

ISSN: 2582-6433



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed 6th Edition

**VOLUME 2 ISSUE 7**

## **DISCLAIMER**

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis



IJLRA

## **EDITORIAL TEAM**

### **EDITORS**

#### **Megha Middha**



*Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar*

*Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can*

*bring a change to the society*

#### **Dr. Samrat Datta**

*Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board*



## Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC - NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March

14th, 2019

## Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



## Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research

methodology and teaching and learning.

## **ABOUT US**

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS  
ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

# **Case Commentary**

## **Kihoto Hollohan vs Zachillhu And Others**

### **Supreme Court of India**

*Authored by- Saahen Sharma*

**Equivalent citations : 1992 SCR (1) 686, 1992 SCC Supl. (2) 651**

**Bench: Sharma, L.M. (J), Venkatachalliah, M.N. (J), Verma, Jagdish Saran (J), Reddy, K. Jayachandra (J), Agrawal, S.C. (J)**

### **Overview of the Case**

The case relates to the anti-defection law and the petition involved in this case was instituted in response to the Fifty-Second Amendment of the Constitution passed in 1985.

As per the Constitution (Fifty-Second Amendment) Act, 1985, the tenth schedule was inserted which laid down the terms for the disqualification of a member of either house of the Parliament or the state legislature, who has defected from being a Member of the House. As per the second paragraph of the tenth schedule, a member of a house would ensure disqualification if—

- (a) He voluntarily gives up his membership in the party through which he became a candidate at the elections.
- (b) If he without obtaining the prior permission of his belonging party votes or abstains to vote, which acts contrary to any direction issued by the party, where such a vote has not been accepted by the party within 15 days of such vote or abstention.
- (c) If the member gets so elected, who was set up by any political party joins a different political party after the election?
- (d) If the nominated member joins any other political party after the expiry of six months from the date, he took his seat in the parliament/state assembly.

Now, paragraph 6(1) of the schedule states that the question of disqualification shall be put in front of the Chairman/Speaker of the House for a decision, where his decision would be final and cannot be challenged.

Furthermore, paragraph 7 states that no court shall have jurisdiction in respect of any matter connected with the disqualification of the member of the House.

This schedule thus attracted many petitions before various high courts and the Supreme Court challenging the constitutional validity of the amendment.<sup>1</sup>

## The Main Issue of the Case

The petitions filed were mainly because paragraph 7 of the Tenth Schedule aimed to make a change in Chapter IV of Part V and Chapter V of Part VI of the Constitution since it takes away from the Supreme Court and the High Courts the jurisdiction and power laid down in Art 136 and Art 226 and 227 of the constitution and takes away the court's power of judicial review and that the very concept of a disqualification a member for defection is violative of the fundamental values and principles underlying parliamentary democracy and violates a member's freedom of speech, right to dissent and is destructive of a basic feature of the Constitution. Additionally, paragraph 7 brings a change in operation and effect articles 136, 226, and 227 which would require ratification as per article 368, where non-compliance of the same would render the entire Bill vitiated which would invalidate paragraph 7, which as contended failed adherence to.<sup>2</sup>

Thus, the Tenth Schedule of the Constitution inserted by the Constitution (Fifty-Second Amendment) Act, 1985, which seeks to penalize and disqualify elective representatives for defecting from the party is violative of the fundamental principles of parliamentary democracy and is thus violative of the basic feature of the Constitution.<sup>3</sup>

## Dissenting Opinion

The dissenting opinion was delivered by Justice Lalit Mohan Sharma and Justice J.S. Verma

The dissenting opinion so delivered is presented below

---

<sup>1</sup> *Kihoto Hollohan Vs Zachillhu And Others* 1992 SCR (1) 686, 1992 SCC Supl. (2) 651

<sup>2</sup> *Kihoto Hollohan Vs Zachillhu And Others* 1992 SCR (1) 686, 1992 SCC Supl. (2) 651

<sup>3</sup> *Ibid*

The amendment act without ratification, as mandatorily required by art 368(2) of the constitution the stage of presenting the amendment bill for the assent of the president did not reach the so-required assent and thus the so-called assent was not established. Now, in the absence of ratification, it is not merely paragraph 7 but the entire 52nd Amendment Act, which shall be rendered unconstitutional. The constitutional power as mandated in Article 368 of the Constitution was not invoked and thus the Constitution cannot be considered to stand amended following the requirements for a Bill to become an Act.

J.Verma and J.Sharma further opined that the doctrine of severability cannot be applied to a Bill making a Constitutional amendment where any part falls under clause (2) of Article 368 which states that an amendment may be initiated only by the introduction of a Bill in either House of the Parliament and would become an act only when given assent by the President unless as per sub-clause(b) the bill seeks to make any change in Chapter IV of Part V, Chapter V of Part VI, or Chapter I or part XI, would require to be ratified by the legislature of not less than one-half of the states by resolution. The non-adherence to the mandatory language of Art 368 should therefore vitiate the amendment.

Furthermore, the Speaker's decision to disqualify a Member as per the Tenth Schedule is not immune from judicial scrutiny, it is thus an act that is legally void, and liable to be ignored.<sup>4</sup>

The democratic system envisages an independent adjudicatory authority responsible for resolving disputes related to the competence of a Member of the House. Justices state that the Speaker whose tenure is dependent on the continuous support of most of the House cannot be considered an impartial authority and does not satisfy the requirement of an independent authority. Thus, the finality and single-minded choice of the Speaker as the Sole arbiter in such matter is violative of an essential part of the basic feature of the Constitution.

Thus, as per their opinion, the entire 52nd amendment Act shall be declared unconstitutional and thus all decisions passed by the Speakers must be considered null and void<sup>5</sup>.

---

<sup>4</sup> *Kihoto Hollohan Vs Zachillhu And Others* 1992 SCR (1) 686, 1992 SCC Supl. (2) 651

<sup>5</sup> *Ibid*

# The Majority Opinion and the Judgement of the Supreme Court

The operative majority opinion was delivered as per Justice Venkatachaliah. J, Jayachandra Reddy. J and Agrawal. J is as explained below-

The court opines that paragraph 7 of the Tenth Schedule contains a provision that is independent of and stands apart from the main provisions of the Tenth Schedule. The provision intended to provide a remedy for the unprincipled and unethical defection is separate and is thus a severable part. The remaining part of the Tenth Schedule stands independent of paragraph 7. Thus, even if paragraph 7 requires ratification it cannot be justified that the rest of the provision of the amendment becomes constitutionally infirm all because one severable and independent provision failed to undergo ratification.

Furthermore, the contention that the provision even when paragraph 7 is excluded, violates the basic structure due to the reason that they affect the democratic right of the elected member, and the principle of parliamentary democracy is unsound and rejected. The provisions do not violate any rights or freedom under articles 105 and 194 and the provisions are salutary and intended to strengthen the Indian parliamentary system by curbing the unethical practices of defection.

The Speakers, and Chairman while exercising their powers act as Tribunal adjudicating rights and obligations and thus their decisions are within the ambit of being amenable to judicial review. However, keeping in mind, the Constitutional Scheme, the judicial review, having regard to the status of the repository of the adjudicatory power, no actions that wrongfully restrain or are 'quia timet' shall be permissible and cases of interlocutory disqualifications and suspension are liable to interference. <sup>6</sup>

Paragraph 6(1) seeks to impart finality to such decisions of the Speaker/Chairman, which stands valid, but the concept of statutory finality does not detract from or does away from judicial review under Art 136, 226, and 227 so far as infirmities based on violations of

---

<sup>6</sup> *Ibid*

constitutional mandates and noncompliance with Rules of Natural Justice and perversity are concerned.

Further, the court stated that the contention that entrusting the Speaker/Chairmen would itself vitiate the decision based on the likelihood of political bias is unsound. The Speaker/Chairmen hold pivotal positions in the Parliamentary democracy and are the guardians of the rights and privileges of the House, they are expected to take decisions in the interest of Parliamentary democracy. Thus, the vitiating of decisions taken by the Speaker based on arbitrariness and likelihood is unsound and is rejected.

Thus, the court in concluding their opinion stated that it is unnecessary and incorrect to pronounce that paragraph 7 of the Tenth Schedule of the Amendment Act violates the principles of judicial review and thus violates the basic structure of the constitution.<sup>7</sup>

## Case Comment

Now, looking at the law established via the 52nd amendment, the court's reasoning for the same seems somewhat biased toward the validity of the Tenth Schedule. The majority opinion states that paragraph 7 of the Schedule is in essence independent of and stands apart from the other provisions of the schedule. Looking at the schedule, we fail to see any such declarations being made by the Amendment Act, nor do we see a clause that states that paragraph 7 should be interpreted in an individual capacity. The court's reasoning that just one provision of the entire schedule stands apart from the rest when no such declarations have been made by the Act seems to be without basis. The one paragraph that stands apart just happens to be paragraph 7 which through its text, bars the courts from having jurisdiction in respect of any matter connected with the disqualification of a member of a house, which overreaches to bring a change in Chapter IV Part V and Chapter V part VI. Such a change should require ratification of the Amendment Bill before it becomes an Act, something the legislature failed to conduct. A reading of the reasoning presented by the majority opinion regarding the same paints a picture that the judiciary, to preserve the validity of the entire Amendment Act, separated the one provision that required ratification for the Bill to become an Act. Paragraph 7 gaining this

---

<sup>7</sup> *Kihoto Hollohan Vs Zachillhu And Others* 1992 SCR (1) 686, 1992 SCC Supl. (2) 651

status of independence allows the courts to sever it from the rest of the Amendment, resulting in the invalidation of the said paragraph but a validation of the rest of the Amendment. I thus fail to see the fundament behind the reasoning of the court for their reasoning.

Furthermore, the court in its judgment states that just because the post of a Speaker/Chairmen is of an elected individual, whose tenure is directly dependent on pleasing and gaining the votes of the majority of the House, it cannot be said that their decisions would be biased. The Speaker of the House is one of the most important positions in the Indian Parliamentary system. He is responsible for the decorum of the House and is the overall coordinator of all parliamentary debates. In such a position where your tenure is directly dependent on your popularity and ability to gain the maximum votes from the members of the House, it is reasonably difficult to deliver decisions regarding the defection of your voters in an unbiased manner. Given the current paradigm of Indian Society where officials at the highest level are corrupt and the Houses of Parliament are predominantly controlled by one party, it is difficult to disregard the bias that could arise regarding the defection status of a popular leader decided by the Speaker. Given the arduous task of introducing judicial review in such decisions, it is hard to believe that the Speaker would give an unbiased opinion against the very members who are responsible for electing him as speaker.

Additionally, given the scenario of the political crisis in states like Maharashtra, it can be said that the current paradigm of anti-defection law has failed to shore up the stability of elected governments. Considering the recent debacle of Shiv Sena Leader Eknath Shinde defecting from the party it can be said that the Amendment Act has had deleterious and undesired consequences regarding the defection status of Members of the House. Not only have governments fallen due to defection, but the defectors have not suffered any cautionary consequences. The current law allows for the Speaker to singlehandedly rule over the defection's proceedings, the beneficiary party can accelerate the proceedings using money and third-party agencies to facilitate the two-thirds threshold. Additionally, the voters also don't seem to be interested in the furnishing of justice by voting correctly against the defectors. Agreeing with Ruchi Gupta's arguments from her article *'The crisis in Maharashtra shows the anti-defection law to be ineffective, even counterproductive'*, it is obvious that politicians are adept at subverting the institutional processes to benefit their ends, with there being a high

probability for payoffs in support of the defectors<sup>8</sup>. Considering the Eknath Shinde case, where petitions by the MLAs of the Assembly were shut down since Shinde and his supporters could claim that they would not be subject to penalization for defecting since they represent the two-thirds of the Shiv Sena's strength and thus claim protection under the anti-defection law. In concurrence with Ruchi Gupta's opinion, the current legislation revolving around the anti-defection law undermined not just the very principle of representation by disregarding proper and honest representation and instead blindly favoring the party's stand has contributed to polarization in India by making it impossible to construct a majority on any issue outside party affiliation. The current anti-defection law instead of providing stability has facilitated the undermining of the democratic process and thus it is time the legislature makes a change to the anti-defection law.<sup>9</sup>

## Conclusion

This case legislates upon the validity of the 52<sup>nd</sup> Amendment Act of the Constitution. Petitions challenging the constitutional validity of the Amendment Act were received from across the country. The main contentions of the case revolved around paragraph 7 and paragraph 2 of the Tenth Schedule of the Amendment, where paragraph 2 conferred upon the speaker the power to decide and preside over the decision regarding the anti-defamation status of a member of the House, giving the speaker absolute power over the decision, where his decision shall hold finality and shall not be subject to external review. Further paragraph 7 conferred that in determining the defection status of a member of the House, the courts shall not have the power to intervene in any decision. The provisions were challenged on the basis that they violated the basic feature of the Constitution since the provisions took away the freedom of speech and the right to dissent and due to the reasons that proper procedure involved in passing of a Bill to make it an Act were not followed. The Court opined that the paragraph 2 did not in any way inhibit or impact the freedom of speech or the right to dissent. Furthermore, it was observed that paragraph 7 required ratification, and in the absence of which it was held to be

---

<sup>8</sup> Gupta, Ruchi. "Ruchi Gupta Writes: The Crisis In Maharashtra Shows The Anti-Defection Law To Be Ineffective, Even Counterproductive." *The Indian Express*, June 27, 2022.  
<https://Indianexpress.Com/Article/Opinion/Columns/Maharashtra-Political-Crisis-Anti-Defection-Law-Ineffective-7992778/>.

<sup>9</sup> *Ibid*

unconstitutional. The said paragraph was further held to be severable from the rest of the Schedule, due to which the rest of the Schedule and the Act were held Constitutionally valid. The other contentions like the Speaker would not be able to deliver unbiased and fair decisions and that imparting finality to the Speaker's decision would violate the concept of judicial review were shut down. All in all the Schedule was declared constitutional while removing paragraph 7 from the Schedule on the pretext that it failed to undergo ratification.

---

