Nandigram Petition: Analysing Mamata Banerjee's plea seeking Judicial Recusal

Anujay Shrivasatava
29 Jun 2021

Recently, the West Bengal Chief Minister and All India Trinamool Congress leader, Ms. Mamata Banerjee had filed an election petition challenging the election win of the Bhartiya Janata Party ('BJP') Leader, Mr. Suvendhu Adhikari. The case is currently pending before a Single-Judge Bench of the Hon'ble Calcutta High Court, headed by Hon'ble Mr. Justice Kausik Chanda, in Mamata Banerjee vs. Suvendhu Adhikari, EP/1/2021 (Pending).

On 18 June 2021, it was **reported** that Banerjee had objected to Justice Chanda hearing her election petition. The objections were made through a **letter** written by Banerjee's lawyer, Advocate (Mr.) Sanjay Basu, to the Acting Chief Justice of the Calcutta High Court, Hon'ble Mr. Justice Rajesh Bindal.

While the outcome of this case has important ramifications for the State Legislature in West Bengal, it is not relevant to the discussion in this article. In this article, I shall examine the plea for judicial recusal made by Banerjee. With reference to prior law and current governing law on Judicial Recusals, I establish that the threshold for Justice Chanda's recusal is not met in the present case.

THE PLEA FOR RECUSAL:

Banerjee has stated that the election petition must be listed before a Judge of the Calcutta High Court other than Justice Chanda, as there was a "reasonable apprehension" in her mind about the likelihood of a bias on part of the Hon'ble Judge. There are three reasons reportedly forwarded by Banerjee for objecting to the Hon'ble Judge's hearing of the case.

First, it was stated that the election petition had certain political ramifications. Banerjee stated that Justice Chanda was allegedly an active member of the BJP prior to his elevation as a Judge of the High Court. Consequently, Banerjee argued that in the event Justice Chanda were to take up the election petition, there will be a reasonable apprehension in "her mind" of bias on part of Justice Chanda, should the High Court give a favourable order to Adhikari, and conversely, an unfavourable order to Banerjee.

Second, Banerjee stated that her views on confirmation of Justice Chanda as a permanent judge of the High Court were sought by the Calcutta High Court's Former Chief Justice, where Banerjee had allegedly conveyed her objections and reservations about the same. Given the fact that Justice Chanda would be likely aware about her objections to his confirmation as a permanent judge of the Calcutta High Court, she apprehends that there is a likelihood of bias on the part of Justice Chanda.

Third, as Adhikari is a member of the BJP and since Justice Chanda was also allegedly an active member of the BJP, it will lead to a situation and perception where Justice Chanda in adjudicating the matter may be said to be a judge in his own cause. The letter finally stated that in order to sustain the confidence of the public in the judiciary, the election petition "ought to be reassigned".

PRIOR LAW ON JUDICIAL RECUSAL IN INDIA:

Judicial Recusals is a lesser-known area of law which usually sees overlaps of discussion between Constitutional Law and Professional Legal Ethics. The **Indian Constitution** is silent about any situations or circumstances which warrant for a Judge of any court to recuse themselves from a case. In spite of this constitutional silence, the Hon'ble Supreme Court of India and various High Courts have envisaged certain situations where recusal of a judge is possible, and perhaps, necessary to further the ends of justice. Importantly, under the existing legal jurisprudence, it is completely left to a judge to decide whether or not to mention the reasons for which she/he recuses from a case. However, as we shall later see, the jurisprudence on standards for Judicial Recusal has recently seen stringent modifications owing to the increasing malpractices such as "bench-hunting". There are four notable judgments by the Supreme Court of India which require a mention.

First, in **Manak Lal vs. Prem Chand Singhvi, AIR 1957 SC 425**, a Three-Judge Bench of the Supreme Court had held that 'judicial authorities' (which include both courts and tribunals) must act impartially, objectively and without any bias. It was held that the test for judicial recusal is not whether in fact a bias has affected the judgment, it always must be checked whether a litigant could "reasonably apprehend" that a bias attributable to a judge or member of the tribunal might have operated against him in the final decision. By following this approach, the important principle that "justice must not only be done, it must also appear to be done" comes to fruition.

Second, in **Ranjit Thakur vs. Union of India, (1987) 4 SCC 611**, a Division-Bench of the Supreme Court held that the appropriate approach for a judge whose recusal is sought should be to look at the mind of the party before him and not test his own conscience by asking himself whether he is honest, or alternatively, whether he is biased or not.

Lastly, in **State of West Bengal vs. Shivananda Pathak, (1998) 5 SCC 513** and also later in **Narinder Singh Arora vs. State, (2011) 1 SCC 651**, the Division-Benches of the Supreme Court had held that an essential requirement of judicial adjudication is that the

judge is “impartial” and “neutral”. The judge should be in a position to apply her/his mind objectively to the facts of the case put up before him. If a judge is pre-disposed or suffers from prejudices or has a biased mind, he disqualifies himself from acting as a judge.

CURRENT LEGAL POSITION GOVERNING JUDICIAL RECUSALS AND THE THREAT OF “BENCH-HUNTING” PRACTICE:

Moving away from the above-mentioned standards in the cases discussed previously, the courts in India have had to reconsider the principles on which judicial recusals can be made. This was done pursuant to the increasing malpractices of “bench-hunting” by parties and their advocates to seek judicial recusal of a judge whom they believe would not offer a favourable order to them. There are five remarkable cases which require a perusal.

First, the Hon’ble Delhi High Court in Court On Its Own Motion vs. State, (2008) 146 DLT 429 (DB), had held that the path of recusal is very often a convenient and a soft option. The High Court recorded that a judge has no vested interest in doing a particular matter. However, the oath taken by a High Court judge under Article 219 of the Indian Constitution, enjoins on a judge. This duty is to duly, faithfully and to the best of his knowledge as well as judgment, perform his duties without any fear, favour, affection or ill-will while upholding the Constitution and the various laws. Moreover, wherever unfounded or motivated allegations of bias are sought to be made with a view of “forum hunting” or “bench preference” or “brow-beating” the court, then a judge succumbing to such a pressure would tantamount to him not fulfilling his oath of office. This approach was recently adopted by a Division-Bench of the Supreme Court in **Seema Sapra vs. Court On Its Own Motion, 2019 SCC OnLine 1392** (‘Seema Sapra’) where the Supreme Court dismissed a plea for recusal of Hon’ble Mr. Justice A.M. Khanwilkar.

Second, in the **Subrata Roy Sahara vs. Union of India, (2014) 8 SCC 470**, a Division-Bench of the Supreme Courtcomprising of Hon’ble Mr. Justice K.S.P. Radhakrishnan and Hon’ble Mr. Justice J.S. Khehar, had rejected pleas for their recusal sought by five Senior Advocates of recognized eminence, in a case which related to the notorious Sahara Scam. In a strong move, the Supreme Court recorded that calculated psychological offensives, mind games and inappropriate language were being adopted by advocates to seek recusals of judges and engage in bench-hunting. The Bench unanimously stated that such tactics must be deprecated and strongly repulsed. It further suggested to all judicial authorities to adopt a similar approach when such unimaginable conduct by advocates howsoever eminent is shown.

Third, in the landmark case of **Supreme Court Advocates-on-Record Association vs. Union of India (Recusal Matter), (2016) 5 SCC 808** (‘NJAC Case’), before a Five-Judge Constitution Bench of the Supreme Court, recusal of Hon’ble Mr. Justice J.S. Khehar was sought by various advocates during the hearings, after having successfully sought the recusal of Hon’ble Mr. Justice Anil Dave. Justice Khehar had noted that the case was example of another form of “forum shopping”, where a litigant makes allegations of a perceived conflict of interest against a judge. By raising such allegations, they require the judge to recuse from the proceedings, so that the matter could be transferred to another judge. Notably, all five judges, including Hon’ble Mr. Justice Jasti Chelameswar (who had given the sole dissent on the court’s later declaration of the National Judicial Appointments Commission as unconstitutional), had unanimously held that the question for recusal in a case before a judge (whose recusal is sought), is entirely for the judge to decide.

While the Constitution Bench in the NJAC Case did not refer to the earlier cases mentioned above, through this judgment, the positions laid down by the Supreme Court earlier in the cases mentioned in the previous segment all stand implicitly overruled. Notably, as held by the Supreme Court in the Five-Judge Constitution Bench decision in **Central Board of Dawoodi Bohra vs. State of Maharashtra, (2005) 2 SCC 673**, which discusses various principles of judicial discipline, there is no requirement for a bench of higher strength to not refer the precedents with a lower bench strength which took a contrary position of law.

Fourth, in a strongly worded judgment by a Three-Judge Bench of the Supreme Court in **Tehseen Poonawala vs. Union of India, (2018) 6 SCC 72**, which is also famously known as the "Judge Loya" decision, Hon'ble Dr. Justice D.Y. Chandrachud reiterated the above-mentioned position by holding that a decision as to whether a judge should hear a case, is purely a matter of conscience of for the judge whose recusal is sought.

Lastly, it is pertinent to mention an Order by the Five-Judge Constitution Bench of the Supreme Court in **Indore Development Authority vs. Manohar Lal, S.L.P. (Civ.) Nos. 9036-9038/2016** ('Manohar Lal') which was authored by Hon'ble Mr. Justice Arun Mishra. Writing a unanimous order, Justice Mishra outlined the test for Judicial Recusal holding that "the ultimate test is that it is for the Judge to decide and to find out whether he will be able to deliver impartial justice to a cause with integrity with whatever intellectual capacity at his command and he is not prejudiced by any fact or law and is able to take an independent view" [emphasis mine]. Justice Mishra also noted that if recusals were to be made on the mere requests of the litigants, it would tantamount to "bench-hunting" or giving the litigant "a judge of their choice" who can apparently share the views which are to be canvassed by them. Moreover, there is no such "right" for any litigant to have a judge of their choice on the bench and there cannot be any room to entertain the same.

ANALYSING THE RECUSAL PLEA:

Notably, the three grounds raised by Banerjee to both object to Justice Chanda's hearing of the case and seek a different judge to hear the election petition, seem to be premised on the earlier jurisprudence on Judicial Recusals, which required a judge to check *"reasonable apprehension"* in mind of a 'litigant' before him about any potential questions of bias, neutrality or impartiality. If we were to apply the earlier law on Banerjee's recusal plea for Justice Chanda, perhaps a strong case could have emerged in favour of her plea.

However, as per the current governing law laid down by the Supreme Court in the cases discussed in the immediately preceding segment (especially the NJAC Case and Manohar Lal), *it is completely left to a judge to decide whether or not they should recuse from a particular case*. As noted earlier, the current governing law has been evolved by the Supreme Court owing to the increasing malpractices of *"bench-hunting"*, "*forum shopping", "seeking a favourable judge", or "brow-beating"* the court, which are detrimental to the values of judicial accountability, judicial independence and meeting the ends of justice. Consequently, in the present case, it is up to Justice Chanda to himself decide whether or not he wishes to recuse, based on the objections raised by Banerjee to his hearing of the case.

Even acknowledging the possibility that Justice Chanda could choose to recuse at a later hearing as per the above-mentioned principles, I argue that Banerjee's plea for recusal is legally flawed and unlikely to succeed.

Given the fact that all judges take an oath under the Indian Constitution, *it is absurd to impute allegations of bias on judges merely for their prior political background (if any)*.

Various judges have had often been a part of political parties or represented political parties and their members before courts during their time as a practicing lawyer. They could have also occupied offices such as those of Attorney General of India, Solicitor General, Additional Solicitor Generals, Advocate General and Additional Advocate Generals, all of whom hold their office at the pleasure of the President or the Governor. It is understandable and appreciable that where a Judge may have previously directly acted as an advocate or consultant for an individual including a politician, it could be a guiding factor for a judge to decide recusing from a case.

This seems to not be the case in the present circumstances, given the fact that Banerjee has not raised a plea about Justice Chanda having ever represented Adhikari during his practice as an advocate, eliminating any direct conflict of interest between Justice Chanda and Adhikari. This is also cemented by the fact that Adhikari was **reported** to join BJP after leaving Banerjee's party in December 2020, which is significantly after Justice Chanda's elevation as a High Court Judge, eliminating possibility of Justice Chanda ever representing Adhikari on BJP's behalf as a lawyer. Consequently, the objection that Justice Chanda was allegedly involved with BJP (which Adhikari is currently a part of) is by itself insufficient to be an objective ground to seek Justice Chanda's recusal.

It is important to also highlight that by taking the yardstick raised in Banerjee's plea as absolute, any sitting or ad-hoc Judges of the Hon'ble High Courts or the Hon'ble Supreme Court with such background should never be able to hear election petitions, merely owing to their affiliation with a certain political party or affiliated organization in the past. Enabling of Judicial Recusals on such a yardstick would be to create abdication of a judge's duty under their constitutional oath as acknowledged by the Supreme Court in the Seema Sapra Case. Moreover, it would also be encouraging the malpractices of bench-hunting, forum shopping, seeking appointment of a favourable judge or brow-beating of the court.

CONCLUDING REMARKS:

I have sought to establish that Banerjee's plea for Justice Chanda's recusal in her election petition challenging Adhikari's win is legally flawed and unlikely to succeed. It is important to mention that even if Justice Chanda does not recuse and should the court decide in favour of Adhikari or give an order/judgment that Banerjee perceives to be unfavourable to her, Banerjee could challenge the final order/judgment before a larger bench of the High Court as per law. A larger bench of the High Court can in rare and exceptional cases also choose to remand the case to a different Single-Judge bench and hear the case afresh. Even if a larger bench of the High Court decides in favour of Adhikari, Banerjee can appeal before the Supreme Court. Moreover, even if the Supreme Court too decides in favour of Adhikari, Banerjee can still seek legal recourse to filing a 'review petition' before the Supreme Court. Therefore, various stages of legal remedies are still available under the law, should Banerjee's election petition against Adhikari be ultimately decided by Justice Chanda and should the court hold in favour of Adhikari.

It is relevant to point out that as per the current governing law on Judicial Recusals, Banerjee should have raised the grounds for seeking recusal before the Justice Chanda led bench, rather than writing a letter to the Acting Chief Justice for seeking allotment of the case to a different bench. This point has also been **reportedly** echoed by Justice Chanda

in an oral hearing while responding to the plea for his recusal. Respectfully speaking, such conduct by a litigant shows not only ignorance of the current governing law on Judicial Recusal, but raises ethical questions on why the recusal plea was not reportedly made before the very judge whose recusal was sought.

Anujay Shrivastava is a Law Graduate from Jindal Global Law School, O.P. Jindal Global University, Sonipat. Views are personal.