

SYNOPSIS

The Petitioner (Shiv Sena) which emerged as the second largest political party in the Fourteenth Maharashtra Legislative Assembly Elections, 2019 (**“the Legislative Assembly”**) is constrained to move the instant Writ Petition under Article 32 of the Constitution *inter alia* challenging the *ex-facie* arbitrary and malafide actions of the Hon’ble Governor of Maharashtra in refusing to accept the claim of the Petitioner to form the Government and declining to give reasonable time of even three working days to demonstrate its majority support in the House.

The Hon’ble Governor *vide* the impugned action dated 11.11.2019 acting arbitrarily, in hot haste and in complete violation of the law laid down by this Hon’ble Court in **SR Bommai vs UOI, (1994) 3 SCC 1**, has rejected the claim of the Petitioner to form the Government and has also refused to grant even three days time to the Petitioner to demonstrate that it has the requisite majority to form the Government in Maharashtra. It is submitted that the factum of majority cannot be decided by the Hon’ble Governor in his own *ipsi dixit* and the floor of the House is the only ‘constitutionally ordained forum’ to the test majority. Besides, it is submitted that the government formation is a sacrosanct political

process in democracy and Hon'ble Governor cannot act as a stumbling block for thwarting/stalling a political party from forming the Government. It is also submitted that as per the constitutional conventions and practice, the Governor is duty bound to allow reasonable time for political parties to conclude their negotiation on government formation and not act as an agent/mouthpiece of the Central Government and /or the Ruling party at the Centre and has to allow reasonable time to political outfits to present the conclusion of their negotiations before taking a decision to reject any claim to form the Government. It is submitted that the instant is a classic case where these constitutional conventions which have the force of law have been followed by the Governor in sheer breach.

THE RELEVANT FACTS IN BRIEF

It is submitted that the elections to the Fourteenth Maharashtra Legislative Assembly were declared on 24.10.2019. The party wise distribution of the seats in the Fourteenth Maharashtra Legislative Assembly as declared is as under:

Party	Seats
All India Majlis-E-Ittehadul Muslimeen	2
Bahujan Vikas Aaghadi	3

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Bharatiya Janata Party	105
Communist Party of India (Marxist)	1
Independent	13
Indian National Congress	44
Jan Surajya Shakti	1
KrantikariShetkari Party	1
Maharashtra Navnirman Sena	1
Nationalist Congress Party	54
Peasants And Workers Party of India	1
PraharJanshakti Party	2
RashtriyaSamaj Paksha	1
Samajwadi Party	2
Shiv Sena	56
Swabhimani Paksha	1
	288

The Petitioner had a pre poll alliance with the (Bhartiya Janata Party) (“BJP”). However, post the results, the

Petitioner and the BJP had serious political differences and the Petitioner declined to join hands with BJP.

It is submitted that being faced with the prospect of losing the State, the BJP has resorted to using all tactics including the Hon'ble Governor's office in an attempt to prevent the Petitioner from forming the Government in the State.

The Hon'ble Governor did not take any action in inviting any political party to form the Government for almost 18 days. On 09.11.2019, the Hon'ble Governor called upon the BJP to indicate its willingness and ability to form the Government and giving it 48 hours' time to prove that it has the requisite majority. The BJP declined to form the Government on 10.11.2019.

On 10.11.2019, the Hon'ble Governor asked the Petitioner, to convey its willingness and ability to form the Government. On 11.11.2019 itself, the Petitioner staked claimed to form the Government while submitting that it had the majority support. The Petitioners are given to understand that Respondent Nos. 3 and 4 herein are principally willingly to support the Petitioners in forming the government in the State of Maharashtra.

The Petitioner also *vide* letter dated 11.11.2019 requested for three days time to give the letters of support to demonstrate

that it has the requisite majority to form the Government. However, the Hon'ble Governor on 11.11.2019 vide the impugned press release for reasons best known to himself, has refused to grant even three days to the Petitioner to demonstrate its majority and has in effect rejected the claim of the Petitioner to form the Government.

While the BJP was granted 48 hours to show its majority, the Petitioner's claim was rejected within a period of 24 hours despite the categorical assertion of the Petitioner that it has the majority and that it be given three days' time to demonstrate the same.

GOVERNMENT FORMATION IS A SACROSANCT POLITICAL EXERCISE POST A GENERAL ELECTION AND THE GOVERNOR CANNOT ACT IN A MANNER SO AS TO THWART/PREVENT A PARTY FROM FORMING THE GOVERNMENT

It is submitted that the forming of the Executive Government post a general election is not a sprint to the finish. The forming of the Government is a reflection of the will of the people, a sacrosanct act involving various political stakeholders. The Hon'ble Governor has been mandated under the Constitution to provide a reasonable opportunity to various stakeholders to lay claim to form the Government. The Hon'ble Governor cannot act in a manner so as to only suit

the majority political party at the Centre, or act on the diktats of the Central Government.

It is further submitted that there is ample constitutional convention to show that the next largest party has been invited to form the Government and to demonstrate its strength on the floor of the House.

In the *Ninth General Elections*, no party secured an absolute majority and the President invited the Leader of the single largest party (INC) to form the Government and they declined the offer. Subsequently, the leader of the next largest party (the Janata Dal) was invited by the President to form the Government and a minority Government at the Centre was formed with the outside support of other parties¹.

It is submitted that the process of arriving at a political consensus to form government among the stakeholders has to be given fullest opportunity. The Governor cannot act as a stumbling block and scuttle a possible formation of Government. While the Governor and/or the President cannot act as a facilitator for formation of the Executive Government, however, at the same time it is a well accepted convention that the Governor and/or the President cannot by their actions deter/prevent and or act as a stumbling block in the

¹See page 137 of Kaul Shakhder on *Practice and Procedure of Parliament*, Sixth Edition, published by Lok Sabha Secretariat.

formation of Government. In a hung legislature, political stakeholders have to be given adequate opportunity and time to explore the possibility of forming the Government.

In England in 2017, it took 18 days for an arrangement to be agreed between the Conservative Party and the Democratic Unionist Party(DUP), where the DUP would support a minority conservative government in a confidence and supply arrangement².

In the paper titled **“Making Minority Government Work”** published by the Constitution Unit, UCL, the authors Robert Hazell *et al* observe that the Sovereign must ‘stand back until the parties have concluded their negotiations’. They have further also observed that

“..Government formation is a political process the Monarch must stand back until the parties have concluded their negotiations..”³

and that

“..The Governor-General will abide by the outcome of the political parties negotiations, and accept the political decision as to who can command the confidence of parliament...”⁴

²See page 7 of paper titled “What happens after indecisive election results” by Lucinda Maer and Gail Bartlett; published by the House of Commons Library.

³See chapter 6.3.2 of the paper titled Making Minority Government Work, Robert Hazell, The Constitution Unit, UCL

⁴See chapter 6.3.2 of the paper titled Making Minority Government Work, Robert Hazell, The Constitution Unit, UCL

It is submitted that actions of the Governor in giving hardly 24 hours to the Petitioner to show the letters of support and the action of the Governor on 11.10. 2019 declining to grant even a reasonable time of three days to the Petitioner is *ex facie* arbitrary and in breach of the constitutional convention to give the political parties the necessary 'elbow room' to conclude negotiation on government formation.

It is also pertinent to note that the Shiv Sena/Petitioner has been in advanced talks for government formation with the Nationalist Congress Party (NCP) as well as the Indian National Congress (INC). Shri Sanjay Raut, leader of the Shiv Sena, has met Shri Sharad Pawar leader of the NCP and the talks have been in a positive direction. To this effect Shri Arvind Sawant, the sole Union Minister from the Shiva Sena in the NDA Government has also resigned from the Union Cabinet on 11.11.2019. The Chief of the Shiv Sena, Shri Uddhav Thackeray, has also had a positive telephonic conversation with the President of the INC, Smt Sonia Gandhi, in this regard on 11.11.2019.

The Petitioners are given to understand that Respondent Nos. 3 and 4 herein are principally willingly to support the Petitioners in forming the government in the State of Maharashtra.

Apart from the above, the Petitioner has acquired the support of 8 independent MLA's, namely, Shri Narendra Bondekar, Smt. Manjula Gavith, Shri Shankar Rao Gadak, Shri Chandrakanth Patil, Shri Ashish Jaiswal, Shri Bachhukadu, Shri Rajkumar Patel and Shri Rajendra Patel Vadraokar. The letters of support are annexed along with the Writ Petition.

It is submitted that all the three major stakeholders ie. The Shiv Sena, NCP and INC are in the process of evolving a common minimum programme and it is for this reason that three days' time was sought from the Governor.

The constitutional premise on which the Governor is obliged to act under the Constitution, is towards formation of a stable government. A genuine and serious attempt to provide such a government requires the Governor to take all possible steps in furtherance of that constitutional premise. This further requires that the Governor give reasonable time to the political party that seeks to form the government.

What is a reasonable time depends on the facts and circumstances of each case. In the facts of this case what is required is a common minimum programme for the people of Maharashtra. The formulation of this common minimum programme would require a minimum period of three days, and therefore the request of three days was made by the

Petitioner which was illegally rejected by the Hon'ble Governor.

Despite these developments and the talks of the Petitioner with the various stake holders in an advanced state being communicated to the Hon'ble Governor on 11.11.2019, the Hon'ble Governor has chosen to fast-forward the process depriving the Petitioner of the opportunity to form the Government in the State of Maharashtra despite staking claim for the same.

It is submitted that the process of Government formation cannot be fast forwarded, paused or played at the behest of the political party ruling at the Centre. The Hon'ble Governor is duty bound to at the least give a reasonable time to the political party staking claim to show its majority.

It is apposite to note that the Petitioner has been associated with the BJP in the State of Maharashtra for the last thirty years, however, owing to certain fundamental political differences that have evolved over the last few weeks/months the association has come to a staggering end. It is submitted that the BJP acting through the Hon'ble Governor has penalized the Petitioner for having severed ties with it by

ensuring that the request for three days time is refused by the Hon'ble Governor.

It is also in public domain that all the other major stakeholders except the Petitioner had publicly refused to stake claim to form the Government. In this background, the Hon'ble Governor's refusal and hot haste in acceding to the Petitioner's request for even three days to prove its majority smacks of arbitrariness, malafides and is nothing but a deliberate attempt by the Hon'ble Governor to ensure that the Petitioner does not form the Government in the State of Maharashtra.

The Petitioner having asked for three days' time, it could not be said that it was unreasonable. The action of the Hon'ble Governor even denying this time is *exfacie* arbitrary, contrary to Article 14.

GOVERNOR IS NOT THE CONSTITUTIONALLY ORDAINED FORUM TO TEST THE MAJORITY OF A POLITICAL PARTY STAKING CLAIM

Be that as it may, it is submitted the test as to whether a political party has the requisite majority or not cannot be determined by the Raj Bhavan, and can only be tested on the floor of the House. Once the Petitioner had staked claim, the Hon'ble Governor ought to have invited the Shiv Sena/Petitioner to prove its majority on the floor of the

House. The Hon'ble Governor cannot arrogate to himself the privilege of the House and make a subjective decision on whether a political party enjoys the support or not. This is completely beyond the purview of the scope of the Governor's powers during Government formation. This issue is no longer *res integra*.

This Hon'ble Court in ***SR Bommai vs UOI, (1994) 3 SCC 1***, has categorically held that the only constitutionally ordained forum for assessing the strength of a political formation is on the floor of the House, and that the assessment of majority is not a matter of private opinion of the Governor or the President. In this regard, paragraph 118, 119 and 120 of Justice PB Sawant in ***SR Bommai's case*** being relevant is extracted hereunder:

“118. In view of the conclusions that we have reached with regard to the parameters of the judicial review, it is clear that the High Court had committed an error in ignoring the most relevant fact that in view of the conflicting letters of the 7 legislators, it was improper on the part of the Governor to have arrogated to himself the task of holding, firstly, that the earlier 19 letters were genuine and were written by the said legislators of their free will and volition. He had not even cared to interview the said legislators, but had merely got the authenticity of the signatures verified through the Legislatures Secretariat. Secondly, he also took upon himself the task of deciding that the 7 out of the 19 legislators had written the subsequent letters on account of the pressure from the Chief Minister and not out of their free will. Again he had not cared even to interview the said legislators. Thirdly, it is not known from where the Governor

got the information that there was horse-trading going on between the legislators. Even assuming that it was so, **the correct and the proper course for him to adopt was to await the test on the floor of the House** which test the Chief Minister had willingly undertaken to go through on any day that the Governor chose. In fact, the State Cabinet had itself taken an initiative to convene the meeting of the Assembly on April 27, 1989, i.e., only a week ahead of the date on which the Governor chose to send his report to the President. Lastly, what is important to note in connection with this episode is that the Governor at no time asked the Chief Minister even to produce the legislators before him who were supporting the Chief Minister, if the Governor thought that the situation posed such grave threat to the governance of the State that he could not await the result of the floor-test in the House. We are of the view that this is a case where all canons of propriety were thrown to the wind and the undue haste made by the Governor in inviting the President to issue the Proclamation under Article 356(1) clearly smacked of mala fides. The Proclamation issued by the President on the basis of the said report of the Governor and in the circumstances so obtaining, therefore, equally suffered from mala fides. A duly constituted Ministry was dismissed on the basis of material which was neither tested nor allowed to be tested and was no more than the ipse dixit of the Governor. The action of the Governor was more objectionable since as a high constitutional functionary, he was expected to conduct himself more firmly, cautiously and circumspectly. Instead, it appears that the Governor was in a hurry to dismiss the Ministry and dissolve the Assembly. The Proclamation having been based on the said report and so-called other information which is not disclosed, was therefore liable to be struck down.

119. In this connection, it is necessary to stress that in all cases where the support to the Ministry is claimed to have been withdrawn by some legislators, **the proper course for testing the strength of the Ministry is holding the test on the floor of the House. That alone is the constitutionally ordained forum for seeking**

openly and objectively the claims and counter-claims in that behalf. The assessment of the strength of the Ministry is not a matter of private opinion of any individual, be he the Governor or the President. It is capable of being demonstrated and ascertained publicly in the ¹²⁸ **House. Hence when such demonstration is possible, it is not open to bypass it and instead depend upon the subjective satisfaction of the Governor or the President. Such private assessment is an anathema to the democratic principle, apart from being open to serious objections of personal mala fides.** It is possible that on some rare occasions, the floor-test may be impossible, although it is difficult to envisage such situation. Even assuming that there arises one, it should be obligatory on the Governor in such circumstances, to state in writing, the reasons for not holding the floor-test. The High Court was, therefore, wrong in holding that the floor-test was neither compulsory nor obligatory or that it was not a prerequisite to sending the report to the President recommending action under Article 356(1). Since we have already referred to the recommendations of the Sarkaria Commission in this connection, it is not necessary to repeat them here.

120. The High Court was further wrong in taking the view that the facts stated in the Governor's report were not irrelevant when the Governor without ascertaining either from the Chief Minister or from the 7 MLAs whether their retraction was genuine or not, proceeded to give his unverified opinion in the matter. What was further forgotten by the High Court was that assuming that the support was withdrawn to the Ministry by the 19 MLAs, it was incumbent upon the Governor to ascertain whether any other Ministry could be formed. The question of personal bona fides of the Governor is irrelevant in such matters. What is to be ascertained is whether the Governor had proceeded legally and explored all possibilities of ensuring a constitutional Government in the State before reporting that the constitutional machinery had broken down. Even if this meant installing the Government belonging to a minority party, the Governor was duty-bound to opt for it so long as

the Government could enjoy the confidence of the House. That is also the recommendation of the five-member Committee of the Governors appointed by the President pursuant to the decision taken at the Conference of Governors held in New Delhi in November 1970, and of the Sarkaria Commission quoted above. It is also obvious that beyond the report of the Governor, there was no other material before the President before he issued the Proclamation. Since the “facts” stated by the Governor in his report, as pointed out above contained his own opinion based on unascertained material, in the circumstances, they could hardly be said to form an objective material on which the President could have acted. The Proclamation issued was, therefore, invalid.”

A reading of the aforesaid would also show that this Hon’ble Court has categorically laid down the following principles:

- i. The proper course for testing the strength of a claim to form the Government is on the floor of the House.
- ii. The assessment of the strength of the political formation to command majority in the house **is not a matter of private opinion of any individual be he the Governor or the President.**
- iii. It is not open for the Governor to bypass the Constitutionally ordained forum of a floor test and arrive at a subjective satisfaction that the political formation does not have the majority.
- iv. Any private assessment by the Governor of the strength of the claim to form the Government without giving an opportunity to the party staking claim to prove it on the

floor of the House is an anathema to democratic principles, apart from raising questions about malafides regarding the actions of the Governor.

If the aforesaid principles are applied in the facts of the present case, it would show that the Hon'ble Governor has acted in stark violation of the law laid down by this Court in **SR Bommai's case**. Despite the categorical warning by this Hon'ble Court, the Hon'ble Governor in his *ipsi dixit* has proceeded to reject the claim of the Petitioner to form the Government more so without even giving a reasonable time to the Petitioner to showcase that it has the majority support.

More importantly the subjective assessment done at Raj Bhavan by the Hon'ble Governor, and rejecting the claim of the Petitioner without asking it to prove its majority on the floor of the House, is *ex facie* violative of the solemn duties cast upon the Governor and in complete defiance and violation of the well settled law laid down by this Hon'ble Court in **SR Bommai's case**.

The Petitioners verily apprehend that given the break neck speed with which the events have unfolded over the last couple of days, it is likely that the impugned action of the Hon'ble Governor in refusing to allow the Petitioners to form the Government and rejecting even a minimum of three days

days time to the Petitioner to demonstrate the majority is a part of the well concerted plan of the BJP to invoke Article 356. *Inturn allow the BJP horse trading.*

The impugned action is a desperate attempt to create a non existent case for imposition of Presidents Rule. It is submitted that the Petitioners will be put to grave and irreparable loss if this Hon'ble Court does not hear the instant Petition at its earliest convenience. The Petitioner respectfully submits that the actions of the Hon'ble Governor apart from being arbitrary, illegal and against the law laid down in ***Bommai's case*** is also an attempt to frustrate the will of the people and pave way for New Delhi to rule Maharashtra.

It is submitted that any imposition of Presidents Rule would also result in horse trading by the BJP and to somehow cobble up a majority by using unconstitutional means. It is submitted that in these circumstances any precipitative action by the Governor to enable the BJP to acquire the MLA's by poaching would be an anathema to democracy and cannot be countenanced.

It is submitted that the impugned decision being exfacie unconstitutional is liable to be interfered with and set aside. In this background, the present Writ Petition is being filed.

LIST OF DATES

DATES	PARTICULARS																								
2014	<p data-bbox="542 580 1433 782">Post the 2014 Maharashtra Assembly Elections, the seat share of the Maharashtra Legislative Assembly was as follows:</p> <table border="1" data-bbox="542 857 1377 2341"> <thead> <tr> <th data-bbox="542 857 1252 981">Party Name</th> <th data-bbox="1252 857 1377 981">Seats</th> </tr> </thead> <tbody> <tr> <td data-bbox="542 981 1252 1104">All India Majlis-E-Ittehadul</td> <td data-bbox="1252 981 1377 1104">2</td> </tr> <tr> <td data-bbox="542 1104 1252 1228">Bahujan Vikas Aaghadi</td> <td data-bbox="1252 1104 1377 1228">3</td> </tr> <tr> <td data-bbox="542 1228 1252 1352">Bhartiya Janata Party</td> <td data-bbox="1252 1228 1377 1352">122</td> </tr> <tr> <td data-bbox="542 1352 1252 1475">Bharipa Bahujan Mahasangh</td> <td data-bbox="1252 1352 1377 1475">1</td> </tr> <tr> <td data-bbox="542 1475 1252 1599">Communist Party of India (Marxist)</td> <td data-bbox="1252 1475 1377 1599">1</td> </tr> <tr> <td data-bbox="542 1599 1252 1723">Independent</td> <td data-bbox="1252 1599 1377 1723">7</td> </tr> <tr> <td data-bbox="542 1723 1252 1846">Indian National Congress (INC)</td> <td data-bbox="1252 1723 1377 1846">42</td> </tr> <tr> <td data-bbox="542 1846 1252 1970">Maharashtra NavanirmanSena</td> <td data-bbox="1252 1846 1377 1970">1</td> </tr> <tr> <td data-bbox="542 1970 1252 2093">Nationalist Congress party</td> <td data-bbox="1252 1970 1377 2093">41</td> </tr> <tr> <td data-bbox="542 2093 1252 2217">Peasants and Workers party of India</td> <td data-bbox="1252 2093 1377 2217">3</td> </tr> <tr> <td data-bbox="542 2217 1252 2341">RashtriyaSamaj Paksha</td> <td data-bbox="1252 2217 1377 2341">1</td> </tr> </tbody> </table>	Party Name	Seats	All India Majlis-E-Ittehadul	2	Bahujan Vikas Aaghadi	3	Bhartiya Janata Party	122	Bharipa Bahujan Mahasangh	1	Communist Party of India (Marxist)	1	Independent	7	Indian National Congress (INC)	42	Maharashtra NavanirmanSena	1	Nationalist Congress party	41	Peasants and Workers party of India	3	RashtriyaSamaj Paksha	1
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	Indian National Congress (INC)	122
	Total	288
21.10.2019	Elections to the Fourteenth Maharashtra Legislative Assembly were carried out for 288 seats.	
24.10.2019	Results to the Fourteenth Maharashtra Legislative Assembly were declared.	
	<p>Bhartiya Janata Party emerged as the Single Largest Party with 105 seats followed by the Shiv Sena emerging as the second largest party with 56 seats.</p> <p>NCP emerged as the third largest party with 54</p>	

	seats and the INC secured 44 seats.
08/09.11.2019	The Hon'ble Governor for almost 18 days did not take any action in inviting any political party to form the Government, but on 09.11.2019 the Hon'ble Governor invited the BJP to indicate willingness to form the Government while giving it 48 hours to prove that it has the requisite majority.
10.11.2019	However, the BJP on 10.11.2019 itself expressed its inability and declined to form the Government.
10.11.2019	With the BJP expressing its inability to form the Government on 10.11.2019, the Hon'ble Governor on the very same day asked the Petitioner, to convey its willingness and ability to form the Government by granting it only 24 hours to demonstrate its majority.
11.11.2019 at about 6.30/7.00	On 11.11.2019, the Petitioner staked claimed to form the Government while submitting that it has the majority support. The Petitioner has also <i>on</i> the same day i.e. on 11.11.2019 itself requested for three days time to give the letters of support to demonstrate that it has the

	requisite majority to form the Government.												
11.11.2019	Shiv Sena MP Mr. Arvind Sawant resigned from the Union Cabinet.												
11.11.2019	<p>The Petitioner is in advanced positive talks of forming a coalition Government with the NCP and INC along with support of Independent MLA's.</p> <p>The party wise distribution of seats of the coalition government consisting of the Petitioner, NCP, INC and independent MLA's will be as follows:</p> <table border="1" style="margin-left: auto; margin-right: auto;"> <thead> <tr> <th style="text-align: center;">Party</th> <th style="text-align: center;">No of Seats</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">Shiv Sena</td> <td style="text-align: center;">56</td> </tr> <tr> <td style="text-align: center;">NCP</td> <td style="text-align: center;">54</td> </tr> <tr> <td style="text-align: center;">Indian National Congress (INC)</td> <td style="text-align: center;">44</td> </tr> <tr> <td style="text-align: center;">Independent</td> <td style="text-align: center;">8</td> </tr> <tr> <td style="text-align: center;">Total</td> <td style="text-align: center;">162</td> </tr> </tbody> </table>	Party	No of Seats	Shiv Sena	56	NCP	54	Indian National Congress (INC)	44	Independent	8	Total	162
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11.11.2019	The Hon'ble Governor on 11.11.2019, for reasons best known to him, has declined to accommodate the request for three days and has rejected the claim of the Petitioner to form the												

	Government. The Hon'ble Governor vide impugned action/order/decision dated 11.11.2019 has invited Respondent No. 3 to indicate willingness and ability to form Government. [IMPUGNED ACTION/ DECISION/ ORDER]
12.11.2019	Hence this Petition