

(2011) 08 BOM CK 0189
In the Bombay High Court
Case No : Writ Petition No. 329 of 2005

Shri Matanhy Saldanha

APPELLANT

Vs

Shri Jitendar Deshprabhu and The Hon"ble Speaker

RESPONDENT

Date of Decision : 12-08-2011

Acts Referred:

Constitution of India, 1950 — Article 188, 99

Citation : (2012) 1 BomCR 138

Hon'ble Judges : S.A. Bobde, J;F.M. Reis, J

Bench : Division Bench

Advocate : V. P. Thali, for the Appellant; S.G. Bhobe, for Respondent No. 1, S.G. Dessai, V. Parsekar and A. V. Pavithran, for the Respondent

Judgement

S.A. Bobde, J

1 Heard learned Counsel for the parties.

2 The Petitioner has challenged order dated 09.08.2005 passed by Respondent No. 2-Speaker of the Goa Legislative Assembly, disqualifying the Petitioner being a Member of the Goa

Legislative assembly under Rule 2 (1) (a) and 2(1) (b) of the Tenth Schedule of the Constitution of India. At the relevant time, the Petitioner was a Member of Legislative Assembly of Goa from Cortalim. As a result of political manoeuvre, the then Government headed by Mr. Manohar Parrikar as Chief Minister belonging to the Bhartiya Janata Party (BJP) was said to have lost majority in the House after resignation of a Minister and four Members of Legislative Assembly of the United Goan Democratic Party (UGDP), the Governor of Goa summoned the House on 02.02.2005, to enable the Chief Minister Mr. Parrikar to take a Vote of Confidence in the House. At that time, the Petitioner was the lone Member of Legislative Assembly of the UGDP in the House and was said to have acted contrary to the decision of the party by supporting the Parrikar Government as claimed by him in his letter dated 31.01.2005 addressed to the Governor of Goa.

A disqualification petition No. 3/2005 was moved by the Respondent-Jeetendra Deshprabhu seeking disqualification of the Petitioner from the membership of the House on the ground that he voluntarily given up the membership of the party and that he has voted contrary to the party whip.

3. The Petitioner filed a reply to the petition. Respondent No. 1-Deshprabhu did not lead any evidence or examine any witness. On 04.08.2005, the Petitioner filed about six applications, which included; (a) application to the Speaker that he himself recues on the ground of bias; (b) for production of documents;

(c) for summons to one Radharao Gracias for cross-examination since his affidavit was relied on by Mr. Deshprabhu; (d) application for time to lead evidence; (e) application for examining witnesses, who were present on the date and (f) application for filing the affidavit of Smt. Auda Viegas, one of the witnesses and member of the UGDP. The Speaker dismissed in all five applications of the Petitioner without giving any reasons. However, took the affidavit of Smt. Auda Viegas on record where she stated that she had attended each and every meeting of the UGDP and in none of the meetings of the Presidium, any whip was ever discussed nor that the Secretary General Mr. Anacleto Viegas was authorized to issue the whip. Eventually, after arguments, on 09.08.2005, the impugned order was passed and the Petitioner was restrained from exercising his rights as Member of Legislative Assembly in the House. The Petitioner has questioned the said order by way of present petition.

4. At the hearing of this petition, Mr. Surendra Dessai, the learned Counsel for the Respondent No. 2-Speaker submitted that the term of Assembly from which the Petitioner was disqualified is itself over and the petition be treated as infructuous.

However, the learned Counsel for the Petitioner submitted that the Petitioner was deprived of the membership of the House without being allowed to complete his term due to the impugned order of disqualification. Consequently, he was not paid any honourarium and allowances which would have been received by him.

In the circumstances, we find that the petition merits consideration though the term of the House from which the Petitioner was disqualified is over.

5. According to Respondent No. 1-Deshprabhu, who filed the petition before the Speaker, Mr. Saldanha-the Petitioner, voluntarily gave up the membership of his party, the UGDP by his conduct. That by a letter dated 29.01.2005, the UGDP as well as the Maharashtrawadi Gomantak Party (MGP), which had earlier committed their support to the Government headed by Mr. Manohar Parrikar, had withdrawn the support to the Government.

In spite of that, the Petitioner, on 29.01.2005, communicated his personal decision to support the Government headed by Mr. Manohar Parrikar which he reaffirmed on 31.01.2005 in letter to the Governor of Goa. The Petitioner has, therefore, incurred disqualification under paragraph 2(a) of the Tenth Schedule of

the Constitution of India for having voluntarily given up membership of a Political Party. Mr. Deshpabhu, had also contended that the Governor of Goa had also summoned the House to meet on 02.02.2005 at 2.30 p.m. to enable the Chief Minister, Mr. Manohar Parrikar to take a Confidence Motion in the House. The UGDP had issued a whip which Mr. Saldanha had avoided to receive. The whip was, therefore, published in daily "The Navhind Times" on 02.02.2005. On 02.02.2005, Mr. Saldanha did not make any request to change the sitting arrangement and occupied Treasury Bench and later on, in defiance of the party whip, he voted in favour of the Motion of Confidence. He, therefore, has incurred disqualification under paragraph 2 (a)(B) of the Tenth Schedule of the Constitution.

6. Voluntarily giving up membership:

The Speaker, by the impugned order, has observed

that after four MLAs of the BJP had resigned as MLA, the lone MGP MLA and lone independent MLA-Mr. Filipe Neri Rodrigues, had also withdrawn their support for the Parrikar Government and thus, the Parrikar Government had reduced to minority. Thus, the strength in the Assembly was as under:

BJP

-

17

INC

-

15

NCP

-

2

MGP

-

1

UGDP

-

1

IND

-

Thereafter, the MGP, NCP, UGDP, an independent MLA along with the Congress Party formed a coalition styled as "United Legislative Party" (ULP). The MGP, NCP, UGDP and independent supported the formation of Congress led ULP Government in the State and on 30.01.2005 informed the same to the Governor. The ULP then staked a claim and informed the Governor by letter dated 31.01.2005. Therefore, the Governor summoned the House on 02.02.2005 to enable the Chief Minister Mr. Manohar Parrikar to take a Vote of Confidence in the House. However, the Petitioner Mr. Saldanha acted contrary to the decision of the party by addressing a Fax message to the Governor that his decision was to support the Parrikar Government also followed by a letter dated 31.01.2005 addressed to the Governor reaffirming his position. The Speaker relied on a letter dated 29.01.2005 signed by the Secretary General of the UGDP conveying to the Governor the decision of the party to withdraw the support of the BJP Government and a letter dated 30.01.2005 of the UGDP conveying to the Governor that the party has resolved to unconditionally support the ULP Government and also noted that the Petitioner had clearly stated in his reply that he had decided to support the BJP Government. The Speaker, therefore, concluded that by this conduct, having regard to the law in *Shri Kihota Hollohon Vs. Mr. Zachilhu and others*, and *Ravi S. Naik and Sanjay Bandekar Vs. Union of India and others*, , the Petitioner has incurred disqualification under paragraph 2 (1) of the Constitution by voluntarily giving up membership of the party. It is nobody's case that the Petitioner either wrote a letter of resignation from the UGDP or even orally told anyone that he is giving up the membership. It is also nobody's case that the Petitioner was seen with any order or made any attempt to join any other political party.

7. Mr. Thali, learned Counsel for the Petitioner, submitted that the there is nothing in the Petitioner's conduct to show that he had voluntarily given up the membership of the UGDP and that the Petitioner has not done any act, overt or covert, from which such an inference can be drawn. It is well settled that the membership of a party may be said to have been given up voluntarily without any resignation from the said party, if the conduct of a member clearly pointed out to such an act.

8. In the present case, the only act attributed to the Petitioner is that he extended his support to the BJP Government headed by Mr. Manohar Parrikar. Viewed along with the withdrawal of support earlier committed by the UGDP to the BJP led Government, there is No. doubt that the Petitioner's decision to support the BJP led Government is different from the decision of a political party opposed to it. The question is, whether this constitutes voluntarily giving up of membership of the party.

This inference may be drawn by a Court if either a Member states that he has given up or is giving up the membership of the party or if he makes a move to join any other political party as in *Ravi Naik's (supra)* case where two MLAs Mr.

Bandekar and Mr. Chopdekar had stated to Dr. Kashinath Jhalmi and also made it known to the public that they were giving up membership of the party and had also appeared along with members, who wanted to join other parties to form the Government, before the Governor. No. such act is attributed to the Petitioner who, being the lone member of a party in the Assembly, remained where he was and took a strange and novel step of issuing a party whip to himself to vote in favour of the Confidence Motion.

9. Mr. Surendra Dessai, the learned Counsel for Respondent No. 2-the Speaker, relied on the decision of Ravi Naik's case where the Supreme Court held that in order to attract the disqualification under paragraph 2 (a) of the Tenth Schedule, it was not necessary to show that the member had resigned the membership and that giving up of membership may be inferred from his conduct. The facts and circumstances in which the inference was drawn that Mr. Bandekar and Mr. Chopdekar had voluntarily given up membership of the party are materially different from the facts of the present case. As observed, in that case the Speaker had given a clear finding in his decision that the Governor himself had stated that these two members had met with Dr. Wilfred D'Souza, who had taken them to show that he had the support of 20 MLAs for forming a Government. Dr. Jhalmi had also stated that both the MLAs have given up membership of the political party and also have said it orally to him and others. The reply filed by the MLAs did not deny the fact that they went to the Governor against the party MGP. It was, in these circumstances, the Speaker concluded that he was satisfied by their "conduct, actions and speech" that they have voluntarily given up the membership of the MGP.

10. In the present case, nothing is brought on record except a decision of the Petitioner to support the Confidence Motion of the BJP Government. This may certainly be viewed as opposition to the party line, but cannot be considered as an act done with the intention of voluntarily giving up membership of a political party. In order to enable the court to draw the inference that a member has voluntarily given up membership of the party, the Members must have clearly done some act, which exhibits his intention to disassociate from his party as different from having a contrary view to it or joining any other party. The basis of paragraph (2) of the Tenth Schedule of the Constitution of India is to prevent and discourage defection. In the present case, the act complained of does not suggest any intention to defect, muchless an actual defection.

11. We are, therefore, of the view that the Petitioner cannot be said to have voluntarily given up membership of his political party disobeying the party line or by disagreeing, by taking, contrary stand to that of the party, for which he may have been liable for some other action.

12. In Balchandra L. Jarkiholi and Others Vs. B.S. Yeddyurappa and Others, , the Petitioner-Members of the Legislative Assembly belonging to the Bhartiya Janta Party were charged with voluntarily giving up membership of the party for having written a letter expressing No. confidence in the Chief Minister and withdrawing

support from him. The Supreme Court took a view that this did not amount to voluntarily giving up membership of the party and distinguished its earlier decision in Ravi Naik's case, where Mr. Chopdekar and Mr. Bandekar had gone to the Governor along with those claiming to form a majority and a new Government and having made a statement that they had given up the membership of the party.

13. In the present case, the Petitioner has not acted overtly or covertly with any intention to give up the membership of his political party but appears to have stayed within the party and taken a decision contrary to the party line.

14. We have made the above observations on the basis that the Petitioner's party i.e. the UGDP had indeed passed a resolution withdrawing support from the BJP led Government and that the Petitioner had knowledge of the resolution. No such resolution nor a copy thereof was placed either before the Speaker or before this Court. Before the Speaker, the complainant-Deshprabhu merely placed on record a letter dated 29.01.2005 addressed by the Secretary General, UGDP to the Governor of Goa, stating that, yesterday i.e. on 28.01.2005 the UGDP resolved to withdraw its support from the BJP led Government headed by Mr. Manohar Parrikar. The purported resolution dated 28.01.2005 by which the UGDP is said to have withdrawn its support for the BJP led Government has not been produced anyway. In spite of this, in the impugned order, there is an observation that the UGDP decided to withdraw the support for the BJP led Government is proved. The proof that there was a resolution to withdraw the support could not have been substituted by proof that the Secretary General wrote a letter that the party Presidium had passed a resolution to withdraw its support. It must be remembered that the proceedings involved disqualification of an elected member of the Legislative Assembly and a finding in that regard could not have been based on the secondary evidence in the form of a letter referring to the resolution withdrawing support. In the absence of the proof of this basic fact, it is difficult to support the conclusion that the Petitioner's continued support should be construed as intention to voluntarily giving up the membership of the party.

15. This takes us to the consideration of the finding that the Petitioner is guilty of disobeying the whip issued by the UGDP and he has acted in violation of Clause 2 (1) (b) of the Tenth Schedule of the Constitution of India, which reads as follows:

"TENTH SCHEDULE" PROVISIONS AS TO DISQUALIFICATION ON GROUND of DEFECTION

2. Disqualification on ground of defection:

(1) Subject to the provisions of paragraphs 4 and 5, a member of a House belonging to any political party should be disqualified for being a member of the House

(a).....

(b) if he votes or abstains from voting in such House 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, any 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.

The Petitioner is found to have disobeying the whip which directed him to vote contrary to the motion tabled by Mr. Manohar Parrikar, claiming a motion of confidence in the BJP Government. The finding has been rendered by Speaker without construing the alleged whip itself. The direction to vote i.e. whip is published in the newspaper reads as follows:

"WHIP" SHRI MATHANY SALDANHA THE LONE MEMBER FO THE UNITED GOANS DEMOCRATIC LEGISLATURE PARTY HAVING OFFICE AT CASA DO ALIADOS, ABADÉ FARIA ROAD, MARGAO, GOA IS DIRECTED TO BE PRESENT IN THE GOA LEGISLATIVE ASSEMBLY ON ALL THE DAYS ON WHICH THE HOUSE SITS FOR THE SECOND SESSION 2005 and VOTE AGAINST ALL THE GOVERNMENT MEASURES/BUSINESS WHENEVER THE SAME COME UP FOR VOTING IN THE HOUSE

2) VIOLATION of THIS WHIP WILL ENTAIL CONSEQUENCES UNDER THE TENTH SCHEDULE of THE CONSTITUTION of INDIA

The whip directs the Petitioner to sit in the House and vote against "All Government measures/business" to be moved by the Parrikar Government, which reads as follows:

THAT THIS HOUSE EXPRESSES ITS CONFIDENCE IN THE COUNCIL of MINISTERS HEADED BY SHRI MANOHAR PARRIKAR.

16. The expression of confidence by the House in the Council of Ministers cannot be described as a Government measure or business. Neither the Tenth Schedule of the Constitution of India nor The Members of the Goa Legislative Assembly (Disqualification on Ground of Defection) Rules, 1986 (for short "the Rules") prescribe any form in which a whip should be couched. However, a specific

direction to the members to vote or abstain from voting in a particular manner on a particular issue must be considered as essential. Indeed, a member cannot be disqualified for not voting contrary to a Motion of Confidence when a direction to him is to vote against all Government measures and business. Nothing has been shown to us, which would suggest that the expression of confidence by the House in the Council of Ministers is known as "Government measure" or "Government business." The finding that the Petitioner has voted contrary to a whip is, therefore, unsustainable. The stand taken by the Petitioner that he has issued the whip to himself and, therefore, he acted properly, is also unsustainable, arbitrary and mischievous as on plain reading of the Tenth Schedule (supra) the whip has to be issued by the political party.

17. We might note that the Rules do not prescribe any method of serving a direction or a whip on Members of the Legislative Assembly. In the present case, the whip was not served on the Petitioner, who was not only a Member of Legislative Assembly but also a Minister at the relevant time. The whip reproduced earlier was published in the newspaper "The Nav Hind Times" as a form of substituted service, without any attempt to paste or send its copy by Registered Post Acknowledgment Due or by Telegram at the residence or office of the Petitioner, who was a Cabinet Minister. Merely because No. Rules for service of a whip have been enacted, the publication by substituted service, which is the least desirable form of service, cannot be considered as valid. It would have been entirely different if attempts had been made assuming his refusal to paste notice of the whip at his residence or at his office along with a telegram or registered post acknowledgment due in addition to the publication of the whip in the newspaper. In a given case, a member would be entitled to look upon with suspicion and doubt the authenticity of a notice published in the newspaper and hence the disqualification based on such a notice cannot be upheld. There seems to be serious lacuna in the Rules about ensuring that the members have authentic notice of whips issued by their parties. There is No. procedure for registration of whips with the Speaker and it is consequently not possible for members of a party or opponents to verify, whether a whip is said to have been issued by the Party even for the purposes of filing disqualification petition.

18. In *Shri Kihota Hollohon Vs. Mr. Zachilhu and others*, ; the Supreme Court observed as under:

123. Keeping in view the consequences of the disqualification i.e. termination of the membership of a House; it would be appropriate that the direction or whip which results in such disqualification under Paragraph 2 (1) (b) is so worded as to clearly indicate that voting or abstaining from voting contrary to the said direction would result in incurring the disqualification under Paragraph 2 (1) (b) of the Tenth Schedule so that the member concerned has fore-knowledge of the consequences flowing from this conduct in voting or abstaining from voting contrary to such a direction.

We find that, it was, therefore, necessary that the whip to have clearly directed

the member to vote in a particular manner, on a particular issue to Confidence Motion and not merely refer to Government measures or business.

19. In the result, the judgment and order dated 09.08.2005 passed by Respondent No. 2 in Petition No. 3/2005 is hereby set aside. However, Respondent No. 2 is directed to pay to the Petitioner salary due to him as MLA for and from the Month of August-2005 onwards.

20. Rule made absolute in the above terms. No. order as to costs.