

# A Speaker's flawed move to determine the real faction

Posted at: 16/01/2024

## **Context:**

In the Shiv Sena case in Maharashtra, the question as to which faction is the real party cannot be decided by the Speaker as the Tenth Schedule does not require him to decide this.

## **Introduction:**

The Speaker of the Maharashtra Assembly, Rahul Narwekar, was required to decide whether the breakaway group of Shiv Sena Members of the Legislative Assembly (MLA) under the leadership of Eknath Shinde voluntarily gave up the membership of their party and later voted against the whip issued by that party, the Shiv Sena, and thereby incurred disqualification.

## **What is defection?**

1. Under the anti-defection law contained in the Tenth Schedule of the Constitution, treated as defection and the Members of the legislature who do either of these things are liable to be disqualified. Voluntarily giving up the membership of their original party or voting against the whip of the party are
2. It was immaterial that Eknath Shinde later became the Chief Minister or that a majority of the Shiv Sena's legislators joined the Shinde group or that the original Shiv Sena party became a minority in the Assembly.
3. These facts are irrelevant for the determination of the question of disqualification under the Tenth Schedule.

## **An attempt to prevent disqualification!**

1. The original Shiv Sena party filed a petition seeking the disqualification of the Shinde group, which was led by rebel MLAs under the leadership of Eknath Shinde.
2. The rebellion led to the formation of an alliance with the Opposition party and Mr. Shinde being sworn in as Chief Minister.
3. Speaker Narwekar was called upon to decide whether this action could be treated as voluntarily giving up the membership of the Shiv Sena and thus disqualified.
4. The Supreme Court of India has explained the scope of this term used in paragraph 2(1)(a) of the Tenth Schedule. In *Rajendra Singh Rana vs Swami Prasad Maurya* (2007), the Court stated that when a member or a group of members of the ruling party joins hands with the Opposition party and meets the Governor along with the Members of the Opposition and try to form an alternative government, they can be said to have voluntarily given up the membership of their original party.
5. Speaker Narwekar's nearly 1,200-page judgment tried to avoid this consequence and save the Shinde group from disqualification. However, it is a deeply flawed judgment. Under the

Tenth Schedule, a legislator could avoid disqualification on two grounds: a split in his political party where one-third of the legislators form a faction and break with that party, or the legislator's party merging with another party and not less than two-thirds agree to the merger and walkout of the original party.

6. The split provision in paragraph 3 of the Tenth Schedule was omitted through the 91st Constitution Amendment in 2003 due to frequent abuse by legislators. Now only the merger provision in paragraph 4 remains, which can protect defectors provided the conditions stipulated in paragraph 4 are met, such as the merger of the defectors party with another party.

#### **Speaker's erroneous move:**

1. Supreme Court's direction. Speaker Narwekar has been accused of attempting to determine the real Shiv Sena faction, citing the Commission of India under paragraph 15 of the symbols order. However, this question cannot be decided by the Speaker, as it is only decided by the Election Commission.
2. The only question that the Speaker must decide is which party the legislators defected from, or their original political party.
3. The political party by which they were set up as a candidate for election. The explanation to paragraph 2(1) clearly states that an elected member of a House is deemed to belong to the party.
4. Therefore, it is not the Speaker's function to determine the real party, which is not related to the anti-defection law.

#### **Judiciary's clear enunciation of the law:**

1. The Speaker's decision to recognize the Chief Whip and legislature party leader by the Shinde group as valid contradicts the Supreme Court's ruling that Mr. Shinde and Bharat Gogawale are illegal.
2. The court also ruled that the Deputy Speaker's recognition of Ajay Choudhary as Chief Whip is valid.
3. The Supreme Court has stated that when conduct prohibited under the Tenth Schedule is committed, there is only one political party, the original Shiv Sena led by Uddhav Thackeray.
4. The Speaker's decision to find the Shinde group the real party is clearly without jurisdiction, as the Subhash Desai judgment reveals that the Shiv Sena, led by Thackeray, is the only party that could issue a valid whip to all members of the Shiv Sena.

#### **Conclusion:**

As regards the question of which faction is the real Shiv Sena, it can be decided only by the Election Commission of India. The Speaker has no jurisdiction to decide it. It may be noted that Parliament while enacting the Tenth Schedule did not consider paragraph 15 of the Symbols order as a relevant factor.