

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.397 OF 2019

Sadanand Vaingankar. Petitioner.

Versus

The Speaker & Others. Respondents.

Mr. S. S. Kantak, Senior Advocate with Mr. Abhijit P. Gosavi and Mr. Kher C.J. Simoes, Advocates for the Petitioner.

Mr. Satya Pal Jain, Senior Advocate with Mr. Pankaj P. Vernekar, & Mr. B. Fatarpekar, Advocates for Respondent Nos.1 & 2.

Mr. D. J. Pangam, Advocate General with Mr. Deep Shirodkar, Additional Govt. Advocate for Respondent Nos.3 and 4.

Mr. S. D. Lotlikar, Senior Advocate with Ms. S. Kenny, Advocate for Respondent Nos.5 & 6.

Mr. S. R Rivankar, Advocate for Respondent No. 8.

Mr. S. Sayed holding for Mr. C. A. Ferreira, Advocate for Respondent No.9.

***Coram : S.C. Gupte &
Nutan D. Sardesai, JJ.***

Date : 28th June, 2019.

ORAL ORDER :- (Per S.C. GUPTE, J.)

This Petition is filed by a petitioner, who claims to be a public spirited individual involved in social and political activities in the State of Goa, and who is the Vice President of National Executive Committee of a political party, namely, Forward Democratic Labour

Party.

2. The Petition seeks to challenge an order passed by the Speaker of the Goa State Legislative Assembly. It is submitted that in purported exercise of powers under para 4 of the Tenth Schedule to the Constitution of India, the Speaker, in the present case, has approved merger of Maharashtrawadi Gomantak Legislature Party with Bhartiya Janata Party and that this order is *ex facie* without jurisdiction and authority of law. The thrust of the challenge is that in exercise of powers under the Tenth Schedule, particularly para 4 of it, the Speaker of a Legislative Assembly does not have a power to decide whether or not any split or merger of political parties has taken place, in the absence of any disqualification petition filed against any member(s) under para 6 of the Tenth Schedule on account thereof. Other points raised in the Petition, besides this jurisdictional objection, concern the merits of the so called order of approving merger of the two political parties.

3. Respondent Nos. 5 and 6 are Members of the Legislative Assembly, respectively, from the constituencies of Pernem and Sanvordem in the State of Goa. They had contested elections on the ticket of Maharashtrawadi Gomantak Party in the elections held for the Assembly in the year 2017. Both were elected from their respective constituencies. It is submitted that around the time when results of the Assembly elections held in 2017 were declared by the

Election Commission of India, the party-wise position of the elected representatives stood as follows :

- a. Bhartiya Janata : 13
- b. India National Congress Party : 17
- c. Maharashtrawadi Gomantak Party : 03
- d. Goa Forward Party : 03
- e. Nationalist Congress Party : 01
- f. Independents : 03

Pursuant to an invitation to do so by the Hon'ble Governor of the State of Goa, Bhartiya Janata Party, under the leadership of Shri Manohar Parrikar, formed a government with the support of Maharashtrawadi Gomantak Party, Goa Forward Party and the Independents. During the functioning of the Assembly, some further changes occurred in the party-wise strength due to resignations, elections, etc. We are, however, not concerned with these. The controversy, which has given rise to the present Petition, has arisen as a result of events which appear to have transpired after the demise of the then Chief Minister, Shri Manohar Parrikar, on 17th March, 2019. It is the Petitioner's case that it was widely reported that on account of its differences with Bhartiya Janata Party regarding formation of a new government after his death, Maharashtrawadi Gomantak Party was to withdraw its support to the Government, which might have affected the stability of the

Government. It is the Petitioner's case that to overcome this situation, Bhartiya Janata Party engineered defection of Respondent Nos. 5 and 6 from Maharashtrawadi Gomantak Party. It is submitted that in a midnight drama extending into the wee hours of the next morning, the two MLAs submitted a resolution to the Speaker indicating their agreement of merging Maharashtrawadi Gomantak Legislature Party with Bhartiya Janata Party. It is submitted that in the early hours of 27th March, 2019 at around 2.00 a.m., the Speaker passed an order approving the merger. It is submitted that this turn of events was solely due to the fact that Maharashtrawadi Gomantak Party had called an Executive Committee Meeting that very morning, at which it was likely to take action for suspension of one of the Members of their Legislature Party, i.e. one of the two defecting MLAs. It is submitted that immediately after this order, effect was given to it by a notification in the Legislative Assembly Bulletin. Soon thereafter, Respondent No.5 was made Deputy Chief Minister, whilst Respondent No.6 was sworn in as P.W.D. Minister of the State.

4. On these facts, the Petitioner's case before this Court is that the Speaker, by unauthorisedly approving the so-called merger of Maharashtrawadi Gomantak Legislature Party with Bhartiya Janata Party under para 4 of the Tenth Schedule to the Constitution, illegally usurped powers which he did not possess. It is submitted

that the merger of a political party (original party) with another political party including the satisfaction, if any, of its essential condition of not less than 2/3rd of the Members of the Legislature Party having agreed to such merger, are matters to be considered only as and by way of defence, when a disqualification petition is filed against the concerned Member(s) under para 6 of the Tenth Schedule. It is submitted that the Speaker's authority to rule on the validity of any split or merger within the meaning of para 4 of the Tenth Schedule is sourced only from his power to decide on the question of disqualification of a Member of a House on the ground of defection within the meaning of para 2 of the Schedule. It is submitted that such power can be exercised only upon a petition being filed under para 6 of the Tenth Schedule referring the question of disqualification for the decision of the Chairman or, as the case may be, the Speaker of the House. Learned Senior Counsel for the Petitioner refers to the Constitution Bench decision of the Supreme Court in the case of ***Rajendra Singh Rana and ors. vs. Swami Prasad Maurya and ors.***, reported in (2007) 4 SCC 270, in support of his submission.

5. Mr. Jain, learned Senior Counsel appearing for Respondent Nos.1 and 2, submits that the Speaker, in the present case, has not exercised any power or passed any order under para 4 of the Tenth Schedule. Learned Counsel submits that as the master of

the House, the Speaker is entitled to note changes in the bench strength of any legislature party or political affiliation. The Speaker has to note any such change brought to his notice, particularly from the point of view of organising the business of the House, such as making sitting arrangements for individual Members of the House on Treasury or Opposition Benches, as the case may be. It is submitted that in the present case, merger of two parties was brought to the notice of the House through a communication made to the Speaker by Respondent Nos. 5 and 6. It was noted first by the Under Secretary and later approved by the Secretary of the Legislature; and the note was finally approved by the Hon'ble Speaker. Though it is termed as an order, learned Senior Counsel submits, it is no order under para 4 sub-para (1) and/or (2) of the Tenth Schedule of the Constitution of India, but merely a matter of the Speaker taking notice of the change communicated to him by the concerned Members of the Assembly. Learned Counsel submits that this position has been made clear by the Hon'ble Speaker (i.e. the Deputy Speaker acting at that time as a Speaker) in his sworn testimony submitted before this Court. It is submitted that the document of 27th March, 2019 (the so called order) is not a final order at all, but an internal matter of the House regarding regulation of procedure and conduct of its business. It is submitted that such internal matter is immune from any challenge before a court of law in terms of Article 212 of the Constitution of India. It is submitted

that it would be open to the Speaker to consider the legality or validity of the merger, while deciding any disqualification application under the Tenth Schedule. (Incidentally after the filing of the present petition, the third member of Maharashtrawadi Gomantak Legislature Party has made an application before the Speaker referring the question of disqualification of Respondent Nos.5 and 6 under para 6 of the Tenth Schedule.) It is reiterated by learned Senior Counsel appearing for Respondent Nos. 1 and 2 that this application shall be decided by the Speaker without reference to, and without in any way being influenced by, the so called order passed on 27th March, 2019 or any notification thereof in the Legislative Assembly Bulletin.

6. Since the Speaker, in the present case, has himself adopted a position that what was passed on 27th March, 2019 was not an order under para 4 of the Tenth Schedule or any final recognition or legal affirmation of the reported merger, the matter really is in a narrow compass. In the very first place, the Court is confronted with a serious jurisdictional issue. If there is no order under paragraph 4 of the Tenth Schedule and a disqualification petition has been pending before the Speaker under paragraph 6 of the Tenth Schedule, on which there is no decision as yet, is there anything for this Court to consider by way of judicial review. If it is a matter of mere noting of a change communicated to the Speaker concerning

the political affiliation of a Member, without reference to its legality, that may simply qualify as an ordinary business of the House. What is held to be a quasi-judicial matter amenable to judicial review is the decision of a Speaker or a Chairman, as the case may be, on a disqualification petition and not any other ordinary business of the House of Representatives.

7. The Judgment of ***Rajendra Singh Rana*** (supra) referred to by Mr. Kantak, learned Senior Counsel for the Petitioner, basically considers whether a split in a political party or a merger of two political parties can be considered by the Speaker for determining its legality under para 4 of the Tenth Schedule without reference to any application for disqualification presented to him under para 6 of the Tenth Schedule. In that case, on 27.8.2003, 13 Members of the U.P. Legislative Assembly, elected on the tickets of Bahujan Samaj Party ('BSP'), had met the Governor and requested him to invite the leader of the opposition party, i.e. Samajwadi Party ('SP'), to form the Government. This was in the face of a recommendation made by the then leader of BSP, who was running the Government of the State, for dissolution of the assembly. The Governor invited the leader of SP to form the Government and gave him time to prove his majority on the floor of the House. At that stage, one Maurya, leader of BSP Legislature party, filed a petition before the Speaker in terms of Article 191, read with para 6 of the Tenth Schedule, praying for

disqualification of the 13 BSP MLAs, who had proclaimed support to SP before the Governor on 27.8.2003. The disqualification was sought in terms of para 2 of the Tenth Schedule on the basis that they had voluntarily given up their membership of BSP, i.e. their original party. Whilst this application was pending before him, 37 MLAs belonging to BSP requested the Speaker to recognize a split in BSP on the basis that one-third of the members of BSP Legislature Party, consisting of 109 legislators, had in a body separated from the party pursuant to a meeting and resolution passed therein. The Speaker took up this application for recognition of the split the very same evening. He verified the signatures of all 37 members, who had signed the application presented to him, in their physical presence. Overruling the objections of Maurya, whose application for disqualification of the 13 Members was pending before the Speaker at that time, the Speaker passed an order accepting the split in BSP on the arithmetic that 37 out of 109 members comprised more than one-third of BSP legislature party. The Speaker's action was challenged before the High Court in a writ petition. Before the proceedings in that petition could conclude, on 7th September 2005, the Speaker passed an order rejecting the Petition filed by Maurya for disqualification of the 13 MLAs of BSP. The rejection was on the footing that the validity of the split was already established before the Speaker, who had ruled on it in favour of the defectors, when 37 MLAs requested him for recognition

of the split. When the matter went before the Supreme Court, the Court set aside the Speaker's order. The Court held that in the context of introduction of sub-article (2) of Article 102 and in the light of Article 191 of the Constitution of India, a proceeding under the Tenth Schedule is one to decide whether a member has become disqualified to hold his position as a member of the Parliament or of the Assembly on account of defection, which had been added as a ground of disqualification. The Court held that a proceeding under the Tenth Schedule gets started before the Speaker only on a complaint being made to him about a person or persons having incurred disqualification on the ground of defection. It is to meet such a claim that the member or members, against whom the proceedings are initiated, has or have the right to show that there has been a split in the original political party, the splitting members forming one-third of the members of the legislature party (as the provision then existed), or that the party has merged with another political party and hence, para 2 was not attracted. The Court did not accept the argument of the defecting members that the Speaker had an independent power to decide the legality of a split or merger of a political party as contemplated in paras 3 and 4 of the Tenth Schedule. The Court, at the same time, acknowledged that the power to recognize a separate group in the Parliament or an Assembly may vest with the Speaker on the basis of the Rules of Business of the House. But that is different, as the Court observed, from the power

available to him under the Tenth Schedule.

8. In the present case, not only does the Speaker maintain that there was no order under Para 4 of the Tenth Schedule recognizing, or deciding on, the legality of a merger, but the Speaker also states on oath, and also through his Counsel at the Bar, that he proposes to decide the pending application, and such other application/s as may be filed later, for disqualification of the two Members on the ground of defection under Para 6 of the Tenth Schedule independently of, and without being influenced by, the order of 27/3/2019 or effect given to it by notification in the Assembly Bulletin. There is, thus, no question of quashing the order of 27th March, 2019 on the principles stated in ***Rajendra Singh Rana*** (supra).

9. Mr. Kantak submits that there is nothing in the Rules of the House or its business that empowers the Speaker to accept any merger; the only power is contained in para 4 of the Tenth Schedule. Learned Counsel is not right there. As part of ordinary conduct of legislative business by the Speaker as the Master of the House, the Speaker has to take note of any change in the membership of any legislature party communicated to him and conduct proceedings of the House accordingly. Besides, in exercise of the powers conferred by paragraph 8 of the Tenth Schedule, read with Section 14A of the

Government of Union Territories Act, 1963, the Speaker, Goa, Daman and Diu Legislative Assembly has made rules (Rules of 1986). Under the Rules of 1986, the leader of each legislature party has to furnish information in relation to each member, which includes his party affiliation. Based on this information, the Secretary of the House maintains a register, recording such information on a separate page in the Register. Whenever there is any change in this information, the same has to be communicated to the Speaker, who may then order it to be reflected in the Register. This scheme of the Rules not only requires changes in the party affiliation of a member to be communicated to the Speaker, but to be noted by the latter. In the present case, the change in their party affiliation, by reason of a merger, was communicated by the two Members to the Speaker. (It was not done, though, in the prescribed form.) The Speaker noted it in the order of 27th March, 2019, after the Under Secretary and Secretary of the Legislature noted and approved it. This power of the Speaker is derived from the Rules of Business of the House. The Supreme Court, in ***Rajendra Singh Rana*** (supra) has made an allowance for such power. It is only that, as the Court said, it is different from the power available to the Speaker under the Tenth Schedule. The former is sourced in the rules of Business, and which the Master of the House ought to possess in the very nature of the things and which is, in any event, provided for in the particular rules of the House (Rules of 1986) in the present

case; the latter is under para 4 of the Tenth Schedule and which is to be exercised only when the Speaker is moved under para 6 of the Tenth Schedule. What the Speaker has done here is within the legislative arena and whatever he does within the legislative arena is not amenable to judicial scrutiny. It follows, thus, that the so-called acceptance of the merger and its notification in the Legislative Assembly Bulletin, cannot be faulted on the law stated in ***Rajendra Singh Rana*** (supra).

10. In ***Kihoto Hollohan vs. Zachillhu and ors.***, reported in 1992 Supp (2) SC 651, a Constitution Bench of the Supreme Court, whilst dealing with the issue of constitutional validity of the Tenth Schedule, considered whether the determinative authority of the Speaker or the Chairman in the Tenth Schedule concerning disqualification of a member, was a judicial power or whether it was within the non-justiciable legislative area. The Constitution Bench held that the Tenth Schedule does not, whilst providing for an additional ground for disqualification and for adjudication of a disputed disqualification, seek to create a non-justiciable constitutional area; the power to resolve such dispute vesting in the Speaker or Chairman is a judicial power. The Speaker or Chairman, whilst exercising powers and discharging functions under the Tenth Schedule, acts as a tribunal, adjudicating rights and obligations under the Tenth Schedule and his decision in that capacity, unlike

his other decisions as the master of the House, is amenable to judicial review. In the light of various decisions referred to and the nature of functions exercised by the Speaker/Chairman under para 6, the Supreme Court held that the scope of judicial review under Articles 136, 226 and 227 of the Constitution in respect of orders passed by the Speaker/Chairman in para 6, would be confined to jurisdictional errors alone, i.e. infirmities based on (i) violation of constitutional mandate, (ii) mala fides, (iii) non-compliance with rules of natural justice and (iv) perversity. This limited scope of judicial review was both on account of the finality clause in Para 6 and the constitutional intendment and status of the repository of such adjudicatory power, i.e. Speaker/Chairman. The Supreme Court made it clear that this judicial review would not be available at a stage prior to the making of a decision by the Speaker/Chairman; no *quia timet* action would be permissible in the matter.

11. That also answers the Petitioner's second prayer in this Petition, which is for declaring disqualification of Respondent Nos. 5 and 6. Power to disqualify a member exclusively vests in the Speaker or the Chairman, as the case may be, and no Court can interfere in the matter before he exercises such power. Mr. Kantak submits that the Speaker has made up his mind; the order is almost a foregone conclusion. Whether or not it is so (calling it to be so, though, would really be a matter of speculation), no *quia timet* action before

a Court of law is available to any aggrieved party; it is only after a decision is taken on a disqualification Petition under para 6 after considering any defence raised under para 4 of the Tenth Schedule, that the limited judicial review, as explained by the Supreme Court in ***Kihoto Hollohan*** (supra), is available before Constitutional Courts.

12. A number of High Court judgments have affirmed this position. Many of these were matters where splits or mergers were noted/allowed by the Speaker and the grievances were carried by aggrieved parties to High Courts under Articles 226 or 227 of the Constitution of India. A Division Bench of Rajasthan High Court observed in ***Shri Krishna vs. State of Rajasthan & ors.***, reported in 2010 (3) RLW 2265, that if the petitioner was aggrieved, he was required to approach the Speaker of the Assembly in view of para 6 of the Tenth Schedule and could not invoke the writ jurisdiction of the High Court. (Two petitions were pending in that case before the Speaker for disqualification of the concerned MLAs.) A learned Single Judge of the same High Court in ***Jaswant Singh Gurjar vs. Hon'ble Speaker Rajasthan Vidhansabha Jaipur***, reported in 2011 (2) RLW 1648 (Raj.), held that judicial review should not cover any stage prior to the making of a decision by the Speaker/Chairman. No notice to the Speaker was issued accordingly. A learned Single Judge of Punjab & Haryana High Court in ***Kuldeep Bishnoi vs. Speaker, Haryana Vidhan Sabha and ors.***, reported in 2011 (1) RCR (Civil)

627, held that any order of the Speaker recognizing a split/merger even if it is termed under para 4 of the Tenth Schedule, would necessarily be subject to an adjudication under paragraph 6 of the Tenth Schedule. No doubt, the order of the learned Single Judge, after the Division Bench of the High Court interfered with it, was carried before the Supreme Court and it is the Supreme Court order in appeal (in ***Speaker, Haryana Vidha Sabha vs. Kuldeep Bhshnoi & ors***, (2015) 12 SCC 381) which now holds the field. The Supreme Court in that order, however, has effectively upheld the view of the learned Single Judge in this behalf. Though the Court decided the appeals in the background of the complaint that interim orders were passed by the High Court (the Division Bench hearing appeal from the Single Judge) in purported exercise of its powers of judicial review under Articles 226 and 227 of the Constitution, it nevertheless held in para 44 as follows :

“44. ... In that regard, we are of the view that since the decision of the Speaker on a petition under Para 4 of Schedule X concerns only a question of merger on which the Speaker is not entitled to adjudicate, the High Court could not have assumed jurisdiction under its powers of review before a decision was taken by the Speaker under Para 6 of Schedule X to the Constitution. It is in fact in a proceeding under Para 6 that the Speaker assumes jurisdiction to pass a quasi-judicial order which is amenable to the writ jurisdiction of the High Court. It is in such proceedings that the question relating to the disqualification is to be considered and decided. Accordingly, restraining the Speaker from taking any

decision under Para 6 of Schedule X is, in our view, beyond the jurisdiction of the High Court, since the Constitution itself has vested the Speaker with the power to take a decision under Para 6 and care has also been taken to indicate that such decision of the Speaker would be final. It is only thereafter that the High Court assumes jurisdiction to examine the Speaker's order."

13. There is, thus, no merit in either of the two prayers of the petition. The petition is, accordingly, dismissed.

14. Learned Counsel for the Petitioner submits that his client would also be presenting a disqualification petition against Respondent Nos.5 and 6 herein to the Speaker. It is stated by learned Counsel for Respondents No.1 and 2 that in keeping with the statement of the Speaker, noted and accepted in paragraphs 5 and 6 above, any such petition shall be decided without reference to, or being in any way influenced by, the order of 27th March, 2019 and its notification in the Legislative Assembly Bulletin. Learned Counsel also states that the pending disqualification petition, as well as any petition that may be filed by the Petitioner, shall be decided by the Speaker within a reasonable period of time. The Statement is accepted. It is made clear that all rights and contentions of the parties on merits are kept open, and may be debated in the pending disqualification petition/s.

Nutan D. Sardesai, J.

S.C. Gupte, J.