behalf of the Speaker. According to Mr. Giri, the decision of disqualification is a decision of the house and the Speaker under Article 178 of the Constitution is an Officer of the House. Mr. Giri endeavoured to canvass that the impugned decision is a decision of the house and to support his contentions he referred to the provisions underlying Articles 178, 187 and 208 of the Constitution of India to submit that the Speaker is an Officer of the State Legislature having its own secretarial staff and is vested with powers to frame rule for regulating its business. Mr. Giri in this regard referred to the



rules framed by the Bihar Legislative Assembly in exercise of powers vested under Article 208 of the Constitution of India which reads as Rules of Procedure and Conduct of Business in the Bihar Vidhan Sabha. With reference to the definition clause present at rule-2, the report of the proceedings clause present at rule 295, the duties attached to the post of Secretary present at rule 301, 302 and 303, it was sought to be impressed that the order impugned is a decision of the house.

The argument of Mr. Giri that the order impugned is a collective decision of the 'House' is not only fallacious but is on a complete misconception of the Constitutional provisions and is thus only taken to be rejected. An order passed by the Speaker in exercise of powers vested under Article 191(2) read with provisions of the Tenth Schedule even though results in disqualification of an elected member from the 'House' but such decision is not a decision of the 'House' for it has not been deliberated before the 'House' and in fact the Speaker while discharging such functions, acts as a Tribunal adjudicating on the rights and obligations. Reference in this regard is made to paragraph 111 of the judgment rendered in the case of **Kihoto Hollohan** (supra).

Adverting next to the merits of the contentions



advanced by Mr. Kanth, it was contended by Mr. Giri that the judgment passed by the Supreme Court in the case of **People's Union for Civil Liberties** (supra) relied upon by Mr. Kanth to canvass that the right to vote is a Constitutional right, was distinguished in the judgment passed by the Supreme Court in the case of **Kuldip Nayar vs. Union of India** (Supra) and with reference to paragraph 362 of the judgment it was submitted that the opinion has been distinguished to hold that a right to elect, though fundamental to democracy is neither a fundamental right nor a common law right but is a pure and simple a statutory right. Mr. Giri referring to paragraphs 1 and 2 of the judgment passed in the case of **Kuldip Nayar** (Supra) has submitted that the issues before the Court was whether deletion of requirement of being a domicile of the State concerned for election to the Council of State, under the Amendment Act, 2003 and whether the open ballot system in such elections, was violative of the principles of secrecy affecting the right guaranteed under Article 19(1) (a) of the Constitution of India. The Constitution Bench upheld the amendments and the writ petition was dismissed. With reference to paragraph 385 of the said judgment it was submitted that the conduct of election to the Rajya Sabha is guided under the Conduct of Elections Rules, 1961 which



prescribes the form of nomination papers and Form-2-C relates to election to the Council of States. It is stated that the Supreme Court has held that no sooner the nomination in this form is filed by the candidate, it becomes a declaration which would bind the elected legislator in the matter of allegiance to the political party concerned.

With reference to the provisions of the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter referred to as 'the Order') framed by the Election Commission of India under Article 324 of the Constitution of India read with Section 29A of 'the RP Act' and the provisions of the Conduct of Elections Rules, 1961, it was submitted that the moment a symbol is allotted to the candidate he becomes the official candidate of the party and there can be no dispute on the issue. He submits that the very fact that the candidate proposed by the petitioners filed nominations as independent candidates, while holding Janta Dal (United) membership, it by itself confirms that the candidates fielded by the party were official candidates and once the symbol was allotted to them and nomination was filed by them, it was a declaration which was binding on all the legislators who were members of the Janta Dal (United) party. With reference to paragraphs 438 and 439 of the judgment



passed in the case of **Kuldip Nayar** (supra) it was submitted that after the amendment introduced in 'the RP Act' vide Amendment Act 40 of 2003, an election to the Council of State is to be conducted by open ballot and any voter who refuses to show his vote to the authorized agent of his party, would forfeit his right to vote which would be cancelled by the Presiding Officer on account of violation of the election procedure.

Mr. Giri next turned to the judgment rendered in the case of **Kihoto Hollohan** (supra) and referring to paragraph 109, 110 and 111 it was submitted that the scope of judicial review in such matters stands outlined. He further referred to paragraphs 112 to 119 to submit that the office of Speaker by itself reflects his impartiality for he does not owe allegiance to a particular party rather he is a representative of all the parties and thus an order passed by the Speaker has a very limited scope of judicial review. It was submitted that on the facts accompanying the matter in issue, an opinion has been expressed by the Speaker and which on the facts and in the circumstances governing the case would warrant no interference merely on a possibility of a second opinion.

Mr. Giri next referred to the Tenth Schedule to the Constitution to submit that the entire argument of the petitioners



is centered around paragraph 2(1) (b) when it is a disqualification under paragraph 2(1) (a) of the Tenth Schedule. It is contended that whereas the disqualification under paragraph 2(1) (a) of the Tenth Schedule is for an event taking place outside the floor of a house, a disqualification under paragraph 2(1) (b) would be for an act done on the floor of the house. He thus submits that in these circumstances where paragraph 2(1)(a) of the Tenth Schedule itself conceives of a disqualification for an act done outside the house, the argument on the issue of 'Whip' would be misdirected. He further submits that even the instance of dissent shown by late Smt. Indira Gandhi in fielding a different candidate is misplaced since at that relevant time the Tenth Schedule was not in existence and thus the two events cannot be equated.

With reference to section 33 of 'the RP Act' it was submitted that for presentation of nomination on behalf of a candidate who is other than the official candidate, it would require 10 proposers. He thus submits that until such time that the independent candidate has a support of 10 proposers they cannot contest an election. He submits that the conduct of a candidate belonging to a particular party who contests the official candidate of his party as an independent candidate and



that of his proposers without whose support he cannot contest are so interlinked that if such candidate becomes liable for disqualification under paragraph 2(1) (a) of the Tenth Schedule, so shall follow in the case of his proposers who cannot contest a similar disqualification. With reference to rule 4 of the Conduct of Election Rules, 1961 he submits that a nomination for contesting an election is to be filed in Form 2-A to 2-E and in so far as an election to the Council of State is concerned, it is in Form-2-C. It is thus the argument of Mr. Giri that the candidate as well as his proposers who stand up to contest the official candidate of their party, are subject to the same disqualification under paragraph 2(1) (a) of the Tenth Schedule and there is no distinction in between the conduct of the candidate who stands as an independent or his proposers. Mr. Giri referred to paragraphs 13 to 18 of the counter affidavit filed on behalf of respondent no.1 to support his submissions and to submit that the forfeiture of membership as found in the impugned order is restricted to the membership of these petitioners in the 15th Legislative Assembly and not prior thereto. Proceeding herefrom Mr. Giri referred to the judgment of the Supreme Court reported in **(2004)8 SCC 747 (Mahachandra Prasad Singh (Dr.) vs. Chairman, Bihar Legislative Council)** and



with reference to paragraphs 11, 13 and 16 to 18 it was submitted that in the said case the petitioner was disqualified for contesting the parliamentary election as an independent candidate though he was elected to the Legislative Council on the ticket of the Indian National Congress and the Supreme Court held that since such fact was admitted hence the petitioner had incurred a disqualification under paragraph 2(1)(a) of the Tenth Schedule. He thus submits that if a candidate belonging to a particular party who chooses to contest an election as an independent, has been held to incur a disqualification under paragraph 2(1) (a) of the Tenth Schedule, the same principles would also extend to the case of his proposers. With reference to paragraph 11 of the judgment rendered in the case of **Ravi S. Naik** (supra) it was submitted that it is not only by way of resignation that a surrender of membership can be assessed rather it is the conduct of the person concerned which would decide the issue of disqualification on grounds of voluntary surrender and in the present case there was no room for confusion for upholding the petitioners disqualification.

Contesting the arguments of petitioners on the issue that the candidates fielded by the party were not official candidates in absence of a decision in this regard by the



Parliamentary Board of the party, it was contended that an issue of adherence to the party's constitution is an internal matter of the party and what is relevant is whether the candidate fielded by the party had an official sanction. With reference to Clauses-4, 5 and 13 of the Election Symbols (Reservation and Allotment) Order, 1968 it was submitted that the moment a symbol is allotted to the candidate to file his nomination papers, he shall be deemed to be set up by the political party concerned. He thus submits that in the circumstances where a symbol has been allotted by the party to the candidates other than those proposed by the petitioners, they will be deemed to be official candidates. He further submits that the arguments on the constitution adopted by the party were never advanced by the petitioners before the Speaker and cannot be canvassed herein. With reference to Forms 'A' and 'B' attached to the Order it was submitted that the moment these two documents are filed there remains no confusion as to status of these persons as official candidates. It is submitted with reference to Annexure-3 series which are nomination papers of the candidates proposed by the petitioners that they never claimed to be Janta Dal (United) candidate rather they have contested the election as independent candidates. With reference to the show cause reply filed by the



petitioners, a copy whereof is placed at Annexure-10, more particularly paragraphs 29 and 30 thereof and the written statement present at Annexure-12 it was submitted that the very resentment expressed by the petitioners confirms their act of voluntary surrender of their membership. Contesting the arguments on discrimination, it was submitted that there is no applicability of Article 14 in such matters especially where proceedings against others are yet pending.

Mr. Giri concluding his arguments has referred to a Bench decision of this Court reported in **2009(4) PLJR 240 (Jai Narayan Prasad Nishad Vs. Union of India)** as affirmed by the Division Bench in the judgment reported in **2010(1) PLJR 1014 (Jai Narain Prasad Nishad vs. The Union of India)** and with reference to paragraph 37, 38, 43, 44 and 48 it was submitted that it is the conduct and act of the member concerned which is relevant and since the actions of these petitioners reflected their voluntary surrender of membership, they have incurred disqualification as envisaged under paragraph 2(1)(a) of the Tenth Schedule.

Mr. Lalit Kishore has appeared for the Chief Convener of the Janta Dal (United) party who has petitioned for disqualification of the 4 petitioners before the Speaker. Mr.



Kishore addressed the Court on the aims and objects of the Tenth Schedule and for the purpose has referred to Volume-10 of D.D. Basu's Constitution of India. He submitted that the schedule was inserted by the 52nd Constitutional amendment in 1985 and by the Constitutional (91st Amendment) Act, 2003 the provisions have been made more stringent. It is submitted that the endeavour of the provisions relatable to disqualification is with the sole object of restricting floor crossing/defections within the party. It was contended that the avowed object for which Tenth Schedule has been introduced by way of Constitutional amendment, the scope of judicial review in exercise of plenary powers vested in the High Court under Article 226 of the Constitution of India would be circumscribed. It was the endeavour of Mr. Kishore to impress that excepting the grounds of perversity, in no other circumstance the order impugned can be challenged and even the said ground has not been established by the petitioners.

With reference to a judgment of the Supreme Court reported in **AIR 1974 SC 806 (Bhut Nath Vs. State of West Bengal)**, paragraph 16 he submitted that the conduct of these petitioners has already been assessed and affirmed in the order of the Speaker and a mere 2nd opinion would not justify any



interference by the High Court. Continuing his argument as regarding the scope of interference in such matters, learned counsel also referred to paragraphs 109 and 110 of the judgment of the Supreme Court rendered in the case of **Kihoto Hollohan** (supra) and paragraph 8.1 of the judgment rendered in the case of **Mahachandra Prasad Singh** (supra). It was the contention of Mr. Kishore that the moment there is no dispute on facts, there cannot be any perversity in an order merely because a different view is possible. It is the contention of Mr. Kishore that a disqualification of any member is automatic upon his conduct of voluntary surrender and the order of the Speaker is merely a confirmation of this position. According to Mr. Kishore, the Speaker does not disqualify any Member rather the order passed by him is a mere confirmation of his disqualification. With reference to the stipulations provided under Articles 191 and 192 of the Constitution it was submitted that it is only in circumstances where a dispute arises whether a member has incurred disqualification provided under Article 191(1) of the Constitution of India that the matter is referred to the Governor for decision but not in cases where the conduct of the Member speaks for itself. Since Mr. Kishore was appearing on behalf of the Chief Convener of the Janta Dal (United) party hence the



Court enquired as to whether an appropriate decision at the party level against such Members would be a condition precedent before an exercise of disqualification is undertaken under the Tenth Schedule. While submitting that appropriate orders have also been passed at the party level, it was further submitted that such issue is not relevant for a decision by the Speaker on the issue of disqualification on grounds of voluntary surrender of membership. In his effort to justify that the petitioners had full knowledge of the fact that the candidates fielded by the party were official candidates, learned counsel referred to paragraphs 26, 27, 30, 31 and 41 of the show cause reply filed on behalf of the petitioners to submit that such acceptance is manifest from their reply. Referring to the evidence given by the Chief Convener present at Annexure-11 more particularly page 111 to 117 of the writ proceedings it was submitted that the evidence is sufficient to establish that the candidates fielded by the party were official candidates even if they were not chosen by the Parliamentary Board and in any event any such irregularity whatsoever did not bestow any right on the petitioners to set up their own candidate.

Responding to the argument of Mr. Kanth that activities done outside the house would not attract



disqualification under Schedule-X it was submitted that a disqualification under paragraph 2(1) (a) of the Tenth Schedule is relatable to a happening which takes place outside the house and thus the arguments to that effect by Mr. Kanth is not a correct interpretation of the provisions. To support his argument, Mr. Kishore referred to the judgment of **Mahachandra Prasad Singh** (supra) to submit that the disqualification admittedly was a happening which took place outside the house. Responding to the argument advanced by Mr. Kanth on the issue of discrimination, it was argued that no advantage could be drawn by the petitioners on the anvil of Article 14 of the Constitution for it is only available against a State and an intra-party decision cannot be questioned on the threshold of Article 14 as it is purely a private transaction. With respect to a judgment of the Supreme Court reported in **(1997)3 SCC 321 (State of Haryana Vs. Ram Kumar Mann)**, paragraph 3 it was submitted that there is no reverse application of Article 14 and merely because some of the others have not yet been proceeded against, it would not amount to discrimination. To support his stance that there is no negative application to Article 14, learned counsel relied upon a judgment of the Supreme Court reported in **(2000)9 SCC 94 (State of Bihar vs. Kameshwar Prasad Singh)** paragraph



30. Mr. Kishore while concluding his argument addressed on the issue of forfeiture of past benefit and submitted that no confusion remains on the issue in view of the notification issued under the orders of the Speaker on 1.11.2014 in respect of disqualification of these petitioners and which clarifies all doubts that the forfeiture of past benefit is restricted to the membership of these petitioners in the 15th Legislative Assembly and does not extend beyond that.

In his short reply to the arguments of Mr. Giri and Mr. Kishore, Mr Kanth again referred to the judgment of the Supreme Court rendered in the case of **Kihoto Hollohan** (supra) and to submit that the five postulates mentioned by the Supreme Court warranting interference in an order of disqualification stands satisfied in the case in hand. With reference to a judgment of the Supreme Court reported in (2011)7 SCC 1 (**Balchandra L. Jarkiholi Vs. B.S. Yeddyurappa**), paragraph 156 it was submitted that the status of Speaker under the Constitution is kept at a very high pedestal and he is expected to be impartial while discharging his obligations. According to Mr. Kanth, such impartiality has been found wanting from the Speaker. It was submitted by Mr. Kanth that the immunity to the orders passed by the Speaker is only when it is passed on the floor of the house



and not outside. It was contended that the moment the Speaker decided to take a back seat in the case of Ms. Renu Kumari and Ms. Annu Shukla who faced harsher accusations, the impartiality expected of the Speaker has also taken a back seat. With reference to paragraph 77 of a judgment of the Supreme Court rendered in the case of **D. Sudhakar** (supra) it was submitted that similar situation had arisen in the said case and the observations of the Supreme Court are equally applicable to the present case. It was contended that the Speaker has proceeded with a premeditated biased mind when he refused the petitioners' counsel to continue with his arguments and also did not permit him to lead his witnesses. It was contended that there has been no satisfactory reply on the issue of violation of the party's constitution and even the admission alleged on the part of the petitioners on the issue of official candidate is not borne from the records rather are presumptuous. Replying to the arguments of Mr. Giri that there is no distinction between a candidate and his proposer it was submitted that the proposition is not correct and even if such act reflects dissent but the same in no manner would amount to surrender of membership. With reference to paragraph 50 of the judgment rendered in the case of **B.S. Yeddyurappa** (supra) it was submitted that dissent is a



healthy form of democracy and cannot be treated as a defection. It was submitted that at no stage the petitioners were required to answer on their conduct prior to the commencement of the present proceedings and in any event this conduct would not constitute either resignation or voluntary surrender and to support his argument learned counsel has again referred to paragraph 11 of the judgment passed by the Supreme Court in the case of **Ravi S. Naik** (supra).

I have heard learned counsel for the parties and I have perused the materials on record.

India is a parliamentary democracy governed by rule of law with the Constitution of India being the supreme document, a mother of all laws. The legislature, the executive and the judiciary all derive their powers from the Constitution which was adopted by the Constituent Assembly on the twenty-sixth day of November, 1949 and was enforced on 26th January, 1950 when India became a sovereign, socialist, secular, democratic republic. The preamble to the Constitution reads as follows:

“WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a ‘SOVEREIGN SOCIALISTS SECULAR DEMOCRATIC REPUBLIC’ and to secure to all its citizens:
JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith



and worship;
EQUALITY of status and of opportunity;
and to promote among them all
FRATERNITY assuring the dignity of the
individual and the unity and integrity of the
Nation;
IN OUR CONSTITUENT ASSEMBLY this
twenty-sixth day of November, 1949, do
HEREBY ADOPT, ENACT AND GIVE TO
OURSELVES THIS CONSTITUTION.

The preamble to the Constitution represents its basic structure and democracy is an integral part of this structure. The liberty of thought, expression, belief, faith and worship are some of the salient features of this Democracy and which would be a governing factor for the adjudication of the dispute raised herein.

The democratic set up of this country is governed by a three tier system i.e. the local self Government constituted at the district level in each State, the State Legislature consisting of the Governor, the Legislative Council and Legislative Assembly at the State level with the Parliament at the centre for the Union consisting of the President and the two houses, namely the Rajya Sabha (Council of States) which is also referred to as the Upper House and the Lok Sabha (House of People) casually referred to as the Lower House.

A strong democracy preconceives of a strong party system meaning thereby the members belonging to a party owe



allegiance exclusively to the party to which they belong. Though in greater number of countries the democratic set up is based on two party system, India along with its neighbours are some of the countries in which a multi-party system of democracy exists. This multiparty system of democracy besides consisting of representatives having party affiliation, there are other independent legislators who are unattached with any particular political party. One of the malady engulfing such multi-party system, is the instances of floor-crossing by the legislators the dictionary meaning of which can be found in the word 'defection'. The word 'defection' is synonymous to the term 'abandonment of loyalty' and connotes a change in party affiliation or a shift of allegiance. This is a malady which exists as an integral part of every democracy and is an evil rooted within.

Since there was no specific law governing an issue of defection or to deal with the problem of Legislators changing their allegiance from one party to another on considerations other than a call of conscience that on December 8, 1967, the Lok Sabha passed a unanimous resolution in the following terms:

“A High Level Committee consisting of representative of political parties and Constitutional experts be set up immediately by

the Government to consider the problem of Legislators changing their allegiance from one party to another and their frequent crossing of the floor in all its aspects and make recommendations in this regard”

The Committee so constituted came to be known as the ‘Committee on Defections’ and who upon consideration of large scale instances of shift in party allegiance by the legislators made certain recommendations on the issue of defections.

It is in consideration of the recommendations of the ‘Committee on Defections’ that the Constitution (32nd Amendment) Bill, 1973 was introduced in Lok Sabha on 16.5.1973 which provided for disqualification of a member of either House of Parliament or State Legislature from continuing as such, on his voluntary surrender of the membership of the political party which had set him up as a candidate or on his voting or abstaining from voting in such house, contrary to any directions issued by such political party or any person authorized by such political party on its behalf without obtaining prior permission of such party/person or authority. Though this bill lapsed on account of dissolution of the House but ultimately the Constitution (Fifty-second Amendment) Bill, 1985 got translated into the Constitution (Fifty-second Amendment) Act, 1985 when it was passed by the Lok Sabha and Rajya Sabha on 30th & 31st

of January 1985, respectively and got the Presidential assent on 15.2.1985 and was enforced w.e.f. 1.3.1985. The statement of objects and reasons appended thereto reads as follows:

“The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of a democracy and the principles which sustain it.

With this object an assurance was given in the address by the President to Parliament that the Government intended to introduce in the current session of Parliament an Anti-Defection Bill. This bill is made for outlawing defections and fulfilling the above assurance.”

The object of ‘the Act’ was loud and clear. A decision had been taken and a resolution passed to deal with defectors with no leniency. By virtue of the Constitution (Fifty-second Amendment) Act, 1985, not only Articles 102 and 191 were amended by incorporation of clause (2) specially catering to the issue of disqualification but the Tenth Schedule also stood incorporated in the Constitutional scheme. As I said the object of amendment was loud and clear and the purpose was to put an end to the political defections which were backed either by a lure of office or for other considerations and had ramifications capable of shaking the very foundation of this democracy.

The Tenth Schedule as it was originally enacted under the Constitution (Fifty-second Amendment) Act, 1985



while providing for disqualification upon voluntary surrender of membership by a legislator also provided for disqualification in cases of defiance by a legislator to the party's directives issued in context of voting on the floor of the house. While providing for such disqualification, it excluded a group so representing a faction consisting of not less than one-third of the members of a legislature party who decided to stay separate from the party to which they belong or in case of a party deciding to merge with another political party where it had the support of not less than two-third of its legislators. The recognition of identity of such break away group in case of a split as originally enacted in the Tenth Schedule, was made even more stringent by the Constitution (Ninety-first Amendment) Act, 2003 enforced from 1.1.2004.

The relevant Constitutional provision as it exists today in context with the issue of disqualification of a Legislator of a State would be as follows:

“190. (1)-(2) * * *

(3) If a member of a House of the Legislature of a State-

(a) becomes subject to any of the disqualifications mentioned in clause (1) and (2) of Article 191; or

* * *

191.(1) A person shall be disqualified for being chosen as, and for being a member of the Legislative Assembly or Legislative Council of a State—

(a)- (d) * * *

(e) if he is so disqualified by or under any law made by Parliament.

* * *

(2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule”

TENTH SCHEDULE

“Interpretation.- In this Schedule, unless the context otherwise requires,-

(a) ‘House’ means either House of Parliament or the Legislative Assembly or, as the case may be, either House of the Legislature of a State;

(b) ‘legislative party’, in relation to a member of a House belonging to any political party in accordance with the provisions of paragraph 2 or paragraph 3 or, as the case may be, paragraph 4, means the group consisting of all the members of that House for the time being belonging to that political party in accordance with the said provisions;

(c) ‘original political party’, in relation to a member of a House, means the political party to which he belongs for the purpose of sub-paragraph (1) of paragraph 2;

(d) ‘paragraph’ means a paragraph of this Schedule.

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) if he has voluntarily given up his membership of such political party; or

(b) if he votes or abstains from voting in such Houses contrary to any direction issued by the political party to which he belongs or by any person or authority authorised 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.

Explanation.- For the purposes of this sub-paragraph,-

(a) an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member;

(b) a nominated member of a House shall,-

(i) where he is a member of any political party on the date of his nomination as such member, be deemed to belong to such political party;

(ii) in any other case, be deemed to belong to the political party of which he becomes, or, as the case may be, first becomes, a member before the expiry of six months from the date on which he takes his seat after complying with the requirements of Article 99 or, as the case may be, Article 188.

(2) An elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election.

(3) A nominated member of a House shall be disqualified for being a member of the House if he joins any political party after the expiry of six months from the date on which he takes his seat after complying with the requirements of Article 99 or, as the case may be, Article 188.”

The crucial issue raised and contested before this Court revolves around the interpretation of paragraph 2(1) (a) of the Tenth Schedule read with the explanation attached thereto and whether the conduct of the petitioners has been such that it reflects their voluntary surrender of their membership as legislators of the Janta Dal (United) party.

The facts are not in contest rather it is an admitted



position that these petitioners were opposed to the candidature of Shri Pawan Kumar Verma and Shri Ghulam Rasool as contestants for the Rajya Sabha elections and were not only proposers to the candidature of Shri Anil Kumar Sharma and Shri Shabir Ali but have also acted as their elections agents and canvassed in their support.

Mr. Kanth has canvassed to question the decision of the Speaker on all the five counts which permit a judicial review of such decision. According to him, not only the order is attended with mala-fides but it also violates the principles of natural justice inasmuch as no opportunity was provided to the petitioners to lead evidence. It is further stressfully argued that the order has been passed in violation of the Constitutional mandate, is discriminatory in nature and the reasons accompanying the decisions are perverse.

The arguments of Mr. Kanth have been contested by Mr. Giri as well as Mr. Kishore on each count and while contesting as such, they have also argued on the limits of judicial review of such decision.

‘Defection’ as I said is a malady defacing our democracy and if not checked would shake the very foundation of this democracy. It is to preserve the purity of this democracy



that the Anti Defection law was codified under the Constitution (Fifty-second Amendment) Act, 1985 and the Constitution (Ninety-first Amendment) Act, 2003. Though lengthy arguments have been advanced by Mr. Kanth on the issue of discrimination, denial of opportunity to lead evidence, the order being pre-meditated, the attitude of the Speaker being biased, the rules of natural justice being violated and the Constitutional mandate flouted but in the opinion of this Court, in view of the admitted position as to the role of these petitioners as proposers/election agents of candidates other than those set up by the party to which they belong, in my opinion, these arguments are more academic than contentious for the only issue which requires to be determined by this Court is whether this act of the petitioners in being proposers of Mr. Anil Kumar Sharma and Mr. Shabir Ali who were not the candidates set up by the Janta Dal (United) Political party and in performing duties as their election agents, amounted to their voluntary surrender of their membership or not.

As discussed a 'defection' in the present context would mean an 'abandonment' of the party to which the legislator concerned belongs; an act confirming disloyalty to that party; a positive act to join another party; a change in party



affiliation/allegiance; an act of floor-crossing, call it by any name. The question is whether the act and conduct of the petitioners is reflective of any such category. There is a very thin line separating an act of 'defection' with an act of 'dissent'. Whereas all cases of defection would be inclusive of acts of dissent either backed by lure for office or for other considerations which strictly may not be called 'moral' but the converse is not always true and all cases of 'dissent' do not necessarily fall within the meaning of the term 'defection'.

Our Constitution itself guarantees to its citizens, the liberty of thought, expression, belief, faith and worship. A dissent in context with a people's representative can be for any of these reasons and unless accompanied with a lure for public office or other considerations or the act itself has a reflection of abandonment of loyalty, it would not constitute a 'defection'. The issue again would be different when talked in context with an issue discussed on the floor of the house and a dissent in such cases would be a defiance to the party's directives and would make the legislator liable for being proceeded under paragraph 2(1)(b) of the Tenth Schedule.

The issue in hand is not relatable to an event taking place on the floor of the house rather it is an event which took

place beyond the floor of the house and thus such act has to be considered in context with the facts governing the act itself.

While on the issue, I would consider the arguments of Mr. Kanth that matter arising from events which take place beyond the floor of the 'House' cannot be a subject matter of disqualification under paragraph 2(1) (a) of the Tenth Schedule, only to reject the same for simple plain reason that such issue is no more *res integra* and, stands concluded by the very judgments relied upon by him more particularly rendered in case of **Mahachandra Prasad Singh** (Supra).

Whereas the election to the Lok Sabha is by a secret ballot, the election to the Rajya Sabha is through the open ballot system introduced vide Representation of People's (Amendment) Act 40 of 2003 which came into force from 28.8.2003. While a legislator can well vote against his party candidate in a Lok Sabha election by virtue of the secret ballot system, in so far as the Rajya Sabha election is concerned, unless the legislator shows his ballot to the party's representative under the open ballot system, his right would stand forfeited and his ballot would be rejected.

Whether a voting simplicitor against the party's candidate in such elections invite a disqualification under the

Tenth Schedule? In my opinion this would be paradoxical rather anti-thesis to the word 'democracy' for a legislator cannot be treated differently on two similar occasions when his act, on both occasions, is designed to elect a public representative.

In fact there is no contest on this issue since even the Speaker in paragraph 25 of the order impugned has held that the petitioners cannot be disqualified on account of voting against the party's representatives. The opinion of the Speaker in fact is a reflection of the observation of the Supreme Court in paragraph 458 of the judgment rendered in the case of **Kuldip Nayar** (supra) in which it has been held that the right of expression of a voter in the open ballot system would not lead to disqualification for voting in a particular manner though he may attract action from the political party to which he belongs.

The considerations get even further restricted when applied to the conduct of the petitioners in becoming proposers to such candidates who were not the party's candidates and their act of being election/canvassing agents of such candidates. It is not in dispute that the two persons standing as independents, namely, Anil Kumar Sharma and Shabir Ali are members of the Janta Dal (United) Party and not any other political party.

In so far as the issue of any member belonging to a



particular political party standing as independent to contest the candidates set up by the political party to which they belong is concerned, the law stands concluded by the judgment of the Supreme Court rendered in the case of **Dr. Mahachandra Prasad Singh** (supra). The issue is whether the proposers of such independent candidates who also act as his election agent, should also meet the same fate or are to be treated differently. It has been the argument of Mr. Giri that the conduct of a member belonging to a political party standing independent to contest the party's candidate as well as his proposers are so intrinsically interlinked that there can be no other conclusion and there is no distinction between the two but on the other hand it was contended on behalf of the petitioners by Mr. Kanth that acting as proposers or election agent is a mere form of dissension and does not amount to surrender of membership. It has been argued by Mr. Kanth that there being no other instance in the custody of the respondent convener which would reflect a voluntary surrender of membership of these petitioners, a discretion exercised by the petitioners to dissent against the candidate set up by the party would not amount to surrender of membership.

The entire argument thus which requires an answer from this Court is whether the confirmation by the Speaker to



the opinion expressed by the convener of the Janta Dal (United) political party regarding the acts of these petitioners of being proposers of Shri Anil Kumar Sharma and Shri Shabir Ali, acting as their election agent and canvassing in their support amounted to their voluntary surrender, is a perversity defined or is an act of dissent in exercise of liberty of expression granted to the petitioners under Article 19(1)(a) of the Constitution of India.

The term 'perversity' has been explained in a judgment of the Supreme Court reported in **(2010)13 SCC 216 (Municipal Committee, Hoshiarpur Vs. Punjab State Electricity Board)**, paragraph 28 thereof reads as under:

“If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law. If the findings of the Court are based on no evidence or evidence which is thoroughly unreliable or evidence that suffers from the vice of procedural irregularity or the findings are such that no reasonable person would have arrived at those findings, then the findings may be said to be perverse. Further if the findings are either ipse dixit of the Court or based on conjecture and surmises, the judgment suffers from the additional infirmity of non-application of mind and thus, stands vitiated. (Vide Bharatha Matha s. R. Vijaya Rengathan²⁸).



In the present case it is not in dispute that the two candidates fielded by the Janta Dal (United) political party were not recommended by the Parliamentary Board of the party, the body empowered to take such decision. There is no dispute on this fact. In fact it is to answer such issue posed by the petitioners that Mr. Giri and Mr. Kishore relied upon the provisions of the Conduct of Election Rules, 1961 and the Election Symbols (Reservation and Allotment) Order, 1968 to submit that once a nomination is filed by a candidate which is supported by the party's representative, he becomes an official candidate. The other argument advanced by Mr. Giri and Mr. Kishore to contest such argument was that adhering to the party's constitution in the matter of selection of candidates was an internal matter and since the constitution of the Janta Dal (United) political party was not one of the issue raised by the petitioners before the Speaker hence that cannot be a subject-matter of discussion before this Court.

I am in full agreement with the contentions advanced by learned counsel for the respondents that the petitioners cannot rely upon the constitution adopted by the Janta Dal (United) party if they never chose to lead the same during the course of the proceeding before the Speaker but the records of the



proceedings more particularly the examination of the convener manifests that the party's constitution was not only led during the evidence with the permission of the chair rather the questions put against the same, was avoided by the convener by saying that he shall reply on those issues after examining the documents.

Having said that, the fact remains that the candidates so fielded by the Janta Dal (United) party though were recognised as official candidates but admittedly these candidates did not have the approval of the Parliamentary Board. The records of the proceedings confirm this position. In such extraordinary admitted circumstances where the candidates fielded by the Janta Dal (United) political party did not have the approval of the Parliamentary Board of the said political party, the act of these petitioners of supporting the candidature of Shri Sharad Yadav while opposing the candidature of the other two by being proposers of Mr. Anil Kumar Sharma and Shri Shabir Ali and acting as their election agent as also for canvassing on their behalf, whether can be termed as a voluntary surrender of their membership and would amount to abandonment of their loyalty or in absence of any other instances, be termed as an act of dissension shown by them and not worthy of disqualification.

The Supreme Court in the case of **Kihoto Hollohan** (supra) has while interpreting paragraph 2(1) (a) of the Tenth Schedule, held as such:

“13.

A person who gets elected as a candidate set up by a political party is so elected on the basis of programme of that political party. The provisions of Paragraph 2(1)(a) proceed on the premise that political propriety and morality demand that if such a person, after the election, changes his affiliation and leaves the political party which has set him up as a candidate at the election, then he should give up his membership of the legislature and go back before the electorate. The same yardstick is applied to a person who is elected as an Independent candidate and wishes to join a political party after the election.”

The Supreme Court while upholding the validity of the stipulation present at paragraph 2 of the Tenth Schedule has held in paragraph 53 that it does not violate the freedom of speech, freedom of vote and conscience as contended. Thus when an exercise of conscience vote cannot be a sole basis for disqualification, an act of being a proposer for exercising such conscience vote is just a step behind such exercise.

No Doubt the Supreme Court in the case of **Ravi S. Naik** (supra) has held in paragraph 11 of the judgment that it is not only a positive act of tendering resignation that would amount to voluntary surrender of membership but an inference



to such surrender can be drawn also from the conduct of a member and in a case where a member of a particular political party stands to contest the election as an independent against his party's candidates may fall within this category but I have reservations to accept the argument advanced by Mr. Giri & Mr. Kishore, that the proposers of such candidate should also be held as such and my opinion rests on the premise that whereas standing as an independent candidate is an open act of defiance, floor-crossing and an act of abandonment of loyalty, on the other hand, an act of being a proposer, an election agent and canvassing in election, though are admitted acts of dissent shown towards the candidates fielded by the party and does amount to extending support to such candidates but does not *stricto-sensu* amount to abandonment of loyalty towards the party and I draw strength and analogy for my opinion from the observations made by the Supreme Court in paragraphs 28 and 52 of the judgment rendered in the case of **Jagjit Singh Vs.**

State of Haryana reported in (2006)11 SCC 1:

“28. We have no difficulty in accepting the contention that there is a fundamental difference between an independent elected Member and the one who contests and wins on ticket given by a political party. This difference is recognised by various provisions of the Tenth Schedule. An independent elected Member of a House incurs disqualification when he joins any political party after election as provided in para 2(2) of the



Tenth Schedule. **There is also no difficulty in accepting the proposition that giving of outside support by an independent elected Member is not the same thing as joining any political party after election. To find out whether an independent Member has extended only outside support or, in fact, has joined a political party, materials available and also the conduct of the Member is to be examined** by the Speaker. It may be possible in a given situation for a Speaker to draw an inference that an independent Member of the Assembly has joined a political party. No hard-and-fast rule can be laid down when the answer is dependent on the facts of each case.”

“52. We are of the view that **to determine whether an independent Member has joined a political party** the test is not whether he has fulfilled the formalities for joining a political party. **The test is whether he has given up his independent character on which he was elected by the electorate. A mere expression of outside support would not lead to an implication of a Member joining a political party.** At the same time, non-fulfilment of formalities with a view to defeat the intent of para 2(2) is also of no consequence. The question of fact that a Member has given up his independent character and joined, for all intent and purposes, a political party though not formally so as to incur disqualification provided in para 2(2) is to be determined on appreciation of the materials on record.

(Emphasis supplied)

It is a matter of record that of the three candidates fielded by the Janta Dal (United) political party for contesting the Rajya Sabha election namely, Shri Sharad Yadav, Shri Ghulam Rasool and Shri Pawan Kumar Verma, whereas the



petitioners did not show dissension against the candidature of Shri Sharad Yadav but they protested against the candidature of the other two persons by becoming proposers of the two candidates who stood as independents. The two acts of the petitioners are in two different directions. Whereas the petitioners as loyal members of the party have supported the candidature of Shri Sharad Yadav in the same transaction they have opposed the candidature of the other two. This wholesome conduct of the petitioners has been put to test in the present transaction and cannot be bifurcated rather has to be appreciated cumulatively. A person cannot be held to be partially loyal to a party or of partially abandoning the party. The conduct of a member is to be adjudged in totality and not in a partial manner. It is not in dispute that there was no opposition by these members to the candidature of Shri Sharad Yadav and to that extent they remain loyal members of the party but in their opposition to the rest of the two candidates, it has been held to be a voluntary surrender of their membership. It is a paradoxical situation for the act of the petitioners in the same election cannot be treated differently and candidate wise. The moment there is a cloud created, it is sufficient to exonerate the petitioners of the charges specially when there is no other instance or any cogent

material evidence available to support the charge.

It was the argument of Mr. Lalit Kishore that the finding by the Speaker on the issue of disqualification is merely a confirmation of the disqualification which has already taken place. The petition filed by the convener placed at Annexure-4 series to the writ petition charges the petitioners of being proposers, election agent of Shri Anil Kumar Sharma and Shri Shabir Ali and of taking active participation in the election and of voting against the official candidates. It is in the backdrop of such charges that the convener has held that their conduct amounts to voluntary surrender of their membership and which opinion of the convener stands confirmed in the order of the Speaker.

In this regard it is to be held that whereas a conduct of a legislator has to be adjudged on the basis of the bundle of acts which back his conduct, the event of disqualification takes place on a particular date when this conduct stands proved to constitute a 'defection'. Neither the complaint of the convener placed at Annexure-4 series makes any mention as to the date on which the petitioners have voluntarily surrendered their membership nor does it find mention in the order of the Speaker. There is complete silence on the date of disqualification. In this

context I would refer to the observation of the Supreme Court made in paragraph 34 of the judgment of **Rajendra Singh Rana** (Supra) which seemingly holds that a disqualification has to be with reference to a date and cannot be indeterminate. The relevant extract of paragraph 34 thereof is reproduced hereinbelow:

“34.
..... Therefore in the background of the object sought to be achieved by the Fifty-second Amendment of the Constitution and on a true understanding of para 2 of the Tenth Schedule, with reference to the other paragraphs of the Tenth Schedule, the position that emerges is that the Speaker has to decide the question of disqualification with reference to the date on which the member voluntarily gives up his membership or defies the whip. It is really a decision ex post facto. The fact that in terms of para 6 a decision on the question has to be taken by the Speaker or the Chairman, cannot lead to a conclusion that the question has to be determined only with reference to the date of the decision of the Speaker. An interpretation of that nature would leave the disqualification to an indeterminate point of time and to the whims of the decision-making authority. The same would defeat the very object of enacting the law. Such an interpretation should be avoided to the extent possible. We are, therefore, of the view that the contention that (*sic* it is) only on a decision of the Speaker that the disqualification is incurred, cannot be accepted. This would mean that what the learned Chief Justice has called the snowballing effect, will also have to be ignored and the question will have to be decided with reference to the date on which the membership of the legislature party is alleged to have been voluntarily given up.”



The circumstances noted hereinabove lead to several questions and the most striking of which is that if the conduct of the petitioners to act as proposers/election agents/canvassers of Shri Anil Kumar Sharma and Shri Shabir Ali be held as an act of voluntary surrender of their membership, how their conduct is to be judged where in the same transaction these petitioners have supported the candidature of Shri Sharad Yadav. The order impugned is silent on this issue which is very relevant in the present context where the disqualification of the petitioners solely rests on their conduct in the Rajya Sabha election. In my opinion this single aspect of the matter as well as the absence of any other evidence to reflect the act of disloyalty of these petitioners or of floor-crossing or their act being backed by any lure of benefits, their conduct cannot constitute an act of voluntary surrender for even when an elected representative owes his allegiance to the party to which he belongs and is also answerable to the electorate for his conduct but until such time that there are materials to demonstrate his disloyalty to his party and an act of abandonment of membership, a disqualification in such circumstances would be an abuse of the avowed object for which the Law on Defection was conceived.

Though learned senior counsel for the respondents



have laboured hard to impress this Court on the scope of judicial review and its restrictions even when the law on the issue stands settled as back as in 1992 vide judgment of the Supreme Court rendered in the case of **Kihoto Holohan** (Supra) and the subsequent judgments of the apex court some of which find discussion in this judgment but in my opinion the order under challenge in failing to take note of the circumstances discussed hereinabove, it stands covered within the parameters of paragraph 28 of the judgment rendered in the case of **Municipal Committee** (supra) warranting a judicial review on the following summarized grounds:

- (a) A voluntary surrender of membership falling within the meaning of term 'defection' and 'dissent' are not synonymous and although every act of 'defection' may be for reasons attributable to dissent either backed by a lure for office or for other considerations but the converse is not always true and every act of 'dissent' does not necessarily amount to 'defection' or a voluntary surrender of membership.
- (b) 'Dissent' is an integral part of a vibrant democracy and is not the same as 'defection' especially in the



present context where admittedly the candidates fielded by the party were not approved by its Parliamentary Board and the petitioners expressed their dissent against only two of the three candidates fielded by the party;

- (c) A conduct of legislator has to be adjudged cumulatively and not in a partial manner. The dissent shown by the petitioners by extending support to the two members of the party who stood as independents against two of the three candidates fielded by the party in the Rajya Sabha election while extending support to the third candidate is by itself not sufficient to unseat them from membership in absence of accompanying circumstances backing such act which have reflections of abandonment of loyalty to the party;
- (d) The order impugned is resting entirely on a single act of these petitioners of extending support to two members of the Janta Dal (United) Party who stood as independents in the Rajya Sabha election against two of the candidates fielded by the party but has completely failed to measure the act of

these petitioners in supporting the candidature of Sri Sharad Yadav, the third candidate fielded by the Party in the very same election;

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- (e) Though an isolated act of standing independent against the party's candidate may be capable of interpretation as a disloyalty to the party and an abandonment of membership but an isolated act of extending support to such independents with nothing further to add on, cannot amount to voluntary surrender of membership;
- (f) The order fails to take notice of the fact that except for the admitted position that these petitioners had acted as proposers and election agents of Sri Anil Kumar Sharma and Sri Shabir Ali, there is no other evidence on record confirming the opinion expressed in the petition of the convener;
- (g) If voting as per conscience in a Rajya Sabha election cannot be a subject of disqualification under paragraph 2(1)(a) of the Tenth Schedule, then an act of extending support by becoming proposer/election agent is only a step behind the conscience vote so exercised;

(h) The order is silent on the date of voluntary surrender of membership.

For my reasons recorded hereinabove, I am unable to uphold the view expressed by the learned Speaker and for the same reasons the judgment and order dated 1.11.2014 passed by the Speaker as contained in Annexure-13 to the writ petition as well as the notification bearing no.1695 dated 1.11.2014 issued pursuant thereto cannot be upheld and are accordingly set aside. The petitioners stand restored to their respective positions. The consequences shall follow.

The writ petition is allowed but in the circumstances there shall be no order as to costs.

(Jyoti Saran, J)

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