



**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

D.B. Civil Writ Petition No. 7451/2020

1. Prithviraj Meena S/o. Ram Karan Meena, 9 Biswa Thodabhim, Karauli (Dist.) Rajasthan
2. Ved Prakash Solanki, S/o Shri Mata Prasad Solanki, aged about 44 Years, MLA, N-35, Gandhi Nagar, Jaipur I,
3. Suresh Modi S/o. Mohan Lal Modi, Maya Bhawan Neem Ka Thana, Distt. Sikar
4. Vishvendra Singh S/o Brijendra Singh, 18 D, Civil Lines, Jaipur
5. Deependra Singh S/o Late Bharat Singh, Village Mau The. Shrimadhopur Dist Sikar Rajasthan
6. Sachin Pilot, S/o Late Shri Rajesh Pilot, aged about 42 Years, R/o. VPO, 11, Civil Line, Jaipur
7. Bhawarlal Sharma S/o. Manak Ram Sharma, 46-47, Sardar Shahar House Graenade Marg Pratap Nagar Kathipura Jaipur
8. Gajraj Khatana S/o Late Suraj Bhan, 65, Bhagwati Nagar -I Jaipur
9. Indraj S/o. Umrao Lal Gurjar, 578, Ganga Mata Temple Area Pavota Tehsil Kotputli Jaipur
10. Gajendra Singh Shaktawat, S/o Shri Gulab Singh Sherawat, Shaktawat Farm House, Behind Police Station, Bheender, Udaipur, I,
11. Hema Ram Choudhary S/o Moola Ram Choudhary, Vill Adarsh Luk Dhauri Mana, Barmer, Rajasthan
12. Ram Niwas Gawriya, aged about-years, S/o Shri Raghu Ram, MLA, R/o. Near Marwar School, Jhalra Road, Kuchaman City, Nagaur, Rajasthan
13. Amar Singh S/o Sukh Ram, 51 Years, Jatav Basti Basai Post - Bansi Pahlad Pur The Roopwas Bharatpur
14. Brijender Singh Ola, S/o Shri Sisram Ola, Aged About 51 Years, 96, Gourav Nagar, Civil Lines, Jaipur.
15. Murari Lal Meena, S/o. Narayan Lal Meena, R- 5H/101-102, Indira Gandhi Nagar Jaipur
16. Mukesh Kumar Bhakar S/o Surja Ram, Ladun, VPO, Khariya Teh Didwana Dist Nagur Rajasthan





17. Rakesh Parekh, aged about – years, S/o Shri Rameshwar Lal Parikh, village. Miyan, Bhagwan Pura, Sarwad, Ajmer
18. Harish Meena, aged about – years, S/o Shri Narayan Meena, MLA, No.10, Jawahar Nagar, Jaipur- 4
19. Ramesh Chand Meena S/o. Shankar Lal Meena, H No 52, Village Naya Gaon Post Ranipura Teh Madrayal Karauli Rajasthan

----Petitioners

Versus



1. The Honble Speaker, Rajasthan Legislative Assembly Jaipur Rajasthan
2. The Secretary, Rajasthan Legislative Assembly, Jaipur Rajasthan
3. Mr. C.P. Joshi S/o Shri Bhudev Prasad Joshi, Honble Speaker, Rajasthan Legislative Assembly, 49, Civil Lines, Jaipur - 302 006
4. Dr. Mahesh Joshi S/o Shri Mool Chand Joshi, age-66 years,, R/o B-20, Sen Colony, Powerhouse Road, Near Railway Station, Jaipur
5. Public Against Corruption through its General Secretary Poonam Chand Bhandari S/o Late Shri Rikhab Raj Bhandari, aged about 65 years, R/o A-14, Malviya Nagar, Jaipur
6. Virendra Singh Hada S/o Pratap Singh Hada, R/o D-6/247, 2nd Floor Chitrakoot Yojna, Jaipur.
7. Mohan Lal Nama S/o Late Shri Murlidhar Nama, R/o C-1, Ganesh Nagar, C-Block, Shanti Path, Tilak Nagar, Jaipur
8. Union of India through the Secretary, Ministry of Law and Justice (Department of Legal Affairs), Regd. Office at 4th Floor, A-Wing, Shastri Bhawan, New Delhi-Delhi-110001

----Respondents

For Petitioner(s) : Mr. Harish Salve, Senior Advocate through VC assisted by Mr. Divyesh Maheshwari, Adv.



Mr. Mukul Rohatgi, Senior Advocate
 assisted by Mr. S. Hariharan, Adv.
 Ms. Jakriti Jadeja, Adv. through VC
 Mr. Lokesh Sharma, Adv. through VC
 Mr. Rajesh Goswami, Adv. through VC
 Mr. Yashvardhan Nandwana, Adv.

For Respondent Nos.1 & 2 : Dr. Abhishek Manu Singhvi,
 Senior Advocate assisted by Mr.
 Aavishkar Singhvi, Adv. through VC
 Mr. Amit Bhandari, Adv. through VC
 and Mr. Harendar Neel, Adv.
 Mr. M.S. Singhvi, Advocate General
 assisted by Mr. Darsh Pareek, Adv.
 and Mr. Siddhant Jain, Adv.

For respondent No.3 : Mr. Prateek Kasliwal, Adv. with
 Ms. Supriya Saxena, Adv.

For respondent No.4 : Mr. Devadatt Kamat, Senior Advocate
 : Mr. A.K. Bhandari, Senior Advocate
 Mr. N.K. Maloo, Senior Advocate
 assisted by Mr. Siddharth Bapna,
 Mr. Sarvesh Jain, Adv.
 Mr. Anuj Bhandari, Adv.
 Mr. Vaibhav Bhargava, Adv.
 Mr. Abhimanyu Yaduvanshi, Adv.

For respondent No.5 : Mr. P.C. Bhandari, Adv.
 Mr. Abhinav Bhandari, Adv.
 Mr. T.N. Sharma, Adv.

For respondent No.6 : Mr. P.S. Sirohi, Adv.

For respondent No.7 : Mr. Vimal Choudhary, Adv. &
 Mr. Yogesh Kumar Tailor, Adv.

For respondent No.8 : Mr. R.D. Rastogi, Additional Solicitor
 : General assisted by
 Mr. Devesh Yadav, Adv.



HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE PRAKASH GUPTA

DATE OF ORDER :: **24/07/2020**

BY THE COURT:(PER HON'BLE THE CHIEF JUSTICE)

1. Initially the writ petition was listed before the learned Single Judge on 16.07.2020. The leaned Single Judge on the prayer of the petitioners, vide order dated 16.07.2020 permitted them to incorporate the additional ground regarding the constitutional validity of the provision of Tenth Schedule of the Constitution of



India and the matter was accordingly placed before the Division Bench.

2. In the writ petition the petitioners have prayed for following reliefs:-

(A) Issue a writ of mandamus or an appropriate writ declaring clause 2(1)(a) to be violative of the basic structure of the Constitution of India and thus void;

(B) Issue a writ of certiorari or direction/order in the nature of a writ or certiorari to quash and set aside the Show Cause Notice dated 14.07.2020 issued by the Hon'ble Speaker of the Rajasthan Legislative Assembly.

(C) Issue a writ of mandamus or a Direction/Order in the nature of a Writ of Mandamus declaring/upholding the status of the Petitioners as Members of the Rajasthan Legislative Assembly – the House on account of them continuing to be members of the Indian National Congress as per the Explanation (a) to Para (2) of the Tenth Schedule of the Constitution of India.

(D) Issue a Writ of Mandamus or Direction/Order in the nature of a Writ or Mandamus declaring that alleged actions of the Petitioners as Members of the Rajasthan Legislative Assembly do not come within the purview of disqualification envisaged under Para (2) of the Tenth Schedule read with Article 191 of the Constitution of India.

(E) Issue a Writ, Order or Direction declaring Clause 2(1) (a) of the Tenth Schedule read with Article 191 of the Constitution of India ultra vires.

(F) Pass any other order deemed fit in the interest of justice and equity."

3. The facts of the instant case in nutshell are that the Assembly Elections in the State of Rajasthan were held on 07.12.2018 and the Indian National Congress party (in short 'INC') being the single largest party formed the Government under the Chief Ministership of Mr. Ashok Gehlot. The petitioner No.6, namely, Mr. Sachin Pilot was appointed as the Deputy Chief Minister. It is asserted that since the voices of the masses were not being heard by the Chief Minister, the petitioners had certain genuine grievances regarding the manner in which functioning of the



Government was being carried out. Being aggrieved thereby, the petitioners expressed their grievances against the Chief Minister. Sensing the brewing discontent, the Chief Whip called for a Legislative party meeting on 13.07.2020, without providing any specific agenda. Subsequently on the same day, following notice came to be issued by the Chief Whip, Congress Legislative Party,

Rajasthan Assembly:-

"NOTICE

JULY 13, 2020

Earlier on 13th July, 2020, a meeting was called of all members of the Congress Legislative Party (of the Rajasthan Assembly) at 10.30 am at the Chief Minister's residence at Jaipur.

Regrettably, it was noticed that some members deliberately choose to avoid attending the same despite full knowledge of the event.

However, in view of the exigencies of the emergent political situation prevailing in the State on account of repeated attempts at defections and to discuss and draw out a political strategy to address the same, another meeting of the Congress Legislative Party is being called at 10.0 AM tomorrow i.e. July 14, 2020 at the Fairmont Hotels and Resorts, 2, RIICO, Kukas, Jaipur.

You are requested to attend the meeting of the Congress Legislative Party. Any failure to participate without providing valid and adequate reasons in advance in writing to the undersigned, it will be deemed to be clear and categorical evidence of your intention to disassociate from the Indian National Congress and its ideology and will invite action as per the relevant statute and the Constitution of India.

This notice is being sent on the email addresses provided by the legislators and registered with the Rajasthan Assembly along with copies being served on SMS and Whatsapp as well.

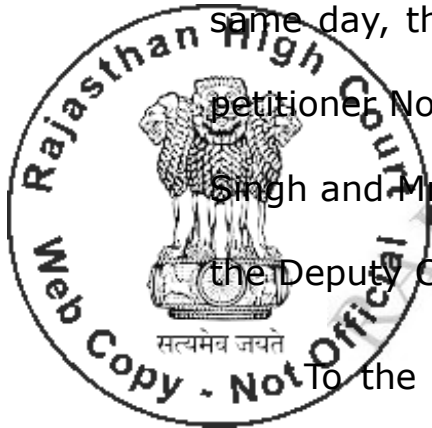
Sd/-

(Mahesh Joshi)"

4. It is further stated in the writ petition that it was also learnt that the Chief Minister has ordered an enquiry by the Special Operations Group (Rajasthan Police) in order to investigate the



petitioners, which is no more than a ploy to threaten the petitioners and the other MLAs from raising their voices against the leadership within the party. Through material available in public domain the petitioners were also given to understand that the MLAs were not allowed to move out of their respective houses and were constantly kept under the vigil of the local police. On the same day, the petitioners were also given to understand that the petitioner Nos.6, 4 and 19, namely Mr. Sachin Pilot, Mr. Vishvendra Singh and Mr. Ramesh Chand Meena respectively were removed as the Deputy Chief Minister and the State Ministers.



To the shock and surprise of the petitioners, the INC party through their Chief Whip filed a complaint on 14.07.2020 under Paragraph 2(1)(a) of the Tenth Schedule of the Constitution of India. Taking note of the said complaint, the respondent No.1 issued a notice on 14.07.2020, itself, against the petitioners seeking their explanation within two days of the issuance of the notice. In the meantime, the petitioner No.6 Mr. Sachin Pilot has also issued statements stating that he has no intention of leaving the Congress Party and he continues to extend his allegiance to the INC. The said notice dated 14.07.2020 is ex-facie bad in law and liable to be quashed at the threshold on the following grounds:-

(A) The complaint dated 14.07.2020 preferred by Dr. Mahesh Joshi as Chief Whip is based on the assumptions and surmises and the same has no factual ground to support the alleged apprehensions voiced therein.



(B) None of the petitioners have either by express or implied conduct indicated to the members of their constituencies and/or the public at large of their intention to leave or voluntarily gave up their membership to the INC.

(C) The complaint dated 14.07.2020 is bereft of a single utterance or any action on the part of the petitioners to indicate their intention to distance themselves as being members of the INC let alone, indicative of their intention to deliberately destabilize the elected Government by indulging in activities blatantly prejudicial to the continuance of the Government and/or acting openly against the interest of the INC.



(D) In a democratic set up, the actions of an elected representative of the people, who merely seeks to voice his disagreement with certain policies/decisions taken by some members of a party, does not amount to acting against the interest of the party, much less tantamount to indulging in activities prejudicial to the continuance of the Government.

(E) By no stretch of imagination, a healthy discourse of the pros and cons of one's own political party can amount to voluntarily giving up his membership as contemplated by Paragraph 2(a) of the Tenth Schedule of the Constitution.

(F) By not attending two party meetings convened by the Congress Legislative Party cannot tantamount to fall within the purview of Paragraph 2(a) or 2(b) of the Tenth Schedule of the Constitution, so as to make them liable to disqualification on the ground of defection. Non attending of party meetings and voicing a difference of opinion outside the House are matters between the



members and his party and have nothing to do with the deeming clause in the Tenth Schedule.

(G) The show cause notice dated 14.07.2020 is contrary to the Rajasthan Legislative Assembly Members (Disqualification on the Ground of Defection) Rules, 1989 (in short, 'the Rules of 1989) as the Rule mandates that the Hon'ble Speaker must provide 7 days notice to each member to the show cause notice.

Therefore the show cause notice dated 14.07.2020 calling upon the members to file their response on or before 17.07.2020 is clearly in violation of the mandated rules and procedures established by the Rajasthan Legislative Assembly.

(H) A similar complaint alleging defection on the part of its members by the Bahujan Samaj Party members was filed way back in the month of September, 2019 and no action has been taken on the same by the Speaker till date. However, in the instant case the Congress Legislative Assembly is seeking to impose sanctions upon the petitioners on sheer presumptions inasmuch as the complaint was filed on 14.07.2020 and show cause notice has also been issued on the even date of 14.07.2020.

(I) If a properly and duly elected member is deprived of his membership of the House without voluntarily resigning from the party merely on the whims and fancies of the leadership of his party, it would have dangerous consequences. Therefore, the reliance placed on **G. Viswanathan Vs. T.N. Legislative Assembly, (1996) 2 SCC 353**, by the INC party is misplaced.

(J) Even if a member is sought to be 'expelled' from his party in accordance with law, he would continue to be a member of the



said political party for all practical purposes in view of the deeming provision under Explanation (a) of Paragraph 2 of the Tenth Schedule.

(K) The aforesaid situation lends credence from the Parliamentary Debates relating to the Constitution (52nd amendment) Bill, 1985, by which the Tenth Schedule was introduced in the Constitution. In the draft bill, besides clauses (a) and (b), clause (c) had also been included to Paragraph 2 of the Tenth Schedule, which read as under:-

“(c) If he has been expelled from any political party in accordance with the procedure established by the Constitution, Rules or regulations of such political party.”

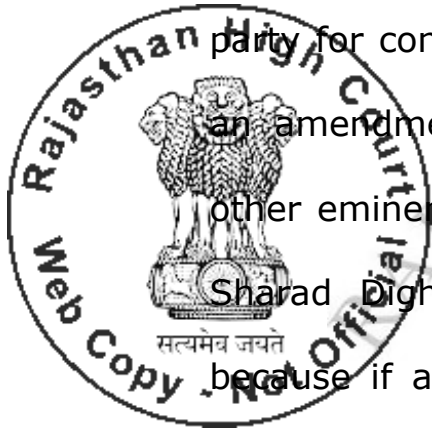
This sub-clause (c) was subsequently omitted from the final bill after debate in Parliament in which dangerous effect of the inclusion of such a sub-clause were pointed out by many members. As a matter of fact, this clause (c) was specifically deleted whilst passing the Act. In such circumstances, the intention of the Parliament is amply clear that no disqualification would attach to a member who had been expelled by his or her political party. Since the member is expelled from the political party, none of his or her act can post expulsion constitute an act of voluntarily giving up of membership of such political party. It is trite that when a provision was contained in a Bill/Ordinance, which preceded a legislative enactment, and such a provision is omitted from the statute, the omission must be presumed to be conscious and deliberate and given due weight. In this regard



reliance is placed on **Dr. Rashal Yadav Vs. State of Bihar & Ors. , (1994) 5 SCC 267.**

The then Law Minister Shri A.K. Sen had also observed that having regard to the consensus arrived at with respect to the controversy that was raised with regard to Paragraph 2(1)(c) which sought to disqualify persons who were expelled by their party for conduct outside the House, it has been decided to bring an amendment deleting the said provision. Speeches made by other eminent Parliamentarians also make the position clear. Shri Sharad Dighe had stated that the clause had to be deleted because if a member is to be expelled from a political party in accordance with the procedure for anything done outside the house, it would have created several practical problems and it would have given a handle specially to the bosses of smaller party. Professor Madhu Dandavate had stated that the Bill must not be a handle in the hands of the party caucus expelling party members arbitrarily for their honest dissent. There are enough instances in this political life of our country where merely for the expression of political dissent from a leader, people have been expelled.

(L) If it was not intention of the legislature to not include expelled members of a political party within the category of persons who could be clubbed with the category of persons who voluntarily resigned from membership of their parties, the same cannot be imported in the Tenth Schedule by virtue of the judicial pronouncement in **G.Viswanathan's case (supra)**. The Hon'ble Supreme Court in **Amar Singh Vs. Union of India, (2011) 1 SCC 210**, has also observed that the decision of





G.Viswanathan's case (supra) requires another look and thus

the following questions were referred to the Larger Bench:-

“(1) What is the status in either House of Parliament or State Legislatures of a member who is expelled from the party which set him/her up as a candidate for election?

(2) Will the provisions of X Schedule of the Constitution apply to such Member?

(3) Was the view taken in G.Vishwanathan case with regard to the status of the members in either House of the Parliament who had not voluntarily resigned from their party but had been expelled therefrom in harmony with the provisions of the X Schedule of the Constitution?

(4) In view of the fact that members of the two houses of Parliament, who are expelled from the membership of parties which had set them up as candidates in the election, are not referred to in the Tenth Schedule to the Constitution, was the decision in G. Vishwanathan case that they must be deemed to continue to belong to such party in view of Explanation (a) to paragraph 2(1) of the Tenth Schedule, a correct interpretation of the said provisions, having regard to the parliamentary debates on the Bill which became the Tenth Schedule.

(5) Can Explanation (a) to paragraph 2(1) of the Tenth Schedule to the Constitution be extended to include members of the two houses of parliament who are expelled from their parties?

(6) When a member of either House of Parliament is expelled by the party which had set him up as a candidate for election and he either joins another political party or forms his own party, can it be said that he had voluntarily given up his membership of the party in view of the legal fiction created by Explanation (a) to paragraph 2(1) of the Tenth Schedule.

(7) What is the status of an “unattached” member in either House of Parliament or in the State Legislatures?”

(M) The report of the committee on electoral reforms popularly known as the Dinesh Goswami Report, 1990 had recommended that the anti-defection law in the Tenth Schedule should be changed with respect to the following aspects:-

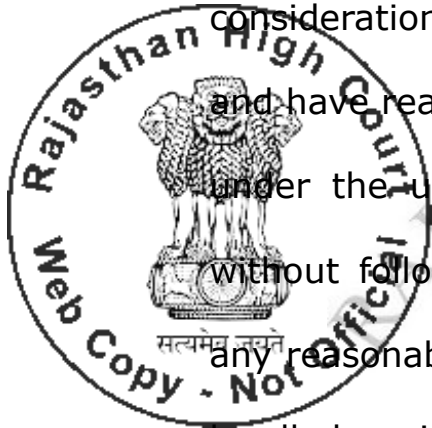


“(i) Disqualification provisions should be made specifically limited to cases of (a) voluntarily giving up of membership of a political party by an elected member and (b) voting or abstention from voting by a member contrary to his party direction or whip only in respect of a motion of vote of confidence or a motion amounting to no-confidence or money bill or motion of vote of thanks to the President’s address.”

(N) The impugned notice is based on *malafide* intentions and considerations of the respondent No.3. The petitioners apprehend and have reason to believe that the Speaker would disqualify them under the undue pressure of the Chief Minister on 17.07.2020 without following the procedure of law and without giving them any reasonable opportunity of hearing and refuting the allegations levelled against the petitioners in the show cause notice. It is the intention of the respondent No.3 to disqualify the petitioners from the membership of the House as early as possible and to give undue benefits to the Chief Minister.

(O) The impugned notice is without jurisdiction within the ambit of Tenth Schedule and Article 191 of the Constitution.

(P) Freedom of speech and expression is not only an integral part of Part-III (Article 14, 19 and 21) of the Constitution of India but is a part of the basic structure of the Constitution also. The expression “voluntarily giving up of membership of a political party” cannot be so widely construed so as to jeopardize the fundamental right of freedom and expression. Therefore, the allegations levelled in the complaint are imaginary, false and baseless. Mere expression of dissatisfaction or even disillusionment against the party leadership cannot be treated to





be a conduct falling within Paragraph 2(1)(a) of the Tenth Schedule.

(Q) Even if expression of views and opinions, however strongly worded, are treated to be a part of Paragraph 2(1)(a), the said provision would not stand the scrutiny and will have to be declared ultra vires of the basic structure of the Constitution of



(R) The very foundational facts based upon which the Speaker has issued notice under Tenth Schedule are the facts which, if not constitutionally construed in the aforesaid context, would render the provision itself unconstitutional.

5. Respondent No.4 submitted his preliminary reply to the writ petition.

6. The parties entered appearance through Counsels noted hereinabove and argued the matter physically as well as through Video Conferencing for admission.

7. Mr. Harish Salve, learned Senior Counsel appearing for the petitioners has submitted that Tenth Schedule of the Constitution of India makes provisions as to disqualification of the Members of the House of Parliament or Legislative Assembly on ground of defection. Paragraph 2 of this Schedule is in two parts, namely, Paragraph 2(1)(a) and Paragraph 2(1)(b) and in the instant case Paragraph 2(1)(a) is attracted. Paragraph 2(1)(a) envisages that a member of a House belonging to any political party shall be disqualified for being a member of the House if he has 'voluntarily' given up his membership of such political party. In the instant



case, the petitioners have not voluntarily given up their membership. They have a right to dissent against local leadership and agitate the grievances of the people of their constituencies and this right flows from the provisions of Article 19(1)(a) of the Constitution of India.

8. He further submitted that the petitioners have not joined any other political party. He referred to the notice dated 13.07.2020 issued to the petitioners, which evinces that the petitioners were not called inside the House. They were called to attend the meeting at Hotel Fairmont, Kukas, Jaipur. Notice has been given with *malafide* intention to disassociate the petitioners from the INC without providing adequate and valid reasons in advance. Mr. Salve thereafter referred to para 4 and 5 of the impugned notice dated 14.07.2020, wherein it has been stated that even in the absence of formal resignation from membership, an inference can be drawn from the conduct of a member that he has voluntarily given up his membership of the political party to which he belongs.

9. Learned Senior Counsel has submitted that in the complaint dated 13.07.2020 reliance has been placed on the case of **Rajendra Singh Rana Vs. Swami Prasad Maurya & Ors., (2007) 4 SCC 270**, where a request was made to the Governor to invite the leader of the opposition party to form a Government as against the advise of the Chief Minister belonging to their original party to dissolve the assembly and from this conduct an irresistible inference was drawn that 13 members had clearly given up their membership of BSP. Learned Senior Counsel





submits that in the present case the petitioners have not conducted themselves in any hostile or prejudicial manner to the interest of the INC and its Government in Rajasthan.

10. Learned Senior Counsel further contended that if one asks for change of leadership within his political party, it cannot be considered as voluntarily giving up his membership of a political

party. If one protests against the working of the Chief Minister in public or private, it is his right of free speech and right of his conscience.

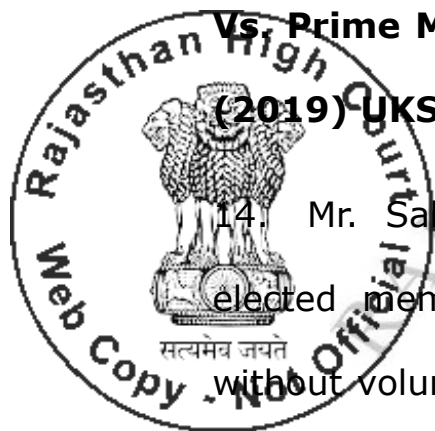
Mr. Salve further argued that if the Government is falling and one is going to support the invitation of another Government, that becomes the "floor crossing" because in that event it is replacing one Government by another. Thus, the notice given by the respondent No.1 in the present case is premature and unconstitutional.

12. Learned Senior Counsel also submitted that the facts of the present case would clearly reveal that the Speaker is not working like an independent Tribunal. On the contrary, he has issued notice dated 14.07.2020 only on the basis of complaint of the Chief Whip. He further submitted that the legislature clearly envisaged the need to provide for "floor-crossing" on the basis of honest dissent. In the present case, as many as 19 elected representatives have conducted themselves with a particular course of action and this fact by itself lends credence and reassurance to a presumption of their bonafides. Therefore, in the instant case the parameters of "floor crossing" are not fulfilled.





13. Mr. Salve has placed reliance on the judgment of the Hon'ble Supreme Court in **I.R. Coelho (Dead) by Lrs. Vs. State of T.N., (2007) 2 SCC 1**, and submitted that right of freedom of speech outside the House is taken away in the instant case, whereas the right of dissent cannot be taken away by issuing the impugned notice. He has also relied upon the judgment in **Ragina (Miller) Vs. Prime Minister (Lord Advocate and others intervening), (2019) UKSC 41**.



14. Mr. Salve further submitted that if a properly and duly elected member is deprived of his membership of the House without voluntarily resigning from the party, merely on the whims and fancies of the leadership of his party, it would have dangerous consequences. Therefore, the reliance placed on **G. Viswanathan (supra)**, by the INC is misplaced. In this regard, learned Senior Counsel has also fortified his submissions by placing reliance on the judgment of Hon'ble Supreme Court in **Amar Singh (supra)**, where it was held that decision in **G. Viswanathan's case (supra)** merits another look and the matter was referred to a Larger Bench on the questions referred to above.

15. Mr. Salve has vehemently submitted that the law and the pronouncements of law are evolutionary process. While **Kihoto Hollohan Vs. Zachillhu & Ors., 1992 SCC Supp. (2) 651**, was decided in light of the situation that stood at the relevant time in the year 1992, the basic structure doctrine as understood then has been considered without considering the provisions of Article 19 as a part of the basic structure of the Constitution of India.



16. He further submitted that after the Constitutional Bench judgment rendered by the Hon'ble Supreme Court in **I.R. Coelho (supra)**, it can no longer be argued that Article 19 does not form part of the basic structure of the Constitution. Consequently, he submits that Paragraph 2(1)(a) of the Tenth Schedule has to be tested against the basic structure doctrine, as presently existing in

law. In other words, Mr. Salve submits that the circumstances as made in the complaint made by the Chief Whip to the Speaker essentially rely upon the absence of the petitioners from the two legislative party meetings convened by the Chief Whip. He contends that if the meeting is convened by the Chief Whip, it cannot be held to be a whip, as understood in Parliamentary practice since admittedly the Assembly is not in session, nor any Assembly Session has been convened as of date. Apart from that, he submits that mere absence of a member of the Legislative Assembly from the meeting of the legislative party ought not to be treated as an act of voluntarily giving up the membership of the political party.

17. It is further submitted by Mr. Salve that in **Kihoto Hollohan (supra)** itself, the Constitutional Bench of the Hon'ble Supreme Court upheld the right of 'dissent' so far as discussion in the select committee are concerned. In this regard, the learned counsel has relied upon the following observations of the Hon'ble Supreme Court in **Kihoto Hollohan's case(supra):-**

"Paragraph 2 (1) (b) deals with a slightly different situation i.e. a variant where dissent becomes defection. If a Member while remaining a Member of the political party which had set him up as a candidate at the election, votes or abstains from voting contrary to "any direction" issued by the political party to which



he belongs or by any person or authority authorised by it in this behalf he incurs the disqualification. In other words, it deals with a Member who expresses his dissent from the stand of the political party to which he belongs by voting or abstaining from voting in the House contrary to the direction issued by the political party.”

18. He further argued that in **Kihoto Hollohan (supra)**, the Hon'ble Supreme Court reiterated the power of judicial review under Article 32, 226 and 227 of the Constitution and culled out certain eventualities and/or grounds on which challenge to the order of the Speaker can be entertained.

19. Mr. Salve contends that the assumption of authority by the Speaker, in the facts and circumstances of the case, proceeds on a footing that refusal by the petitioners and/or absence of the petitioners from the legislative party meeting can amount to an irresistible inference that the petitioners have by their conduct indicated their desire to voluntarily give up their membership from the Indian National Congress party.

20. Mr. Salve submits that at the very best, on the reading of the complaint itself, it would clearly indicate that the complainant has tried to assert that from the absence of the petitioners from the legislative party meeting, such an inference ought to be drawn and based on such assertion the Speaker has proceeded to issue notice to the petitioners. Consequently, it is submitted by Mr. Salve that the absence of the petitioners from the legislative party meeting, at the very best, would indicate 'dissent' and not 'defection'. He further asserts that Tenth Schedule was brought into the Constitution and is termed as Anti-Defection Law. He vehemently submits that for 'defection' to take place, there has to



be evidence of conduct, *prima-facie*, indicating 'crossing of floor' and consequently, he submits that until and unless the conduct of nature which is akin to 'crossing of floor' (defection) takes place, no complaint can be lodged far less entertained by the Speaker.

21. Learned Senior Counsel Mr. Salve further submits that disagreement with the party leader and/or disagreement with the Chief Minister and/or a demand for removing the Chief Minister by itself or cumulatively cannot be deemed to be even *prima-facie* defection.

22. Mr. Salve further submitted that denying a member of the Assembly a right of 'dissent', would itself tantamount to throttling the Parliamentary Democracy. 'Dissent' by itself cannot be treated to be 'defection' until and unless the act akin to 'floor crossing' occurs. He asserts that in the present case, no allegation is available on the record, far less substantiated by highlighting any form of 'defection' and at the very highest or very best are instances of 'dissent'.

23. Mr. Salve therefore, submits that this Court needs to examine in its jurisdiction under Article 226 of the Constitution the width and the scope of Paragraph 2(1)(a) of the Tenth Schedule on the touchstone of the basic structure doctrine, as evolved and as laid down by the Hon'ble Supreme Court from time to time.

24. Mr. Mukul Rohatgi, learned Senior Counsel appearing for the petitioners while relying upon the judgment in **Supreme Court Advocates-on-Record Association & Anr. Vs. Union of India, (2016) 5 SCC 1**, has submitted that if free dissent is construed to give up membership of the political party, it would tantamount to





invasion over the right of free speech and expression enshrined in Article 19(1)(a) of the Constitution. He further submitted that the Speaker has no jurisdiction to issue any notice under Paragraph 2(a) of the Tenth Schedule. The impugned notice is non-speaking, *malafide* and it also does not speak about the situation to recoup the Chief Minister. He further submits that the manner in which the notice is issued and the notice itself is suspicious. Relying upon the judgment in **Kihoto Hollohan's case (supra)**, learned Senior Counsel vehemently argued that under the Indian Constitutional dispensation, the power to decide a disputed disqualification of an elected member of the House is not treated as a matter of privilege and the power to resolve such electoral dispute is clearly judicial and not legislative in nature.

25. Mr. Rohatgi further submitted that challenge to the impugned notice is mainly on the count that notice is dated 14.07.2020 and the complaint of the Chief Whip is also of dated 14.07.2020 and in this way, the notice has been issued within a space of few hours only. That apart, in the present time when COVID-19 is spreading, only three days time has been given to the petitioners to submit their reply, which is contrary to Rule 7 of the Rules of 1989, which provides for seven days time to the member to submit reply to the Speaker. Even otherwise, there are as many as 19 petitioners/members and everyone has to consult his lawyer and, therefore, it is not possible for any petitioner to give proper reply to the notice within a short period of three days. No other conclusion is possible that notice is *malafide*.

26. Learned Senior Counsel has submitted that *malafide* of the Speaker is established from the fact that one Mr. Madan Dilawar,



a Member of the Assembly filed a complaint nine months ago seeking disqualification of certain existing Members and in that case the Speaker did not take any action against any erring Member. He has relied upon the judgment in **Balchandra L. Jarkiholi & Ors. Vs. B.S. Yeddyurappa & Ors., (2011) 7 SCC 1**. He has also relied upon the judgment in **Keisham Meghachandra Singh Vs. Hon'ble Speaker, 2020 SCC Online**

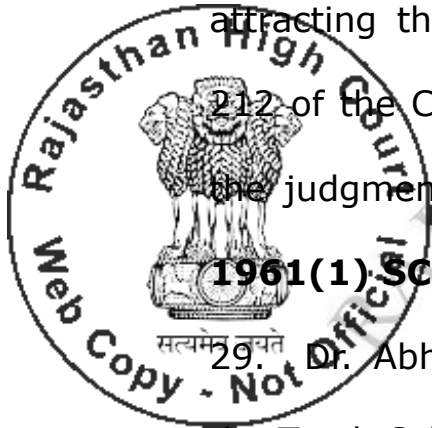
SC 55. It has been held in the said case that time has come that the Speaker should be replaced because he is normally belonging to a political party. He further submitted that the Speaker has surrendered his impartiality, therefore, is incapacitated to be the adjudicator in this case. Therefore, this Court may exercise its jurisdiction vested by Article 226 of the Constitution even at the stage of issuance of notice by the Speaker. In this regard, he placed reliance on the judgment rendered in **Deepak Bajaj Vs. State of Maharaashtra & Anr., (2008) 16 SCC 14**.

27. Per contra, Dr. Abhishek Singhvi, learned Senior Counsel appearing for respondent No.1 has vehemently argued that only a show cause notice has been given to the petitioners, therefore, having regard to the constitutional intendment and the status of repository of the adjudicatory power entrusted to the Speaker, judicial review at this stage is not permissible. As a matter of fact, the present writ petition is premature. Nevertheless, the fact that a member of the legislative assembly has incurred disqualification on account of defection is a matter which falls within the domain of the Speaker only and the Courts cannot give any verdict over the same. Therefore, the present petition under Article 226 of the Constitution is not maintainable. In this regard, the learned Senior



Counsel has placed reliance on the judgments in **Kihoto Hollohan (supra)** and **Shri Amrita Rawat & Ors. Vs. Speaker, Legislative Assembly & Ors., (Writ Petition No.791-92 of 2016), 2016 SC Online Utt 377.**

28. Learned Senior Counsel also argued that the proceedings before the Speaker are proceedings in the House, thereby attracting the bar from interference by the Courts under Article 212 of the Constitution. In this regard, he has placed reliance on the judgment in **Pandit MSM Sharma Vs. Dr. Krishna Sinha, 1961(1) SCR 96.**



29. Dr. Abhishek Singhvi further argued that the provisions of the Tenth Schedule apply not only to the conduct within the House but also apply to the conduct outside the House. Therefore, the contentions raised on behalf of the petitioners that the Tenth Schedule proceedings are intended only for floor crossing or defiance of the whip or proceedings within the House are wholly unacceptable. All the activities and conduct of the petitioners and the issue whether the petitioners have given up the membership of the INC are still under consideration of the Speaker and the petitioners and the respondent Nos.2 and 4 would be free to submit their respective versions before the respondent No.1.

30. Dr. Abhishek Singhvi further argued that before issuing the show cause notice dated 14.07.2020, the respondent No.1 has fully applied his mind and all the relevant facts relating to the conduct of the petitioners have been incorporated in the show cause notice. A sufficient time of three days has also been provided to the petitioners to appear before the Speaker and submit their comments. Rule 7 of the Rules of 1989 nowhere



provides a mandatory time period of 7 days for filing response to the show cause notice. This rule merely contemplates that the member may submit his response to the Speaker within a period of 7 days or any time extended by the Speaker. In addition to it, the time for filing comments has already been extended till 24.07.2020, thus, reasonable opportunity of defending has been

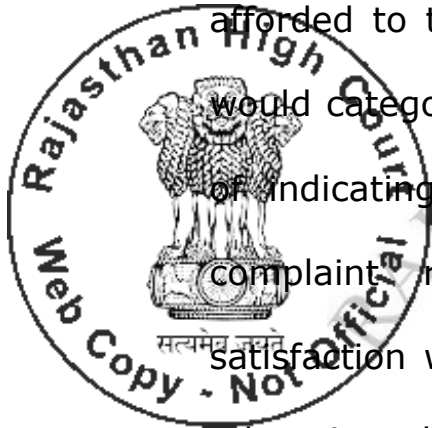
afforded to the petitioners. A bare perusal of the Rules of 1989 would categorically show that there is no requirement whatsoever of indicating any reasons in the notice. On the basis of the complaint received from respondent No.4, a *prima-facie* satisfaction was recorded and impugned notice was issued. Even

otherwise, the Rules of 1989 are merely directory in nature and not mandatory. The principle of natural justice contained in Tenth Schedule is completely flexible, contextual and its determination cannot be through a straight jacket formula. In this regard he has relied on **Jagjit Singh Vs. State of Haryana, (2006) 11 SCC 1.**

31. He has also argued that the petitioners have imputed *malafide* on the part of the Speaker but their pleadings in this regard are very vague and casual. The burden of establishing malafide is on the petitioners and no proof in support of these allegations has been placed on record, therefore, allegations are misplaced. In this regard, he has relied upon the judgment in **E.P.**

Royapa & Ors. Vs. State of Tamil Nadu, 1974(2) SCR 348 and **Express Newspaper Vs. Union of India, 1986(1) SCC 133.**

32. Learned Senior Counsel Dr. Abhishek Singhvi has relied upon the judgments in **G. Viswanathan Vs. T.N. Legislative Assembly (supra)** and **Ravi. S. Naik Vs. Union of India &**





Ors., 1994 SCR (1) 754. In these case, it was held by the Hon'ble Supreme Court that the act of voluntarily giving up the membership of the political party may be either express or implied. When a person who has been thrown out or expelled from the party which set him up as a candidate and got elected, joins another (new) party, it will certainly amount to his voluntarily giving up the membership of the political party which had set him up as a candidate for election as such member.

33. He further placed reliance on the judgment in **Dr. Mahachandra Prasad Singh Vs. Chairman, Bihar Legislative Council & Ors., (2004) 8 SCC 747.** In the said case a Member of Legislative Council elected to Bihar Legislative Council on the ticket of INC was found to have contested parliamentary election as an independent candidate. In such circumstances the Chairman's findings that the said member had given up the membership of said party was upheld by the Supreme Court. Therefore in that case, a member was disqualified under the Tenth Schedule for his conduct off the floor of the House.

34. Dr. Abhishek Singhvi has submitted that judicial review/interference during pendency of disqualification proceedings at interim or pre-adjudication stage is impermissible subject to exceptions carved out in **Kihoto Hollohan'a case (supra)**. In the said case in para 42 the Hon'ble Supreme Court has held as under:- .

"42.....However, having regard to the Constitutional Schedule in the Tenth Schedule, judicial review should not cover any stage prior to the making of a decision by the Speakers/Chairman. Having regard to the constitutional intendment and the status of the repository of the adjudicatory power, no quia timet actions are permissible, the only exception for any



interlocutory interference being cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repercussions and consequence.”

35. In this regard, Dr. Singhvi also relied upon the judgment in **Speaker, Haryana Vidhan Sabha Vs. Kuldeep Bishnoi & Ors., (2015) 12 SCC 381.**

36. He has further relied upon the judgment in **Speaker, Orissa Legislative Assembly Vs. Utkal Keshari Parida, (2013) 11**

SCC 794 In that case, it was held that rules vest the Speaker of the House with the authority to decide the question as to whether a member of the House has become subject to disqualification under Tenth Schedule of the Constitution. In this regard, learned

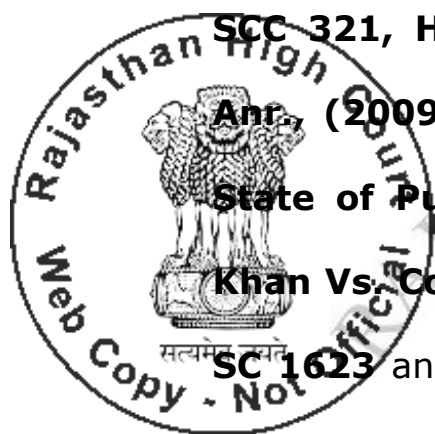
Senior Counsel has relied upon paragraph 46 of the Constitutional Bench judgment of the Hon'ble Supreme Court in **Kihoto Hollohan (supra)**, which reads as under:-

“46. It would, indeed, be unfair to the high traditions of that great office to say that the investiture in it of this jurisdiction would be vitiated for violation of a basic feature of democracy. It is inappropriate to express distrust in the high office of the Speaker, merely because some of the Speakers are alleged, or even found, to have discharged their functions not in keeping with the great traditions of that high office. The Robes of the Speaker to change and elevate the man inside.”

37. Dr. Abhishek Singhvi, learned Senior Counsel further argued that when constitutional validity of statutes or rules framed thereunder is challenged, the Courts must be reluctant to pass interim orders. If Courts find that the statute is unconstitutional or rules framed thereunder are unconstitutional, then the Court can strike down such law or rules, but operation of such statute cannot be made ineffective by passing interim orders. Learned counsel also argued that when a case is referred to larger bench



for decision, the other proceedings involving same issue during pendency of reference would not remain stayed till decision of Larger Bench. In support of his submissions, he has relied upon the judgments in **T.Govindaraja Mudaliar Etc. Etc. Vs. The State of Tamil Nadu & Ors., (1973) 1 SCC 336, Ashok Sadarangani & Anr. Vs. Union of India & Ors., (2012) 11 SCC 321, Harbhajan Singh & Anr. Vs. State of Punjab & Anr., (2009) 13 SCC 608, Smt. Somawanti & Ors. Vs. The State of Punjab & Ors., AIR 1963 SC 151 and Md. Ayub Khan Vs. Commissioner of Police, Madras & Ors., AIR 1965 SC 1623 and Health For Millions Vs. Union of India & Ors., (2014) 14 SCC 496.**



38. Dr. Singhvi further submitted that the Hon'ble Supreme Court in **Kihoto Hollohan (supra)** had considered the constitutional validity of the Tenth Schedule on the touchstone of basic structure doctrine. In this regard, he has relied upon para 21 of the judgment in **Kihoto Hollohan's case (supra)**, which reads as under:-

"21. The contention that the provisions of the Tenth Schedule, even with the exclusion of Paragraph 7, violate the basic structure of the Constitution in they affect the democratic rights of elected Members and, therefore, of the principles of Parliamentary democracy is unsound and is rejected."

39. Dr. Singhvi has, therefore, prayed to dismiss the writ petition and the stay application at the threshold.

40. Mr. Devadatt Kamat, learned Senior Counsel appearing for respondent No.4 (Chief Whip) along with Mr. A.K. Bhandari and Mr. N.K. Maloo, learned Senior Counsels, while supporting the



submissions advanced by learned Senior Counsel Dr. Abhishek Singhvi, has submitted that a *quia timet* action in regard to an action sought to be taken by the Speaker under the Tenth Schedule is absolutely prohibited. Therefore, the challenge to the impugned notice is not maintainable. There are a catena of judicial decisions including that of Hon'ble Supreme Court which have refused to entertain a writ petition challenging the show cause notice issued by the Speaker. In this regard, learned Senior Counsel has relied upon **Col. (Retd.) Devinder Sherawat Vs. Delhi Legislative Assembly, WP(C) No.812/2019.**



41. Learned Senior Counsel Mr. Kamat further submitted that the petitioners have challenged the constitutional validity of Paragraph 2(1)(a) of the Tenth Schedule subsequent to the filing of the original petition, whereas the so called challenge is wholly covered against the petitioners by the judgment in **Kihoto Hollohan (supra)**. The very ground of freedom of speech and expression, the right to dissent and principle of intra-party democracy urged on behalf of the petitioners were expressly considered and rejected by the Hon'ble Supreme Court in the case of **Kihoto Hollohan (supra)**. Therefore, the challenge by the petitioners to the above constitutional provisions on the same grounds after nearly 30 odd years is totally impermissible and a mischievous attempt to lend life to a lifeless matter. Once the constitutional validity was upheld by the Hon'ble Supreme Court, there was no question of subsequent writ petition being filed. In this regard, he has placed reliance on the judgment in **Omprakash Verma Vs. State of A.P., (2010) 13 SCC 158.**



42. Learned Senior Counsel further submitted that merely because the constitutionality of the provision has been raised in the writ petition, it cannot be a sequitur that the proceedings under the statute sought to be challenged cannot be allowed to proceed. In this regard, he has placed reliance on the judgment of the Hon'ble Supreme Court in **A.C. Aggarwal Vs. Ram Kali, 1968 (1) SCR 205, Independent Court Vs. Union of India, (2017) 10 SCC 800.**

43. Mr. Kamat has also relied upon the judgment in **Shrimanth Balasahib Patil Vs. Karnataka Legislative Assembly, (2020) 2 SCC 595**, wherein the main allegation against the MLAs was that they did not participate in the meetings of the party and the Assembly session held from 06.02.2019 onwards and conduct of all the aforesaid members was in violation of the whip issued by the INC in this regard. The Hon'ble Supreme Court held that the Speaker in our view had concluded on material and evidence that the members have voluntarily given up their membership of the party, thereby accruing disqualification in terms of the Tenth Schedule, which cannot be reviewed and evaluated in the writ petition.

44. Mr. A.K. Bhandari, learned Senior Counsel appearing for the respondent No.4 submits that the writ petition is not maintainable at the stage of issuance of notice by the Speaker and in this regard he has placed reliance on the judgment dated 05.03.2012 passed by the Division Bench of the Rajasthan High Court in **D.B. Special Appeal(Writ) No.630/2010, Jaswant Singh Gurjar Vs. The Hon'ble Speaker, Rajasthan Vidhansabha** and the



judgment dated 04.08.2010 passed by the Single Bench of the Rajasthan High Court in **S.B. Civil Writ Petition No.4991/2010, Jaswant Singh Gurjar Vs. The Hon'ble Speaker Rajasthan Vidhansabha Jaipur.**

45. As per the contentions raised on behalf of respondent No.4, the petitioners acting in consultation with the BJP have left the State of Rajasthan and have gone away for nearly 10 days. They have lodged themselves in a hotel/resort in Manesar in Haryana, which is a BJP ruled State. The Lemon Tree Resort, where the petitioners were residing, had been turned into a Covid quarantine centre by the BJP Government of Haryana to keep them insulated.

Despite repeated requests from the top leadership at the Centre and the State of the INC, these petitioners did not return to their parent State and have not met the leadership of the INC either at Rajasthan or at Delhi. There are serious attempts made by these petitioners to offer allurements and bribes to the members of the INC to switch support to the BJP. There are allegedly audio conversation of the petitioners and the senior functionaries of the BJP, which have been aired by regional and national media channels and which are in public domain, which demonstrate that the petitioners in consult with the BJP have been trying to negotiate monetary deals in return for their alleged support to the BJP. In this regard, FIR No.48/2020 and 49/2020, dated 17.07.2020 have been registered at Police Station Special Operation Group (SOG), Jaipur under Sections 124A and 120B of the IPC. Therefore, prayer has been made to dismiss the writ petition at the threshold.





46. Mr. M.S. Singhvi, learned Advocate General, reiterating the submissions of Dr. Abhishek Singhvi and Mr. Devadatt Kamat, learned Senior Counsels, submits that the show cause notice is lawful and at this stage, the Hon'ble High Court has no jurisdiction to interfere with the proceedings initiated by the Speaker.

47. Learned Advocate General has relied upon the order dated 08.08.2019 passed by the Speaker, Legislative Assembly of NCT,

Delhi in **Saurabh Bhardwaj Vs. Devinder Sehrawat.**

48. On the contentions raised and urged at the hearing, the following questions fall for consideration by this Court:-

(i) Whether the judgment of the Hon'ble Supreme Court in **Kihoto Hollohan Vs. Zachillhu & Ors. ,1992 SCC Supp.**

(2) 651, has tested the constitutionality of Paragraph 2(1) (a) of the Tenth Schedule of the Constitution of India only with the touchstone of 'crossing over' or 'defection' and the Court was never called upon to answer, much less the question of intra-party dissent?

(ii) Whether, in the facts and circumstances of the present case, Paragraph 2(1)(a) of the Tenth Schedule of the Constitution, is violative, in particular to the basic structure of the Constitution of India including the fundamental right of freedom of expression guaranteed by Article 19(1)(a) of the Constitution of India and thus void?

(iii) Whether the expression of dissatisfaction or disillusionment and the strongly worded opinions against the party leadership can be a conduct falling within the scope of Paragraph 2(1)(a) of the Tenth Schedule of the Constitution?

(iv) Whether the foundational facts based upon which the Speaker issued notice, are the facts which if not constitutionally construed in the aforesaid context, would render the provisions itself unconstitutional?





(v) Whether the manner of exercise of jurisdiction of the Speaker has to be differentiated from the existence of jurisdiction of the Speaker to commence a proceeding against any legislator under Paragraph 2(1)(a) of the Tenth Schedule of the Constitution?

(vi) Whether 'whip' as an instrument of party discipline only applies for actions expected out of legislators inside the House?

(vii) Whether the Speaker is not in a position to adjudicate upon the said question of constitutionality as raised by the petitioners in this petition?

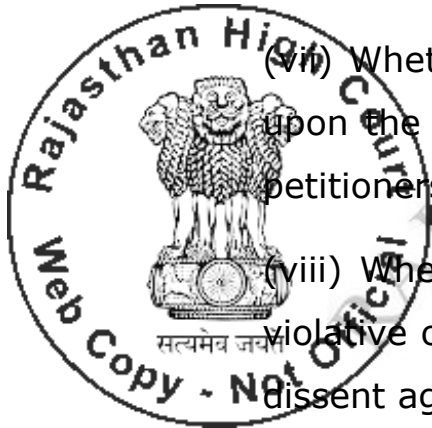
(viii) Whether the notice issued by the Speaker is *ex-facie* violative of the essence of democracy and aims at throttling dissent against persons in power?

(ix) Whether by way of the instant notice, the voice of the petitioners seeking a leadership change within the party expressed in the most democratic manner is sought to be stifled and the petitioners are threatened with abdication their right to express their reservations on the functioning of such leadership?

(x) Whether the words 'voluntarily given up his membership of such political party' in Paragraph 2(1)(a) of the Tenth Schedule take within their ambit, a criticism of the Chief Minister/manner of functioning of the State unit of the party, by an MLA, outside the House?

(xi) If the answer to issue No.(x) is in the affirmative, then, would not Paragraph 2(1)(a) be violative of the basic structure of the Constitution which includes Article 19(1) (a)?

(xii) Whether the action of the Speaker including the haste in issuing notice dated 14.07.2020 is not *malafide*, an abuse of power, in breach of natural justice and also betrays a foregone conclusion?





(xiii) Whether the judgment of the Hon'ble Supreme Court in **Kihoto Hollohans's case (supra)** can be understood so as to bar the High Court from examining the aforesaid questions?

49. In view of the questions framed hereinabove, we are of the considered view that the present writ petition is maintainable.

50. The writ petition is admitted on the prayers (A), (B) & (E) of the prayer clause of the writ petition.

51. So far as prayers (C) and (D) are concerned, the same are beyond the jurisdiction of this Court and therefore, the said prayers are hereby rejected.

52. After completion of filing of pleadings of the parties and the intervenors, Counsel for the parties shall be at liberty to file an application for early hearing of the writ petition.

53. Till then, the 'status quo' as exists today viz-a-viz impugned notices dated 14.07.2020 shall be maintained.

(PRAKASH GUPTA),J

(INDRAJIT MAHANTY),CJ

KAMLESH KUMAR /

सत्यमेव जयते