Delving into the verdict on the Shiv Sena issue

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The most interesting thing about the Supreme Court of India's judgment on the Shiv Sena issue is that both sides think that it is in their favour. The Chief Justice of India has apparently analysed the issues with clarity and reached conclusions with a great amount of ingenuity. However, it eludes ordinary citizens how each party can think that the statement of law contained in the judgment is in its favour. Therefore, it is necessary to analyse the judgment and find out what the top court of the land has actually said on the contentious issues brought up before it.

Floor test was wrong in law

The Maharashtra Governor's action in calling for a floor test has been very severely criticised by the Court, which characterised it as illegal. The judgment says, "In the present case the Governor did not have any objective material before him to indicate that the incumbent government had lost the confidence of the House and that he should call for a floor test. Hence, the exercise of discretion by the governor in this case was not in accordance with Law." The Court has said in so many words that the Governor is a constitutional authority and should not involve himself in any inner- or intra-party disputes. Well, it is logical for the Court to say that the resignation of Uddhav Thackeray as Chief Minister before the floor test has effectively prevented the Court from restoring his Chief Minister-ship and thus doing complete justice in this case. But there is no doubt that the Governor was wrong in law in calling for the floor test.

However, the Constitution Bench does not find anything wrong in the same Governor inviting Eknath Shinde to form an alternative government. It is of course the constitutional responsibility of a Governor to explore the possibility of an alternative government when the incumbent government falls. No one can fault the Governor for doing that exercise. But the action of the Governor in calling for a floor test which has been characterised as illegal by the Court, triggered the resignation of the Chief Minister. The fruit of this 'illegality' was the formation of an alternative government. It is rather naive to believe that the impact of that illegality evaporated the moment Uddhav Thackeray resigned. As it happened, the Governor had Mr. Shinde sworn in as Chief Minister, a member of the same Shiv Sena to which Mr. Thackeray belonged, with great alacrity.

As per the universally accepted convention, in all democratic countries, when a government falls, the constitutional head, Governor or President, enquires of the leader of the Opposition whether he could form a government. The Governor of Maharashtra did not ask the leader of the Opposition in the Assembly whether he was in a position to form a government. Instead, he chose another member of the Shiv Sena, whose government had just resigned, to form the government. This action of the Governor showed that he was a willing party to the ongoing inner-party conflict in the Shiv Sena.

The Court has in unambiguous terms stated that the Governors shall not enter the arena of inner- or intra-party conflicts. But that is what was precisely happening. Therefore, when the Constitution Bench approves the Governor swearing in the Shinde government, it misses out on the continuing impact of the "illegal" act of the Governor in calling for the floor test. The Supreme Court seems to have ignored the immorality of the whole exercise. The judgment lost its moral timbre here.

Validity of whip

Now to the question of disqualification of MLAs who defied the whip; the basic issue is whose whip is valid. As it happened, both the groups issued whips to all the members of the Shiv Sena Party and each group has moved disqualification petitions against the other group. It has been rightly held by the Court that the decision on a disqualification petition should be taken in the first instance by the Speaker. So, the matter of disqualification has been referred back to the Speaker. In this context, the most basic question that should be raised is whose whip is valid. The Supreme Court has stated clearly in the judgment that it is the political party which can appoint the whip as well as the legislative party leader, and not the legislative party. However, the judgment has imported needless confusion by stating that when a split occurs in a party, two factions arise and no single faction is the party.

As a matter of fact, the Tenth Schedule contemplates an original political party and a faction which arose as a result of a split in the original party when paragraph 3 contained the split provision. After the split provision was omitted, the original political party changes only when a merger under paragraph 4 takes place. When the original political party merges with another party, either that party becomes the original political party or a new party formed after such merger. The point is that there is always an original political party, which is the point of reference for the purpose of deciding the question of disqualification.

The Tenth Schedule does not contemplate two rival factions at any time. The explanation to paragraph (2)(1) is very crucial in determining the question. It says, "An elected member of a House shall be deemed to belong to the Political Party, if any, by which he was setup as a candidate for election as such member." This explanation clarifies the party affiliation of a defecting member. According to this explanation, all members of the Shinde faction belong to the original political party, the Shiv Sena led by Uddhav Thackeray. It must be made clear that under the Tenth Schedule, Mr. Thackeray's party is not a faction; it is the original political party. Going by the judgment, it is this party which can issue a valid whip. So, all those members who defied Uddhav Thackeray's whip are liable to be disqualified. It is not clear why the judgment did not deal with the above explanation to paragraph (2)(1). So long as this paragraph is in operation, the Speaker does not have to look for other evidence to decide which party can issue a valid whip. It is the original political party which can issue the whip.

The purpose of the anti-defection law is to punish the defecting legislators and protect political parties from being destabilised. The purpose of paragraph 15 of the symbols order is to decide which faction in a political party is that party in the event of a split. The anti-defection law does not recognise any split. It disqualifies all the members who voluntarily give up the membership of the party or who defy the whip issued by the party. The Speaker is not called upon to decide which faction is the real party. The law settled that question through the paragraph (2)(1) (explanation).

The judgment lacks clarity where it says, "the effect of the deletion of Para 3 is that both factions cannot be considered to constitute the original political party". The Speaker needs to decide the question of defection on the basis of the above paragraph. The Election Commission of India (ECI) may follow its own criteria to decide which faction is the party. The Speaker has to decide which legislator has defected from the original political party on the basis of the Tenth Schedule. The ECI decides it on the basis of tests fashioned by it.

The judgment creates a certain amount of confusion by talking about factions and the need for the Speaker to decide which faction is the real party. The Supreme Court could have decisively stated that it is Uddhav Thackeray's party which is the original political party and that party alone could issue a valid whip. If it had said so, Mumbai would not have been in such a state of confusion as it finds itself in today.

Despite an overall analysis of issues with clarity, the judgment creates some confusion by talking about factions and the need for the Speaker to decide which faction is the real party

A Court recall that impacts the rights of the accused

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The top court's order seeking to recall its decision in the Ritu Chhabaria case would deviate from fundamental principles of criminal procedure

The Supreme Court of India's order on May 1, seeking to recall its own decision in *Ritu Chhabaria vs Union of India* upon the insistence of the Solicitor-General of India, Tushar Mehta, that central investigation agencies were 'facing difficulties', has caused concern among legal professionals. Besides the questionable legality of the Court 'recalling' its own decision, what is of concern too is how this order would impact the rights of the accused to be released from custody. On May 12, in its interim order, the Supreme Court clarified that courts could grant default bail independent of and without relying on the Ritu Chhabaria judgment. However, the Court's decision to suspend the rights of defendants in criminal cases would lead to further erosion of the constitutional rights of the accused and deviate from fundamental principles of criminal procedure.

Right to default bail

The right to statutory bail, often known as default bail, is available to accused persons in cases when the investigating agency fails to complete its investigation within the stipulated time. Under Section 167(2) of the Code of Criminal Procedure (CrPC), the maximum time available to investigators is 60 or 90 days, depending on the seriousness of the offence. If the authorities are unable to complete the investigation within this time period, the accused can seek to be released from custody by applying for default bail under the first *proviso* to Section 167(2) of the CrPC. Notably, the 'default' characteristic of this bail comes from the fact that the application is unrelated to the merits of the case, and is designed to prevent long-term detention of the accused.

The right to default bail has been characterised by the Court in multiple judgments as an indefeasible right, flowing from Article 21 of the Constitution which guarantees the right to life and personal liberty. Therefore, in cases where the investigating authorities attempted to circumvent this procedure, the Court rightly called out these tactics and refused to extend custodial detention of the accused. In *Achpal vs State of Rajasthan* (2018), the Court held that an investigation report, albeit complete, if filed by an unauthorised investigating officer, would not bar the accused from availing default bail. In *S. Kasi vs State* (2020), the Court further stated that even during the COVID-19 pandemic, the investigating agencies would not be allowed any relaxation towards computing the maximum stipulated period of investigation, which could lead to additional detention of the accused.

This interpretation draws from the history of Section 167 of the CrPC, which has its roots in a recommendation of the 41st Report of the Law Commission. Under the older version of the CrPC, accused persons could be detained for a maximum of 15 days. Noting the abuse of this provision by the police, who kept the accused under extended periods of custody by misusing other provisions pertaining to trial, the Law Commission recommended extending the period for which an accused could be detained in custody. This found its way into the CrPC through an amendment in 1978. To counter the powers granted to investigating authorities through extended detention, a provision for statutory bail was also introduced so as to ensure that the accused is not detained in custody for long periods of time.

Here too, not a bar

Unfortunately, these protections that were guaranteed to the accused were also whittled away in practice, as investigating authorities routinely filed incomplete or supplementary charge sheets within the 60/90 day period, to prevent the accused from seeking default bail. In other instances, the investigating authorities would file charge sheets, incomplete or otherwise, after the 60/90 day period, but before the default bail application could be filed by the accused. The Supreme Court's decision in *Ritu Chhabaria* delegitimised such illegal practices and held that incomplete charge sheets filed by the police would not bar an accused from applying for default bail. The Court emphasised that the preliminary or incomplete nature of these police reports revealed that the investigation was not complete.

Most importantly, in *Ritu Chhabaria*, the Court did not lay down any radically new proposition. Rather, it drew from prior judgments, such as *Uday Mohanlal Acharya v. State of Maharashtra*, which delineated the constitutional foundations of the right of an accused to avail statutory bail. Thus, *Ritu Chhabaria* did not create any additional hurdles in investigation. Rather, highlighting the indefeasible nature of the right to seek default bail, the Court in *Ritu Chhabaria* simply reiterated that incomplete charge sheets could not prohibit the accused from seeking to be released on default bail.

This is further seen in other judgments which have deviated from *Ritu Chhabaria* on questions of fact. For instance, in *Jasbir Singh* (2023), the Supreme Court held that a complete charge sheet filed within time could not be rejected because the investigation did not have sanction. Given these possibilities, it remains unclear as to why the Court would want to consider the possibility of recalling the judgment on legally tenuous grounds.

This decision is particularly alarming because the right to default bail, which has been interpreted so far as flowing from the Indian Constitution, could possibly be made subservient to concerns of 'difficulties' faced by investigative authorities. What makes the matter even more serious is the Supreme Court also agreed to defer decisions on default bail for accused persons across the country which would have been decided as per *Ritu Chhabaria*. Given the serious implications of this judgment on the constitutional rights of the accused, it is imperative that the three-judge bench of the Supreme Court hearing this matter does not sacrifice procedural propriety at the altar of administrative convenience.