

(1984) 07 J&K CK 0001

In the Jammu And Kashmir High Court

Case No : Constitutional References No's. 1 to 12 of 1984

Speaker, Legislative Assembly

APPELLANT

Vs

Abdul Jabbar Sheikh Hassan-Ud-Din Bandy and Others

RESPONDENT

Date of Decision : 30-07-1984

Acts Referred:

Constitution of Jammu and Kashmir, 1956 — Article 70

Jammu and Kashmir Representation of the People Act, 1957 — Section 249, 24G

Citation : AIR 1985 J&K 1

Hon'ble Judges : A.S. Anand, Acting C.J.

Bench : Single Bench

Advocate : Z.A. Shah, for the Appellant; H.L. Bhagotra and B.A. Khan for S. Rafiq Hussain Khan, M.H. Beg, S.P. Gupta, R.P. Sethi, T.S. Thakur, V. Kaul, G.N. Hagroo, G.R. Shah, M.K. Tikku, R.N. Kaul, B.A. Bashir, M.L. Qazi, A. Bhan and R. Rashid, P.L. Handoo, for the Respondent

Judgement

A.S. Anand, Actg. C.J.

1. The Preliminary issue which this court is called upon to decide at this stage is :
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Whether the allegations contained in the complaint of Sardar Rafiq Hussain Khan dated 3-7-1984, addressed to the Speaker Legislative

Assembly attract the provisions of Section 24-G of the Representation of the People Act? If so, what is its effect?

The facts deserve notice only in so far as they are relevant to the pristine issue aforesaid.

2. Sardar Rafiq Hussain Khan, Chief Whip of the Jammu and Kashmir National Conference, addressed the following communication to the

Speaker of the Jammu and Kashmir Legislative Assembly :

To

The Hon'ble Speaker, J & K Legislative Assembly, Srinagar. My dear

Sir,

I as Chief Whip of Jammu and Kashmir National Conference Legislature Party wish to inform you that the following members of the Legislature

Party have violated the Party Whip and chosen voluntarily to withdraw support they were obliged to lend to Leader of the House Dr. Farooq

Abdullah to whose Party they belonged and have chosen Shri G. M. Shah as their Leader knowing full well that he has been expelled from Jammu

and Kashmir National Conference. This constitutes defection in terms of Anti-Defection Law of our State. I request you, therefore, to take

appropriate action in terms of Section 70 of Jammu and Kashmir Constitution immediately.

1. Shri Abdul Jabbar Sheikh

MLA Kangan.

2. Shri Talib Hussain

MLA Rajouri.

3. Shri Hassam-ud-Din Bandy.

MLA Hazratbal.

4. Shri Sona Ullah Dar

MLA Pulwama.

5. Shri Ghulam Hassan Mir

MLA Tangmarg.

6. Shri Mohamad Khalil Johar

MLA Bandipora

7. Shri Hakim Mohamad Yasin

MLA Khan Sahib.

8. Shri Munshi Habib Ullah

MLA Kargil.

9. Shri Dilawar Mir

MLA Rafiabad.

10. Shri Mehboob Beg

MLA Anantnag.

11. Smt. Khem Lata Wakhlu Nominated MLA

12. Smt. Gaurbachan Kumari Rana Nominated MLA

On receipt of the said communication, the Speaker of the Jammu and Kashmir Legislative Assembly issued notice to all the non-applicants

mentioned in the communication of Sardar Rafiq Hussain Khan, calling upon them to file objections, if any, in regard to the communication of Shri

Khan within ten days from the receipt of the notice. The non-applicants replied the notice raising preliminary objections as also contested the stand

of Shri Khan on facts and law. The non-applicants asserted that they were not disqualified from continuing to be the members of the Jammu and

Kashmir Legislative Assembly. On receipt of their replies, the Speaker has made a reference to this court u/s 70 of the Constitution of Jammu and

Kashmir.

3. Parties were issued notice and after service the non-applicants were also permitted to file supplementary submissions in response to the

reference, without, however, introducing any fresh fact which was not already incorporated in their replies to the show cause notice issued by the

Speaker. At the request of Mr. P. L. Handoo appearing for Sardar Rafiq Hussain Khan, proceedings were directed to be taken up from day to

day as the learned counsel submitted that the references may be decided before 31st of July, 1984. The supplementary submissions were

thereafter filed by the non-applicants in which besides reiterating the challenge as contained in their original reply to the show cause notice certain

preliminary objections were also raised.

4. During the pendency of the reference in this court Mr. Khan at whose representation/complaint the Speaker of the Legislative Assembly had

initiated the action and made a reference to this court, through a written communication addressed to the Deputy Registrar cancelled the power of

attorney he had earlier issued in favour Mr. Handoo. He also filed an affidavit through his counsel S/Shri H. L. Bhagotra and B. A. Khan. The

affidavit for facility of reference is reproduced hereunder : --

1. That I have gone through the objections filed by all the 12. respondents in the above mentioned reference.

2. That after going through those objections I concede that the respondents have not incurred any disqualification in terms of Section 24-G of the

Representation of the People Act.

3. That the above stated statement is correct and true.

Shri P. L. Handoo thereafter sought to withdraw from the case on behalf of Mr. Khan and he was permitted to do so. He, however filed an

application being C. M. P. No. 31 of 1984 on his own behalf and on behalf of S/ Shri Mohi-ud-Din Shah, Abdul Rahim Rather and Mohammad

Shaffi, seeking permission of the court to be impleaded as parties and to be permitted to assist the court to dispose of the reference. Notice of this

application was issued to the non-applicants who were granted time to file objections to the application. Pending the disposal of that application, it

was agreed to by learned counsel for the parties that since a preliminary issue was required to be raised in the case on the basis of the preliminary

objections, Mr. Handoo, may be permitted to assist the court but without prejudice to the objections which the non-applicants may raise in reply

to his application regarding their locus standi to be impleaded. Accordingly this court, in the interest of justice, permitted Mr. Handoo to assist the

court on his behalf and on behalf of three others.

5. The entire controversy in the present reference revolves round the scope and interpretation of Section 24-G of the Representation of the People

Act as introduced by the Amending Act of 1979, (hereinafter referred to as 'The Act'). It would be advantageous to first notice the provisions of

this Section.

24-G. Disqualification for being a member of either House of Legislature A person shall be disqualified for being a member of the Legislative

Assembly or the Legislative Council of the State : --

(a) If he, having been elected as such member, voluntarily gives up his . membership of the political party by which he was set up as a candidate in

such election or of which he became a member after such election.

(b) If he votes or abstains from voting in such house contrary to any direction or whip issued by such political party or by any person authorised by

it in this behalf without obtaining prior permission of such party or person.

Explanation : For the purposes of this Section political party means : --

i) a political party classified as a recognized political party under any law or any rule, regulation, order or notification having the force of law with

respect to the matter relating to, or in connection with election to the Legislative Council, of the

ii) any other political party which is recognized by the Speaker of the Legislative Assembly or as the case may be, by the Chairman of the

Legislative Council, as a political party.

5A. ' Although, after the affidavit of the complaint Sardar Rafiq Hussain Khan, noticed above, was filed and he had conceded that the preliminary

objection raised by the non-applicants was well founded, this court could answer the reference and dispose it of, but considering the importance of

the question, this court decided to hear the submissions from the learned counsel for the parties with a view to decide the preliminary issue.

6. Before proceeding to deal with the submissions raised and considering the scope and interpretation of Section 24-G of the Act, it would be

useful to note some of the factual assumptions, as accepted by Mr. P. L. Handoo, Mr. M. H. Beg (who appeared for the non-applicant No. 1)

Mr. H. L. Bhagotra (Counsel for Sardar Rafiq Hussain Khan) and Mr. Z. A. Shah (Counsel for the Speaker) for the purposes of deciding the

preliminary issue only and on the basis of which the arguments addressed by the learned counsel for the parties are required to be appreciated.

Those factual assumptions are : --

1. That Sardar Rafiq Hussain Khan as Chief Whip of the National Conference Legislature party had issued a direction/ whip.

2. That the direction/whip was not issued with regard to the transaction of any business on the floor of the House.

3. That the direction/whip was not issued to regulate the manner of voting on any issue in the House of the Legislature.

4. That the direction/whip was in the nature of a general direction to the members of the National Conference party not to withdraw support from

the leader of the House Dr. Farooq Abdullah.

5. That despite the direction/whip issued by the Chief Whip the non-applicants voluntarily withdraw support from Dr. Farooq Abdullah and instead

elected Shri G. M. Shah, who had been earlier expelled from the National Conference, as their Leader, And

6. That when the direction/whip was issued as well as when the support was withdrawn by the non-applicants from Dr. Farooq Abdullah, they were all members of the National Conference.

7. At this stage, I would like to dispose of an argument raised by Mr. Handoo, with regard to the manner in which the references are required to

be disposed of. Although, as noticed in the earlier part of this order, the preliminary issue had been raised in consultation with and with the

agreement of counsel for the parties, including Mr. Handoo, yet during the course of his submissions, Mr. Handoo submitted that the references

could not be disposed of summarily by deciding the preliminary issue and that for deciding the question, a detailed enquiry was required to be

made in which evidence would be required to be adduced either orally or by affidavits, and that then only should this court, after appreciating the

evidence, dispose of the references Learned counsel submitted that once a reference is made to the High Court u/s 70 of the State Constitution, a

detailed enquiry is a ""must"" and under no circumstances can a reference be rejected straightway by the High Court, after only deciding the

preliminary issue. Learned Counsel referred to the provisions of Articles 103 and 192 of the Constitution of India to urge that under the said

Articles, whenever any question arises as to whether a member of the Legislature had become subject to any of the prescribed disqualifications the

question shall be referred for decision of the Governor, or the President of India, as the case may be and his decision shall be final but the

Governor or the President (as the case may be) before giving any such decision shall obtain the opinion of the Election Commission and shall act

according to such opinion. The precise contention of Mr. Handoo was that the Governor or the President, could not summarily reject the

complaint moved by any citizen and he had to refer it to the Election Commission for its opinion and the Election Commission also could not

summarily dispose of the complaint without holding a detailed enquiry, howsoever, ""fantastic and frivolous"" the complaint may have been. Learned

counsel in this connection placed reliance on Brundaban Nayak Vs. Election Commission of India and Another, . The. reliance, in my opinion, is

misplaced. In the Supreme court case, their Lordships of the Supreme Court interpreted Article 192 of the Constitution of India and opined that

under the first clause of Article 192(1) a question should only arise, though it is immaterial how it arises or by whom it is raised or under what

circumstances the same is raised Their Lordships went on to observe that such a question when raised is required to be referred to the Governor,

but the Governor on his own cannot dispose of the reference, even if it may appear, prima facie, to be ""fantastic or frivolous."" They, on terms of

Clause (2) of Article 192, observed that the Governor shall act under Sub-clause (2) of Article 192 only on the opinion of the Election

Commission to whom he is under an obligation to refer the question for opinion. The Enquiring Agency, i.e. the Election Commission of India,

however, suffers from no such disability in the matter of giving its opinion and if prima facie, it comes to the conclusion that the question is ""fantastic

or frivolous"", it can straightway reject it and forward the opinion to the Governor. This judgment thus is not an authority for the proposition

canvassed by Mr. Handoo. As a matter of fact, this authority completely demolishes his argument. In para 14 of the judgment their Lordships

observed : --

It is true that Article 192(2) requires that whenever a question arises as to the subsequent disqualification of a member of the Legislative

Assembly, it has to be forwarded by the Governor to the Election Commission for its opinion. It is conceivable that in some cases, complaints

made to the Governor may be frivolous or fantastic; but if they are of such a character, the Election Commission will find no difficulty in expressing

its opinion that they should be rejected straightway.

The aforesaid observations clearly show that the Election Commission (who is required to hold the enquiry in the reference, like the High Court u/s

70 of the State Constitution), can dispose of the complaint ""straightway"" if it is of the opinion that the said course is warranted on the basis of the

factual allegations contained in the complaint, even without framing a preliminary issue and only on examining the factual allegations contained in the

complaint or petition. This judgment, therefore, negatives the contention of Mr. Handoo and does not advance his case at all.

8. Mr. Handoo then referred to some other opinions of the Election Commission of India, reported in 1975 ELR 98 and 1975 ELR 271 to urge

that the Election Commission had held a detailed enquiry before returning its

opinion to the Governor or the President (as the case may be) and that it did not summarily deal with the Complaint referred to it by the Governor or the President. A careful perusal of the opinions in both the cases show that the Election Commission proceeded to hold the enquiry as neither of the parties asserted that the question could be disposed of on the basis of some "admitted factual assertions" These ' opinions also cannot advance the case of Mr. Handoo either. As a matter of fact the opinions referred to only show that the Election Commission is "competent" to ask the parties to adduce evidence, if the question referred to it cannot be disposed of otherwise.

9. In *Re Maharaja Anand Chand M. P.* 1975 ELR 27, where the complaint was referred to the Election Commission of India, by the Governor and the Election Commission found that the complaint dealt with a disqualification which existed at the time of his election, it opined summarily without holding any detailed enquiry" that even if the allegations made in the petition are factually correct, no question arises in terms of Articles, 101(3)(a) and 103(1) as to whether Maharaja Anand Chand has become subject to any disqualification after his election as member of the Parliament and the petition should be rejected. Similar procedure was adopted by the Election Commission in : (1975) ELR 29, 1975 ELR 195 1975 ELR 196 and 1975 ELR 198. In all th-ese cases the Election Commission opined that even if the allegations made in the application are factually correct, no dis-qualification was made put and the reference deserved to be rejected without any further enquiry.

10. I, therefore, reject the submission of Mr. Handoo noticed earlier.

10A. Mr. Z. A. Shah, who appeared for the Speaker, also made a vain attempt to support the submissions of Mr. Handoo that the reference cannot be taken up for consideration without first affording the parties an opportunity of adducing evidence either orally, or by way of affidavits even if on the facts alleged in the petition or complaint no disqualification is spelt out. In this connection he urged that the representation of Mr. Khan contained not only some factual assertions but also deducible inferences and that since according to the preliminary issue, it was only the factual assertions which could be taken into account the answer to the references cannot be properly given without a detailed enquiry, I cannot

agree. If on the basis of factual assertions contained in the complaint it can be found that the provisions of Section 24-G of the Act are not

attracted, the court is not required to allow the parties to adduce evidence and hold a detailed enquiry.

The question of holding an enquiry would arise only when either the factual assertions contained in the complaint attract Section 24-G or the

preliminary issue itself is a mixed question of law and fact and cannot be disposed of without recording evidence. Where the preliminary issue is

purely an issue of law, to be decided on the basis of factual assertions contained in the representation which are admitted and involves only an

interpretation and application of provisions of law, this court can dispose of the preliminary objection straightway and this course has been adopted

by the Election Commission while dealing with references under Article 103 or Article 192 in the cases noticed above.

10B. I, therefore, hold that if the High Court on a reference made to it u/s 70 of the Constitution finds that even if the allegations made in the

application are factually correct, no dis-qualification. has been incurred by the non-applicant, it can straightway, after hearing the parties only,

reject the reference and it is not obliged to hold any further enquiry.

11. I shall now take up the submissions on merits to find out that even if the allegations taken in the complaint are treated to be factually correct the

provisions of Section 24-G of the Act are attracted or not. Mr. Beg who appeared for non-applicant No. 1 and, whose arguments were adopted

by learned counsel for the other non-applicants in the first instance analysed the complaint/ representation made to the Speaker and submitted that

the said complaint only alleged that the nonapplicants had violated a direction of the Chief Whip of the Jammu and Kashmir National Conference

Legislature party inasmuch as they had voluntarily withdrawn their support to the leader of the House Dr. Farooq Abdullah and had instead chosen

to support Shri G. M. Shah as their leader knowing full well that Shri Shah stood expelled from the National Conference. Mr. Beg urged that even

if it be assumed that the direction or the whip of the type detailed in the representation was issued and the non-applicants as members of the party

had flouted the same. The provisions of Section 24-G were not attracted. He submitted that the mischief of Clause (b) would be attracted only if

the violation was in the manner of voting in the House and that on the admitted factual assumptions noticed earlier there was no whip or direction

issued with regard to the manner of voting inside the House and that the whip/direction did not also relate to the proceedings inside the House.

Submitted the learned counsel that on the plain reading of Clause (b) of Section 24-G (supra) it would be obvious that the provisions of the said

clause would be attracted only where the defiance of whip/direction was made by party members by voting or abstaining from voting in the House

contrary to the whip/direction and that since it is no body's case, as indeed it could not be any one's case, that the defiance of the whip took place

at the time of voting in the house, Clause (b) clearly was not attracted.

12. In reply Mr. Handoo submitted that cl, (b) of Section 24-G of the Act did not provide the place where the whip could be issued and it only

provided that after a whip is issued, no matter where, it cannot be flouted except at the cost of incurring the disqualification. He urged that the

object of enacting Sub-clause (b) of Section 24-G was to prevent defiance of the whip which was essential for smooth transaction of business in

the House, and if the effect of defiance was felt in the House, as in the instant case, where a new Council of Ministers has come into existence, as a

clear effect of defiance of the whip Clause (b) would be attracted. The argument of Mr. Handoo is wholly fallacious. Sub-clause (b) of Section 24-

G in its plain terms deals with a situation where a party member votes or abstains from voting in the House contrary to the directions or whips

issued by the Political party to which he belongs. Admittedly, there were no proceedings in the House and the question of voting or abstaining from

voting in the House did not arise. Mufti Baha-ud-Din Farooqi Acting Chief Justice (as his Lordship then was) speaking for the majority view in the

Full Bench case of Mian Bashir Ahmed v. State of Jammu and Kashmir AIR 1982 JK 26 interpreted this Clause in Para 18 of the Judgment. His

Lordship observed : ""The words ""in such House"" qualify the words ""votes or abstains from voting"" and are intended to limit their operation to the

voting which takes place when the House is sitting and its business is being transacted, Thus this Section would be applicable and as legislator

would incur disqualification if he willingly gives up the party habitat or if he flouts or disobeys the party's whip or direction in the matter of voting in

the course of transaction of its business by the House." This interpretation, with which I am in respectful agreement completely negatives the stand

taken by Mr. Handoo and supports the contention of Mr. Beg. Even otherwise, the argument of Mr. Handoo does complete violence to the

language of Clause (b) and seeks to enlarge its scope, which the Legislature never intended.

13. Subsequently, however Mr. Handoo changed his stand completely and categorically asserted that the allegations contained in the complaint of

Mr. Khan brought into operation Clause (a) of Section 24-G of the Act and not Clause (b). Mr. Shah, who appeared for the Speaker also toed

the same line and stated that Clause (a) of Section 24-G was attracted in the case of the non-applicants and not Clause (b). In view of this shift in

the stand, I am relieved of the task of dealing with the question of the duties of whip and the area of operation of the whip, on which question Mr.

Handoo had sought to join issue with Mr. Beg, who had relied upon "The Parliamentary Practice" by Erskine May.

14. Mr. H. L. Bhagotra who represents Sardar Rafiq Hussain Khan the representationist, stated that the complaint/representation he had filed

before the Speaker sought disqualification of the non-applicants in terms of Clause (b) and not Clause (a) of Section 24-G of the Act. He went on

to add that after studying the preliminary objections, the representationist was satisfied that even Clause (b) was not attracted and he, therefore,

filed an affidavit stating that the non-applicants suffered no disqualification. After the submissions of Mr. Bhagotra that the representationist had

sought to get the non-applicants disqualified under Clause (b) and the assertion of M/s Handoo and Shah, and Beg that Clause (b) was not

attracted, on the factual assertions contained in the representation, the reference did not require to proceed further and the court could reject it but

that was not considered a proper course because the preliminary issue covers within its ambit and scope both Clause (a) and (b). I, therefore, now

proceed to deal with the submissions of the parties based on Clause (a) of the section.

15. Political defection i.e. leaving one party and joining another had assumed alarming proportions and posed a challenge to the successful

functioning of parliamentary democracy in the country. It was felt by leaders of the public opinion, Jurists, and Parliamentarian that the evil was

required to be checked. The problem was debated and discussed at various forums and in the rest of the country, 32nd Amendment Bill which,

inter alia, provided for disqualification of a defector against continuing as a member of either House of the Parliament after discussion did not

mature into an Act. It was at this stage, that the State of Jammu and Kashmir took a lead and introduced Section 24-G in the Jammu and Kashmir

Representation of People Act, 1957 in 1979. Through this Section the Legislature sought to deal with two situations and provide that if either of

the situation exists a member shall stand disqualified to continue as a member of the House. Since I have dealt with the ambit and scope of Clause

(b) in the earlier part of this judgment and held on the basis of the plain language of the clause and the concession of M/s. Handoo, Shah, and

Bhagotra that the said clause is not attracted to the allegations made in the representation, I shall now deal with the situation envisaged by Clause

(a) of Section 24-G. This clause in terms provides that if a person having been elected as a member of the Legislature on the ticket of a political

party, which had set him up as a candidate in such election or which he joined subsequent to his election, voluntarily gives up his membership of

that political party, then he would incur the dis-qualification prescribed by Section 24-G and the person concerned shall be disqualified for

continuing as a member of the Legislature of the State. For the applicability of the clause, therefore, it must be alleged and proved that the member

had ""voluntarily"" given up his membership of the political party. The expression ""voluntarily"" denotes willing disassociation with the political party

and the expression ""gives up"" which qualifies the expression ""membership of the political party"" unmistakably implies disassociation with the

political party by leaving that party. In other words, it implies that for a member to incur the disqualification under Clause (a) it has to be alleged

and established, as a fact, that the member concerned had ""voluntarily"" disassociated and left the political party which had set him up as a

candidate. This provision is aimed at acting as a deterrent for the member of a political party, on whose ticket he was elected to leave that party

after his deletion.

16. The provisions of Clause (a) are so stringent that it is the mere act of leaving the party which had set up the concerned elected person as a

candidate or which he had joined after his election which attracts the disqualification irrespective of the fact whether or not the member concerned joins any other party.

17. Mr. Handoo who was also supported by Mr. Z. A. Shah vehemently urged that the manner of giving up the membership of the party was not

prescribed in Section 24-G (a), and, therefore, the membership could be given up either by writing, orally, or by conduct. Argued the learned

counsel, that in the instant case the withdrawal of the support to the Leader of the House, Dr. Farooq Abdullah, who under the Rules of

Procedure and Conduct of Business in the Jammu and Kashmir Legislative Assembly, is the Chief Minister, and extension of support to Mr. G. M.

Shah, who stood expelled from the membership of the National Conference, unmistakably shows that the non-applicants had voluntarily given up

the membership of the National Conference Party by their conduct. Learned counsel submitted that since the membership had been given up

voluntarily by them, Clause (a) was clearly attracted. Mr. Beg, on the other hand, submitted that it is not the case of the representationist in the

complaint/ representation that the non-applicants had given up the membership of the National Conference, and, therefore, it was not open to M/s

Handoo and Shah to canvass that on the allegations contained in the complaint Clause (a) of Section 24-G of the Act was attracted.

18. There is substance in the submission of Mr. Beg that the disqualification envisaged by ct. (a) of Section 24-G (supra) would be attracted only if

there is a factual allegation in the complaint/representation that a particular member had voluntarily given up the membership of the party to which

he belonged and that allegation was proved conclusively, and, therefore, in the absence of any such factual allegation, it was futile to contend that

Clause (a) of Section 24-G of the Act would have any application. He urged that where the author of the complaint/representation himself has

stated that he never made a complaint/representation in terms of Clause (a), Mr. Handoo was trying to act as "more loyal than the king" by urging

that Clause (a) was sought to be attracted by the complainant. Mr. Beg went on to add that changing a leader or voting out a leader of a political

party by the members of the political party can never be equated with the giving up of the membership of the political party as such a change was

inherent in a democratic party and party leader could be changed if he forfeited the confidence of the members. Argued Mr. Beg, that if

withdrawing support from the leader or voting out the leader be treated as synonymous with leaving the political party, it would imply that the party

concerned is not a democratic party but an authoritarian group and that it could not be said for the National Conference which was a democratic

party.

19. With a view to appreciate the controversy i.e. whether Clause (a) of Section 24-G is attracted to the factual allegations contained in the

complaint/representation it is necessary to look to the precise factual assertions of Sardar Rafiq Hussain Khan. The representation/complaint is

dated 3-7-1984, and it says, inter alia, that ""following members of the Legislature party"" had violated - the party whip and chosen voluntarily to

withdraw support which they were obliged to lend to the leader of the House, Dr. Farooq Abdullah and have chosen Shri G. M. Shah as their

leader knowing full well that he had been - expelled from the Jammu and Kashmir National Conference. The names of the ""members of the

Legislature party"" have been given in the complaint/representation and they are the 12 non-applicants. The tenor of the complaint/representation

and its plain language unmistakably shows that the Chief Whip of the Jammu and Kashmir National Conference Legislature party did not consider

the 12 M. L. As. named therein to have left the membership of the party. As a matter of fact, he categorically stated that the said 12 M.L.As. were

the ""Members of the legislature party"" and that while being such members they had violated the party whip. Obviously, the violation of the whip

could only be alleged against a party member and not against a member who had left the party and the grievance made in the representation also

was that the named members of the Legislature party had defied the party whip. There is no averment directly or even by inference in the

complaint/representation that the 12 named M.L.As. had voluntarily given up the membership of the National Conference party which admittedly

had set them up as candidates for the election. It admits of no doubt that on 3-7-1984 when the complaint/representation was made, the Chief

Whip of the National Conference party treated the named 12 . M.L.As. as members of the National Conference Legislature party and sought

action against them for defying the whip. Had it been otherwise, nothing prevented him from asserting as a fact that those members had given up the membership of the party?

20. In deed, as urged by M/s Shah and Handoo a person can give up the membership of a political party voluntarily by either of the three modes

suggested by them, but in the instant case in the complaint/representation of Mr. Khan there was no assertion whatsoever that the 12 M.L.As. had

voluntarily given up the membership of the National Conference Legislature party by the acts alleged against them in the representation. Their acts

of withdrawing support from Dr. Farooq Abdullah and lending support to Shri G. M. Shah were considered by the Chief Whip only as a defiance

of his directions. It appears from its plain language that the author of . the complaint/representation was only seeking to bring into operation Clause

(b) of Section 24-G and not Clause (a) and this view in fact is fortified by the stand taken by Mr. Bhagotra appearing for Mr. Khan who stated

that his complaint was only under Clause (b) of Section 24-G of the Act.

21. It is as noticed above a factual assertion made in the complaint/representation by Mr. Khan, as Chief Whip of the National Conference party,

that the 12 named M.L.As were the members of the Legislature party and had chosen to violate the party whip. In the face of this factual assertion

it is futile for any one to contend that the assertion in the complaint to read to imply that the 12 M.L.As. named in the complaint/ representation had

voluntarily given up the membership of the political party which had set them up as candidates at the election. Confronted with the plain and

unambiguous language of the complaint/representation, Mr. Handoo and Shah tried to wriggle out of the situation by asserting that the

representation for which no particular form or mode is prescribed u/s 70 of the Constitution can be supplemented by furnishing of better particulars

like the furnishing of better particulars in an Election Petition. When in an election petition it is permissible for the petitioner to supply better

particulars after the petition is filed, how can the representationist be denied that opportunity in respect of a reference made on the basis of his

representation, asserted Mr, Handoo? Learned counsel were at pains to urge that the complaint/ representation be liberally interpreted so as to

ensure that no defector is permitted to pollute the precincts of the Legislature

after the enactment of Section 24-G. Learned counsel went on to add that in case the court permits them to lead evidence in support of the assertions contained in the complaint/representation they will be able to establish their case. This appears to me to be an attempt to delay the proceedings, because the factual assertion which they want to prove by evidence have in any case been treated as admitted. Evidence can, therefore, in no way improve their case.

22. Indeed, it is a salutary principle of Election Law that the court should safeguard the purity of the election process and see that no disqualified member is permitted to sit in the legislature, but it is also a cardinal principle of election law, that an elected candidate has not to be non-suited except on clear proof of his disqualification. The Consequences of vacating a seat in the legislature by unseating a sitting M.L.A. are grave and serious not only for that particular M.L.A., but also for the entire constituency whom he represents as by unseating him the constituency is left without a mouth-piece, and where the case concerns 12 M.L.As, the court has to be even more cautious to see that no injustice is done to either party.

22A. I quite agree with M/s Handoo and Shah that even in an election petition where the allegations of corrupt practices are levelled, the court may grant permission to furnish better particulars so as to complete the cause of action, but what is important is that better particulars are permitted only if the petition contains material facts and not otherwise. It is, however, well settled that there is a vast and clear distinction between material facts and particulars. In Samant N. Balkrishna and Another Vs. V. George Fernandez and Others, , their Lordships of the Supreme Court opined that material facts must be contained in the election petition itself and that the omission of a single material fact, would lead to an incomplete cause of action and statement of claim would become bad. The duty of a petitioner is to present.

a full picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet.

After the period of limitation for filing a petition expires material facts cannot be permitted to be supplied. The function of particulars is quite

different. Particulars are intended to meet quite a separate requirement of

pleadings. Their function is to fill in the picture of the petitioners cause of action. Where material facts have been given, the court can if it finds that full particulars have not been given, call upon the party to furnish full particulars but where material facts are lacking, the same cannot be supplied under the guise of giving better particulars.

23. Of course, a complaint/ representation u/s 70 of the Constitution is quite distinct from an election petition and in the representation detailed

grounds on which the party concerned is sought to be disqualified may not be given in their fullness in which they are expected to be given in an

election petition but the complaint/ representation must give material facts which constitute the cause of action on the basis of which the member

concerned is sought to be disqualified. I could have permitted M/s. Handoo and Shah to furnish better particulars had the material fact been given

in the complaint/representation. The material fact for the purpose of Clause (a) was that the member concerned had voluntarily given up the

membership of the political party which had set him up as candidate in the election. If it was then not stated as to how he had given up the

membership, it may have been possible for the court to seek better particulars to find out the manner by which the member concerned had given

up voluntarily the membership of the National Conference Legislature party. That is not the case here. It would bear repetition to say that there is

no averment in the complaint/representation at all, that the 12 named M.L.As. had voluntarily given up the membership of the National Conference.

On the other hand, the complaint/representation itself declares that even on 3-7-1984, those M.L.As. were being treated as members of the

National Conference party. Where the language of the representation/complaint is clear, the salutary rule of interpretation of pleadings is to give it

the natural meaning and not to read anything in between the lines, as Mr. Handoo, seems to suggest. As a matter of fact, both Mr. Handoo and

Mr. Shah candidly conceded that factual assertions to attract Clause (a) of Section 24-G were lacking in the complaint/representation, but raised

an argument of despair that since the conduct of the 12 M.L.As. was writ large in the complaint/representation, this court should, prima facie,

opine that Clause (a) of Section 24-G was attracted to the case. I cannot agree, As already observed, the complaint/representationist went to the

Speaker with the grievance that party whip had been violated and the blameworthy conduct of the members was given to show the manner in

which the party whip was defied. Though, misconceived, the representationist had sought to get the 12 M.L.As. disqualified under Clause (b) of

Section 24-G and not under Clause (a) of Section 24-G which stand was also later on given up during the course of hearing before me. As a

matter of fact, Mr. Handoo had also laboured hard to urge before me the applicability of Clause (b) till he took the somersault and changed his

stand.

23A. As in a criminal trial, so also in an election enquiry be it concerning the allegations of corrupt practice or disqualification or the like, the effect

of which would be to unseat a legislator, there would be presumption of innocence and it is for the party seeking to get the elected candidate

unseated, on any of the grounds, to first clearly allege and then strictly prove a case against the other party. Where no foundation is laid in the

petition or complaint for getting the particular member disqualified or unseated no amount of evidence or better particulars can cure the defect and

the petitioner has to thank himself for the vagueness. Mr. Handoo was at pains to extricate himself from the language of the

complaint/representation and time and again pleaded for liberal interpretation of the pleadings. He urged that the complaint/representation be read

as whole to determine as to what was the intention of the author of the complaint and if that intention can be clearly spelt out, some lacuna in the

complaint should not stand in the way of the representationist getting a chance for a detailed enquiry to prove the charge of disqualification against

the non-applicants. I agree. It is the substance and not the form which is relevant. However, reading the complaint as a whole not only by myself

but also with the assistance of learned counsel for the parties, the only conclusion that I can arrive at is that the author of the

complaint/representation had only made a grievance against the non-applicants that they had voluntarily violated the party whip and had gone

ahead by indicating as to what possibly the whip was and how it was defied. Beyond this nothing else can be read into it. It is not possible to read

in the representation that the 12 M.L.As. had voluntarily given up the membership of the National Conference. There is a vast difference between

withdrawing from the membership of a political party and withdrawing support to the leader of the party by the members. By the withdrawal of the support to the leader, the members concerned do not cease to be members of the political party but by dis-associating themselves from the political party by leaving it, they become outsiders so far as the party is concerned and come within the mischief of Section 24-G of the Act. It is unimaginable that in a party democracy the leader of a political party cannot be voted out by the members of the party even if he loses the confidence of the members. It is unimaginable that by voting out a leader at the party forum, the members ipso facto lose membership of the party. That is not permissible in a democracy and is an attribute of authoritarianism. Mr. Handoo agreed that the mere fact of withdrawing support from Dr. Farooq Abdullah may not amount to giving up the membership, but he urged that since the 12 M.L.As. had gone further and lent support to non-member, it was the worst type of political immorality. May be it is so, but the remedy for it lies under party constitution. The concerned M.L.As., as long as they are members of the party are bound by the party constitution and discipline. If the constitution of the party so permits disciplinary action can be taken against the defaulting members and if permitted they can even be expelled, Mr. Handoo argued that if the members are expelled, they would not be "defectors" within the meaning of Clause (a) of Section 24-G of the Act, and, therefore, the only way to "punish the erring M.L.As. was to apply the provisions of Section 24-G (a). The argument is self defeating. Clause (a) of Section 24-G is not meant to come to the aid of a political party, which choose to "punish" its members for voting out a leader while remaining in the party. Remedy to deal with such members lies elsewhere and through different process. Intra-party discipline cannot be enforced through Section 24-G(a) and it would be misuse of Section 24-G to invoke it for such a purpose.

24. There is, indeed, no quarrel with the proposition raised by Mr. Handoo that a sound party system is essential for the stability of parliamentary democracy or a parliamentary form of the Government. But it also is equally important that the right of dissent is preserved in the party itself and the members of the party are not denied the right to vote out a leader and choose another one except on the pain of suffering the disqualification u/s

24-G. In a party democracy all problems are required to be decided by discussion and adjustment of views and this right of dissent is essential in a

democracy. Shri N. A. Palkiwala in his Book ""Our Constitution defaced and Defiled"" at pages 67 and 68 (1974 Edition) observed :

No greater insult can be imagined to members of the Parliament and the State Legislature than to tell them once they become members of a

political party that they shall have no right to form a judgment and no liberty to think for themselves..... and they must become ""soulless and

consciousless entities"" who would be driven by their political party in which ever direction the party choose to push them.

25. ""In other words the argument of Mr. Handoo implies that the party legislatures must accept the principle ""Once a leader, always a leader ""and

a challenge to the 'Principle' would take them within the mischief of Section 24-G (a) of the Act. Such a plea needs a notice only and does not

even need any comments.

25A. In view of the above discussion, and on a plain language of the complaint/ representation which completely lacks any factual assertion or

statement that the 12 named M.L. As. had voluntarily given up the membership of the National Conference, it is obvious that the allegations in the

complaint, even if admitted to be true do not attract the provisions of Clause (a) of Section 24-G of the Act.

26. 1 would now deal with yet another aspect of the case. Section 24-G(a) of the Act, in terms provides that ""a person"" shall be disqualified if he

comes within the mischief of Clause (a) or Clause (b) of this Section. Both in Clause (a) and Clause (b) the expression ""if he"" qualifies the particular

conduct which entails the disqualification. Mr. Handoo urged that the 12 named M.L.As. who he styled as ""a pack of defectors"" had formed into a

'group' and had thereby brought political instability by withdrawing support to the leader of the House (who under the Business Rules is the Chief

Minister) and by choosing to lend their support to Mr. Shah and that their conduct squarely fall within the mischief of Clause (a) of Section 24-G of

the Apt. I have already held that the provisions of Section 24-G (a) of the Act are not at all attracted in this case. Even otherwise, can such a

Group"" be said to come within the mischief of Section 24-G? This question was not debated before the Full Bench, as indeed, it was not required

because the allegations before the Full Bench were against two individual members in their individual capacity. In my opinion, Section 24-G was enacted by the Legislature with individual cases in view and not to deal with a group of persons who while remaining within a party, for ideological or other reasons, do not support the leadership of the party. Such members cannot be treated at par with "a person" who voluntarily gives up the membership of the party". Such group of members have to be dealt with under the party Constitution and not u/s 24-G of the Act. It appears to me that the Legislature in its supreme wisdom did not want to cover within the ambit and scope of Section 24-G of the Act, what has now popularly come to be known as a 'party Split' Implying thereby that members of one political party fall put in different groups each claiming to be the real party suggesting thereby that none had voluntarily given up the membership of the party concerned. Such a "Split" in the political party has to be dealt with differently and, I say so, because in my opinion, action on ideological differences within a party must be treated separately as process of polarisation is necessary and essential for the functioning of a democracy. A reference u/s 70 is not the proper remedy for deciding the question as to which of the groups is the real party. An enquiry u/s 70 of the Constitution of necessity cannot extend to the determination of that question. The language of Section 24-G itself suggests that it was not intended to cover within its ambit "split" because in a "split" no one admits to the voluntary leaving the membership of a political party. A "Split", therefore, appears to have been deliberately left out of the purview of Section 24-G of the Act and, in any event, the provisions of the section cannot come into play when the "group" claims to continue to belong to the same political party and has not dis-associated itself from the party. In that event the very sine qua non of Clause (a) i.e. voluntarily leaving the membership of the party would be missing, in such a situation and the group shall have to get their rival claims settled else where i.e. before the Election Commission of India.

27. It may be of interest to note that the two anti-defection bills, one brought by Mrs. Gandhi's Government and the other by the Janta Government which though failed to become law, defined, "defection" so as to exclude a "Split" within a party for. it would be a moot point, after

the "Split" as to which of the two groups is the deserter. That controversy has to be resolved by the Election Commission, under the Election.

Symbols (Reservation and Allotment) order, 1968. Since neither the Representation of the People Act, nor, the Constitution of the State contains

any definition of the expression "defection it would not be unreasonable to hold that defection as known in common parlance would exclude a

vertical Split" within the party within the meaning of Section 24-G of the Act. Shri H. M. Seervai, dealing with the question of defections in his

treatise "Constitutional Law of India" 2nd Edition, Vol. (iii) at pages 1831 to 1835, took note of the definition of "defection" as given in the two anti

defection bills introduced in the Parliament and opined :

If a small number of M. Ps. desert their party, they become deserters, who may be subjected to pains and penalties, but if a large number of M.

Ps. desert their party..... say 20%..... this grand scale desertion ceases to be desertion.

These observations imply that a "split" in the party depending upon what is the number of those who have caused the "Split" will have to be treated

on a different footing than an individual member, who either voluntarily gives up the membership of the political party by which he was set up as a

candidate after his election or when he votes or abstains from voting in legislature contrary to any direction or the whip issued by that political

party, Considered in this light, it appears to me that Section 24-G of the Act is not meant to cover within its ambit cases arising out of a "split" in

the party and it confines itself to individual cases.

28. Mr. Z. A. Shah placed strong reliance on the "Mischief Rule" and the Rule of "Restrictive Construction" as contained in Maxwell's

Interpretation of Statutes, and urged that with a view to combat the evil which the Section seeks to curb, the construction must be so placed on the

section that it covers even a "split" in the party and the "group of deserters" who cause the "Split" also come within the net of Section 24-G. This is

begging the question, for, it has to be determined as to who is the deserter and the forum for that debate is elsewhere. Of course, the "Mischief

Rule" and the "Rule of Restrictive Construction" are sound Rules for interpretation of Statutes but the same cannot be extended to do violence to

the plain language of the statute more particularly when the statute is of a penal

nature. In the instant case, Section 24-G of the Act has penal consequences and that too very serious and grave ones. The rule of construction for such a statute is the "strict interpretation of rule" and it is an accepted law in this country that a penal provision must be strictly construed and if two views are possible, the one favouring the party likely to be effected, must be adopted. Therefore, I am of the opinion that Section 24-G prima facie, does not bring within its scope a "split" within the political party and the determination as to which of the groups of a political party after the "Split" can be treated as "deserters" would depend upon a number of factors and the scope for debate of that question is not in a reference u/s 70 of the Constitution but in separate proceedings before the Election Commission of India.

29. In the instant case, whether the 12 M.L.As. named in the representation/complaint who constitute more than 25% of the total membership of the National Conference Legislature party (as it was pointed out at the time of hearing that before 2-7-1984, the National Conference had a strength of 47 members) are to be treated as deserters or not, is not for this forum to decide and that is a matter which shall have to be agitated before the Election Commission of India under the Election Symbol (Reservation and Allotment) Order, 1968, because it will be for the Election Commission of India, to recognize the political party under the said order as also under SRO 3156 dated 17-10-1966 and under other relevant orders and rules. This is a matter which the parties concerned may agitate before the Election Commission of India and get a verdict. A reference u/s 70 of the Constitution of Jammu & Kashmir is not a substitute for the proceedings before the Election Commission of India, whose decision in these matters, under the relevant rules, is final.

30. I would in this connection also consider an argument-raised by Mr. S. P. Gupta, counsel for Smt. K. L. Wahloo and Smt. Gurbachan Kumari

Rana. Learned counsel submitted that Clause (a) of Section 24-G could only apply to "elected members" and not to "nominated members".

Learned counsel pointed out that both Smt. Wakhloo and Smt. Rana had been nominated by the Governor in exercise of his constitutional powers

u/s 47 of the Constitution and the Legislature could not have intended that Clause (a) would also be applied to such nominated members. This

argument of Mr. S. P. Gupta, was not replied to either by Mr. Handoo or Mr. Shah. There appears to be force in the submission of Mr. Gupta.

On the plain language of Clause (a) of Section 24-G it is apparent that it applies only to ""elected members"" and not to ""nominated members"", and,

therefore, Clause (a) would have no application to the cases of the nominated members, Smt. K. L. Wakhloo and Smt. Gurbachan Kumari Rana.

31. Mr. Handoo sought to get all the 12 M.L.As. disqualified as a ""group"" because of their conduct even when these two members clearly fall

outside the scope of the operation of Clause (a) of Section 24-G of the Act. It certainly could not have been the intention of the Legislature that a

group"" comprising of individuals all of whom are not subject to disqualifications should get disqualified by this back door method. I am, as such of

the opinion, that the ambit and scope of Clause (a) of Section 24-G of the Act does not take within its fold a ""split"" in the party and that the forum

to settle taht controversy in else-where i.e before the Election Commission of India.

32. It appears from a plain reading of the language of the complaint/representation that the author had no intention of either invoking Clause (a) or

Clause (b) of Section 24-G in the case, and, that is why the complaint/representation was filed before the speaker couched in the language in

which it -was. May be that the author * himself realized that ""split"" was outside the scope of operation of Section 24-G and that is why he took

recourse to such a vague language in the complaint/ representation.

Thus, for what has been discussed above, I hold that the allegations in the complaint/representation, even if admitted to be true, do not attract the

provisions of either Clause (a) or Clause (b) of Section 24-G of the Act, and deciding the preliminary issue accordingly, I hold that the non-

applicants (12 M.L.As.) have not incurred any disqualification within the meaning of Section 24-G of the Representation of the People Act. The

Reference is answered accordingly.

33. As the judgment was about to be announced, the Deputy Registrar of the High Court has brought to my notice a communication addressed to

him by the Speaker Jammu and Kashmir Legislative Assembly, wherein it has been requested by the Speaker that ""the Hon'ble Acting Chief

Justice may be informed that the said reference may be treated to have been

withdrawn with immediate effect.

34. In the first place, the High Court being a court of record, no party whosoever it may be, can treat a matter pending before the High Court as

withdrawn"" at his sweet will without first seeking permission of the High Court to permit it to withdraw the same. The communication of the

Speaker No. LP-27/PA/84 dated 30-7-1984 seeks no such permission.

35. In the second place. I have my doubts whether after reference has been made to this court by the speaker, he retains any power to withdraw

the reference as for all practical purposes after making the reference he becomes functus officio. Prima facie I am of the view that once a question

has been raised by way of reference before the High Court, the mere intention of the party who had made the reference not to proceed with the

same, cannot be deemed sufficient for the court to refuse to answer the reference u/s 70 of the Constitution. In taking this view I am fortified by the

Judgment in the case of Maharaja Anand Chand M. P. reported in 1975 ELR 27 wherein it was opined :

If a question properly arises under Article 103 as to whether the member has, or has not, become subject to a disqualification, the fact that the

person who originally raised the question does not wish to proceed with the matter and asks for permission to withdraw his petition, will not be

sufficient for the Election Commission to desist from giving an opinion on the reference.

36. Similar view was also expressed in Shri Yadvendra Singh's case, reported in 1975 ELR 67 wherein it has been observed :

Once a question of disqualification of a member of a House of Legislature has been raised, the Commission is required by the Constitution to give

its opinion to the President, the Rajpramukh or the Governor as the case may be.

37. In view of these pronouncements, I have my doubts whether the Speaker can be permitted to withdraw the reference at this stage but I give no

final opinion on this aspect and leave this matter to be decided in an appropriate case at an appropriate time. The communication of the Speaker in

the circumstances has become infructuous.