

Supreme Court of India

Indira Nehru Gandhi (Smt.) vs Raj Narain & Anr on 24 June, 1975

Equivalent citations: 1975 AIR 1590, 1975 SCC (2) 159

Author: V Krishnaiyer

Bench: Krishnaiyer, V.R.

PETITIONER:

INDIRA NEHRU GANDHI (SMT.)

Vs.

RESPONDENT:

RAJ NARAIN & ANR.

DATE OF JUDGMENT 24/06/1975

BENCH:

KRISHNAIYER, V.R.

BENCH:

KRISHNAIYER, V.R.

CITATION:

1975 AIR 1590

1975 SCC (2) 159

ACT:

Representation of the People Act 1951, S.116B(2)-Stay of election judgment and order-Judge-Power-Dimensions of Judge power to stay-Difference between executive discretion and judicial discretion, explained-Cognisability of non-legal arguments in such cases-Equity and ground of "unclean hands"-Courts cannot go into the merits of the case at the stage of granting stay-Balance of convenience, public justice etc. are relevant considerations--Precedents of pre-1966 Election law are of no value to post-1966 cases of conditional stay--Nature of 'type design' stay orders and their value-Legal effect of a stay order in general and in particular, in the instant case, as a Minister or Prime Minister-Power to ask for a review of provisional orders.

HEADNOTE:

In the General Parliamentary Elections of 1971, the appellant was declared as a successful candidate from the Rae Bareilly Constituency in Uttar Pradesh. She won the election by a margin of 1,11,810 votes over her nearest rival Sri Raj Narain. Sri Raj Narain, respondent No. 1, who was sponsored by the Samyukta Socialist Party filed an election petition u/s 80 r/w S.100 of the Representation of the People Act, 1951 to challenge the election of the successful candidate. A learned single judge of the Allahabad High Court upheld the challenge on two grounds

rejecting the other grounds of challenge. The learned judge also granted an absolute 20 days' stay. The appellant moved this Court, challenging the 'unseating' verdict against her by the High Court. The appellant also sought "absolute stay" of the judgment and order under appeal. Respondent No. 1 filed cross-appeals against the said judgment rejecting the grounds of challenge, except two.

Allowing the petition and granting the stay in terms, the Court

HELD : 1. While the right to appeal is statutory, the power to stay is discretionary. But judicial discretion-indeed, even executive discretion-cannot run riot. The former though plenary, is governed in its exercise by sound guidelines and courts look for light, inter alia, from practice and precedent without however being hide-bound mechanically. Judicial power is dynamic, forward looking and socially luscious and aware. [407 H, 408 A]

2. The court decides forensic questions without getting embroiled in nonlegal disputes working as it does in a sound-proof system of sorts. The Court is the quiet of the storm centre and views with an equal eye, the claims on each side, taking judicial note of the high issues and balance of convenience in the wider context. The judicial approach is to stay away from political thickets and new problems with institutionalised blinkers on, so long as the court methodology remains the same. Arguments about political sentiment, political propriety and moral compulsion though relevant at other levels, fall beyond the conventional judicial orbit and the courts have to discriminate shift them while deciding. on the grant of stay pending an appeal. If national crises and democratic considerations, and not mere balance of convenience and interests of justice, were to be major inputs in the Judges exercise of discretion systematic changes and shifts in judicial attitude may perhaps be needed. But sitting in time-honoured forensic surroundings the Supreme Court is constrained to judge the issues before it by canons sanctified by the usage of this Court. [408 C-H]

3. The preliminary objection of "unclean hands" not entitling the petitioner/ ,appellant to seek the equitable relief of stay is not founded on facts. The stay order does not state that it was to enable the election of a different leader that time was granted. The petitioner could not be faulted as having played false to the Court since the Congress Parliamentary Party convoked subsequent to the judgment has full bloodedly plumped in favour of her remaining in office

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as Prime Minister and guiding the Party as its one and only leader. In such matters one has go by prima facie materials and probabilities. (408 H, 409 A-E)

4. At the stage when the Court is considering whether a stay should be granted or not, it is premature and perhaps

unwise to pronounce on the merits of the appeal itself except where the judgment contained grotesque errors absurd conclusions or grossly erroneous propositions of law. The High Court's finding, until upset, holds good, however weak it may ultimately prove. The offence of corrupt practice u/s 123 of the Representation of the People Act, 1951 may be light or grave, which is for the Bench which hears the appeal. In extensor to hold, one way or the other. When findings of contravention of the election law is before the Court, this Court cannot take the prima facie view that the justice of the case justifies indifference to those findings. [410 C, 411A, F-G]

5. Socio-legal considerations such, as prior practice of this Court, special circumstances compelling departure, the balance of convenience, dictates of public justice, the way in which public interest ties, are relevant to the grant or refusal of stay and the terms to be imposed on the petitioner in the event of grant. [411 H, 412 A]

6. It was for the first time in 1966, by amending Act LXVII of 1966, that a statutory right of appeal to the Supreme Court was created by S.116A of the Representation of the People Act, 1951 and a plenary power to grant stay, conditional or otherwise was vested in this Court u/s 116 B(2) of the Act, independently of constitutional remedies. The question of an absolute stay or a qualified stay of the unseating verdict did not and could not arise under the pre-1966 law and to rely upon past precedents as tantamount to absolute stay of an order which took effect would be untenable. [413 G, 414 C-E]

7. The "type-design" of stay orders made by this Court under the post-1966 law has, with marginal variations, acquired a standardized form. This *cursus curiae* is more persuasive for adoption, unless exceptional legal or other grounds for deviation are made out for grant of absolute stay. The orders are dichotomous in character. They are : (a) that "the operation of the judgment and order of the High Court be and is hereby stayed" and (b) the petitioner shall abide by certain enumerated terms viz. (i) that he will be entitled to attend the Sessions of the Legislature and sign the Register; (ii) he shall not take part in the proceedings of the House or vote or draw any remuneration as such member. [414 F-G, 415 A-B]

8. Section 8A being the necessary follow-up of the judgment u/s 100 of the Representation of the People Act 1951 the legal effect of an order of this Court suspending the application of the judgment and order of the High Court' is that by sheer force of the first limb of this court's stay order, the judgment and order of the High Court is nullified for the once i.e. till the appeal is disposed of. Consequently the disqualification also ipso jure remains in abeyance. There is a plenary eclipse of the High Court's judgment and order during the pendency of the appeal, subject to the few restraints clamped down on the applicant.

[415 C-D, H, 416 A]

9. This appeal relates solely to the Lok Sabha Membership of the applicant and the subject matter of her office qua Prime Minister is not directly before this Court in this litigation. Indeed that office and its functions are regulated carefully by a separate fascinating of Articles in the Constitution. There is some link between membership of one of the two Houses of Parliament and Ministership (Art. 75), but once the stay order is made, the disqualification regarding Membership is in suspended animation and does not operate. Likewise the appellant's Membership of the Lok Sabha remains in force so long as the stay lasts. However there will be a limitation regarding the appellants' participation in the proceedings of the Lok Sabha in her capacity as Member thereof, but, independently of the Membership, a Minister and a forty the Prime Minister, has the right to address both Houses of Parliament (without right to vote, though) and has other functions to fulfil (Arts. 74, 75, 78 and 88 are illustrative.) In short the restraints set out in the usual stay order cannot and will not detract from the appellant being entitled to exercise such

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rights as she has, including addressing Parliament and drawing salary, in her capacity as Prime Minister. There will thus be no legal embargo on her holding the office of Prime Minister. [416 D-G]

[The court gave liberty to the parties to move a Division Bench of this Court, if justifying considerations appeared necessary later on, to move for variations of the conditions of the instant stay order]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 887 of 1975 and Civil Misc. Petition No. 3557 of 1975 (Application for absolute and unconditional stay with an *ex parte* ad interim order).

N. A. Palkhivala and J. B. Dadachanji for the Appellant. J. P. Goyal for the Respondent.

ORDER

1. Right at the beginning, I must record appreciation of the valuable assistance given by counsel on both sides to the Court in clarifying the twilight aspects and unraveling the latent facets of what, viewed in typically isolated legal perspective, unturned to the national wave-length and unclouded by the dust-storms of politics, is a humdrum case. Having regard to the obstreperous environs and mounting tensions surrounding the events following upon the judgment of the Allahabad High Court, it must be stated to the Credit of Shri Palkhivala and Shri Shanti Bhushan that in their suave submissions they have shown how sound and fury only help thwart the thought-ways of law and

extra-legal tumults can be walled off from the Court hall. The arguments have been largely legal and their merits have to be weighed in judicial scales. What, perhaps in a certain view, are not strictly pertinent to the stay proceedings have, however, been adverted to at the bar, inevitably and understandably, but within marginal limits, if I may say so, because the proceedings in the Halls, of Justice must be informed, to some extent, by the great verity that the broad sweep of human history is guided by sociological forces beyond the ken of the noisy hour or the quirk of legal nicety. Life is larger than Law. Now I proceed to discuss the merits of the matter.

2. The appellant has moved this Court challenging the 'unseating' verdict against her by the High Court. She, has also sought 'absolute stay' of the judgment and order under appeal. Entering a caveat, the respondent has also appeared through counsel and opposed the grant of stay.

3. While the right to appeal is statutory, the power to stay is discretionary. But judicial discretion-indeed, even executive discretion-cannot run riot. The former, though plenary, is governed in *Already reported in (1976) 2 S.C.R. P. 347.

its exercise by sound guidelines, and courts look for light, inter alia, from practice and precedent, without however, being hide-bound mechanically by the past alone. After all, Judicial power is dynamic, forward-looking and socially luscious and aware. I mention this dimension of 'judge-power' because, the industry and ingenuity of both lawyers have unearthed prior instances zigzagging now and then but substantially striking the same note. A few orders from the debris of old records have been brought up which seem to suggest variations in the type of stay granted by the higher courts. I shall have occasion to dilate on them a little later. Suffice it to note that the power of the court must rise to the occasion, if justice, in its larger connotation, is the goal-and it is.

4. Having regard to the historic power-stakes involved in this election appeal and stay proceeding, vigorous arguments, marked by strokes of heat and flashes of light, have been heard in this application for stay and the time consumed at the bar has been considerably more than when like matters have been routinely dealt with by this Court. Let it be plainly understood that the Court decides forensic questions without getting embroiled in non-legal disputes working as it does in a sound-proof system of sorts. Moreover, notwithstanding the unusual, though natural, excitement and importance surrounding the case, the Court is the quiet of the storm centre and views, with an equal eye, the claims on each side, taking judicial note of the high issues and balance of convenience in the wider context. Arguments about public sentiment, political propriety and moral compulsion, though touched upon at the bar and relevant at other levels, fall beyond the conventional judicial orbit and have to be discriminately shifted. Nevertheless, Shri Palkhivala has pressed before me the propriety and urgency of the Court taking into consideration the national situation even while exercising its discretionary power. As, a counterweight to this submission, Shri Shanti Bhushan has claimed that no republic can surrender its democratic destiny to a single soul without being guilty of overpowering the parliamentary process by a personality cult. This brings to the fore an activist interrogation about the cognisability of such considerations by a court. Do the judicial process and its traditional methodology sometimes make the Judicature look archaic, with eyes open on law and closed on society, forgetting the integral yoga of law and society? If national crises and democratic considerations, and not mere balance of convenience and interests of 'justice', were to be major

inputs in the Judges exercise of discretion, systemic changes and shifts in judicial attitudes may perhaps be needed. Sitting in time-honoured forensic surroundings I am constrained to judge the issues before me by the canons sanctified by the usage of this Court.

5. Now to the points urged before me. More or less by way of preliminary objection, Shri Shanti Bhushan asserted that the petitioner, having come with unclean hands, was not entitled to seek the equitable relief of stay. How were her hands unclean? Because, the argument runs, her advocate induced the High Court into granting a stay by misrepresenting that if the judgment came into immediate effect, the national government would be paralyzed for want of a Prime Minister and so time was needed for the ruling Party to elect a new leader to head the Government. Taken in by this alleged critical need of the democratic process, the learned Judge granted 20 days' stay. This spell, ingeniously secured, was perverted to consolidate her leadership, not to find a successor. If this version of the respondent were veracious, the petitioner's conduct were dubious and this Court would not condone such 'solemn mockery'. But Shri Shanti Bhushan's submission loses its sting if Shri Palkhivala were to be heeded. For, according to the latter, all in a hurry a stay was moved by the Allahabad advocate praying for stay stating both the need to elect a leader (not, another leader) and to enable filing of an appeal. The Congress Parliamentary Party was since convoked but there was a thunderously unanimous vote reaffirming, faith in the petitioner as leader and Prime Minister. If her Party so fullbloodedly plumped in favour of her remaining in office as Prime Minister and guiding the Party as its one and only leader, the petitioner could not be faulted as having played false to the Court. She could only call a meeting of the Party but not coerce the members to elect anyone other than the one they had set their hearts upon. Whether that Party's leadership resources were too inadequate to secure an alternative chief may be an interesting question, but the Court does not peep into that penumbral area. Moreover, the stay order does not state that it was to enable the election of a different leader that time was granted. I have no good reason to reject the petitioner's plea that the choice of an alternative leader was left to her Party, that she did what she could in the spirit of the representation to Court and did not what she could not viz., to force her partymen to push her aside for the nonce for the Court's satisfaction. In these matters one has to go by prima facie materials and probabilities. I overrule the 'unclean hands' objection.

6. Shri Palkhivala, for the petitioner, contended that an unconditional stay was appropriate and essential because (a) it was Sanctioned by some precedent; (b) there were momentous consequences disastrous to the country if anything less than the total suspension of the order under appeal were made; (c) the adverse holding of the High Court on two counts hardly exceeded, even on its face, technical violations unworthy of being visited with an ad interim embargo on Parliament Membership during the pendency of the appeal apart from being palpably perverse and (d) the nation was solidly behind the petitioner as Prime Minister. Minimal justice, public interest and balance of convenience concurred in his favour. Shri Shanti Bhushan, on the contrary, joined issue on these pleas and asserted that (a) the appellant must be treated like any other party; (b) that an absolute stay was unprecedented; (c) that the democratic process would take care of itself even if the petitioner stepped aside for a while; (d) the corrupt practices were corrupt in law and fact, fully proved and could not be glossed over by a court of law as technical and (e) the alleged solid support by party minions meant little since similar phenomena could be organized by any strategist in top office and the rule of law cannot be drowned by the drums and shouts of numbers. In his

submission, public interest and balance, of convenience as also justice to the High Court judgment demanded that an illegally elected Member did not continue longer as Prime Minister under the umbrella of a stay order from this Court, without jeopardizing the credibility of the country abroad.

7. Shri Palkhivala assailed, in his opening submissions, the two findings recorded against the appellant holding her guilty of corrupt practice. Indeed, he was at pains to convince me that his client had, a strong prima facie case on the merits, in the sense that the judgment, on its face, was perverse and legally untenable. Although I listened at some length to these arguments and, to an extent, to the counter submissions made by Shri Shanti Bhushan in his endeavour to establish that the holdings were sound, I made it fairly clear in the course of the hearing that at this stage when I was considering whether a stay should be granted or not, it was premature and perhaps unwise to pronounce on the merits of the appeal itself except where the judgment contained grotesque errors, absurd conclusions or grossly erroneous propositions of law. Having considered the submissions on this basis, I do not think I should express any opinion way or the other on the merits of the findings. Nor do regard it just for counsel for the respondent to say that every discrepancy in the petitioner's evidence or other incorrectness in testimony can be called false. Not to accept a witness's evidence may be due to many grounds of probability not always because of univercity or unreliability. These aspects will surely be examined at the hearing of the appeal, not now.

8. Counsel for the petitioner, after dealing with the 'ex- facie untenability of the judgment under appeal which I have just disposed of, moved on to what he called justice between the parties. This is not an ordinary lis, where even after stepping down from office, the petitioner can, if and after she wins the appeal step back into office. In politics, 'red in tooth and claw', power lost is not necessarily followed, after legal victory by power regained. The Court cannot in that sense, restore the parties to their original position as in ordinary cases. However, the respondent suffers no prejudice by the continuance of the petitioner as Parliament Member and Prime Minister. To cap it all, there is hardly a run of a little over half-a-year for the full term of this Parliament to expire. So, he pressed for continuance of the status quo which had gone on for a few years now during the pendency of the Election Petition.

9. The respondent's counsel retorted that the question of justice between two private persons was alien to election litigation and cited a ruling to emphasize what is obvious. In an election case, the whole constituency is, in an invisible but real sense, before the court and justice to the electoral system which is the paramount consideration is ,best done by safeguarding the purity of the polls regardless of the little rights of individual combatants.

10. At the first flush I was disposed to prolong the 'absolute stay' granted by the High Court, moved not only by what Shri Palkhivala had urged but by another weighty time factor that the appeal itself, in the light of the directions I have already given yesterday, may well be decided in two or three months. But on fuller reflection I have hesitated to take that course. After all, the High Court's finding, until upset, holds good, however weak it may ultimately prove. The nature of the invalidatory grounds upheld by the High Court, I agree, does not involve the petitioner in any of the graver electoral vices set out in Section 123 of the Act. May be they are only venial deviations but the law. as it stands, visits a returned candidate with the same consequence of invalidation. Supposing a

candidate has transported one voter contrary to the legal prohibition and even though he has won by a huge plurality of votes his election is set aside. Draconian laws do not cease to be law in court but must alert a wakeful and quick-acting legislature. So it follows that I cannot, at this preliminary stage, lightly dismiss the illegality of the election as held by the High Court. But more importantly, I am disinclined to set store by Shri Palkivala's 'Private justice' submission (to borrow his own phrase) because the ultimate order I propose to make, if I may even here anticipate, substantially preserves the position of the petitioner as Member of Parliament and does not adversely affect her legal status as Prime Minister.

11. In another facet of the same argument Shri Palkhivala urged that, after all, the petitioner had been held 'technically' guilty of 'corrupt practice' and that the grounds set out by the learned Judge were too flimsy to stand scrutiny at the appellate level. Therefore, the 'justice' of the case demanded continuance of the 'absolute stay' granted by the trial Judge himself. Shri Shanti Bhushan, on the other side, refuted this submission as specious. His argument is this. 'Corrupt practice' could not be dismissed as 'technical' if one had any respect for the law of the land as laid down by Parliament. Once the law has defined 'corrupt practice', commission thereof cannot be condoned as 'technical.' That is defiance of the law and challenge to the wisdom of Parliament. It is one thing to amend the law, but it is another to disregard it on a ground unknown to law that is only a nominal deviance. I am afraid it is premature and presumptuous for me, at this stage, to pronounce upon the relative worth of the findings of the High Court. The offence may be light or grave. But that is for the Bench which hears the appeal in extenso to hold, one way or the other. Before me are findings of contravention of the election law and I cannot take the prima facie view that the justice of the case justifies indifference to those findings. In short, I am not influenced by this aspect of Shri Palkhivala's argument.

12. Leaving aside the injury to private rights as of lesser consequence in election disputes, let me look at the customary factors courts are prone to probe in stay matters where the discretion vests in court.

13. What has been the prior practice of this Court in such cases? What, if any, are the special circumstances compelling departure in favour of the petitioner? What is the balance of convenience?

What does the public justice of the case dictate? Which way does public interest lie? These are the socio-legal considerations which are relevant to the grant or refusal of stay and the terms to be imposed on the petitioner in the event of grant. Stay pending appeal has been usually granted but hemmed in by conditions. The respondent himself has filed a sheaf of orders of conditional stay granted by this Court, suggesting by implication that those conditions should be attached to any stay the Court may be inclined to issue. The terms in which such limited stay orders have been couched, the legal implications thereof, the right surviving under them and the impact thereof on the office of Prime Minister of the petitioner will be scanned more closely later in this order. Suffice it to say for the present that for around two decades there has rarely been what Shri Palkhivala calls an 'absolute stay' issued by this Court in election cases where a Member has been unseated by the High Court for corrupt practice.

14. There was reference at the, bar to political compulsions like the swell of the tidal wave in favour of the petitioner which, even if true (though controverted by the other side), cannot breach the legal dykes to force a stay where precedentially it has not been granted. Nor can the national crisis, conjured up by counsel for the petitioner, in the event of her exit from office, be a valid legal consideration, even if it may perhaps have weight in other spheres. Shri Shanti Bhushan urges that moreover one cannot readily accept that the nation will come to a grinding halt if one person is not available to fill the office of Prime Minister. I make no comments on these rival presentations for it is difficult for the Judge to gauge with his traditional court room apparatus the reality and extent of the circumstances of national magnitude the parties have dwelt upon.

15. So we come to the next criterion which is commonplace in this jurisdiction viz., the balance of convenience. Here, counsel for the petitioner has addressed an attractive argument (repeating in some measure what, under a different head, he had urged) that if the appeal itself were disposed of early, the continuance of the status quo would go a long way to preserve and promote administrative stability and policy continuity, having regard to the fact that the petitioner in this case was more than a Member of Parliament but was the Prime Minister and leader of the ruling Party. In a democracy, the Prime Minister is the central figure who decides crucial internal and international policy, directs measures of great economic moment and is responsible and accountable to the Parliament and the nation for the performance of the Administration. Of course, collective Cabinet responsibility is of the essence of the democratic process, but the Council of Ministers is virtually chosen by the President in accordance with the wishes of the Prime Minister. The broad guidance of the Party in power notwithstanding, the personality of a Prime Minister has a telling effect on democratic government. If, therefore, the appeal itself will be disposed of in some months, 'as it is likely to be, the balance of convenience will be in favour of continuance of the same team which is animated by the Presence of the key personality within the Council of Ministers. Again, the short spell of the pendency of the appeal—a case of this climactic pitch deserves to be disposed of with quick dispatch and I have already given some directions to facilitate it—is a strong factor for non-disturbance of the petitioner's position, having regard to the traumatic effect on and grievous consequences to the petitioner. Of course, these are components of a wider concept of balance of convenience and not altogether forbidden ground in dealing with discretionary exercise. May be there is some force in the plea that there should be a stay of operation of the judgment and order in such manner that upsetting the Ministry in office should be obviated. Ordinarily, even with the same Party ruling, when a Prime Minister resigns, the whole team is ushered out leaving it free for the new leader to choose his new set.

16. Shri Shanti Bhushan has countered this argument by reliance on the practice in the parliamentary system where within the ruling Party a leader is changed or ceases to be available and a new leader is elected, so that the democratic process finds smooth expression. This, he said, has happened in India, as elsewhere and no plea of balance of convenience can be built on what in fact is a desire to remain in office. The Judicial approach, as already pointed out by me, is to shy away from political thickets and view problems with institutionalised blinkers on, so long as the court methodology remains what it is. So no comments again. But the balance of convenience, widely or limitedly connoted, is reasonably taken care of in the shape of the conditional stay granted at the conclusion of this judgment.

17. Shri Palkhivala drew my attention to a few vintage instances of what he calls absolute stay having been granted in election matters by higher Courts. These are cases of long ago and the argument based on them stems from an insufficient comprehension about the anatomy of the pre-1956 Representation of the People Act, 1951 (Act XLIII of 1951). The Court speaks for today, based on current practice and present law.

18. In this context it is necessary to remember that in the Act as it originally stood, Election Tribunals tried election disputes and s. 107 provided

107. Orders to take effect only on publication—An order of the Tribunal under section 98 or section 99 shall not take effect until it is published in the Gazette of India under section 106."

Indeed, there was no right of appeal provided in the Act and the aggrieved parties had to approach the High Court or the Supreme Court under the provisions of the Constitution. The higher Courts in such situations merely stayed the publication in the Gazette, the consequence being that the order of the Tribunal did not come into effect at all. The question, therefore, of an absolute stay or a qualified stay of the unseating verdict did not and could not arise. To rely upon orders passed under the then law merely staying publication of the order of the Tribunal in the Gazette as tantamount to absolute stay of an order which took effect would be untenable.

19. In 1956 a major change in the law was made whereby the order of the Election Tribunal appointed under S. 86 'shall take effect as soon as it is pronounced by the Tribunal' (vide S. 107, as amended by Act XXVII of 1956). By the same amending Act, an appeal was provided from orders of Election Tribunals to the High Court of the State and s. 116A(4) clothed the High Courts with power to stay operation of the order appealed from—and if stay was granted 'the order shall be deemed never to have taken effect. Of course, against appellate orders of the High Court the disappointed party could come to this Court under the provisions of the Constitution (.Arts. 133 or 136).

20. Still later, by amending Act No. LXVII of 1966, the High Court was conferred original jurisdiction to try election petitions and it was provided in s. 107 that the order of the High Court 'shall take effect as soon as it is pronounced..... While a limited power to stay operation of the order of the High Court was conferred by s. 116B(1) on the High Court itself, the statutory right of appeal to the Supreme Court was provided for by S. 116A. However, by virtue of s. 116B(2) it was enacted :

"116B(2). Where an appeal has been preferred against an order made under section 98 or section 99, the Supreme Court may on sufficient cause being shown and on such terms and conditions as it may think fit, stay the operation of the order appealed from."

Thus, for the first time, it was in 1966 that a statutory right of appeal to this Court was created and a plenary power to grant stay, conditional or otherwise, was vested in this Court, independently of constitutional remedies.

21. This narration of the historical background regarding the pre-1966 statutory position is sufficient to distinguish old examples of the pattern of stay granted by this Court. Today there is no case of prohibition of publication in the Gazette. Above all, the type-design, if I may use such an expression, of stay orders made by this Court under the present law has, with marginal variations, acquired a standardised form. Naturally, this *cursus curiae* is more persuasive for adoption, unless exceptional legal or other grounds for deviation are made out for grant of absolute stay.

22. Even on the basis of the post-1966 law, Shri Palkhivala has argued that taking legitimate cognizance of the peerless position of the appellant as Prime Minister of the country, judicial discretion must least disturb not merely her seat in Parliament but her office in Government.

23. I proceed to take a close-up of the 'sample orders' made by this Court during the last many years, dissect them in the background of the judgments under appeal where such orders were passed and mould my order deriving support therefrom. So I turn the focus on the implications and effect of the stay orders in the cases covered by Annexure A filed by the respondent which are in consonance with the usual orders passed by this Court in election appeals.

24. It is evident on its face that the orders are dichotomous in character. The two limbs stand out clearly and they are : (a) that 'the operation of the Judgment and Order of the High Court be and is hereby stayed' and (b) the petitioner shall abide by certain enumerated terms viz., (i) he will be entitled to attend the Sessions of the Legislature and sign the Register; (ii) he shall not take part in the proceedings of the House or vote or draw any remuneration as such Member. In the instances I have examined, the appeals are against orders 'unseating' the returned candidate on the ground of corrupt practice and, disqualifying him for the statutory six-year period prescribed in s. 8A. If corrupt practice is found, disqualification follows, although sometimes the trial Court expressly writes it into the order itself, as in the present case. If the finding of corrupt practice does not come into effect, the sequel of disqualification also does not come into effect. If the biopsy of the stay order inevitably shows that the finding of corrupt practice is suspended and is not operative, the electoral disqualification automatically stands eclipsed. Section 8A being the necessary follow-up of the judgment under s. 100, what is the legal effect of an order by this Court suspending the operation of the judgment and order of the High Court ? By sheer force of the first limb of this Court's stay order, the judgment and order of the High Court is nullified for the nonce i.e., till the appeal is disposed of. Consequentially, the disqualification also ipso jure remains in abeyance.

25. What then is the import of the conditions imposed in the stay order ? They inhibit the elected member, who otherwise by virtue of the stay of the judgment, will be entitled to exercise all his rights and privileges as Member, from doing certain things expressly tabooed, viz., (a) participating in the proceedings; (b) voting or drawing remuneration. For all other purposes, the voiding judgment being suspended, he continues as Member. Indeed, the very direction that he attend the House and sign in the Register as Member to avoid disqualification under Art. 101 of the Constitution postulates that he is a Member and is not disqualified under s. 8A of the Act. For, if the disqualification under s. 8A operates and he ceases to be a Member, there is no need to veto his drawing remuneration, voting or participating in the proceedings. It would be a curious contradiction to say that a person is disqualified to be chosen as or being a Member and yet be

allowed to sign the Register as Member. Can the Court, without stultifying itself and usurping power, permit a non-Member to sit in the House instead of or even in the Visitor's gallery, unless it necessarily reads into the order of stay of judgment a suspension of the disqualification also? There are a number of other privileges for a Member of Parliament which are left untouched by this Court's prior stay orders. Moreover, the specific direction suspending the judgment and order under appeal, read in its plenitude, also suspends the finding of corrupt practice. So much so, the disqualification also shares the fate. I have no doubt that the reasonable effect of a stay order is that there is a plenary eclipse of the High Court's judgment and order during the pendency of the appeal, subject to the few restraints clamped down on an appellant. Those restraints are the second limb of the stay order and are explicit enough.

26. The essential point to note is that by necessary implication the disqualification imposed on every appellant also stands suspended in all cases of conditional stay. The stay is complete, but carved out of it are but three, limitations. 'For all other purposes, the appellant, in all such cases, continues a Member. For instance, if he is prevented from entering the Legislature, a breach of privilege arises. I have gone at length into these ramifications to remove recalcitrant doubts. The typical stay restores to the appellant, during its operation, the full status of a Member of a Legislature minus the right to participate in debates, including voting and drawing of remuneration as a legislator.

27. For these reasons I propose to direct a stay, substantially on the same lines as have been made in, earlier similar cases, modified by the compulsive necessities of this case.

28. What would be the legal impact of an order of this type on the Prime Ministership of the petitioner? The question canvassed about the office of the Prime Minister and its involvement in the present case has exercised counsel on both sides and it is but proper to dissolve the mists of possible misunderstanding by an explicit statement. This appeal, it is plain, relates solely to the Lok Sabha Membership of the appellant and the subject matter of her office qua Prime Minister is not directly before this Court in this litigation. Indeed, that office and its functions are regulated carefully by a separate fasciculus of Articles in the Constitution. There is some link between Membership of one of the two Houses of Parliament and Ministership (Art. 75 but once the stay order is made, as has been indicated above, the disqualification regarding Membership is in suspended animation and does not operate. Likewise, the appellant's Membership of the Lok Sabha remains in force so long as the stay lasts. However, there will be a limitation regarding the appellant's participation in the proceedings of the Lok Sabha in her capacity as Member thereof, but, independently of the Membership, a Minister, and, a fortiori, the Prime Minister, has the, right to address both Houses of Parliament (without right to vote, though) and has other functions to fulfil (Arts. 74, 75, 78 and 88 are illustrative) In short, the restrictions set out in the usual stay order cannot and will not detract from the appellant being entitled to exercise such rights as she has, including addressing Parliament and drawing salary, in her capacity as Prime Minister. There will thus be no legal embargo on her holding the office of Prime Minister. However, this legal sequitur of the situation arising from the stay of the judgment and order of the High Court, including the suspension of the disqualification under S. 8A, has nothing to do with extra-legal considerations. Legality is within the Court's province to pronounce upon, but canons of political propriety and democratic dharma are polemical issues on which judicial silence is the golden rule.

29. It is true that between an absolute stay as sought and the stay as granted there is practically little difference when the petitioner is a Minister. Moreover when the House is not in session, as now, even the restrictions set out in sub-para III of para 31 of this order hardly, have any operation. In this view, the dispute between the parties one asking for an absolute stay (as if it were a magic formula) and the other citing heaps of orders of conditional stay for adoption (as if much difference would be made in practical effect) appears to be shadow-boxing, as pointed out by me even during the arguments.

30. Maybe, brevity which is usual in this Court in orders of stay of this sort might well have sufficed here also but, the over all desirability to dispel possible ambiguity warrants a hopefully longer speaking order.

31. Let me sum up the terms of the operative order I hereby pass I. Subject to para III below, there will be a stay of the operation of the judgment and order of the High Court under appeal.

II. Consequentially, the disqualification imposed upon the appellant as a statutory sequel under s. 8A of the Act and as forming part of the judgment and order impugned will also be suspended. That is to say, the petitioner will remain a Member of the Lok Sabha for all purposes except to the extent restricted by para III so long as the stay order lasts.

III. The appellant-petitioner, qua Lok Sabha Member, will be entitled to sign the Register kept in the House for that purpose and attend the Sessions of the Lok Sabha, but she will neither participate in the proceedings in the Lok Sabha nor vote nor draw remuneration in her capacity as Member of the Lok Sabha.

IV. Independently of the restrictions under para III on her Membership of the Lok Sabha, her rights as Prime Minister or Minister, so long as she fills that office, to speak in and otherwise to take part in the proceedings of either House of Parliament or a joint sitting of the Houses (without right to vote) and to discharge other functions such as are laid down in Articles 74, 75, 78, 88 etc., or under any other law, and to draw her salary as Prime Minister, shall not be affected or detracted from on account of the conditions contained in this stay order.

32. This order, by me sitting single as Vacation Judge, is being delivered with a sense of hurry, although after careful consideration of arguments heard till last evening. Now the Parliament is not in session and the veto on the right to vote is currently academic. Situations may develop, circumstances may change and this order itself, like any interlocutory order, is provisional. If new events like the convening of Parliament take place or fresh considerations crop up warranting the review of the restrictions in this stay order, the petitioner-appellant will be at liberty to move a Division Bench of this Court again to modify the restrictions or pray for an unconditional stay. Likewise, the respondent may also if justifying considerations appear anew move for variation of the conditions in this stay order.

S.R.

Petition allowed.

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