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A CASE THAT SCANS THE WORKING OF THE ANTI-DEFECTION LAW

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‘The working of the Tenth Schedule has been patchy’ | Photo Credit: SUSHIL KUMAR VERMA

A five-judge Bench of the Supreme Court of India is presently hearing a set of cases popularly known as the “Maharashtra political controversy cases”. These cases arose out of the events in June last year, when the ruling Maha Vikas Aghadi (MVA) coalition (the Shiv Sena, the Nationalist Congress Party and Congress) lost power after an internal splintering of the Shiv Sena party. A faction led by Eknath Shinde then joined hands with the Bharatiya Janata Party (BJP) to form the new ruling coalition. The disputes between the various parties have been continuing since then, with the most recent development being an Election Commission of India (ECI) order declaring that Eknath Shinde’s faction is entitled to the party name and symbol.

While questions have been raised about whether the situation is now fait accompli, and whether the Court can “turn the clock back” if it wanted to, the judgment of this case will have consequences not merely for State politics in Maharashtra but far beyond as well. This is because the case raises certain fundamental issues about the working of India’s “anti-defection law”.

The anti-defection law was introduced into the Constitution via the Tenth Schedule, in 1985. Its purpose was to check increasingly frequent floor-crossing; lured by money, ministerial berths, threats, or a combination of the three, legislators were regularly switching party affiliations in the house (and bringing down governments with them). The Tenth Schedule sought to put a stop to this by stipulating that if any legislator voted against the party whip, he or she would be disqualified from the house. While on the one hand this empowered party leadership against the legislative backbench, and weakened the prospect of intra-party dissent, the Tenth Schedule viewed this as an acceptable compromise in the interests of checking unprincipled floor-crossing.

Fast-forwarding 40 years to the present day, we find that the working of the Tenth Schedule has been patchy, at best. In the last few years, there have been innumerable instances of governments being “toppled” mid-term after a set of the ruling party or coalition’s own members turn against it. That this is power-politics and no high-minded expression of intra-party dissent is evident from the well-documented rise of “resort-politics”, where party leaders hold their “flock” more or less captive within expensive holiday resorts, so as to prevent the other side from

getting at them.

Indeed, politicians have adopted various stratagems to do an end-run around the anti-defection law. Recent examples involve mass resignations (instead of defections) to force a fresh election, partisan actions by State Governors (who are nominees of the central government) with respect to swearing-in ceremonies and the timing of floor tests, and equally partisan actions by Speakers (in refusing to decide disqualification petitions, or acting in undue haste to do so). The upshot of this is that, in effect, the Tenth Schedule has been reduced to a nullity: governments that do not have clear majorities are vulnerable, at any point, to being “toppled” in this fashion.

This is where the role of the Supreme Court becomes crucial. Disputes over government formation and government toppling invariably end up before the highest court. It must immediately be acknowledged that such cases place the Court in an unenviable position: the Court has to adjudicate the actions of a number of constitutional functionaries: Governors, Speakers, legislative party leaders, elected representatives, many (if not all) of whom, to put it charitably, have acted dubiously. But the Court does not have the liberty of presuming dishonesty: it must maintain an institutional arm’s-length from the political actors, and adjudicate according to legalities, even as political actors in anti-defection cases do their best to undermine legality. This is a challenging task.

But it is a challenge that the Court has, with due respect, not always risen to. This is one of those situations where the proof of the pudding is in the eating: despite the fact that the Court’s intervention has been sought in every one of these cases, and despite the fact that in recent years the Supreme Court has handed down multiple substantive judgments on anti-defection, the toppling of governments remains as frequent as ever. While one may (partially) put this down to wily politicians finding loopholes in Supreme Court judgments, much like they find loopholes in the Tenth Schedule, this is not all there is to the situation: some of these loopholes were easily foreseeable at the time, but were, unfortunately, not addressed by the Court.

An example of this is the Court’s judgment in the Karnataka political controversy, which effectively sanctified resignations as an end-run around the anti-defection clause. But it is the present case (the Maharashtra political controversy) that presents an interesting case study. One will recall that the crisis, so to say, began when a set of legislators from the Shiv Sena rebelled against Uddhav Thackeray, and were soon ensconced in a resort on Guwahati (with allegations of State political intervention). The Deputy Speaker (there was no Speaker at the time) moved to disqualify the “rebels” who in turn moved the Court, arguing that there was a pending no-confidence motion against the Deputy Speaker, and therefore, as per the Supreme Court’s judgment in Nabam Rebia, he was disqualified from deciding on the disqualifications while it was pending.

The Supreme Court’s vacation Bench stayed the Deputy Speaker’s hand, but in what can only be described as a very curious set of orders, also directed a floor test. The upshot of this was that the “rebel MLAs” (who may or may not have subjected themselves to disqualification) were able to vote in this floor test, and voted to bring the government down (in turn altering a fluid political situation and skewing the balance of power). The new government was swiftly sworn in (by the Governor), and appointed its own Speaker, thus effectively creating a fait accompli with respect to the pending disqualification petitions. To top it all, the Supreme Court’s orders were “interim” in nature, and therefore, no reasons were provided.

These orders, the correctness of which is now being considered by the five-judge Bench, albeit in the context of a changed political situation that itself is the consequence of those very orders, reflect how judicial interventions, if not carefully thought through, can hasten the toppling of a government and contribute to turning the Tenth Schedule into a dead letter. If, for example, it is

held that a Speaker cannot decide a disqualification petition while under a notice for removal themselves, and that a floor test can be ordered in the interim (by the Governor or the court), the consequences are obvious: a “rebel MLA” can move a notice for removal, incapacitate the Speaker from taking action, and leave rebel MLAs free to bring down the government without consequence.

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How the Supreme Court will untangle or cut this Gordian knot in the Maharashtra political controversy is anyone’s guess. But ultimately, the Court will be subject to the verdict of history: the use of money and indeed threats and inducements of prosecution or immunities therefrom to “turn” MLAs is a truth that is evident to all with the eyes to see. The Court’s judgment can act as a counterweight to political power, and infuse a dose of constitutionalism into the politics of government formation and toppling. But equally, the Court’s judgment could make toppling governments even easier for those with the means to do so. Only time will tell which of the two it will be.

Gautam Bhatia is a Delhi-based lawyer

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