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**(1999) 05 AHC CK 0119**  
**In the Allahabad High Court**  
**Case No : Writ Petition No. 2094 (M/B) of 1999**

Lallan Pandey

APPELLANT

Vs

State of U.P.& Ors.

RESPONDENT

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**Date of Decision :** 28-05-1999

**Acts Referred:**

Constitution of India, 1950 — Article 191, 192, 226, 361

**Citation :** (1999) 05 AHC CK 0119

**Hon'ble Judges :** M.A.Khan, J and Pradeep Kant, J

**Final Decision :** Dismissed

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## Judgement

1. The writ petition was heard on 24th May, 1999 and by our order of even day the same was dismissed for the reasons to be recorded later on. We. therefore, set out the following reasons for dismissing the writ petition.

2. Taking concern of the political instability and changing loyalties of the elected representatives of people, the petitioner feeling betrayed has approached this Court under Article 226 of the Constitution of India for issuance of a writ of mandamus commanding the Election Commission on India i.e. opp. party No. 2 to hold due enquiry as provided under Article 192 of the Constitution of India and declare opposite parties 3 to 32 as disqualified.

3. The petitioner has alleged that during the elections the voters (Citizens) cast their votes to a candidate who contest the election on the ticket of a political party in which the voter has faith, and therefore, if such a person who returns in election on the ticket of a party has no right to leave that party after being elected either by joining any other party or by forming a new party.

4. In furtherance of this argument it has further been submitted that such a conduct of the elected representatives is not in keeping with the democratic principles and it also belies the faith of the people.

5. The petitioner has brought on record the names of the parties on whose tickets the Respondent Nos. 3 to 33 had contested the elections and the votes

polled in their favour. It had also been brought on record that earlier in the State of Uttar Pradesh the Government was formed with the alliance of Bhartiya Janta Party and Bahujan Samaj Party with an understanding that during the first six months a member belonging to Bahujan Samaj Party would be the Chief Minister and thereafter for the next six months a member belonging to Bhartiya Janta Party would be the Chief Minister and in consequence of the mutual agreement Km. Mayawati became the Chief Minister of Uttar Pradesh on 21/3/1997 and functioned as such till 20/9/97.

6. After expiry of about six months Sri Kalyan Singh became the Chief Minister as a Bhartiya Janta Party leader and a dispute among the leaders of Bahujan Samaj Party (BSP) and Bhartiya Janta Party (BJP) arose as a result of which the BSP withdrew the support from the BJP on 13/10/1997 and on which Sri Kalyan Singh was asked to prove the majority in the house at a Special session on 21/10/1999, on which date he succeeded in proving the majority in his favour by securing majority of the votes.

7. On 24/10/1997 Km. Mayawati filed petition under Rule 7 which was decided by the Speaker and against that order Special Leave petition was filed before the Hon'ble Supreme Court.

8. The submission of the learned Counsel for the petitioner is that in proving the majority of Sri Kalyan Singh total 22 ML As of Congress forming party as Loktantrik Congress and 12 ML As of BSP, 3 of Janta Dal, 1 of Samta Party and 2 of independent joined hands to support Sri Kalyan Singh. The concern of the petitioner is that without taking the voters into confidence as to whom they still represent formed a new party in the name of Loktantrik Congress, Janta Dal (Raja Ran Pandey Group) and Jantantrik BSP and therefore, they have incurred disqualification under Article 191 of the Constitution of India and are not eligible for being continued as a Member of the Legislative Assembly of the State.

9. The learned Counsel for the petitioner confined his arguments on the powers of the Election Commissioner under Article 192 of the Constitution and the obligation of the Governor of the State to take appropriate decision in this regard irrespective of the matter being decided by the Speaker under Rule 7 against which SLP has been filed before the Hon'ble Supreme Court and the same is still pending. Further submission is that in view of pendency of the SLP before the Apex Court, the claim is not forward under Tenth Schedule but the matter regarding disqualification should be decided under Article 192 of the Constitution..

10. The Counsel for the State raised a preliminary objection that the writ petition is not maintainable as no relief has been asked for against the Governor and the relief prayed for against the Election Commission of India for making an enquiry and giving its opinion to the Governor for holding the private respondents as disqualified can also not be granted as no such opinion has been asked for by the Governor nor any matter or complaint is pending before the Governor. It has been further argued by the State that no mandamus can be issued to the

Governor in view of Article 361 of the Constitution of India and that in absence of any complaint or matter being pending before the Governor and in the absence of any requirement of the Governor to ask for an opinion to the Election Commission and also that the Governor has not asked for any such opinion, the question of issuing of a magnumdoes notaries.

11. Admittedly no complaint has been made by the petitioner to the Governor for taking a decision on the question of disqualification, if at all incurred in accordance with Article 191 of the Constitution by the members of the Legislative Assembly who have been arrayed as a private respondents.

12. The learned Counsel for the petitioner submitted that it is not necessary for the Governor while considering the question of disqualification of the members of the Legislative Assembly under Article 192 of the Constitution to wait for the compliant from any person and the action can be taken by him suo motu.

13. In suppor of his contention the learned Counsel for the petitioner has relied upon a case AIR 1965 SC 1892, Brundaban Nayak Election Commission of India and anther. The question raised in the said case was whether the Election Commission was entitled to hold an enquiry before giving its opinion to the governor under Article 192 (2) of the Constitution of India. The argument was that though the question may have arisen about disqualification it is the Governor alone who can how the enquiry and not the Election Commission. The Hon"ble Supreme Court while rejecting the said contention held that the Election Commission within its Jurisdiction to serve a notice calling for evidence in support thereof as it is the opinion of the Election Commission which is in substance decisive and it is legitimate to assume that when the complaint is received by the Governor, and he forwards it to the Election Commission, the Election Commission should proceed to try the complaint before it gives its opinion. It has 4lso been held in the above noted case that a complaint under Article 192 can be made by any citizen as the whole object of democratic elections is to constitute Legislative Chambers composed of members who are entitled to that status, and if any member forfeits that Status by reason of a subsequent disqualification, it is in the interest of the Constituency, while, such a member represents that the matter should be brought to the notice of the governor and decided by him in accordance will, the provisions of Article 192 (2) of the Constitution.

14. Lordships further observed that it a complaint is made to the Governor the Governor shall ask for the opinion by forwarding the complaint to the Election Commission and the Election Commission, in turn, would have lull authority to enquire into that complaint and send its opinion to the Governor. It is no doubt true that the decision of the question raised under Article 191 (1) has to be decided by the Governor but it must be in accordance with the opinion of the Election Commission. It is the opinion of the Election Commission which is in substance decisive.

15. In the instant case no complaint has been received by the Governor nor any occasion had arisen to forward the complaint to the Election Commission for asking its opinion, therefore, the reliance placed on the dictum of the Hon'ble Supreme Court is not available to the petitioner.

16. On the question of issuance of a writ against the Governor of the State, the learned Counsel for the petitioner relied upon a case AIR 1985 Madras 55 K.S. Haja Sheriff v. His Excellency the Governor of Tamil Nadu, Madras and others, it has been held in this case that it cannot be held that merely because a decision had been arrived under Article 192 (1), no writ petition could be filed. But, to what extent in such proceeding, on being initiated, a petitioner could secure relief would depend upon himself establishing about the existence of the vitiating factors, spelt out in Union of India v. Jyoti Prakash Milter, AIR 1971 SC 1093. Hence, as against a decision pronounced under Article 192 (1) a writ petition could be entertained under Article 226 of the Constitution of India by a High Court.

17. Reliance was also placed in a case reported in AIR 1999 Bombay 53 Pratap Singh Raojirao Rana v. Governor of Goa and others, wherein the High Court while clarifying the functions performed by the Governor, in four categories had opined that if the Governor acts on its sole discretion the same would not be open to judicial review.

18. Further reliance has been placed on a case reported in 1994 (Supp 2) Supreme Court Cases 641, Ravi S. Naik v. Union of India and others, it is on the disqualification. It is a case arising out of Goa Legislative Assembly (Disqualification on Grounds of Defection) Rule, 1986 as such the same is not of any assistance to the petitioner in the instant case, since the petitioner has not based his claim on the disqualification under Tenth Schedule.

19. The case reported in 1996 SC1810, Election Commission of India and another v. Dr. Subramaniam Swamy and another. In this case the question was regarding the allegations of bias, made against the Chief Election Commissioner made by the MLA and the procedure to be adopted by Election Commission in such matters. This case is also not at all applicable in the circumstances of the present case.

20. The case of G. Vishwanathan v. Hon'ble Speaker Tamil Nadu Legislative Assembly Madras and another, (1996) 2 Supreme Court Cases 353, is also a matter arising out of an explanation as to Clause 2 (1) of Tenth Schedule and Article 191 (2) of the Constitution their Lordships of Hon'ble Supreme Court had laid down that unless a person who was elected from the particular party and who has been expelled would continue to belong to that particular party unless he joins another party and on such joining of the party it will certainly amount to his voluntarily giving up the membership of the political party which had set him up as a candidate for election.

21. The learned Counsel for the petitioner stressed that the private respondents

who are the party in the writ petition have incurred this disqualification as they have betrayed the faith of the people by forming a new political party after being elected on the tickets of different political parties. Thus, they became disqualified to remain as a member of the Legislative Assembly. We are afraid that this action of the private respondents cannot be said to be a disqualification, incurred by them after their elections unless it is a disqualification under Tenth Schedule of the Constitution of India. The disqualifications which can be attributed to the members of the Legislative Assembly have been enumerated in Article 191 of the Constitution of India. Article 191 of the Constitution, provides as follows:

"191(1). A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State.....

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule other than an office declared by the Legislature of the State by law not to disqualify its holder,

(b) if he is of unsound mind and stands so declared by a competent Court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

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

(2) For the purpose of this Article, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the first Schedule by reason only that he is Minister either for the union or for such State.

22. The learned Counsel could not impress upon us that any of the disqualifications which have been enumerated in Article 191 can be attributed to the private respondents.

23. A bare perusal of Article 191 leaves no doubt that the petitioner's claim regarding disqualification of the members cannot be based on any of the clauses either contained in sub clauses (a to e) of Article 1 of Article 191 or subclause (2) of subArticle 191. The learned Counsel also could not indicate as to how the private respondents have incurred any disqualification under Article 191 (i)(e) as no law made by the Parliament could be placed before us to indicate the formation of such political parties or break away groups, would be a disqualification. However, with respect to matters of disqualification for violating the conditions of the 10th Schedule the learned Counsel for the petitioner has submitted that on a petition filed by Km. Mayawati the decision was given by the Speaker of the Assembly under Rule 7 and that matter is pending consideration before the Hon'ble Supreme Court.

24. The argument of the learned Counsel for the petitioner further was that is

not pressing any I claim for adjudication of disqualification under 10th Schedule as it is a separate fuse which is pending consideration before the Hon"ble Supreme Court. Next contention was that apart from the provisions of 10th Schedule the private respondents have incurred disqualification as stated above and under these circumstances the Governor was obliged to decide the question as to whether they have incurred disqualification within the meaning of Article 191 of the Constitution or not.

25. As stated above we find that there is no law made by the Parliament till date to hold that if any member of the Legislative Assembly contesting the election on the ticket of a political party after his election joins any other party, of course, not in violation of the 10th Schedule or forms a new party with the break away groups of other political parties or a group of its own party which again should not be in violation of 10th Schedule then it would be a disqualification so as to fall within the ambit of Article 191 of the Constitution. Since no such disqualification is being pressed against the p the present writ Article 192 would norivate respondents in ion the provisions of be attracted.

26. We also find that in Article 361 of the Constitution of India neither a mandamus can be issued [in the instant case to the Governor nor the petitioner has been able to place any law before us under which mandamus Governor.

27. The learned be issued to the Counsel for the State has relied upon a Full Bench decision reported in 1997 (15, v. Union of India, who served in paragraph damns can be issued Governor. Paragraph LCD 140, H.S. Jain ;rein it has been ob133 that no mano his Excellency the 133 to the above report is reproduced below:

"133. No doubt, the immunity is provided to the Constitutional fields like the President of India and Governors of State, against whom no writ can be issued in view of mandatory provisions of Article 361 of the Constitution. This immunity appears to have been based on the doctrine "King can do no wrong" and therefore, he cannot be forehanded by Court"s order. However, since this doctrine in the shape of Article 361 is adopted) by or in our Constitution the I lead of the States and the President of India cannot be commanded by issuing a writ of mandamus. But one thing is certain that from where this immunity clause emanates and adopted in our Constitution, has been uprooted from the land of its birth by Crown Proceedings Act, 1948 in England and thus there is no base to continue this immunity clause in its present form in our Constitution because of the changing concept in modern jurisprudence where State immunity being diluted. All the same since this immunity is guaranteed to the Heads of the States in our Constitution, therefore, we hold that His Excellency the Governor cannot be commanded by writs."

28. We find that there is no case for issuance of mandamus to the Governor. The learned Counsel for the petitioner next argued that mandamus can certainly be issued to the Election Commission.

29. We are of the view that mandamus can certainly be issued to the Election Commission in case the Election Commission has failed to discharge any legal obligation or has failed to fulfil any duty which is cast upon it under the Constitution or any other statutory provisions.

30. In the instant case, since no proceedings are pending before the Governor much less under Article 192 of the Constitution of India, there is neither any occasion to ask for the opinion by the Governor nor the Election Commission is legally obliged to give its opinion in the matter of disqualification of the members. No complaint has also been received by the Governor nor the Governor has asked for an opinion of the Election Commission. In this view of the matter, no mandamus can be issued to the Election Commission also for giving its opinion.

31. Learned Counsel for the petitioner lastly vehemently argued that if this practice of changing the parties and formation of new political parties by the elected representatives is permitted the settled principles of Democracy could be throttled and the very purpose of the democratic set up would be defeated. The people of the country will lose faith in the members elected and consequently it will increase instability, discontentment and will create a feeling of detachment and people who at present exercise their right of franchise with great zeal and enthusiasm. would no longer feel that it is that basic fundamental right which makes that country to run by electing their own representatives by their own choice. In support of this argument, the learned Counsel asserted that political propriety and morality requires that such practice should be stopped.

32. We are afraid that political propriety and morality cannot be enforced through Court of law and it is for the elected representative to consider this question of their own. The concern of the petitioner howsoever genuine might be, cannot be the subjectmatter of judicial review under Article 226 of the Constitution and only course available to the petitioner is to make appeal to the Parliament and to the people of the country and not before the Court of law (sic) cannot be granted in writ jurisdiction. The writ petition is devoid of merits and accordingly stands dismissed summarily.