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**NABAM REBIA AND BAMANG FELIX
V. DEPUTY SPEAKER, ARUNACHAL PRADESH
LEGISLATIVE ASSEMBLY:
A CASE COMMENT**

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ABSTRACT

The *Nabam Rebia* case is a testimony to the fact that the area of discretionary powers accorded to the Governor is still ambiguous. This case comment analyses the lens that has been used to look at this issue in this case. The objective is to interpret the rationale behind this as well as other cases pertaining to the discretionary powers of the Governor and try to construct a stricter interpretation of the same through this exercise. While accepting the conclusion reached by the Courts completely, the comment suggests that greater primacy should be accorded to ministerial responsibility. The ideal implication of this would be that the Government holds majority as long as it isn't objectively disproved and that in such a circumstance discretion absolutely cannot be exercised by the Governor. Further, the paper examines the floor test as one such tool to objectively check the majority of the House. While a floor test is not free of dangers such as horse-trading, it has been clarified that the Governor need not indulge into such questions of morality, as granting him such powers can lead him down a slippery slope to indulgence into the political thicket.

CASE COMMENT

The Governor is bound by the aid and advice of the Council of Ministers under the Article 163 of the Indian Constitution, however the same Article has provided an exception clause i.e. "...except in so far as he is by or under this constitution required to exercise his functions or any of them in his discretion". However, the provisions that require him to do aren't marked out explicitly. The court has, through various decisions, recognised certain Articles which warrant such discretion such as Articles 200, 356, 371(2), 371C(1) and 371F(g).¹ The court has also held that sometimes the Governor can act in his discretion under provisions that ordinarily require him to act with the aid and advice of the Council of Ministers, due to exceptional circumstances. *Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*² deals with the scope of Governor's discretion, especially circumstantial discretion.

The case deals with the factional politics in Arunachal Pradesh in November 2016, when 20 Congress MLAs rebelled against their Chief Minister. These MLAs along with 2 BJP and 2

¹ *Nabam Rebia and Bamang Felix v. Deputy Speaker* [2016] 8 SCC 1.

² Id.

independent MLAs communicated their displeasure with the Government to the Governor. The Governor preponed the 6th session of the House and issued a message under Article 175 inter alia setting the first item of the agenda as the removal of the Speaker. Before this assembly could take place, Nabam Rebia, the Speaker declared the rebel MLAs disqualified. The Deputy Speaker quashed this order of disqualification and conducted the preponed assembly in which the resolution to remove the Speaker was passed. The Speaker along with others challenged the Governor's order and message.³

The Respondents had argued that circumstantial discretion should be accorded as the Government's actions were detrimental to democratic process. The Court rejected this proposition by relying on a harmonious interpretation of the Governor's functions. On analysing the various powers assigned to him, it was concluded that the Governor hadn't been assigned any significant role in the executive or legislative functioning of the State. If the Respondents arguments were to be accepted, the Governor would effectively convert into an "all-pervading super-constitutional authority". Finally both the order and the message were declared unconstitutional and status quo was ordered.⁴

Despite the in-depth analysis of the Governor's powers in this case and in various other cases, the recent question on misuse of discretionary powers in Karnataka shows that the scope of Governor's discretion remains a grey area. This paper seeks to analyse the implication of this judgement on the scope of discretionary powers of the Governor. Further, it is an attempt to use this judgement to analyse the ideal interpretation of this scope in general, keeping the current political scenario in mind. It focuses on development of conventions, specifically that of conducting of floor tests, in order to decrease the ambiguity in this area.

This case falls within the ambit of judgements that are an attempt to restrict the arbitrary use of discretion by the Governor, such as the *SR Bommai*,⁵ *Shamsher Singh*⁶, *State of Rajasthan*.⁷ All of these cases have established the Courts authority to quash the Governor's discretionary actions which are mala fide. Primarily, it is important to note that in this case the Governor had not been

³ Id.

⁴ Id.

⁵ *S. R. Bommai v Union of India* [1994] 3 SCC 1.

⁶ *Shamsher Singh & Anr vs State Of Punjab* [1974] AIR 2192.

⁷ *State Of Rajasthan & Ors. Etc. Etc vs Union Of India* [1977] AIR 1361.

denied discretion on grounds of malice. Justice Khehar has emphasised on the question not being one of bona fides but of constitutional authority. This case is monumental in making it clear that the scope of the Governor's actions is not determined by their morality because he is not the "conscience keeper" of the House.⁸ The first test is thus whether the Governor's actions, regardless of being in bad or good faith, were within his discretionary jurisdiction or not. The issue of mala fide conduct arises after the Constitutional validity of the action is established.

To understand the grounds for such an interpretation taken up by the Court, attention must be drawn to the discussion in the Constituent Assembly about the Draft Article 131⁹ (later Article 155 of the Indian constitution), which deals with the Appointment of Governor. It shows that the idea of democratic election had been rejected because that would warrant more interference by the Governor, as he would have the backing of a whole province. Clearly, such interference by him was not desired, instead he is desired to ordinarily stay detached and only engage in exceptional conditions. Further, the discussions around Draft Article 143¹⁰ (later Article 163 of the Indian Constitution) repeatedly emphasise that the discretionary powers must not run contrary to the functioning of a responsible Government. Therefore, the provisions were never meant to give the Governor broad discretionary powers.

In fact, the scope must be looked through an even narrower lens now because certain considerations expressed behind the purpose of these powers have diluted with time, such as lack of competent men in the provinces, separatist tendencies of the new-formed nation etc. Further, the idea of giving broad discretionary powers has proved dangerous, given the rampant mala fide misuse of such powers.

It is thus clear that the Governor is not empowered to act with discretion to uphold moral principles but only to uphold certain constitutional Principles. However, the Governor is definitely not allowed to intervene on account of any constitutional provision. This is illustrated by the fact that the Court rejected the argument of the Respondents that the motive behind the message of the Governor was to uphold the provisions of certain Rules of the 'Conduct of Business Rules' and

⁸ *Nabam Rebia*, *supra* note 1.

⁹ *P.K. Sen*, C.A. Debates, Vol. VIII, <https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-31>, last visited 5 May 2020.

¹⁰ C.A. Debates, Vol. VIII, <https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-31>, last visited 5 May 2020.

Article 179(c).¹¹ Therefore a question arises about which of the Constitutional Principles must be upheld, a question of interpretation of the phrase “...except in so far as he is by or under this constitution required”.

Given the background and in keeping with the judgment, such an interpretation must be very narrow and should not supersede ministerial responsibility. In fact, the principle of ministerial responsibility seems to be so essential that unless the Government loses the majority, the Governor’s discretion should ideally never supersede the ministers’ advice. Such a strict rule has not been set by the Court explicitly but can be interpreted, because clearly the Court has found the powers *ultra vires* in this case,¹² even though the actions may have been bona fide and for the advancement of democratic principles.

Such a rule could help mitigate the consistent uncertainty in this matter. The Court has ruled in various judgements, for or against the valid use of discretion under different provisions and circumstances. This creates ambiguity as it still fails to clarify the general position. Even in this case, the facts and the provisions are analysed at length due to this ambiguity. To save such a tedious exercise and also increase clarity in this respect so as to limit possible misuse of such rulings, a strict rule can be explicitly developed. This could be of the form that Governor must only be allowed to act without the aid and advice of the Council of Ministers, if they have lost the majority of the House. The foremost Constitutional principle that he must adhere to is that of ministerial responsibility. Therefore, his prime duty should be to ensure that “...at all times, either there is a democratic ‘popular’ government or the state should be under President’s rule”.¹³ He must not interfere with the functioning of the Government if it is still popular. Any interference in the functioning of a popular Government would be treading towards the arena of political thicket. Justice Khehar highlights that the Governor has not been given the authority to resolve political disputes in the House. He has the right to bring this to the President’s attention in his monthly communications but cannot use constitutional provisions to resolve the same.¹⁴ Therefore, practice of discretion only after a Government loses majority, would meet the original purpose behind it

¹¹ *Nabam Rebia*, *supra* note 1.

¹² *Id.*

¹³ *Rameshwar Prasad v. Union of India* [2006] AIR SC 980.

¹⁴ *Nabam Rebia*, *supra* note 1.

and strengthen ministerial responsibility, while also avoiding the probability of partisan misapplication.

At this stage, it must be clarified that the Governor cannot use his discretion on the ground that he was satisfied that the majority had been lost. Such as in this case, where the Governor makes this judgement based on defection by some MLAs. His judgment could be in good faith and even correct, as the Chief Minister was voted out of power in a floor test after this judgement.¹⁵ For a consequentialist this judgement may even be a futile intervention. However, if he was accorded discretion on such subjective grounds, the potential mala fide and partisan use of his powers could become extremely easy to justify. This obviously also poses a threat to federal spirit of the Constitution, as the Governor may also justify his discretionary actions taken under pressures from the Union. Therefore, there needs to be an objective ground.

Objectivity can be sought through development of conventions. The Court has earlier held that there is no difference between the weight of a “constitutional convention” and “a constitutional law”.¹⁶ One such convention developed, also referred to by Justice Khehar in this case, is of a floor test. He opines that the Governor in this case made no attempt to conduct a floor test and objectively prove his belief and therefore, his actions were premature and unwarranted¹⁷. This convention originated in *SR Bommai*¹⁸, it was ruled that as the Council of Ministers are responsible to the house, only on floor of the House that majority can be tested. Floor tests have often been used to test the popularity of the Government and even suspend a President’s rule imposed without such testing such as in *Jagdambika Pal v Union of India*¹⁹. In *Chandrakant Kavlekar v Union of India*²⁰, while ordering a floor test the Supreme Court held, “The holding of the floor test would remove all possible ambiguities.”

¹⁵ ‘Arunachal Pradesh President's Rule’ < <https://www.scobserver.in/court-case/arunachal-pradesh-president-s-rule/judgement-of-the-supreme-court-in-plain-english-bfa933c1-3954-4c20-93b3-a350de551422>> last visited 1 May 2020.

¹⁶ *Supreme Court Advocates on Record Association v. Union of India* [1993] 4 SCC 441.

¹⁷ *Nabam Rebia*, *supra* note 1.

¹⁸ *S. R. Bommai*, *supra* note 5.

¹⁹ [1999] 9 SCC 95.

²⁰ [2017] 3 SCC 758.

A floor test is obviously not free of immorality, horse-trading is a danger inherent in it. Even the Supreme Court has been hardly successful in stopping this recurring evil.²¹ The Courts have to either develop ways to curb this problem to make floor tests more effective or they can choose to accept this as a political reality. But in the context of this paper it is important to establish that it is beyond doubt that the Governor should not be concerned with this, as he is definitely not an impartial judge.

In conclusion, this case is monumental in narrowing the scope of discretionary powers of the Governor, as was envisioned by the Constitution makers and also as is necessitated by the threat to Federalism due to misuse of discretion. The Court has reached a reasonable conclusion. However, the Court could have accorded primacy to ministerial responsibility and the convention of floor testing. This means that it did not clearly assert that a Government holds majority as long as it isn't objectively disproved and that in such a circumstance discretion absolutely cannot be exercised. Had the Court done this it would not need to take up a tedious factual analysis and also establish a clear and strict judicial principle in this regard.

²¹ Manoj Mitta, *Law can do little to stop horse trading*, The Times of India, 2008 <http://timesofindia.indiatimes.com/articleshow/3256861.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst>.