GEHU LAW REVIEW

VOL. 2, ISSUE 2.

Mergers of Political Parties and Anti-defection Law in India: An Interpretational Conundrum

Milind Gawai

Assistant Professor

Maharashtra National Law University, Mumbai

Abstract

Defection of the elected members of a party is not only affects democracy but it has become a headache to the party too. It is a problem created by the Political parties which is taking toll on them. At the time of the commencement of the Constitution, there was silence about the political parties and the issue of defection. As the defection started to affect more, 52nd Constitutional Amendment Act 1985 added tenth schedule to the Constitution. One of the vexatious issues dealt with by the tenth schedule was the merger of the political parties in terms of Paragraph 4, but the issue assumes a different variant and keep continuing the problem of defection. Paragraph 2 of Tenth schedule arrested the menace of individual defection but the exception provided in 4 has been misused and the purpose of enacting tenth schedule seems to be defeated. The interpretation given to phrases used in paragraph 4 has worsen the problem. This paper seeks to explore the questions of interpretation given by especially the Supreme Court and at some places by the High Courts also.

1. Introduction

Political parties play an important role in the parliamentary form of Government. They give shape to policies which directly indirectly impacts society. Their role to mobilise public opinion is the crux of Indian politics. Political parties and their culture is very complex subject-matter of study. Their working when they are part of Government is complex by virtue of Constitutional provisions and laws thereunder. Political parties also grapple with

numerous problems and defection is the one of the most troubling. Defection of the elected members of a party is not only affects democracy but it has become a headache to the party too. It is a problem created by the Political parties which is taking toll on them. At the time of the commencement of the Constitution, there was silence about the political parties and the issue of defection. As the defection started to affect more, 52nd Constitutional Amendment Act 1985 added tenth schedule to the Constitution. One of the vexatious issues dealt with by the tenth schedule was the merger of the political parties in terms of Paragraph 4, but the issue assumes a different variant and keep continuing the problem of defection. Paragraph 2 of Tenth schedule arrested the menace of individual defection but the exception provided in 4 has been misused and the purpose of enacting tenth schedule seems to be defeated. The interpretation given to phrases used in paragraph 4 has worsen the problem. This paper seeks to explore the questions of interpretation given by especially the Supreme Court and at some places by the High Courts also.

First section of the paper throws the light on the nature of the problem of political defection since 1950 till the enactment of 52nd Constitutional Amendment Act. Second part of the paper explores the drafting defects in the phrases used not only in definition clause but also in paragraph 4 which deals with merger of the political parties and there is direct nexus between the definition clause and paragraph 4. Issues of construction/interpretation of the clauses in paragraph 4 are covered in third part which is the main theme of this paper. The conundrums of interpretation of paragraph four has been addressed by focusing on the time-tested canons of interpretation from leading authorities. Last part concludes the debate with suggestions.

2 Political parties and defection before 52nd Constitutional Amendment Act 1985: An overview

In Parliamentary form of government with multiparty system it is required that a political party or a group of political parties who wants to form government must be able to command majority support in the popular house. This gave rise to politics of number games. Political Parties and their politics impact the working of the Constitution. But till 1985 there was neither mention or recognition of political parties in the Constitution of India. This constitutional silence may be because Constitutions deals with the creation of fundamental organs of the State and the working of it by the political parties in a way is controlled by the constitutional philosophy itself. No political party even if it is in power and commanding majority in the legislature can violate constitution barring amendments. Hence every

legislator has to sworn in to protect uphold and defend the Constitution before formally taking a seat in the legislative house[1]. Apart from this there is no direct constitutional mentioning of the political parties. One can say Article 19 (1) (c) which gives freedom to form associations gives indirect recognition to political parties but the point to note is that it is for all association be it political or social or otherwise. The point to note is that there was no constitutional recognition, to be precise mention of the political parties before 52nd Constitutional Amendment Act 1985. As noted earlier that political parties play a significant role in the working of the Constitution, Dr. Ambedkar in Constituent Assembly commented in following words, "*The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics."*[2] Further he expressed scepticism about the people and political parties who might not give preference to the Constitution over their own motives in the following lines, "*Who can say how the people of India and their purposes or will they prefer revolutionary methods of achieving them? If they adopt the prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to pay."*[3] These are prophetic words which happens to be true in many areas of the working of the Constitution especially in the area of parliamentary form of Government and the role of the political parties.

At the beginning of the working of the Constitution the Congress was the largest political party dominating in the Parliament and the State Legislatures under the leadership of Pandit Nehru and therefore there was no problem for the Government to prove majority at any time rather. Before 1967 there were instances of the defection at state level but were not of that magnitude to make the Government collapse. There were around 500 instances of defection before 1967[4]. But the large-scale problems of defection started 1967 onwards and things started to take bad shape. The Lok Sabha appointed a committee in December 1967 to look into issues of political defections under the chairmanship of Y. B. Chavan and other luminaries of the time like M. C. Setalvad. The Committee made the following recommendations;

i) Political parties should arrive at a code of conduct amongst themselves.

[1] Article 74 (4), 99, 124 (6), 148 (2), 164 (3) 188 and 219 read with third schedule
[2] CAD Vol XI p 975
[3] ibid
[4] H. R. Saviprasad & Vinay Reddy, The Law on Anti-Defection: An Appraisal, 11 Student Advoc. 116 (1999).

ii) In cases of defection for ideological reasons, the defector should be disqualified from continuing as a legislator but is allowed to stand again.

iii) In cases of defection due to the lure of the office or pecuniary gains the defector should not only be disqualified from office but also be prevented from standing for a specified period.

One point to note form the recommendations was that it was not that harsh on the defection based on ideology, which it was otherwise. It means there were defections based on ideology as well as for some gratification. These suggestions were not that useful and could not arrest the tendencies of defection and the problem of defection keep soaring. In the year 1967 to 1969 there were as many as 1875 instances of defection in 16 states[5]. The first concrete attempt was made in May 1973 to enact a law on defection when government introduced the Constitution 32nd Amendment Bill, 1973 to give effect to those recommendations but it could not see the logical end due to dissolution of Lok Sabha. In 1978 the then Janata Government introduces the Bill but it was opposed at the very introduction itself not only by the opposition parties but by its own members too. Finally, it was under the leadership of Rajiv Gandhi, the bill was introduced in the year of 1985 and was passes as 52nd Constitutional Amendment Act 1985.

2.2 Overview of Tenth Schedule

Before entering into the crucial issue of mergers of political parties it is required to see what is there in the kitty rather pandoro's box of tenth schedule. It starts with the definition clause defining '*Legislature Party*' and '*Original Political Party*' there are other definitions too but they are just explanatory like '*House'* and '*Paragraph'*. The interpretation of '*Legislature Party'* and '*Original Political Party'* is crucial but it is done in the next section of this paper. Paragraph 2 provides for the disqualification for an individual legislator if they don't obey directions of the leader of their party. The essential object of Tenth Schedule was to arrest the menace of defection which was usually resorted to topple the Government but paragraph 2 goes beyond this purpose and restricts the parliamentary privileges of the legislators. The legislators cannot speak anything against their party orders. The exception of prior permission has been recognised. It was alright to restrict legislators when it is a matter of

[5] Paras Diwan, Aya Ram Gaya Ram: The Politics of Defection, Journal of the Indian Law Institute , (July-Sep 1979, Vol. 21, pp 304

proving the strength of the Government but this provision goes beyond this purpose. It has been criticized for curbing parliamentary dissent[6]. It requires separate enquiry and at the moment outside the scope of this paper. But the point to note is that this paragraph is really violating principles of democracy. Paragraph 3 allowed split of political party as an exception to paragraph 2 but it was repealed by 91st Amendment Act 2003.Paragraph 4 which allows the mergers of the political parties if the 'Original Political Party' merge with another party by 2/3rd majority of elected members. Exemption form the defection is allowed for Speaker of Lok Sabha, Chairman of Rajya Sabha, and on similar lines at state level. The question of defection is to be decided under paragraph 6, by the Chairman or the Speaker of legislative house. Such decision has been declared as final. Bar to the jurisdiction of the Court is there in paragraph 7 which was struck down by the Supreme Court in the case of *Kihoto Hollohon* v. *Zachilhu* because it violates basic structure of the Indian Constitution.[7] The interesting point is that the Government copy of the Constitution of India puts the note that this paragraph was struck down for the want of rectification under Article 368 (2)[8]. Though this was one of the grounds which the Supreme Court relied to struck down this provision but the major premise was that it takes away the judicial review power of the Supreme Court which is a basic structure. Lastly paragraph 8 confers the power of rule making on the parliament and state legislatures for the purpose making this law work. Tenth Schedule has created more problems than which it sought to solve.

3 Drafting defects in Tenth Schedule

Tenth schedule is couched in such a language as if it is any general legislation. The crucial definitions in paragraph 1 are '*Legislature party*', and '*original political party*'.

Paragraph 1 (b) "*legislature party*", in relation to a member of a House belonging to any political party in accordance with the provisions of paragraph or 2 *** paragraph 4, means the group consisting of all the members of that House for the time being belonging to that political party in accordance with the said provisions[9];

[6] Kartik Khanna; Dhvani Shah, Anti-Defection Law: A Death Knell for Parliamentary Dissent, 5 NUJS L. REV. 103, 128 (2012).
[7] (1992) 1 SCC 309
[8] https://www.india.gov.in/sites/upload_files/npi/files/coi-eng-schedules_1-12.pdf
[9] https://www.mea.gov.in/Images/pdf1/S10.pdf

Paragraph 1 (c) "*original political party*", in relation to a member of a House, means the political party to which he belongs for the purposes of clause (1) of paragraph 2[10].

But these definitions use the word '*mean*' which means that these definitions are complete and restrictive. If will apply the standards of interpretation, whenever a word '*mean*' is used in the definition of a phrase it means that phrase has been defined in its fullest extent and the Court is not supposed to interpret it otherwise[11]. But a simple look at the definitions of '*Legislature party*', and *'Original political party*, clearly revels the drafting defect that the phrases are not at all precise. The Supreme Court has in catena of the cases held if the word '*mean'* is used in the definition of a phrase it ousts the judicial creativity to add something more or reduce something from such definitions[12]. The problem is that these definitions are vital for the merger of political parties which has created another level of problem of interpretation.

3.2 **Direct nexus between definitions in paragraph 1 and merger of political parties under paragraph 4**

Paragraph 4 saves the members of the political party if her/his political party mergers with another political party. But as provided in Clause 2 of this paragraph, such merger needs the consent of the 2/3rd majority of the '*legislature party'* which means elected members of that party in a legislative house.

Clause 1 of this paragraph says that a legislator will not incur defection if his 'original *political party*, merge with another party. As defined in Paragraph 1 (c) '*original political party*' is a such a party to which a legislator belongs. The term '*original political party*' is wider as compare to 'legislature party' because the term '*original political party*' allows the non-legislative member of the party to control the activities of the legislators. It sounds anomalous but it is not actually. Because it is not necessary that he leader of the political party will always contest an election to a legislative house. Even if s/he contests an election there is no guarantee that s/he will get elected. Still such leader of the party would be in command and that's the intention of the defining '*original political party*' which means just a political party. Then the question arises why the word 'original' has been prefixed to the

[10] https://www.mea.gov.in/Images/pdf1/S10.pdf
[11] *Justice G. P. Singh, Principles of Statutory Interpretation, 14th Edition 2016 p 198*
[12] *Kasilingam v. PSG College of Technology*, AIR 1995 SC 1395; Commercial Taxation Officer, Udaypur, v. Rajasthan Tax Chem. Ltd., (2007) 3 SCC 124; Indra Sharma v. V.K.V.Sharma, (2013) 15 SCC 778

word 'political party'? Answer is simple for the purpose of identifying the party which is merging with another party and it is not required that all the legislators should agree for such merger. Consent of only 2/3rd legislators is required and therefore to make the things clear the word '*original*' has been used in the definition instead just '*political party.'* But when we look into clause 2 of Paragraph 4 it says that there is need of consent of 2/3rd legislators of the '*legislature party*'. Now this is clearly contradictory provisions and against the object of tenth Schedule. If it is interpreted that merger can happen only as per the agreement of the 2/3rd members of the legislature party because the word '*if and only if*' are used in clause 2 then there is no meaning to clause 1 and it would be redundant and such results would not be anticipated by the framers of this amendment, neither it is in tune with the purpose of tenth schedule.

Normally, there won't be a problem if a national party merge with another national party. But the problems arise in the cases of National party (NP) having state unit (NPSU) if the term "*legislature party*" is interpreted as defined under paragraph 1 (b) it means the total elected members of the party in a particular house. There is no scope for the outside leader of the party in the meaning of '*legislature party*'.

But as we turn to paragraph 2 (1) (b) which provides that if a legislator is not abiding by the instructions of the party leader which is generally called as party whip, it will amount to defection and she/he will be disqualified as legislator. This provision gives the scope to the party leader, authority or any person who may be outside the legislative house and the legislators affiliated to such party is supposed to abide by such instructions.

If Paragraph 2 (1) (b) is read with paragraph 4 (2) there will be obvious clash between the two. If there is a clash between two or more provisions of a law, one need to turn to principles of interpretation to resolve such impasse. So which principle of interpretation can be employed here? Let's first go the literal rule of interpretation which is beautifully summarized in a book by Justice G. P. Singh[13]. The rule of literal interpretation says that whatever is the natural meaning of the words in a legal provision must be adhered to. But what if there is absurd result by such natural meanings of the phrases used in a legal provision. To solve this issue there comes the golden rule of interpretation which says that if

[13] Supra note 11 pp 91

the natural grammatical meaning is resulting into absurdity then it must be avoided and the interpretation which will further the object of a legal provision or the legislation as a whole must be chosen.

Now, if we apply literal rule of interpretation to these provisions in isolation there is no difficulty, but the provisions of Paragraph 4 cannot be read in isolation because it is linked to other provisions, and an isolated interpretation would be defeating the purpose of this law. Rather I would say it results into injustice. The object these rules of interpretation is to help the Court to arrive at seemingly right conclusion and do the justice, and justice is fundamental, basic right of every person or a group of persons like political party.

It is obvious that the provisions in paragraph 2 and 4 are not isolated in their implications what is punished by paragraph 2 is saved by paragraph 4. So, if we look into who can issue whip under Paragraph 2 it is said that any leader, or a person or authority of a political party can issue whip. And whip can be issued very much for merger or restricting a merger. So, what is the value of a whip issued by a *National Leader of a National Party* (*NLNP*) to its state unit (NPSU)? Can legislators of NPSU ignore the whip of national leader. By plain reading of paragraph 2 the answer is clear and emphatic "*No.*" If legislators of NPSU ignore or violates such whip they will incur disqualification and they will have to vacate the seat on which they were projected and got elected. Though it is not automatic result, there is judicial authority in the form of the Chairman and the Speaker who will decide finally as to whether such legislator has incurred disqualification on account of defection or not. The role of the Speaker or the Chairman is little out of the scope of this paper but it is enough to say that they need to act judicially and judiciously by keeping the larger goal of saving the democratic principles of our constitution.

Let's turn to the basic question in hand, that is the whip issued by the national leader to the NPSU not to merge with another state level party or a state unit of the any other national party despite this whip the leader of the '*legislature party'* in the state assembly decided to merge with another party, what is the use of giving the power to issue whip under paragraph 2? By applying the literal rule of interpretation, the whip issued by leader of national party must be adhered to, because the power given to the leader of the party is just not for the purpose of issuing whip at the time of no-confidence motion but it can be used to control the behavior of legislators in a legislative house. Tough this seems to override the purpose for

which 10th Schedule was enacted. If defeating the defection is the object of the 10th Schedule the whip issued by the national leader of the party must be adhere to by the state unit of such party. So, the next question arises is about what is the purpose of having a provision for '*legislature party*' in clause 2 of paragraph 4? The object is again clear because ours is a federal constitution not having separate constitutions for the state, the provisions for the working of the Constitutional machinery of the states are in one place that is the Constitution of India. To deal with the defection at the state level there is need of defining '*legislature party*' at state level, but the legislature party do not exist without the original political party which may be national or a local. It is also true that 'legislature party' is there at national parliament, but it is my submission that such term is defined and used in this schedule by keeping in mind federal schema of the Constitution too. It is possible to imagine that there is national party without *legislature party*, but it is simply impossible to imagine that there is *legislature party* without political party. Political party is the larger umbrella term and legislature party is one part of it and the latter is dependent on the earlier one and not *vice a versa*. Political party is the main part of the tenth schedule and legislature party is the artificial construct for the sake of defining the limits of application of tenth schedule that it applies only to legislators and not to non-elected members. Rightly or wrongly the tenth schedule has given the powers to the political leaders to control the activities of the legislators and as long as such power remains there on the statute book it must be abide by.

3.3 Judicial Interpretation of paragraph 4

The Supreme Court has allowed the mergers of the state unit of the national party (NPSU) as by restrictive interpretation of paragraph 4 and without the direction or whip of the national leader rather against such whip. Such interpretation was arrived at by reading clause 1 and 2 of paragraph 4 in isolation. Meaning thereby that national party leader cannot issue whip to control the defecting tendencies of the state unit. Let's explore few leading cases on it.

A close look at clause 1 and 2 of paragraph 4 suggests two interpretations which is explored below;

First Interpretation

If clause 1 and 2 are read together keeping object of the anti-defection law in sight the first interpretation is that for merger of a state unit of a national party needs merger of such party at national level. If it is presumed that there is no need of merger of a party at national level then the object of tenth schedule will get defeated. Though state unit of a national party has a

special status because of federalism still, it is one party only and its local unit cannot merge without merger of original party at national level.

A two-judge bench of the Gauhati High Court in *W.K. Singh* v. *Speaker, Manipur Legislative Assembly*[14], the question was whether the members of a 'legislature party' (a state unit of national party) can merge with any other political party at State level, without there being a merger of their original political party at national level? The Court observed that there can be two situations first, the term "*have agreed to such merger*" under sub-paragraph (2) implies that the merger should initially take place at the national level, which can subsequently be operative in a State Legislative Assembly '*if and only if*' 2/3rd of the elected members of the state unit of such national party agree to it. In result there can be no merger of a state unit of National party without merger at national level and very importantly merger at national level will not automatically operate at state level because at state level there is need of consent by 2/3rd legislators. Is it is possible that state unit of a national party disagrees with the merger? The answer is yes! Because the Sate legislative house is an important functionary created by the uniform constitution and if there is automatic merger of state unit of national party it would affect the federal principle and hence there is a provision in clause 2 of paragraph 4 that '*legislature party*' with 2/3rd majority agrees for such merger. Therefore, in absence of a merger at national level, there is no possibility of a merger taking place in State Assembly.
Second situation is an interpretation which is possible because of grammatical puzzle of clauses similar to clause 1 and 2 of paragraph 4, is that there is no need of split of national party at national level and the state unit of such party can split and emerge as new party. But the Court in this case did not agree with this interpretation because it was not in tune with purposive interpretation of tenth schedule. However, this was a decision by High Court and that too it was before the paradigm shift the tenth schedule has undergone because of decision in *Kihoto Hollohan* which restricted the powers under paragraph 6 and 7 of this schedule[15].

An argument in favor of this interpretation can also be made by relying on the judgements rendered by the Supreme Court in *Rajendra Rana v. Swami Prasad Maurya*[16] (five-judge bench decision) and *Jagjit Singh v. State of Haryana*[17] (single-judge bench decision). Basic

[14] (1986) 2 Gau LR 91
[15] *supra*, note 7
[16] (2007) 4 SCC 270
[17] (2006) 11 SCC 1

issue in these cases was relating to Paragraph 3 which deal with splits in a political party[18]but the provision was same as that of paragraph 4 the only difference was 1/3rd legislators' consent was required and in paragraph 4 consent of 2/3rd legislators' consent is required. Beyond this difference these two provisions are identical and hence an interpretation of such repealed provision holds the strength. The Court in *Rajendra Rana* held that a group comprising of 1/3rd members splitting from the '*legislature party*' cannot take the shelter under Paragraph 3 unless it is established that there has been a split in their original political party at national level. The Court pointed out that Paragraph 3 has two requirements; firstly, there should be a split in the original political party (outside the legislative assembly) which is usually at national level, and secondly, a claim for split should be made by a group of at least 1/3rd elected members of a '*legislature party*' in state legislative assembly. The Court further held that otherwise interpretation *i.e.*, in absence of a split in original political party, 1/3rd members of legislature party can claim protection split under Paragraph 3 would render one limb of Paragraph 3 ineffective, and such interpretation must be avoided.

The Court in *Jagjit Singh*[19] overruled the full judge-bench decision of the Punjab High Court in *Madan Mohan Mittal v. Speaker, Punjab Vidhan Sabha.*[20] the High Court held that events of political parties at national level had no relation to either 'split' or 'merger' of the party in State level. The Supreme Court while holding that the decision of High Court was incorrect, did not comment categorically on referred to Paragraph 4 because the case was essentially dealing with split. But an inference can be drawn that split and merger are almost same with few differences as noted above.

The Second Interpretation

It is possible that if a state unit of a national party merge with another party there is need of consent of 2/3rd members of 'legislature party' only and there is no need of merger of such party at national level or there is no need of nod by national leader for state level merger. But this interpretation is based on reading clause 1 and 2 of paragraph 4 in isolation. This isolation is inferred because of the requirement agreement of 'legislature party' for merger. The emphasis put by the word 'if and only if the 2/3rd members of legislature party' agrees for such merger. This interpretation is ruling the field of merger of political parties as many

[18] Paragraph 3 is repealed by 91st Constitutional Amendment Act 2003.
[19] *Supra* note 17
[20] (1997) 3 Punj LR 374

as 81 instances of such merger has been accepted till 2005.[21] Basing on this interpretation, 10 Members of Legislative Assembly (MLA) of Goa belonging to Indian National Congress (INC) joined the Bharatiya Janata Party in 2019 because their numerical strength was more than 2/3rd which is the threshold referred in clause 2 of paragraph 4.[22] Again in 2018 Telangana Legislative Assembly where 12 INC representatives merged with Telangana Rashtra Samithi, even though no such merger happened between these parties at the national level. Similarly after the election of 2018 in Rajasthan's 6 Bahujan Samaj Party representatives merged with INC. The writ petition was filed in the High Court which was dismissed by referring to *Kihoto Hollohan*[23] verdict and held that, "*the Court acquires jurisdiction to put such adjudication to judicial review only on the infirmities based on violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity. Judicial review should not cover any stage prior to the making of a decision by the Speaker or a Chairman*.[24]" In recent past there is spree of such local merger of state units of original political parties.

4 Conclusion and suggestions

This is a dangerous effect of this second interpretation which need to immediate cure if not through Constitutional Amendment then through judicial intervention of the Supreme Court. There is need for reconsideration of the *Kihoto Hollohan* on this point. The High Courts are wrongly interpreting that the *Kihoto Hollohan* has rejected judicial review before the decision of the speaker because the reference of violation of natural justice can be brought to the notice of the Court before the actual decision under paragraph six. Law Commission of India 170th Report of 1999 has suggested repeal of para 4 instead of taking any one of the interpretation and suggested that mergers of the parties can be allowed after the dissolution of Lok Sabha or State Legislative Assemblies.

As long as there is no repeal of paragraph 4 of 10th Schedule there is a scope of correction by the interpretation if the first interpretation is accepted by the Courts. After all the purpose of 10th schedule is to restrict, control defection and strengthen democratic working of the legislatures in India.

[21] G.C. Malhotra, Anti-Defection Law in India and the Commonwealth, xi (Lok Sabha Secretariat, Metropolitan Book Co. Pvt. Ltd, 2005)
[22] https://www.thehindu.com/opinion/editorial/aftershocks-in-goa/article28415498.ece
[23] Supra note 7
[24] *Madan Dilawar v. The Hon'ble Speaker, Rajasthan* Civil Writ Petition No. 8056/2020