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**SUBHASH DESAI v. PRINCIPAL SECRETARY:
Interpreting the Issues of the Role of the Speaker Under the Tenth
Schedule, and the Symbols Order**

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SUBHASH DESAI v. PRINCIPAL SECRETARY: Interpreting the Issues of the Role of the Speaker Under the Tenth Schedule, and the Symbols Order

*Abhinav Yadav**

[Abstract: This article examines the case of *Subhash Desai v. Principal Secretary, Governor of Maharashtra & Ors.*,¹ which sheds light on the complex legal framework of anti-defection laws in India and its ramifications on the political dynamics of Maharashtra. The article highlights the impact of the Supreme Court's decision on the role of the Speaker in the Maharashtra political crisis. It underscores the Speaker's crucial responsibility in determining the authentic political party under the Tenth Schedule, particularly in cases involving partisan disputes. However, the discrepancy between the Speaker's political position and their entrusted responsibilities may result in additional litigation and delays, as witnessed in this case.

Moreover, the article examines the court's clarification on the limitations of relying solely on the legislative majority test in deciding disputes under the Symbols Order. The court emphasizes that the Election Commission of India (hereinafter referred to as ECI) should consider other factors to prevent potential misuse or abuse of the provision. This expansion of criteria aims to ensure a comprehensive evaluation of the party's dynamics and internal structure. By providing a comprehensive analysis of the *Subhash Desai* case, this article contributes to a deeper understanding of the complex legal and political issues surrounding anti-defection laws and their implications for the political landscape of Maharashtra.]

I

Introduction

The verdict rendered by the Supreme Court in the case of *Subhash Desai v. Principal Secretary, Governor of Maharashtra*² has brought attention to the intricate legal

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¹ *Subhash Desai v. Principal Secretary, Governor of Maharashtra & Ors.*, 2022 S.C.C Online S.C. 1738.

² *Subhash Desai v. Principal Secretary, Governor of Maharashtra & Ors.*, 2022 S.C.C Online S.C. 1738.

framework of anti-defection laws in India and its profound implications for the political dynamics of Maharashtra. This case analysis aims to critically examine the issues raised in the Subhash Desai case and provide an in-depth understanding of its ramifications within the context of Indian constitutional law and political governance. The genesis of this case can be traced back to the events that transpired in June 2022, when a group of Shiv Sena lawmakers, led by Eknath Shinde, disappeared from public view.³ This development set in motion a series of events that ultimately led to the collapse of the Maha Vikas Aghadi government. The subsequent legal proceedings and the Supreme Court's verdict have opened up a discourse on the complex legal and political issues surrounding anti-defection laws.

The recent verdict of the Supreme Court, while refraining from validating Eknath Shinde's rebellion, has inadvertently strengthened his position. This outcome suggests a potential attraction for more Shiv Sena (UBT) members to align with his party, considering the court's ruling. Moreover, the verdict nullifies the Sena UBT's claim that Shinde's government is "illegal." However, determining the disqualification of 16 MLAs, including Shinde, now rests with Speaker Rahul Narwekar, affording Shinde additional time to strategize his legal defence. Furthermore, the endorsement of Shinde's leadership by his deputy, Devendra Fadnavis, regarding the forthcoming elections provides him with a measure of political stability. Nevertheless, two critical long-term issues remain unresolved: Shinde's ability to secure the traditional vote base of the Shiv Sena for his alliance with the Bharatiya Janata Party (BJP), and the extent to which an ascendant BJP will allow his political influence to thrive.

Despite the Supreme Court's decision to refer the disqualification of rebel MLAs to Speaker Narwekar and its refusal to reinstate Uddhav Thackeray as Chief Minister, the court's stern reprimand of then Governor Bhagat Singh Koshyari, accusing him of procedural errors in conducting the floor test, provides a glimmer of hope for Thackeray's narrative against the ruling alliance. These observations lend support to Thackeray's claims that he has been wronged by the BJP and Shinde, enabling him to harness the sympathy of his traditional "Marathi Manoos" vote bank. However, the verdict reinforces Thackeray's reliance on the Maha Vikas Aghadi and raises the spectre of him assuming a secondary role within the Congress-Nationalist Congress Party (NCP) combine.

From a political standpoint, the verdict can be viewed as a triumph for Deputy Chief Minister Devendra Fadnavis, who is believed to have orchestrated the Shiv Sena split. The downfall of the incumbent government would have posed a significant

³ Swapnil Rawal, *Shiv Sena replaces Eknath Shinde as legislative party leader, reaches out to him*, HINDUSTAN TIMES, Delhi (Jun. 21, 2022,) available at: <https://www.hindustantimes.com/cities/mumbai-news/shiv-sena-replaces-eknath-shinde-as-legislative-party-leader-reaches-out-to-him-101655811705887.html> (last visited 10 May, 2023).

political setback for Fadnavis. Furthermore, the weakened position of Uddhav Thackeray presents an opportunity for the BJP to make significant gains, particularly in securing control over the Brihanmumbai Municipal Corporation (BMC), one of Asia's most affluent municipal corporations.

II

Anti-Defection Law in India: A Background

The anti-defection law in India is a significant legislative measure designed to maintain the sanctity and stability of the country's democratic processes.⁴ Enacted to counter the pervasive issue of political defections, this law was introduced to curb the opportunistic and disruptive tendencies often associated with such actions. As a critical component of India's constitutional framework, the Anti-Defection Law imposes severe consequences on legislators who choose to abandon their political affiliations, thereby ensuring the preservation of democratic ideals and fostering a culture of political accountability. This essay delves into the origins, provisions, and implications of the Anti-Defection Law, shedding light on its impact on Indian politics and the broader implications for the functioning of a vibrant and representative democracy. Through a serious and academic lens, this exploration aims to provide a comprehensive understanding of the Anti-Defection Law's purpose, operation, and challenges in the Indian political landscape.⁵

The roots of the Anti-Defection Law can be traced back to the tumultuous political climate in India during the 1960s and 1970s. This period witnessed a significant rise in political defections, leading to frequent changes in government and the erosion of democratic principles. Recognizing the urgent need to address this issue, the Indian Parliament passed the 52nd Amendment to the Constitution in 1985⁶, introducing the Anti-Defection Law.

In recent years, there have been notable occurrences where lawmakers have utilized the merger clause in the Anti-Defection Law to switch political parties. The Anti-Defection Law was established to deter political defections and ensure stability within the Indian parliamentary system. However, the Law Commission in 1999 recommended the repeal of the clause that exempts certain mergers from the provisions of the Tenth Schedule.⁷

⁴ Virender Sindhu, *ANTI-DEFLECTION LAW IN INDIA* 15 (2015).

⁵ G. C. Malhotra, *ANTI-DEFLECTION LAW IN INDIA AND THE COMMONWEALTH* 40 (2005).

⁶ The Constitution (Fifty-Second Amendment) Act, 1985.

⁷ The Law Commission of India, *ONE HUNDRED SEVENTIETH REPORT ON REFORM OF THE ELECTORAL LAWS* 1.3.3 (1999).

The Law Commission argued that elected individuals should be bound by the party under which they were elected for the entire House term. According to their perspective, if a lawmaker wishes to leave their political party, they should be required to resign from their position in the House. This would ensure that politicians maintain allegiance to the party they were elected to represent.

Unfortunately, the inclusion of the merger clause has had unintended consequences. It has not only facilitated political defections but has also led to instances where lawmakers openly defy party whips. These acts of defiance involve voting against their own party's stance or abstaining from crucial motions and resolutions. These instances of party-switching and defiance of party discipline undermine the principles of party loyalty and stable governance. It creates an atmosphere of uncertainty and hampers the ability of political parties to function effectively. Additionally, such actions can erode public trust in elected representatives, as it appears that personal interests and opportunism are prioritized over the interests of the electorate.⁸

The repeal of the exemption clause for mergers recommended by the Law Commission could potentially help mitigate these issues. By eliminating this provision, lawmakers would be discouraged from switching parties without resigning from their positions. This would encourage greater accountability and reduce the likelihood of arbitrary party switches solely for personal gain. Under the provisions of the Anti-Defection Law, if a legislator voluntarily gives up their membership in the political party on whose ticket they were elected, or if they vote or abstain from voting in contravention of the party's direction, they can be disqualified from holding their seat. The law applies to both the national and state legislatures, ensuring uniformity across different levels of government. Additionally, it applies to both individual members as well as entire political parties if two-thirds of their members defect. This provision discourages mass defections, which could potentially undermine the stability of the government.⁹

The Anti-Defection Law also empowers the presiding officers of the legislative bodies to decide on matters related to disqualification. The presiding officer plays a crucial role in determining the validity of a defection and has the authority to disqualify the defectors. However, this provision has been a subject of controversy and criticism as it raises concerns about potential bias and misuse of power by the presiding officers, who are often affiliated with a particular political party. One of the primary objectives of the Anti-Defection Law is to ensure political stability by discouraging legislators from switching parties for personal gain or political expediency. By imposing disqualification, the law seeks to deter opportunistic

⁸ *Id.*

⁹ A. G. Noorani, CONSTITUTIONAL QUESTIONS IN INDIA: THE PRESIDENT, PARLIAMENT AND THE STATES 70, (2002).

defections that can destabilize governments, disrupt policy-making processes, and undermine public trust in the political system. Moreover, it aims to promote party discipline and discourage elected representatives from prioritizing personal interests over the party's collective agenda.

However, the Anti-Defection Law has also faced criticism on several fronts. Some argue that it limits freedom of expression and curtails the legislator's ability to voice dissenting opinions or vote according to their conscience. Critics contend that this law has transformed elected representatives into rubber stamps for their respective parties, compromising their independence and diminishing the vibrancy of democratic deliberations. In an attempt to circumvent disqualification, political parties often engage in backroom negotiations, offering incentives to legislators to defect. This undermines the spirit of the law and raises concerns about the ethical standards of politicians and the prevalence of corruption within the political system.¹⁰

III

The Decision's Impact on the Role of the Speaker

The Maharashtra political crisis reached a significant juncture on May 11 when the Supreme Court rendered a unanimous decision. This complex episode encompassed a multitude of constitutional functionaries, including the Governor, Deputy Speaker (subsequently Speaker), ECI, and, crucially, the Court. A comprehensive understanding of the political sequence necessitates careful consideration of the decisions undertaken by these constitutional entities, as their interplay is intricately woven together, forming a complex network. Notably, the interim court order, which extended the rebel MLAs' response period for the initial batch of disqualification petitions based on principles of natural justice, yielded a substantial alteration in the distribution of power. The intervening period witnessed the appointment of a Speaker to a vacant post, the Governor's call for a floor test, and ultimately, a change in government.

The ruling by the Supreme Court establishes that the Speaker's decision on disqualification petitions will only apply to future proceedings without retroactively affecting the validity of actions taken during the intervening period.¹¹ The Court duly acknowledges the amplified significance of the Speaker's role within

¹⁰ Pardeep Sachdeva, *Combating Political Corruption: A Critique of Anti-Defection Legislation*, 50 IPSA 2 (1989).

¹¹ *Subhash Desai v. Principal Secretary, Governor of Maharashtra & Ors.*, 2022 S.C.C Online S.C. 1738, ¶93.

the framework of the Tenth Schedule¹², particularly in cases involving partisan disputes. In such instances, the Speaker is required to determine, on a prima facie basis, the authentic political party for the purposes of the Tenth Schedule when multiple factions emerge. The implications arising from this scenario will be further examined in subsequent sections of this essay. However, it is worth noting that the discrepancy between the Speaker's political position and the responsibilities entrusted to them will likely foster additional litigation, resulting in delays and potentially rendering remedies ineffective or unattainable, as exemplified by the present case.

The enduring conflict between the prescribed role of the Speaker as an unbiased adjudicator under the provisions of the Tenth Schedule and the practical functioning of the office became too conspicuous for the court to overlook in the present case. Regrettably, the judges do not thoroughly address the central concern surrounding the partisan conduct of the Speaker, somewhat skimming over these arguments. One of the primary issues that warrants attention is the stark disparity between the prescribed impartiality of the Speaker as an adjudicator and the practical realities of their position as a political figure. While the Tenth Schedule mandates the Speaker to play a neutral role in deciding on matters of defection and factional disputes, the fact remains that the Speaker often continues to hold a political affiliation. This inherent contradiction raises concerns about the ability of the Speaker to maintain an objective and unbiased stance when faced with factional disputes.

In light of the aforementioned observations, it is pertinent to undertake a closer examination of the present judgement, highlighting certain inconsistencies that emerge within the prevailing regime of the anti-defection law, with the Speaker occupying a pivotal role. This analysis aims to provide a critical assessment of the current framework and shed light on the challenges and limitations posed by the existing arrangement.

The Provisional Solution

The Tenth Schedule grants the Speaker the authority to decide on petitions for disqualification. The *Kihoto Hollohan*¹³ case established that the judiciary can review the Speaker's decisions. However, in the current case, the matter was referred to a larger 7-judge bench to address concerns about the potential misapplication of the Court's ruling in the *Nabam Rebia* case¹⁴. In the *Nabam Rebia* case, it was determined that if the Speaker is facing a motion for their own removal, they should abstain from hearing disqualification petitions. To safeguard the constitutional objectives of the Tenth Schedule, the Supreme Court implemented a temporary mechanism. The Court ruled that the Speaker has the power to consider and decide on applications

¹² INDIA CONST. sched. X.

¹³ *Kihoto Hollohan v. Zachillhu*, 1992 SCR (1) 686.

¹⁴ *Nabam Rebia, and Bamang Felix v. Deputy Speaker*, (2017) 13 SCC 332.

that challenge this jurisdiction, aligning with the provisions of the Tenth Schedule. In certain circumstances, the Speaker possesses the discretion to either suspend the proceedings in accordance with the Tenth Schedule, contingent upon the application being made in good faith, or to continue with the disqualification petitions while offering compelling justifications if an application challenging the Speaker's jurisdiction is presented, such as a pending notice of removal under Article 179(c)¹⁵. Acknowledging that the Speaker's decision in this scenario remains subject to judicial examination is crucial.

This interim measure seeks to prevent a potential "constitutional hiatus," which could impede the regular functioning of the Tenth Schedule.¹⁶ In dealing with applications that challenge their authority, it is desirable for the Speaker to exhibit impartiality and fairness. However, this objective becomes unattainable due to the Speaker's frequent alignment with their political affiliation. The political landscape in Maharashtra serves as an illustration, where the Speaker often belongs to newly established political parties or has vested interests in factions that may eventually come to power.

For instance, in the aforementioned crisis, the newly elected Speaker, whose position was subject to scrutiny, appointed a whip from a faction that had emerged from the division within the legislative party. Consequently, this faction joined forces with the Speaker's own party to establish the government. Nevertheless, upon careful examination, the court subsequently determined that this appointment contravened the law. It is imperative to acknowledge that the solution to this issue extends beyond mere judicial review of the Speaker's decisions. As demonstrated in this particular case, the element of timing assumes paramount importance in the realm of politics, as a prolonged delay in the court's decision might have changed the balance of power locally.

One of the matters that was raised pertained to the possibility of the court's involvement in disqualification proceedings under the Tenth Schedule in the absence of a decision by the Speaker. This arose due to the demonstrated inability of the newly appointed Speaker to exercise fairness and impartiality. Consequently, the petitioners approached the court, seeking a direct resolution on the matter of disqualification. However, the Court dismissed this contention, citing a passage from the *Kihoto Hollohan*¹⁷ case, which proclaimed that in a parliamentary democracy, it is inappropriate to manifest a lack of trust in the office of the Speaker, as it embodies the principles of propriety and impartiality.

The legal determination was made affirming the Speaker's rightful authority to adjudicate upon the disqualification petitions, given the Speaker's election by

¹⁵ The Constitution of India, 1950, Article 179(c).

¹⁶ INDIA CONST. Sched. X.

¹⁷ *Kihoto Hollohan v. Zachillhu*, 1992 SCR (1) 686.

Members of the Legislative Assembly (including those against whom disqualification petitions were pending), in accordance with the prescribed procedural norms. Alternatively, the petitioners contended that the Deputy Speaker, who assumed the role of Speaker during the period when the alleged act leading to disqualification occurred, should decide on the petitions. However, the court rejected this argument, citing that a deputy speaker can only discharge their duties when the speakership is vacant, which was not the case as of July 3, 2022.

The deputy speaker's authority was greatly diminished by the deliberate selection of a speaker aligned with the ruling party (BJP) instead of following the prescribed 14-day notice period required for the removal of a speaker.¹⁸ Consequently, the unoccupied speaker's position during that specific timeframe facilitated a more favourable course of action for the Shinde group.

The tenth schedule demonstrates a lack of acknowledgement regarding the Speaker's undeniable membership within the political party that constitutes the government, thereby establishing the Speaker as a prominent political figure. Ample evidence substantiates the Speaker's inclination towards favouring the government and the ruling party, displaying a clear partisan approach. The Speaker's retention of office necessitates the support of a majority of MLAs, a support often procured from the MLAs affiliated with the ruling party or the coalition of parties that comprise the government. In the present scenario, the Speaker was appointed by the newly formed coalition, encompassing the BJP and MLAs from the Shinde faction of the Shiv Sena, in order to assume governance.

Now that the Speaker has assumed the onus of adjudicating the disqualification petition, the ramifications of their decision extend to the very survival of their own coalition government, owing to their continued affiliation with a political party and their prominent public status. If the MLAs in question are disqualified, the impartial exercise of adjudicatory powers holds the potential to precipitate the downfall of the speaker's party or faction-led government. The principle of "nemo iudex in sua causa," which posits that no one should be a judge in their own cause, represents a fundamental tenet of natural justice that could be compromised by the speaker's decision-making. In order to circumvent this quandary, the court adroitly asserts that the Speaker's judicial regalia alter and elevate the position, thereby underscoring the esteemed traditions associated with this high office and dispelling any concerns of distrust.

Nevertheless, a mere assertion of the Speaker's impartiality falls short of establishing a satisfactory assurance. The inherent nature of the Speaker's role, which does not necessitate the disclosure of party affiliation upon assuming the position, provides grounds for a reasonable suspicion of bias, thereby potentially

¹⁸ *Subhash Desai v. Principal Secretary, Governor of Maharashtra & Ors.*, 2022 S.C.C Online S.C. 1738, para 48.

compromising the integrity of the proceedings. However, the Supreme Court's decision to sever all connections between the Speaker and the political party effectively espouses an idealized perception of the speaker's role, disregarding the operational realities of the Constitution. Consequently, the existing framework of anti-defection regulations may potentially run afoul of the fundamental principle of non-prejudice, an essential element of the rule of law. The judiciary's pronouncement, denoting the illegitimacy of the Speaker's appointment as the new whip and legislative party leader, insinuated the presence of partisan inclinations within the Speaker's role. However, rather than critically addressing the ramifications of this finding, the Court opted to embellish the esteemed position of the Speaker, neglecting to accord it the gravity it inherently warrants. This approach effectively evaded an in-depth examination of the implications arising from the Court's conclusion.

The Speaker's ongoing tenure represents the second element of concern. If the Speaker's determination regarding disqualification were to harken back to the date when the disqualifying act—namely, the deliberate defiance of the party whip or the voluntary abandonment of party affiliation—took place, it would undoubtedly cast doubt upon the legitimacy of the proceedings conducted during the interregnum, including the Speaker's own election. In all likelihood, such a scenario would lead to the Speaker's rejection of the disqualification petitions, thereby rendering the Speaker an interested party rather than an impartial arbiter. Consequently, the imperative of acting in an unbiased and equitable manner would be undermined. The aforementioned argument was dismissed by the Court, which determined that the Speaker's verdict concerning disqualification and its ensuing repercussions would solely hold prospective effect, commencing from the date of the said decision. Pertinently, the Court confronted a dearth of precedential guidance regarding the treatment of actions transpiring within the legislative body between the occurrence of the disqualifying act and the Speaker's pronouncement, thereby casting uncertainty on the ultimate ruling's applicability to such conduct. After a careful re-evaluation, the Court arrived at a conclusive stance. In accordance with the ruling, the participating MLAs retain their right to partake in the proceedings until the moment the Speaker renders them ineligible.

The court reasoned that the situation under Article 189(2)¹⁹—which states that the legitimacy of any legislative proceedings shall not be questioned on the grounds that it was later determined that an elected official who was not authorised to sit or vote participated in the proceedings—never materialised because the speaker's decision on disqualification is only prospective.²⁰ The court understood *Rajendra*

¹⁹ The Constitution of India, 1950, Article 182(2).

²⁰ *Subhash Desai v. Principal Secretary, Governor of Maharashtra & Ors.*, 2022 S.C.C Online S.C. 1738, ¶41 (f).

*Singh Rana*²¹ to suggest that the period of the prohibited act under the tenth schedule is the pertinent point of reference of time for the Speaker's determination on disqualification.

This proposition posits that although the Speaker, in an authoritative capacity, may render a decision retroactively, the implications of such a decision will solely manifest from the date on which the Speaker's pronouncement is made. Consequently, an elected legislative body member may have incurred disqualification under the purview of the Tenth Schedule prior to this momentous pronouncement. Nonetheless, the actual vacancy of the member's seat occurs exclusively subsequent to the Speaker's determination of disqualification. Hence, the Tenth Schedule effectively operates contingent upon the chosen date of activation determined by the Speaker, given that the punitive ramifications of disqualification solely take effect on the precise date of the Speaker's decision.

Notably, any proceedings conducted during the intervening period are safeguarded against disqualification penalties.²² It is crucial to acknowledge that the absence of a temporal constraint within which the Speaker must render a decision (unless compelled by a judicial order) is a salient feature. The sole requirement remains the Speaker's obligation to deliberate on the matter within a reasonable time frame.

Speakers' Role under the Tenth Schedule

The Court's ruling elucidated that in the context of disqualification under paragraphs 2(1)(a)²³ and 2(1)(b)²⁴ of the Tenth Schedule, the Speaker, serving as the adjudicatory authority, may be entrusted with the responsibility of ascertaining the authentic or original political party. This determination becomes crucial in cases where factions or groups within a party claim to be the legitimate representation. The enactment of the ninety-first constitutional amendment²⁵ has effectively eliminated the defence of a split within a political party. Consequently, if the Speaker determines that a particular faction or group was not the actual political party at the time of the act that constituted defection, it is inevitable that such a faction or group will suffer adverse consequences. To make this determination, the Speaker is obligated to initially discern which whip, in the context of paragraphs 2(1)(a) and 2(1)(b), represents the political party when multiple factions issue whips.

Nonetheless, the aforementioned scenario bears no relevance to the decision rendered by the ECI under paragraph 15 of the Elections Symbols (Reservation and

²¹ *Rajendra Singh Rana v. Swami Prasad Maurya*, 11 (2007) 4 SCC 270.

²² *Id.*

²³ INDIA CONST. Sched. X, para 2(1)(a).

²⁴ INDIA CONST. Sched. X, para 2(1)(b).

²⁵ The Constitution (Ninety-First Amendment) Act, 1985.

Allotment) Order.²⁶ Furthermore, the Court aptly established that the ECI's determination of the true political party or faction, as per paragraph 15 of the Symbols Order, does not impact the Speaker's decision-making process. It is the Speaker's prerogative to ascertain the pertinent group or faction that qualifies as the legitimate political party to adjudicate the question of disqualification, take into account the specific date on which the member willingly relinquished their membership or contravened the party whip. Consequently, in the present case, the ECI's recognition of the Shinde Faction as the authentic Shiv Sena holds no bearing on the Speaker's decision, as the Speaker must carefully consider the factual circumstances prevailing during the disqualifying act.

The Symbols order's paragraph 15 ruling by the ECI will only be effective going forward. The court ruled that the proceedings under Symbols Order Paragraph 15 cannot be postponed until after the Tenth Schedule's final decision has been made. This is due to the fact that the "test of legislative majority" is simply one of the criteria to be taken into account when making the decision. Other criteria should be given more weight when the legislative authority is in question (for instance, when a disqualification petition is still pending).²⁷

Significantly, the court places significant reliance on the impartial role of the Speaker and envisions a parallel set of responsibilities for both the Speaker and the ECI in ascertaining the genuine identity of the Shiv Sena, albeit for distinct objectives. The Speaker is mandated to consider factors that are similarly considered by the ECI when resolving conflicts arising from factional divisions. In both instances, the Court cautions against utilizing the "test of the legislative majority" and instead advises a comprehensive evaluation of the organizational structure of leadership beyond the legislative realm, alongside other relevant factors, particularly in situations where the strength of the legislative body is in dispute. Such a situation arises in the present case due to the existence of pending petitions seeking disqualification.

By emphasizing the impartiality of the Speaker, the court underscores the importance of fair and objective decision-making in matters of factional conflicts. The role of the ECI is seen as parallel and complementary to that of the Speaker, as both institutions are entrusted with the task of ascertaining the true political entity. While the Speaker's focus is on determining the political party for the purpose of disqualification, the ECI is responsible for recognizing the authentic party for the purpose of symbols and reservations. Crucially, the Court advises against relying solely on the numerical strength of a faction within the legislature, highlighting the significance of considering external factors and the organisational structure of leadership. This broader perspective considers the influence and control exerted by

²⁶ Election Symbols (Reservation and Allotment) Order, 1968, para 15.

²⁷ *Id.*

a particular faction beyond the legislative domain, recognizing that legislative strength alone may not provide a comprehensive picture of the true political party. This approach becomes particularly relevant in cases where disqualification petitions are pending, adding an additional layer of complexity to the determination.

It is absolutely possible under this scenario for the Speaker and ECI to come to conflicting judgements regarding which faction or organisation is the "real" political party for the purposes of disqualifying and awarding insignia, respectively. Again, the Speaker's job, position, and ability to carry out the mission are in question. The Speaker's actions will be biased in favour of one political faction because he may very well be a member of that side. Subjective political factors must take precedence in the absence of objective criteria like the strength of the legislature.

This could lead to the Speaker acting as the kingmaker and sparing his side from the disqualification process. It could be argued that the Speaker's decision is subject to judicial review, but as the current case amply demonstrates, it is unclear how effective this will be given the crucial role that time plays. Moreover, the repeated need for judicial intervention, which would increase the judiciary's role in resolving political disputes, is not good for the principles of democracy and the independence of the judiciary.

The evolving nature of the Court has turned it into a battleground for political warfare due to factional disagreements that have made their way into the judicial system. In addition, there is a concerning trend of constitutional functionaries neglecting their constitutional duties, which often necessitates judicial intervention. As a result, the Court faces the potential risk of being accused of political bias, as the phenomenon of "judicialization of politics" leads to increased court involvement in political matters. One notable trend is the outsourcing of political judgements and the delegation of constitutionally assigned functions by other authorities to the courts. This occurs when political actors willingly or inadvertently accept their roles in the expectation of securing favourable court rulings or simply to evade responsibility for making difficult choices. Consequently, the Court becomes a target for control as it assumes the responsibility of deciding politically significant matters, thereby jeopardizing its independence.

In such conflicts, judges are confronted with the challenging task of performing a delicate political balancing act. They must carefully consider and weigh the competing political goals against the institutional interests of the judiciary. This balancing act requires judges to navigate between the demands of the political environment and their duty to uphold the rule of law. They must take into account not only the specific merits of the cases at hand but also the potential repercussions of their decisions on the reputation and independence of the Court.

Overall, the Court's transformation into a battleground for political warfare, fuelled by factional disputes and the failure of constitutional functionaries, has the potential to compromise its integrity and impartiality. The increasing outsourcing of political judgements and constitutionally assigned functions to the Court further exacerbates the situation, making it a target for control. Judges, in turn, find themselves in the challenging position of weighing political considerations against the preservation of the judiciary's institutional interests. This highlights the need for a careful examination of the evolving role of the Court and the preservation of its independence within the broader political landscape.

IV

The Court's Interpretation of Para 15 of Symbols Order and its Consequences for Disqualification Proceedings

Disqualification proceedings are significantly impacted by the judgement made under Paragraph 15 of the Symbols Order since doing otherwise would have "irreversible consequences." For lack of a better expression, if the ECI determines that the rebel faction is the original political party, it would indicate that they never actually quit the party, participated in anti-party actions, or disobeyed any party whip. As a result, the Speaker would lack justification for disqualifying the members. The observations, in my opinion, are obviously at odds with the justification that Paragraph 15 and the Tenth Schedule function in two different sectors, which has been used repeatedly by ECI in resolving Paragraph 15 disputes.

The Court clarifies the limitations of relying solely on the "test of legislative majority" in the context of deciding disputes under Paragraph 15 of the Symbols Order. The Court states that the ECI should not solely rely on determining the majority based on the legislative wing of the party, as it has been the practice since the *Sadiq Ali case*.²⁸ Instead, the ECI is permitted to consider other factors and criteria in order to reach a conclusion under Article 15.²⁹ These additional criteria may include evaluating the strength and influence of the party's organizational wings, examining the provisions of the party's constitution, or considering any other relevant factor.

The purpose of expanding the criteria for decision-making under Article 15³⁰ is to prevent the potential misuse or abuse of the provision. By solely relying on the legislative majority, there is a risk that the provision can be manipulated or

²⁸ *Sadiq Ali v. Election Commission of India*, (1972) 4 SCC 664.

²⁹ The Constitution of India, 1950, Article 15.

³⁰ *Id.*

exploited. Therefore, the Court's decision aims to ensure a more comprehensive evaluation of the party's dynamics and internal structure.

The court held:

Disqualification is determined based on the date when the act of defection occurs, implying that any actions or events that happen after the prohibited conduct under the Tenth Schedule do not provide an excuse or absolution. Put simply, subsequent actions or events cannot undo or alleviate the consequences that arise from the initial prohibited conduct.³¹

This means that the Speaker has the authority to disqualify a member of the legislature at any time after they commit an act or omission that makes them eligible for disqualification under Paragraph 2. This disqualification can occur regardless of any act or event that takes place between the defection act and the decision on the disqualification proceedings. In the present scenario, this implies that even if the Shinde faction is recognized as the "original Shiv Sena" under Paragraph 15 of the Symbols Order, its members would still be susceptible to disqualification by the Speaker due to their disobedience of the party's chief whip.

The Speaker's decision to recognize Mr Gogawale as the Chief Whip of the Shiv Sena is deemed illegal because it was based on a resolution from a faction of the SSLP without verifying if it represented the decision of the entire political party. However, the decision made by the Deputy Speaker to acknowledge Mr. Ajay Choudhari as the Whip in place of Mr. Eknath Shinde is considered valid.

This implies that at the relevant time, Ajay Choudhari held the position of whip in the party's legislative wing. On multiple occasions, the Shinde faction defied the whip's instructions to vote against the 'vote of no-confidence', which would result in disqualification according to Para 2(b). However, this disqualification only applies to their membership in the house and not automatically to their party affiliation. Now, let's consider a scenario where the Speaker disqualifies the thirty-four MLAs of the Shinde Group today. Which party would they belong to? Based on the reasoning used, it appears evident that these MLAs are not disqualified from the party they originally belonged to, which is the political party that issued their ticket, in this case, Shiv Sena led by Mr. Uddhav Thackeray.

However, the court also notes the following: the decision of the ECI has a prospective effect, meaning that the declaration of one of the rival groups as the political party takes effect from the date of the decision. This observation suggests that the Shinde faction is considered the real Shiv Sena, in control of internal matters and decisions.³²

³¹ *Subhash Desai v. Principal Secretary, Governor of Maharashtra & Ors.*, 2022 S.C.C Online S.C. 1738, para 120.

³² *Subhash Desai v. Principal Secretary, Governor of Maharashtra & Ors.*, 2022 S.C.C Online S.C. 1738, para 155.

The Supreme Court also raises the issue that if only specific members of the group who were granted the symbol are disqualified, the remaining members will have to reapply for a new symbol as per the Symbols ruling. This raises the question: Why should the non-disqualified members go through the symbol allocation process again when they already have a symbol allocated to them? Additionally, the court fails to address which party the non-disqualified members belonged to previously. Consequently, the reasoning employed by the Speaker throughout the Tenth Schedule proceedings renders the Commission's order ineffective and without any force.

The Tenth Schedule and the Symbols Order have an important relationship, which the court likewise acknowledges. It recognises that the result of the proceedings before the ECI would depend on which faction holds a majority in the House. A faction's legislative majority relies on whether or not its members have been disqualified.

The court presents two potential scenarios: firstly, the ECI making a determination before the Speaker decides on whether to proceed with a disqualification, and secondly, the Speaker making a decision on the disqualification proceedings before the ECI reaches a conclusion. The court views the latter situation as the preferable option.

The Symbols Order provides that the "test of majority" shall be applied to conflicts referred to in Paragraph 15 to determine which side shall be recognised as the initial party. However, if the disqualification process is finished before the ECI makes a decision, the ECI will be able to tell which faction is in control by taking into account the disqualified members. This would solve the existing problem where the faction that was designated as the first political party is now facing its own ludicrous disqualification proceedings.

The court notes that, in spite of the interconnectedness of the proceedings, it would be unfair to prevent the ECI from making decisions on petitions according to Paragraph 15 of the Symbols Order up until the "final adjudication" of disqualification petitions under the Tenth Schedule. The ECI cannot be prohibited from carrying out its constitutional obligations indefinitely because it is a constitutional authority. It is not permissible to put off proceedings by a constitutional authority in order to await the outcome of another.

If one constitutional jurisdiction is given preference over another, the court is concerned that its authority will be violated. It also brings up the potential for "indefinite delay" if the ECI proceedings are postponed until the Speaker rules on the disqualification proceedings.

In summary, the court recognizes the importance of the interplay between the Tenth Schedule and the Symbols Order in determining the majority faction in the House. While acknowledging the ideal scenario of resolving disqualification proceedings

before ECI's decision, it emphasizes that the ECI cannot be indefinitely prevented from performing its constitutional duties. The court raises concerns about the authority of one constitutional authority being impinged upon by another and the potential for indefinite delays if proceedings before the ECI are halted.

The court also held that the removal of Paragraph 3³³ means that members facing disqualification proceedings can no longer rely on the defense of a split. If a split occurs within a political party or a legislature party, members from either faction cannot claim to be the legitimate political party when filing petitions for the disqualification of members from the other faction. Any defense must now be based on the current provisions of the Tenth Schedule. The court recognizes that in such split cases, the speaker must determine which faction constitutes the original political party, regardless of the number of members in each faction. The court emphasizes that this determination will not affect any other proceedings, including those under Paragraph 15 of the Symbols Order. The court asserts that these proceedings are independent of each other.

V

Conclusion

The increasing role of courts in political disputes and the outsourcing of political decisions to them have raised concerns about potential bias and threats to judicial independence. Judges are faced with the challenge of balancing political interests while protecting the judiciary's institutional integrity.

The office of the Speaker has been accused of partisan bias, both in parliament and state legislatures. The current political crisis highlights the problems with the Speaker's role in the Tenth Schedule, which led to the matter being brought to court. However, the recent judgement fails to provide a comprehensive solution, creating potential inconsistencies for future exploitation. The judgement's inability to address the controversy leaves room for political and constitutional concerns. It allows rebel factions within a party to claim the status of the original political party based solely on numerical strength, disregarding organizational structure and support. This situation can be manipulated, especially for smaller and regional political parties.

The petitioners sought a constitutional sequence to ensure fairness, proposing that the ECI make a decision after the Speaker addresses Tenth Schedule petitions. However, the court rejected this request without fully recognizing the constitutional precedence of the Tenth Schedule over statutes like the Symbols Order. The court's

³³ INDIA CONST. Sched. X, para 3.

reluctance to provide a resolution may have unintended consequences. It is important to address these inconsistencies and establish a clear constitutional framework to maintain fairness and integrity in political processes.