
(1979) 08 DEL CK 0008

In the Delhi High Court

Case No : Civil Writ Petition No. 1117 of 1979

Dinesh Chandra Pande

APPELLANT

Vs

Chaudhury Charan Singh and others

RESPONDENT

Date of Decision : 13-08-1979

Acts Referred:

Citation : AIR 1980 Delhi 114

Hon'ble Judges : V.S. Deshpande, C.J.;Rajinder Sachar, J

Bench : Division Bench

Advocate : Danial Latiffi, with Dilip Sinha and Raghubir Malhotra, for the Appellant;

Final Decision : Dismissed

Judgement

V.S. Deshpande, C.J.—Which comes first in order of time, the executive or the legislature ? This question raised by the present writ petition is certainly easier to answer than the popular quiz - which comes first, the egg or the chicken. For, the answer comes out of Article 75 of the Constitution and the unwritten conventions or constitutional practice.

2. After the resignation of the Council of Ministers headed by Shri Morarji Desai, the President first called upon the Leader of the Opposition to form the Government. When he expressed his inability to do so, the President asked Shri Morarji Desai and Shri Charan Singh to submit lists of their supporters in the Lok Sabha. After scrutinising them on 26th July, 1979 the President concluded that Shri Charan Singh enjoyed the support of more members in the Lok Sabha than Shri Morarji Desai. He called upon Shri Charan Singh to form a Government adding that in accordance with the highest democratic traditions and in the interests of establishing healthy conventions Shri Charan Singh would seek a vote of confidence in the Lok Sabha at the earliest possible opportunity, say, by the third week of August, 1979. Shri Charan Singh was sworn in as the Prime Minister and thereafter some other Ministers were also sworn in. Presumably on the advice of the Cabinet the Lok Sabha was prorogued by the President. Soon

thereafter a session of the Lok Sabha was called for to begin on Monday the 20th August, 1979 to enable the new Government to seek a vote of confidence.

3. In the above circumstances, the petitioner challenges the legality of the Government formed by Shri Charan Singh. Shri Danial Latiffi, learned Counsel who argued for the admission of the petition, chose to advance the following points in support of the contention:

(1) Under Article 75 (3) the Council of Ministers shall be collectively responsible for the House of the People. The vote of confidence in the Lok Sabha should therefore have been sought by the new Government either before taking office or simultaneously with it. The continuation of the new Council of Ministers in the office without doing so is a violation of Article 75 (3).

(2) The de jure status of the new Government thus being doubtful, the President should not have accepted its advice to prorogue the Lok Sabha since this enables the new Government to continue in office without seeking a vote of confidence in the Lok Sabha.

(3) In case the new Government does not get the vote of confidence on the 20th August, 1979 or thereafter it would not have the right to advise the President to dissolve the Lok Sabha for a mid-term poll because it was not a legally constituted Government.

4. The contentions raised in his argument by the learned counsel are only partly questions of law. They are also partly political. They involve considerations not only of the Constitution but also of the conventions. The courts in India have not evolved a set of principles by following which they shun "political questions" as nonjusticiable in courts. The main reason for nonjusticiability is that legitimate use of political power is generally nonjusticiable since it has political sanction which is sufficient in view of the separation of powers between the executive, the legislature and the judiciary in the Constitution.

5. But when it is alleged that political power has not been used in accordance with the Constitution or law, the courts have to examine if the issues are legal or political and if the latter if they are justiciable or not. The distinction between a legal and a political issue is something which we know, but find hard to define. Broadly speaking, "when there is a general agreement among the dominant groups as to the rules which should be applied, then we have a legal issue.....A political issue, on the other hand, is one about which there is greater conflict. less certainty and less agreement.....The distinction turns on the amount and intensity of the contention, about the interest that is being furthered rather than any distinction in the reasoning process." (Jack Peltason, "Political Science of Public law," as extracted in Constitution Law and Judicial Policy Making, edited and written by Joel B. Grossman and R.S. Wells, pp. 8 and 9).

6. We regard the questions raised in this case as more political than legal because the interests to be subserved by raising them are general or political

rather than individual or legal.

7. When legal and political questions are inter-mixed, judicial experience has evolved some guidelines by which courts would know when an issue is justiciable and when it is not. In *Baker v. Carr*, (1962) 369 US 186, cases involving nonjusticiable political questions were considered to possess one or more of the following characteristics;

- (1) A textually demonstrable constitutional commitment of the issue to a coordinate political department;
- (2) A lack of judicially discoverable and manageable for resolving it;
- (3) The impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion;
- (4) The impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches or government;
- (5) An unusual need for unquestioning adherence to a political decision already made; or
- (6) The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

8. The U.S., Supreme Court held that "unless one of these formulations is inextricable from the case at bar, there should be no dismissal for on justiciability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions", not one of "political cases". The courts cannot reject as ""no law-suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority.

9. Our Supreme Court has, however, had to decide seemingly political questions since the Constitution or a statute had to be interpreted to answer them, ordinarily a duty which courts will not shun. We are not, therefore, able to decline jurisdiction to consider the questions raised in the present writ petition.

CONTENTION (1):

10. The scheme of the Government under the Constitution is its division into three parts, namely the executive, the legislature and the judiciary. It is not without significance that the constitution of the executive and its powers precedes the constitution of the legislature and their powers. The reason is that the President heading the executive is elected for a certain term of years. The Parliamentary executive, namely the Council of Ministers, also has a life which may be longer than the life of any particular Lok Sabha. This is why Article 74 says that there shall be a Council of Ministers to aid and advise the President. That President and the Council of Ministers precede in time the legislature in the process of Government is shown by the order in which the clauses of Article 75 are arranged. Under clause (1) the Prime Minister is appointed by the President

first and the other Ministers subsequently on the advice of the Prime Minister. The Council of Ministers thus comes into being to aid and advice the President. The Government is thus constituted. Under clause (2) the Ministers shall hold office during the pleasure of the President. This only shows that the President is elected for a fixed term and theoretically has the power to dismiss a Minister. But this power would be exercised by the President only in the context of the other clauses of Article 75.

Under clause (3) the Council of Ministers shall be collectively responsible to the House of the People. This leads to the following conclusions. Firstly, there has to be a Council of Ministers before it can become responsible to the House of the People. Thus the appointment of the Council of Ministers has to precede the vote of confidence which they must win from the House or the vote of non-confidence which they must encounter in the House. Secondly, the responsibility of the Lok Sabha is to ensure that the Council of Ministers will resign whenever the Lok Sabha expresses lack of confidence in it. Otherwise the Council of Ministers will continue being only theoretically responsible to the Lok Sabha but not so in practice. But it is only occasionally that such responsibility is tested by vote of confidence or no confidence. Under Clause (5) a Minister has to become a member of either House of Parliament within six months of his appointment. This shows that the President can appoint a Minister not only before he becomes responsible to the Lok Sabha but even before he is a member of the Lok Sabha. This conclusively shows that the existence of the Council of Ministers must precede in order of time the vote of confidence or no confidence in the Council of Ministers by the Lok Sabha.

11. In *Rasesh C. Choksi Vs. State of Gujarat and Others*, , the construction of Article 75 (3) came up directly for consideration. The Supreme Court did not indicate any difficulties in its way of regarding the case as justiciable by the court, but straightway went to decide the issues. The question was whether the Council of Ministers can continue to exist after the dissolution of the Lok Sabha. The argument there was also the same as was made before us, namely, that the Council of Ministers is responsible to the House of the People and must enjoy its confidence. After the dissolution of the House, the Council of Ministers cannot seek the vote of confidence of the House. It was argued, therefore, that it must also go out of office. This argument was rejected. Article 74 precedes Article 75. Under Article 74 there has to be a Council of Ministers to aid and advise the President. Merely because the Lok Sabha has been dissolved is no reason why the country should be without a Government. Under Article 75 (2) the Minister holds office during the pleasure of the President. The President has not exercised his pleasure to say that the Ministers shall not hold office.

In *Thiru K.N. Rajgopal Vs. Thiru M. Karunanidhi and Others*, , the question again was raised whether the Tamil Nadu Ministry could continue in office after the dissolution of the State Assembly. The Supreme Court followed its previous decision in *U.N.R. Rao's* case and held that the Ministry could continue in office

without any constitutional objection. As pointed out above, the exercise of such pleasure itself is dependent on the Council of Ministers enjoying the confidence of the House. The contention of the petitioner that the confidence of the House should be secured before the Ministers are appointed is contrary to the scheme of Articles 74 and 75. The petitioner is right that the Ministers are responsible to the Lok Sabha and they must seek the confidence of the Lok Sabha, but the petitioner is not right that the confidence must be sought simultaneously with the formation of the Government or the appointment of the Prime Minister or the other Ministers.

12. Constitutionally, the Government is a complex structure of many parts. As Justice Holmes observed long ago, "great constitutional powers must be administered with caution. Some place must be allowed for the joints of the machine" (*Missouri Kansas and Tennessee Railroad v. May*, (1903) 194 US 267. It is not only unreasonable but impossible to expect the Council of Ministers to seek the approval of the House immediately on their appointment.

13. It was argued that if the Lok Sabha were continuously in session, the vote of confidence or no confidence would have come about almost immediately after the appointment of the Ministers. It is contended that it was highly desirable that the vote of confidence or no confidence should have been allowed to be expressed by a continued session of the Lok Sabha and the Lok Sabha should not have been prorogued by the President. What is desirable is a question of policy which is for the President as advised by the Council of Ministers to decide. If the courts were to decide it they would be doing the function of the executive. In *State of Punjab Vs. Satya Pal Dang and Others and Baldev Parkash and Others*, , the Constitution Bench speaking through Hidayatullah, C.J. observed that?

Article 174 (2) (which corresponds to Article 85 in respect of the President), which enables the Governor to prorogue the Legislature does not indicate any restrictions on this power, whether a Governor will be justified to do this when the Legislature is in session and in the midst of its legislative work, is a question that does not fall for consideration here. When that happens the motives of the Governor may conceivably be questioned on the ground of an alleged want of good faith and abuse of constitutional powers. We do not go as far as the learned Judges in *Re: Kalyanam Veerabhadrayya*, . But that is not the case here.....No mala fides were attributed to the Governor except to say that he acted in excess of his powers or in colourable exercise of them. The power being untrammelled by the Constitution and an emergency having arisen, the action was perfectly understandable. We shall presently show that the Governor acted not only properly but in the only constitutional way open to him.

These observations apply to the action of the President in proroguing the House under Article 85 in the present case. An extraordinary situation arose when neither of the two leaders could be seen to enjoy the support of an absolute majority in the Lok Sabha. Apparently either of them would have to seek coalition with some other party or parties to secure a confidence vote. Such a

coalition cannot be formed overnight. A common programme and understanding has to come about to sustain the coalition. The President in his wisdom thought that the vote of confidence should be sought by about the third week of August, 1979. His discretion has been exercised after considering the advice of the Council of Ministers and in the fact of an admittedly difficult and extraordinary situation. If there are any undoubted political issues, they are the considerations to be taken into account by the President in calling a leader to form the Government and in giving him the time to obtain the vote of confidence in the Lok Sabha. In the language of the U.S. Supreme Court in *Baker v. Carr* (supra), the "lack of judicially discoverable and manageable standards for resolving" the question make them nonjusticiable. Further, there is "an unusual need for unquestioning adherence to a political decision already made" in this case. The 20th August, 1979 fixed by the President with the advice of the Council of Ministers as the date for the Government to seek confidence of the Lok Sabha is already at hand. Even if an issue were justiciable and this court were to give a direction to the Government to seek the confidence such a direction can hardly be enforced if at all before 20th August. Hence, the issue of such a writ, if at all were possible, would be futile. This is an additional reason why the court should decline to issue any such direction.

14. Our finding on contention No. (1) is that the action of the President in proroguing the Lok Sabha on the advice of the Council of Ministers and in giving them time till the 20th August, 1979 to seek a vote of confidence in the Lok Sabha was not only proper in the circumstances but was entirely constitutional and unobjectionable. The Council of Ministers was validly appointed and their advice was validly tendered to the President.

15. In view of the above findings, contentions (2) and (3) do not survive. But they may also be briefly disposed of.

CONTENTION (2):

16. The selection of a Prime Minister after the result of the election or after the resignation of the Council of Ministers has always been a privilege of the constitutional Monarch in the United Kingdom. This function has to be performed under the Indian Constitution by the President even though it has not been specifically dealt with by the letter of the Constitution. The contention of the petitioner that it is only after a member of the Lok Sabha secures the vote of confidence that he should be appointed as a Prime Minister or a Minister by the President virtually amounts to saying that it is not the President but the Lok Sabha or the members of the party in the Lok Sabha who should select a leader as enjoying their confidence.

17. This recalls an interesting precedent in the British constitutional history. In 1957 the Council of Ministers headed by Sir Anthony Eden resigned. The Queen sought the advice of Churchill and Salisbury as elder statesmen of the Conservative Party who had no personal ambitions at stake as to who should be

called upon to form the Government. At this time the Labour Party took the opportunity of outlining the procedure it wished to be adopted in the selection of a Labour Prime Minister under comparable conditions. It declared that the Monarch should make no selection until a new leader had been elected by the Parliamentary Labour Party in the same way as a Leader is chosen when the party is in opposition. As observed by Marshall and Moodie "The Labour Party, thus, has given notice that it would not be prepared to accept a Leader chosen for it by the Monarch.....Such a "rule" would not conflict with authority and precedent which require, essentially, only that the person selected be acceptable to the party in question." (Some Problems of the Constitution, pp. 62-63).

18. In the present case, Shri Charan Singh was called upon to form the Government when he was already elected as a Leader of the Party. He had also secured the written consent of the Leaders of some parties and was, therefore, able to convince the President that he enjoyed the support of more members than his rival. It is true that such a support has to be demonstrated in the Lok Sabha and not outside it. This contention of the petitioner is certainly right. In *Adegbenro v. Akintola*, (1963) 3 All ER 544 (PC), Judicial Committee of the Privy Council upheld the action of the Governor in dismissing the Prime Minister as not enjoying the confidence of the legislature merely because the majority of the legislators had given a signed memorandum to that effect to the Governor. This decision reversed the decision of the Supreme Court of Nigeria which held that the Majority support or lack of support has to be proved in the Legislature and not outside it. The decision of the Privy Council was regarded as opposed to this constitutional practice and may be one of the reasons which led Nigeria to abolish the right of appeal to the Privy Council. But in the case before us no final decision has been taken on the calculation of the votes outside the Lok Sabha. Only a provisional decision has been taken as to who should be invited to form the Government and seek the vote of confidence in the Lok Sabha as early as possible.

19. Since the decision as to which member of the Lok Sabha should be invited to form the Government has to be taken by the President, it is only the constitutional convention which has to be respected by him in the choice of such a person. There may be a difference of opinion as to who was the person best placed to succeed in getting a vote of confidence in the Lok Sabha. Such a difference of opinion is possible in the working of conventions and, therefore, of constitutional law to some extent. As K.C. Wheare has said it is the association of law with convention within the constitutional structure which is among its essential characteristics (*Statute of Westminster and Dominion Status*, 5th Edn, p. 4). As observed by Marshall and Moodie, it is also the reason "why it is impossible to settle constitutional disputes merely by reference to the state of law". (Some Problems of the Constitution p. 31).

20. Our finding on contention No. (2) is that the legal status of the new Government was according to the convention and also the Constitution so that its

advice could be accepted by the President in respect of the prorogation of the House.

CONTENTION (3):

21. This contention is speculative. We do not cross bridges before we go to them.

22. These are the reasons why the writ petition was dismissed in limine by us on the 13th August, 1979.

23. Since the writ petition was dismissed in limine, it is clear that no substantial question of law of general importance which needs to be decided by the Supreme Court was raised by it and hence no certificate of fitness for appeal to the Supreme Court under Article 133 of the Constitution could be granted.

Sachar, J.

24. I agree that this petition should be dismissed.

25. This petition seeks the issuance of writ of quo warranto challenging the appointment of respondent No. 1; Ch. Charan Singh, as Prime Minister of India. The averments in the petition mostly raise political questions which are outside the purview of this court. When pressed to give specific objection, Mr. Latin, learned counsel for the petitioner sought to urge that respondent No. 1 was not properly appointed in terms of Article 75 of the Constitution. I am unable to appreciate on what basis this contention is made. Article 75 of the Constitution provides that the Prime Minister shall be appointed by the President. It is not disputed that the President had called upon respondent No. 1 to form a government. Clause (1) of Article 75 is therefore clearly complied with. It was however urged by Mr. Latifi that there was nothing to show that respondent No. 1 enjoyed the confidence of the majority of the members of Lok Sabha and referred to clause (3) of Article 75 which requires that Council of Ministers shall be collectively responsible to the House of People. This argument is misconceived. Letter of 27th July, 1979 by the President to respondent No. 1 clearly shows that the President had on the basis of material placed before him come to the conclusion that respondent No. 1 enjoyed the support of more members of Lok Sabha than any other individual and he, therefore, called upon respondent No. 1 to form a government. The President had also expressed a hope that in accordance with the highest democratic traditions and in the interest of establishing a healthy convention of respondent No. 1 would seek a vote of confidence in the Lok Sabha at the earliest possible opportunity say by third week of August, 1979. Mr. Latifi concedes that a session of Lok Sabha has been summoned on 20-8-1979 where the Prime Minister is seeking a vote of confidence. This is being done obviously to comply with the requirement of Clause (3) of Article 75 of the Constitution.

26. Mr. Latifi had sought to argue that summoning of the session of Lok Sabha should have been prior to or simultaneous to the appointment of respondent No. 1 as Prime Minister. This is an impossible suggestion. Obviously a Prime Minister

has to be appointed by the President before the Lok Sabha is summoned in order that the Prime Minister may obtain a vote of confidence from the Lok Sabha.

27. The next argument was that a period of three weeks was too long and that the Lok Sabha should have been summoned earlier. Under Article 85 of the Constitution, the President is empowered to summon each house of Parliament to meet at such time and place as he thinks fit. The summoning of the Session of Parliament is within the purview of the President and the court cannot be asked to arrogate to itself the power to determine what should be the time and place at which the Parliament should have been summoned.

28. The next argument which was really an argument of fear was that unless some time limit was laid down between the appointment of Prime Minister and the time when the session was to be summoned by the President then a time may come in future when the President may appoint a Prime Minister and the session of the Parliament may not be called for months thus setting at naught the mandate of Clause (3) of Article 75 of the Constitution. I feel that this argument which conjures an imaginary danger and is based on conjecture has not even the merit of plausibility and is so fragile that it has only to be stated to be rejected. Argument was raised as to what is to happen if the confidence vote was lost or as to what are the precise powers of the President in that eventuality. Interesting and possibly of some relevance as these questions may be they may figure as good topics at seminars and in public discussions, but issues raised not being legal, remedy cannot be sought in courts. This court though no doubt conscious of its role of sentinel on "qui vive" where constitutional transgressions take place is equally conscious of its role as a recluse and an outsider in so far as matters raised pertain to domain of politics. The petitioner in so far as he seeks to involve the court in issues which are purely political has obviously misconceived his remedy. The writ petition is hereby dismissed in limine. Leave to appeal to the Supreme Court is also refused.