

CHIEF JUSTICE'S COURT

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE M.R. SHAH

HON'BLE MR. JUSTICE KRISHNA MURARI

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE PAMIDIGHANTAM
SRI NARASIMHA

Subhash Desai

v.

Principal Secretary, Governor of Maharashtra and Ors.

W.P.(C) No. 493/2022

CONSOLIDATED TRANSCRIPT OF HEARINGS

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v.
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W.P.(C) No. 493/2022
Item No. 501

TRANSCRIPT OF HEARING

21-Feb-2023

Transcript to be read with the video recording of the hearing.

11:00 AM IST

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CHIEF JUSTICE CHANDRACHUD: So just for the information of all the members of the Bar, you'll see that a screen is there. So we are just trying to explore with the possibility of live transcription of arguments.

MR SIBAL: That's wonderful.

CHIEF JUSTICE CHANDRACHUD: We had to do it in a live environment with an experiment so we'll just see how it works, at least in the Constitution Bench matters. Because then we'll have a permanent record of arguments. Of course it helps the judges and the lawyers, but it will also help our law colleges. They can analyse you know how matters are argued, what was submitted. It is a huge resource.

MR SIBAL: We'll also get to know *Nabam Rebia* was argued My Lord. No I say this in a lighter way, only in a lighter vein.

CHIEF JUSTICE CHANDRACHUD: We are already there.

JUSTICE SHAH: You know why we are telling, Honourable Chief Justice is telling is - Don't interrupt each other. Otherwise that will be difficult. Argue one by one. One at a time.

MR SIBAL: My Lords, in posterity we will get to know what foolish arguments we've made my lords.

CHIEF JUSTICE CHANDRACHUD: Nobody admits. But we'll of course, this will be a great record for the...

MR. SIBAL: No, no, I think it is a wonderful idea.

JUSTICE NARASIMHA: Truly a court of record.....because every word is recorded.

MR SIBAL: It should be, it should be.

JUSTICE NARASIMHA: Every word is recorded.

1 **MR. SIBAL:** My lords in fact, I can share something with you. When I was of practicing in
2 New York, we had these EBT proceedings, that is Examination Before Trial. And I'm talking
3 about this, about the 70s. My Lord they would record everything that was said in the course of
4 that examination even then, so that we know, lawyers knew what was going to happen.

5

6 **MR. MEHTA:** Gujarat has e-courts my lord in the sessions division, Sessions Court. There
7 even our internal whisperings are also recorded.

8

9 **MR SIBAL:** That is very dangerous. That is hazardous, completely hazardous.

10

11 **CHIEF JUSTICE CHANDRACHUD:** Now the only thing is that if there are two or more
12 voices at the same time, that causes little bit of a problem. But they obviously have personnel
13 who will clean up the errors by the evening. They suggested that during the course of the day
14 the Counsel will get the link. So the counsel can look at it. By the evening they would have
15 cleared up the... cleaned up the entire transcript and given it to us.

16

17 **MR. SIBAL:** That's wonderful. That's wonderful. That's truly, truly a milestone, I would say
18 my Lords. A milestone my lords.

19

20 **JUSTICE NARASIMHA:** In VC proceedings, anybody wanted to interrupt, would lift their
21 finger. So much there is no cross talk. So we can follow that so that it won't overlap with one
22 another.

23

24 **MR. SIBAL:** Hopefully. So My Lords, let me just give Your Lordships a birds eye view of what
25 is in issue here, then I'll go on to the matter in some detail. My Lords as Your Lordship knows
26 My Lords, what is in issue is whether the legislative party, that's the central issue, whether the
27 legislative party in the House acts independently of the political party. That's the central issue.
28 Because I will, My Lords, while I go through the facts before Your Lordships, indicate to Your
29 Lordships that on the 21st of June when the first meeting took place, and we called the group
30 led by Uddhav Thackeray, called members of the legislative Party who belonged to now the
31 Eknath Shinde group to come and attend the meeting, which was not done, pursuant to which,
32 My Lords, some actions were taken. The contention throughout has been that there is a split
33 in the party. So the issue before Your Lordships is - can members of the Legislature within the
34 House or comprising of those members of the House by themselves say that there is a split in
35 the party because they don't agree with the leadership? This in turn would require Your
36 Lordships to look at the Tenth Schedule and in that context interpret the role of the party
37 within the legislature. My Lords, after all, members of the Legislature of any particular party

1 come, get elected on a symbol of the party. They are there because of the party. And if they are
2 there because of the party My Lords, they are, there is an umbilical cord link between them
3 while they are sitting in the house and the party outside. Can that link be severed and say we
4 are an independent set of people, we can do what we like. That will require my lords the
5 interpretation of the Tenth Schedule. Require Your Lordships to analyse the role of the whip,
6 how a whip gets appointed, how he happens to be a bridge between the Legislative Party and
7 the political party and that nothing happens in the House without the political party taking a
8 decision. Nothing happens. My Lords the bill is introduced by the treasury benches, any bill....

9

10 **CHIEF JUSTICE CHANDRACHUD:** Is it your contention therefore.... Is it your
11 contention Mr. Sibal, therefore that, unless there is a split outside the house, within the
12 political party, that split cannot find recognition within the Legislative Party within the House?

13

14 **MR. SIBAL:** Absolutely. That's my contention. That is the law also my lords and I will
15 demonstrate that to Your Lordships. That is the law. Now what happens, I am giving Your
16 Lordships an example my lords, a Bill is introduced by the treasury benches, a controversial
17 Bill let's assume. Bill in which there is no consensus. My Lords what happens? The
18 Parliamentary party, a group of members of the Legislature are invited by the Parliamentary
19 Party to sit outside the House in a particular room and say, this is the Bill that's being
20 introduced. What is, what should be our position? The party decides the position and it is
21 articulated in the House. The Legislative Party by itself dehors the party doesn't decide what
22 we are going to do, what we are not going to do. When a whip is going to be issued, My Lords,
23 it is issued outside the House and translated inside the House. On this, you are going to vote
24 against the bill that has been introduced or that you will vote in favour or that you will abstain.

25

26 **JUSTICE CHANDRACHUD:** But when the Tenth Schedule speaks about, say, a merger, for
27 instance, now, there are very few exceptions in the Tenth Schedule, and it speaks of a merger.
28 Ultimately the Speaker has to decide whether there is a merger. The Speaker will not go into
29 whether there was a merger outside the House. Because then the speaker will be taking over
30 the function of the Election Commission of India.

31

32 **MR. SIBAL:** That My Lords, that argument is entirely on a different plane. We are not dealing
33 with it and we will interpret the Paragraph 4 for your Lordships also.

34

35 **CHIEF JUSTICE CHANDRACHUD:** The Speaker's remit cannot lie outside the House.

36

1 **MR. SIBAL:** My Lords, there's a problem. Supposing, alright, let us analyze that for a minute
2 since your lordships have raised the issue. Supposing there are ten members of the Legislative
3 Party in the House. Right? And the merger has to take place of the political party, they belong
4 say to the Samajwadi Party. Right my lords? Now, even Paragraph 4 says there is a merger of
5 a political party, not the merger of the Legislative Party.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Right?

8

9 **MR. SIBAL:** So therefore Samajwadi Party...

10

11 **CHIEF JUSTICE CHANDRACHUD:** But no, if we accept your argument that would mean
12 that unless the Election Commission of India decides on a merger outside the House, the
13 Speaker cannot take a decision within the House whether there is a merger or not. That can't
14 be.

15

16 **MR. SIBAL:** No, no. Election Commission need not decide this issue my lords.

17

18 **CHIEF JUSTICE CHANDRACHUD:** How else?

19

20 **MR. SIBAL:** Because a resolution will be passed that we have merged and that will be
21 informed. The Election Commission, they all have taken a decision. They'll be informed. The
22 majority of the members of the party will decide, they will be informed. Once merger takes
23 place, these eight people, these eight people may say - we don't want to merge. And Paragraph
24 4 says they need not merge. But My Lords, I'll come to that later. It is a very complex issue.
25 Not so....

26

27 **CHIEF JUSTICE CHANDRACHUD:** Let's have a broad now framework of the facts
28 because...

29

30 **MR. SIBAL:** I will, I will My Lords.

31

32 **CHIEF JUSTICE CHANDRACHUD:** In fact, that was our basic problem that unless we
33 have a clear perception on the facts...

34

35 **MR SIBAL:** I am going to do that.

36

1 **CHIEF JUSTICE CHANDRACHUD:** ...it is very difficult for us then to look at the law
2 dehors from the fact.

3

4 **MR. SIBAL:** I entirely agree but, may I just My Lord what are the issues that are going to be.
5 I just want Your Lordships to...

6

7 **JUSTICE NARASIMHA:** We have to necessarily reframe the issues because the kind of the
8 issues which are there which are...

9

10 **MR. SIBAL:** Yeah, yeah. It's not reflective of what needs to be decided. I agree entirely. My
11 Lord the other issue is, the other issue is and that's never come up before the court. And that
12 issue is, can a Governor, swear in a member of a Legislative Party against whom a
13 disqualification matter is pending before the House? That is the other issue. Never come up
14 before. What then are the powers of the Governor in matters in relation to disqualification?
15 This is not a case of a pre-poll alliance, this is not a case of post-poll alliance, this is not a case
16 of one political party. It is a case of people who allege that they are the party because they are
17 a majority in the Legislature. Right My Lords? What then are the powers, or what should be
18 the function of the Governor in matters of this nature, and how he should conduct himself?
19 Because he also knows, because the Disqualification Petition is pending, My Lords. He also
20 knows. And if the Governor does, My Lords, swear him in as a Chief Minister, My Lords, he
21 actually topples, topples a democratically elected government and aides in doing that because
22 they happen to be a majority in the Legislature. My Lords, that's one of the issues that Your
23 Lordships may have to consider. Then the other issue to be considered is, can a Court, a
24 Constitutional Court without referring the matter to the Speaker in the facts and
25 circumstances of this case, decide the matter on it's own, given the fact that there are no
26 disputed facts. We are not going to My Lords place before Your Lordships, any disputed fact.
27 All are matters of record.

28

29 **JUSTICE NARASIMHA:** Your question is, can a constitutional court decide Tenth
30 Schedule?

31

32 **MR. SIBAL:** Yeah, that is correct.

33

34 **JUSTICE NARASIMHA:** Tenth Schedule?

35

36 **MR. SIBAL:** That's correct. That's correct. Because under the Tenth Schedule, it has the
37 Speaker to decide. Correct My Lords? But if the proceedings My Lords are imbued with

1 illegality, and given the conduct of speakers in the past, what then should be the attitude of
2 the court in a given matter? That's the other thing. And then of course, lastly, My Lords, how
3 do you deal with an issue, and that My Lords because the last question in the reference is the
4 powers of the Election Commission. And Your Lordships, and that's the last question, which
5 is the last issue Your Lordships will have to decide, that under Paragraph 15 of the Symbols'
6 Order, when there is a split in the political party, it starts with that proposition, that two
7 factions have arisen pursuant to a split in the political party. Then which factions should get
8 the symbol?

9

10 **JUSTICE NARASIMHA:** Will that arise in this case?

11

12 **MR. SIBAL:** I am sorry?

13

14 **JUSTICE NARASIMHA:** Will that arise here?

15

16 **MR. SIBAL:** Yes, yes, That's the question. That's the question. What is the role of the Election
17 Commission in matters under the...That's part of the reference.

18

19 **CHIEF JUSTICE CHANDRACHUD:** So under Para 15 of the Symbols' Order, when two
20 factions emerge in pursuance of a split, so what is the sequitur and how would you end the
21 sentence?

22

23 **MR. SIBAL:** My Lords, then what is the role of the Election Commission in deciding that
24 matter? Should it await the decision of the Constitutional Court? Should it go ahead? Your
25 Lordships only, as your Lordships will remember, in September said - no stay, but Your
26 Lordship did not say how he is going to decide it.

27

28 **CHIEF JUSTICE CHANDRACHUD:** But that Mr. Sibal is your independent challenge to
29 the order of the Election Commission...We can't ...

30

31 **MR. SIBAL:** That's separate issue My Lord..

32

33 **CHIEF JUSTICE CHANDRACHUD:** We can't really decide that.

34

35 **MR. SIBAL:** No, no, that's a part of the reference. I am going to argue My Lords.

36

37 **CHIEF JUSTICE CHANDRACHUD:** And can we, how do we....

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MR. SIBAL: My Lord, if constitutionally, the Election Commission cannot proceed. The split would have, have to happen on 21st of June. There was no whisper of a split on 21st of June..

CHIEF JUSTICE CHANDRACHUD: So your contention that therefore a Election Commission itself cannot proceed...

MR. SIBAL: Yes.

CHIEF JUSTICE CHANDRACHUD: ...unless the Speaker has decided that.

MR. SIBAL: Correct, correct. That's what Your Lordship said - no stay, fine, no stay. We went before the Election Commission and said you cannot decide on this matter. The matter is pending in Supreme court. He said no, but Supreme Court has said no stay and you will find that tomorrow when, Your Lordships sit at 3:30. But, be that as it may these are the My Lords, that's the last question that Your Lordships, Your Ladyship will have to look at. So these broadly My Lords, are the issues that you might be asked upon to decide, that you might wish to decide. Now, My Lords let's go to the list of dates because unless you have the facts My Lords, it will be... My Lords this is now PDF Page 108 of the written submissions <UNCLEAR> It is marked as Capital A. And I have learnt how to use the iPad.

JUSTICE KOHLI: Mr. Sibal, just wondering if you could just look at the issues that were framed...

MR. SIBAL: Ladyship, I can't hear you..

JUSTICE KOHLI: Look at the issues that were framed once, so that we know the perspective in which you are arguing? The issues that were framed for reference to the Constitution.

MR. SIBAL: I can read those.

JUSTICE KOHLI: Can we just do a quick recall before we...

MR. SIBAL: Yeah, I think that's a good idea. Yes reference order, Your Lordships will have that. Order Compilation My Lords? PDF Page 28. And the questions start at Page 30.

JUSTICE SHAH: Which is the Order dated?

1 **MR. SIBAL:** It is an order dated, 23rd of August 2022, Page 28 my lords and the relevant
2 part....question starts at Page 30 at the bottom. PDF Page 30 My Lords. The Ladyship has it?
3 Justice Shah My Lords?
4

5 **JUSTICE SHAH:** Yes.
6

7 **MR. SIBAL:** May I My Lords? (A), whether notice for removal of a Speaker restricts him from
8 continuing with Disqualification proceedings under the Tenth Schedule of the Constitution, as
9 held by this court in Nabia? I have already argued that. Your Lordships had deferred Your
10 Lordship's judgment on that, so we'll skip that for the moment. (B), whether a Petition under
11 Article 226 or 32, lies inviting a decision on a Disqualification Petition by the High Court or
12 the Supreme Court, as the case may be? That's the question that I have already formulated in
13 different... the language is somewhat different, but the intent is the same. Then (C), can a court
14 hold that a member is deemed to be disqualified by virtue of his or her actions absent a
15 decision to the Speaker. Actually (B) and (C) are together My Lords. They are interlinked.
16

17 **JUSTICE NARASIMHA:** Per se cases?
18

19 **MR SIBAL:** Yes. Language is somewhat My Lords...

20 (D), what is the status of proceedings in the House during the pendency of Disqualification
21 Petitions against the members? My Lords it really does not clarify what it means. What is the
22 status of proceedings? What it means is, that can members against whom there is a
23 Disqualification Petition pending, have a role to play in the House while it is pending?
24 Otherwise you can topple any Government you want.
25

26 Then (E) My Lords, if the decision of a Speaker that a member has incurred disqualification
27 under the Tenth Schedule, relates back to the date of the action complained of, then what is
28 the status of proceedings that took place during the pendency of a disqualification petition?
29 Now My Lords this question only arises if you allow proceedings to go on. If you don't decide
30 on the disqualification before, then this question arises because if at a later point in time, you
31 consider them to be disqualified relating back to the date when their act led to a voluntary
32 giving up membership of the party or violation of the Whip, then My Lords what happens to
33 the intervening proceedings? A Government has been formed, actions have been taken, policy
34 decisions have been made. Would it not be better for the purposes of, I personally believe,
35 democratic traditions that you should await your hands till the disqualification is decided first
36 because this problem will not arise then.
37

1 Then My Lords (F), I think it's very, very important. What is the impact of the removal of
2 Paragraph 3 in the Tenth Schedule? According to me that is central to the entire issue because
3 now you don't have a split. The issue of a split doesn't arise. Which is why if you want to go to
4 the Election Commission there has to be a split in the party. Not a split in the Legislature. That
5 is not on record, no such split. So this is central and we will interpret paragraph 4, also in that
6 context My Lords.

7
8 Then (G), what is the scope of the power of the Speaker to determine the Whip and the leader
9 of the House Legislative party? What is the interplay of the same with respect to the provisions
10 of the Tenth Schedule? My lords, actually again convoluted in its expression. In simple terms
11 it means, that how is a Whip appointed and how is a leader in the House appointed? Is there
12 a role of a political party, or is it something that the Legislative Party decides? Can majority of
13 the Legislative Party decide, I'll change the Whip tomorrow? Can't be. So what has happened
14 in this case? And I'll come to the facts that sitting outside the House, X number of people said
15 you are no longer the Whip and those are members of the Legislature only. I can give Your
16 Lordships documents to the effect. What happens is when a leader of the House is appointed,
17 the letter that is given to the Speaker is that the party hereby decides that this person will lead
18 the House for the party. It is not the, members of the Legislature don't decide these issues.
19 Similarly Whip, because the Whip is the bridge between the Government, between
20 government or the opposition, whichever party it is and the House, members of the
21 Legislature. That's why Your Lordships will see that nowhere in the Constitution does the word
22 political party is referred to except in the Tenth Schedule, because in the Constitution you are
23 dealing with institutions. You're dealing with an institutional framework within which all
24 political parties function. In the Tenth Schedule you are dealing with framework within which
25 a legislative party functions in the context of the political party resulting in disqualification.

26
27 Then My Lords (H) - Are intra-party decisions amenable to judicial review? I don't think that
28 question arises. There is no intra-party decisions in the Legislature. Your Ladyship is right.
29 We need to look at some of these questions. Then (I) - What is the extent of discretion and
30 power of the Governor to invite a person to form the government and whether the same is
31 amenable to judicial review? My lords, Governor's actions are always amenable to judicial
32 review. That's not an issue at all. Question is, what should a Governor do in the context of
33 Disqualification Petitions pending, and which are yet to be adjudicated upon? As a Governor,
34 My Lords, who represents a.. he is a constitutional authority, he needs to protect the
35 Constitution and the Laws. In this very state, a Governor My Lords, in the early hours of the
36 morning gave an oath through the oath of office, made somebody a Chief Minister. And by the
37 early morning, during, on daylight, he had to resign. Governors, and I say this with respect to

1 all the institution of the Governor, that Governors have, in my respectful submissions acted
2 far beyond their constitutional responsibilities, as we have seen, as I have seen in the recent
3 past. That may not be a proposition that the other side will accept. But I'm giving only my view
4 of the matter. It is unfortunate that Governments are actively involved in the politics of the
5 country.

6
7 Then My Lords, the last one. What is the scope or the powers of the Election Commission of
8 India, with respect to determination of a split within a party? That's where My Lords the
9 question of Para 15 of the Symbol's Order comes in.

10

11 My Lords, kindly now, come up, come to the written submissions of the Petitioner and the list
12 of dates is at Page 108. PDF 108.

13

14 **CHIEF JUSTICE CHANDRACHUD:** That is 'A' right? A - Petitioner written submission.

15

16 **MR. SIBAL:** Yes, A. PDF 108.

17

18 **JUSTICE SHAH:** Written submission no? You are referring to Written submissions?

19

20 **MR. SIBAL:** Yes, yes.

21

22 **JUSTICE SHAH:** Not additional written submissions.

23

24 **MR. SIBAL:** A... My Lords. A. Page 108. PDF.

25

26 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal what we could also do is, that of course,
27 you see the broad points of reference. And ultimately we'll need to focus narrow down the
28 reference to the issues which you want to focus on and maybe if you could during the course
29 of the afternoon share that with the other side. We can have their feedback so that if we narrow
30 it down to certain specific issues. Because many of the issues which have been framed in the
31 reference order the may not strictly arise.

32

33 **MR. SIBAL:** Yeah it is not necessary.

34

35 **JUSTICE CHANDRACHUD:** So let's sort of structure that so that it lends some clarity to....

36

1 **MR. SIBAL:** Let us do that in the evening, My Lords. That'll be much easier for us if Your
2 Lordship will allow us, because I'll consult my colleagues on the other side, who will give some
3 agreed issues. Because after noon may not be the most appropriate.

4

5 **JUSTICE CHANDRACHUD:** Evening? Evening would be fine.

6

7 **MR. SIBAL:** Yes. We will..

8

9 **JUSTICE CHANDRACHUD:** And also then we can have some idea about, you know, the
10 time schedule. How long would you take so that then we can restrict them as well, and to
11 certain time.

12

13 **MR. SIBAL:** Well, this side My Lord will take 3 days.

14

15 **CHIEF JUSTICE CHANDRACHUD:** 3? Mr. Sibal, how long would you take about 3 hours
16 or so today?

17

18 **MR. SIBAL:** No, no. Because I'll take much more tomorrow too.

19

20 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal, we will have to have structured arguments.

21

22 **MR. SIBAL:** All right. It'll be structured My Lords. I'm not going to repeat myself at all. Your
23 Lordship knows I have myself, My Lords reduced. I mean..

24

25 **CHIEF JUSTICE CHANDRACHUD:** After Mr. Sibal, after you conclude Dr. Singhvi will...?

26

27 **MR. SIBAL:** Dr. Singhvi and then Mr. Kamat My Lords. My colleague Mr. Kamat.

28

29 **CHIEF JUSTICE CHANDRACHUD:** So Why don't.... maybe we could do this. We have
30 about an hour and 15 minutes before lunch and you get 2 hours after lunch today. That's about
31 3 hours and 15 minutes. So maybe if you could conclude today by 04:00, then we can give Dr.
32 Singhvi until lunch tomorrow and then a little supplement half an hour after lunch for Mr.
33 Kamat and then they can start tomorrow afternoon. We are breaking at 3:30 tomorrow so they
34 get about an hour and a half in the afternoon and maybe on Thursday they can conclude by
35 maybe lunch. And then we will give you....

36

1 **MR. SIBAL:** We'll try that My Lords. We'll try that. No issue My Lords, we certainly try and
2 speed it up. I mean, I just think My Lords, Your Lordships may have questions yourselves.

3

4 **CHIEF JUSTICE CHANDRACHUD:** Of course. If we find that of course there's a little
5 change in the time schedule we can certainly do that.

6

7 **MR. SIBAL:** Then Your Lordships will also have to decide on the Nabam reference at some
8 stage what your Lordships want to do because that sort of opens up another...

9

10 **CHIEF JUSTICE CHANDRACHUD:** So we'll look at the list of dates?

11 **MR SIBAL:** Yes. So on 19-6-1966 Shiv Sena founded by Balasaheb Thackeray to espouse the
12 ideology and legacy of whatever and has been recognized as the state political party by the
13 Election Commission. Balasaheb Thackeray was the President Shiv Sena Pramukh of the Shiv
14 Sena from its very inception and continued in the role till his demise on 17th November 2012.
15 After the demise of Balasaheb Thackeray, Uddhav Thackeray was unanimously elected to be
16 President, Shiv Sena, Paksh Pramukh of the Shiv Sena political party and has continued to
17 hold the position. At present Shri Uddhav Thackeray unequivocally continues to be the Paksh
18 Pramukh of the Shiv Sena, the President of Shiv Sena, which is the highest position as provided
19 in the Constitution of Shiv Sena, and a copy of the Constitution is annexed. 85 - In view of the
20 repeated defections of elected MLAs and MPs and with a view to curb horse trading of an
21 elected representative, the Constitution was amended to include the Tenth Schedule by virtue
22 of the 52nd Amendment to the Constitution with the following statements and objects. The
23 evil of political defections has been a matter of national concern. If it is not combatted, it is
24 likely to undermine the very foundation of our democracy and the principles which sustain it.
25 With this object an assurance was given in the address by the President of Parliament that the
26 Government intended to introduce the current session of Parliament an anti-defection Bill.
27 This Bill is meant for outlawing detection and fulfilling the above assurance.

28

29 So nothing in the Tenth Schedule should be interpreted to give credence to a defection.
30 Nothing in the Tenth Schedule should be interpreted to somehow legalize a defection, give
31 credibility to that process because the whole object of the Act is to ensure that there are no
32 unprincipled defections. My Lords, there is an elected government. The attempt of the Court
33 and of the institution of the Governor should be to allow the elected government to function
34 till such time as a person is either disqualified or not disqualified. Right? And if there is a
35 disqualification petition that should be allowed to be decided. Because if you don't allow that
36 to happen and you pass an order like you did on the 27th of June, unfortunately, it's the judicial
37 order that led to this. It is that judicial order that led to this. Had that not been passed, we

1 wouldn't be here and that if the speaker had been allowed to decide and they would have gone
2 up in appeal if there was a decision against them, or somebody else would have gone up in
3 appeal. So My Lords, 7th April the Tenth Schedule was amended by the 92nd Amendment and
4 Paragraph 3 thereof, which permitted one-third members of the Legislative party to split, was
5 omitted. Split is no longer available as a defense against disqualification under the Tenth
6 Schedule. My Lords please mark that.

7
8 The defenses available were only two that I have one-third of the Legislative party as split
9 pursuant to a split in the political party. It is not a split of the Legislative party. Paragraph 3
10 and I will read that Your Lordships. It is a split in the political party resulting in one-third of
11 the members in the Legislative Party, which gives them a defense to say that they cannot be
12 disqualified. Similarly with Paragraph 4, it's a defense. If I am two-thirds and there's a merger
13 of a party, it's a defense saying, now I am entitled to be that party. That is part of the new party.
14 Either the original a new original party or the part of the merged party. That's a defense. That's
15 why I indicated to Your Lordships, now there's no question of majority, minority, one-third,
16 two-thirds, not relevant, if there's a split. Because what the purpose of the Defection Law is to
17 ensure that there is no un-principled defection. Then My Lords, 23rd January organizational
18 elections of the Shiv Sena Political Party for the term 2018- 23 were held, wherein Uddhav
19 Thackeray was elected as President. The results for duly communicated in the prescribed
20 format to the Election Commission on 27th of February 2018. My Lords, the Election
21 Commission and that is not relevant here -- Election Commission, in its order, says, I don't
22 have your Constitution. Therefore, I will not consider that you are above the organizational
23 wing structure. I will not consider at all. So I go only by what is the legislative majority and the
24 legislative majority is 38 people from the Eknath Shinde group. Therefore they get the symbol.
25 Anyway that's, that's another matter..

26
27 Then My Lords October 2019, elections in the 40th Legislative Assembly of Maharashtra were
28 held. The seat distribution of the said election inter se of political parties is following. Your
29 Lordship knows this. You have seen it before.

30
31 Then My Lords, November 2019, a post-poll alliance was formed between the Shiv Sena, the
32 NCP, as well as the INC called Maha Vikas Aghadi to form a stable government in the State of
33 Maharashtra with the President of Shiv Sena, Uddhav Thackeray being sworn in as the Chief
34 Minister. 23-11-2019 prior to the swearing in of Thackeray , the Governor hastily swore in
35 Devendra Fadnavis early in the morning as a Chief Minister of Maharashtra. This honourable
36 court in Shiv Sena Vs. Union of India directed an immediate floor test and the Devendra
37 Fadnavis resigned before facing the floor of the house. This only indicates how Governors have

1 been conducting themselves. How can a Governor have sworn in somebody as a Chief Minister
2 without knowing that he has majority in the early hours of the morning?

3

4 **JUSTICE NARASIMHA:** This order is on 23rd November?

5

6 **MR. SIBAL:** Yes.

7

8 **JUSTICE NARASIMHA:** Supreme Court's Order?

9

10 **MR. SIBAL:** Yes. Oh the order? I'll just...2019 10 SCC 809.

11

12 **JUSTICE NARASIMHA:** Tell me later.

13

14 **MR. SIBAL:** Then My Lords, it's mentioned there. Anyway. April May 2020 Governor has
15 been at loggerheads with the... 25-11? Oh 25-11, Sunil Prabhu. Now this is important. 25-11
16 Sunil Prabhu was appointed as Chief Whip of the Shiv Sena Legislative Party with the blessings
17 of Uddhav Thackeray, President of the Shiv Sena political party and the same was duly notified
18 to the Speaker of the Maharashtra Legislative Assembly. My Lords, that actually, if Your
19 Lordships don't mind, look at that document. Or do you want to read the dates and then later.

20

21 **JUSTICE NARASIMHA:** We will read the entire dates.

22

23 **MR. SIBAL:** Alright, alright. Then April May 2020 the Honourable Governor has been at
24 loggerheads with the MVA government and is almost created a political crisis. Governor was
25 sitting on to the Shri Uddhav Thackeray's recommendation for nomination to the Maharashtra
26 Legislative Assembly despite a period of six months as an unelected members about to expire
27 on 27-05-2020. Further the Governor had blocked holding of the Speaker's election. No
28 Speaker's election took place. My Lords he was not a member there was a seat My Lords for
29 the Legislative Council, which had to be.. he had to be elected from that seat. He wouldn't hold
30 the election for almost six months. This tells you My Lords, how Constitutional authorities are
31 acting. First you swear in somebody, he resigns the next morning, then you have you have this
32 problem. The BJP has been attempting to create divisions within the Shiv Sena 20th June
33 2020. In the recently conducted MLC election wherein despite having the requisite number of
34 MLAs on its side, the MVA alliance, led by Shiv Sena lost the seat to the BJP. This was because
35 of cross voting within the MVA and particularly within the Shiv Sena at the behest of the BJP.
36 My Lords, I'm not going to rely on these facts, My Lords because this is disputed. So that these
37 facts I'm not going to rely on. It was widely reported in the media that Eknath Shinde, who

1 was then the Cabinet Minister of Urban Development and Public Works, has along with certain
2 other delinquent MLAs of the Shiv Sena gone into hiding in the BJP ruled neighbouring state
3 of Gujarat.

4

5 Then 21 - 6 My Lords. These are the undisputed facts that now start. To contain and allay, the
6 apprehensions that were arising in the party post the MLC elections, an urgent meeting of the
7 Shiv Sena a Legislative party was called on the 21st of June. Eknath Shinde along with certain
8 other delinquent MLAs, did not attend the above mentioned meeting dated 21st of June. The
9 party resolved in the said meeting to remove Eknath Shinde from the position of the leader of
10 the Shiv Sena legislative party and appoint Ajay Chaudhary instead. Now this is interesting
11 because this is a matter which Your Lordships have to constitutionally considered. So, a
12 faction, which is a Legislative Party, decides that I will change the Whip. Constitutionally
13 impermissible.

14

15 Then My Lords, the decision, then Eknath Shinde, along with certain other delinquent MLAs
16 did not attend the meeting. Party resolved in the said meeting to remove Eknath Shinde from
17 the position of the leader of the Shiv Sena legislative party and appoint Shri Ajay Chaudhary
18 instead. The decision to remove Eknath Shinde was communicated by Uddhav Thackeray to
19 the Honourable Deputy Speaker. After due verification, the Deputy Speaker accepted the
20 change of leadership of Shiv Sena in the House. The reason why this happened was My Lords
21 because as Your lordship knows, he had to be a member of the Legislative Council because
22 there was no seat in the Assembly. So, the then Chief Minister became a member of the
23 Legislative Council. Therefore My Lords, in the meantime, somebody had to be appointed as
24 a leader of the House because they were the treasury benches. So Eknath Shinde was the leader
25 of the House and he was removed from his position of leadership by a decision of the party
26 and the Deputy Speaker was told about it and he accepted it. In the larger interest of the party,
27 it was thought fit to call for another legislative party meeting to give one more opportunity to
28 the MLAs who were absent in the meeting on 21st June to show their loyalty and support to
29 the original political party. Hence another meeting of the SSLP was called. Individual notices
30 were issued to all the MLAs of the Shiv Sena and it was made adequately clear that "failure to
31 participate in the meeting without providing valid and adequate reasons in writing,
32 communicated in advance to the undersigned will result in consequential action against you
33 under the relevant provisions of the Constitution" So we were... they were told. On 22nd June,
34 despite the importance of the meeting called on 22nd of June aimed at consolidating the
35 SSLP's strength to contain any possible horse trading, several dissident MLAs did not attend
36 the meeting. Instead, the delinquent MLAs sitting in BJP ruled states sent communications
37 rejecting the holding of the meeting as illegal, which itself shows that those MLAs had been

1 working contrary to the dictate of the original political party. 22nd June: Sunil Prabhu in the
2 capacity of Chief Whip responded to the communication Dated 22nd of June of the delinquent
3 MLAs rejecting the reasons given for their absence from the SSLP meeting as an afterthought,
4 frivolous, backdated and proof of them acting contrary to the interests of the original political
5 party.

6
7 That's the notice that Your Lordships has read, 21st of June, Dated 21st June. I mean, received
8 on 22nd June at 11:30 a.m., but dated 21st June. Eknath Shinde wrote to the Deputy Speaker
9 communicating his appointment as leader. So now My Lords the Legislative Party or a
10 majority of the Legislative Party can decide who is going to be the leader to the party in the
11 House, of the party... sitting in Assam.

12
13 22nd of June, simultaneously a purported notice for the removal of Deputy Speaker Narhari
14 Zirwal under Rule 11 under Maharashtra Assembly Rules read with 179, was received at a
15 Legislature Secretariat, expressing no confidence in the Deputy Speaker. Notice was hand
16 delivered by an unknown courier, and not by any MLA. It is also relevant to note that none of
17 the purported signatories of the notice had personally delivered any such notice, nor it has...
18 it was sent through the registered email address of any of them. The Shiv Sena Legislative
19 Party in its meeting took note of Shri Eknath Shinde and the rebel MLAs and the fact that they
20 had indulged in antiparty activities and were trying to destabilize the MVA government. In
21 view of this it was resolved that the Shiv Sena Legislative party meeting at the then CMs
22 residence that necessary legal action shall be taken under the Tenth Schedule against the
23 errant MLAs. Now who is CM? CM My Lords is a member of the Legislative Council. He is also
24 the *param pramukh*, *paksh pramukh*. So he is the political leader. He is the one who decides.

25
26 23rd of June, this Sunil Prabhu filed disqualification petitions under para 2 (1) (a) seeking
27 disqualification of Eknath Shinde, and 15 other delinquent MLAs of Shiv Sena.

28
29 24th of June, it was widely published in the news report that the rebel MLAs is led by Eknath
30 Shinde were acting in a collusion with BJP and their entire logistical arrangement in Guwahati
31 was made by the BJP leaders.

32
33 24th of June, Secretary of Maharashtra Legislative Assembly received an email from an
34 advocate named Vishal Acharya attaching notice for removal of the Speaker dated 21st June.
35 On the same day, the Secretary of the Assembly communicated the decision of the Deputy
36 Speaker to the email of Vishal Acharya, refusing to take on record the communication dated

1 22nd of June until the genuineness and veracity of any such communication and its signatories
2 was ascertained.

3

4 25th of June, one of the dissident MLAs Deepak Kesarkar, in a live interview, declared that the
5 dissident MLAs had formed a new group and named it Shiv Sena Balasaheb. And it also
6 announced that they will have a separate leader Whip, office and everything else, just like a
7 party has.

8

9 25th of June, Honourable speaker, after due verification, was pleased to issue notices to the
10 delinquent MLAs under Rule 6 of the Maharashtra Legislative Assembly disqualification on
11 ground of defection Rules 86 read with the Tenth Schedule of the Constitution asking the
12 delinquent MLAs to file their replies by 5:30 on the 27th June 2022.

13

14 On 25th of June The National Executive Meeting of the Shiv Sena was held. The said meeting
15 was attended by over 163 representatives of the National Executive and the leadership of
16 Uddhav Thackeray as the President of Shiv Sena was unanimously and equivocally accepted
17 by the National Executive.

18

19 25th of June, Sunil Prabhu filed an additional affidavit that the disqualification proceedings
20 inter alia containing the media reports that showed the hobnobbing of the delinquent MLAs
21 with BJP leaders.

22

23 25th of June, Sunil Prabhu file disqualification petitions against two independent MLAs and
24 one MLA belonging to the Prahar Janshakti Party. The petition against the independent MLAs
25 were filed on the ground that they gave up their independent status by taking part in the
26 resolution dated 21st of June passed by the rebel MLAs and signing the said resolution on the
27 letterhead of SSLP. Also the ground taken against BJP MLA was that the said MLA voluntarily
28 gave up membership of his original political party by taking part in the said resolution, dated
29 21st June, and by signing the same on the SSLP letterhead.

30

31 27th June, issuance of the notice of 25th June, by the Honourable Deputy Speaker came to be
32 challenged by the 16 MLAs, including Sri Eknath Shinde who filed a writ petition under 32.
33 The said Court, the Honourable Court by the interim order dated so and so in writ petition so
34 and so was pleased to in the interim direct this. Thus, meanwhile, as an interim measure, the
35 time granted by the Deputy Speaker of the Assembly to the petitioners or the other similarly
36 placed members of the Legislative Party to submit their written submissions up to today on,
37 today 05:30 p.m. is extended till 12.07.

1
2 My Lord, just kindly note the language here - as an interim measure. They have not filed a
3 reply till date. We are now in February 2023. They've not filed a reply.

4
5 Now My Lords, prior to this, prior to the passing of this judicial order My lords, all that
6 happened was happening outside of Bombay, outside of Maharashtra, in a state in the
7 northeast and by.. by whom? By these legislative... members of the Legislative Assembly, that's
8 all. There was no party in sight. There was no meeting of any party. There was.... nobody called
9 for a meeting of the party. And these are undisputed facts My Lords. These are not disputed
10 facts. . Can the Tenth Schedule countenance a situation, where because of whatever reasons,
11 My Lords, we don't want to go into it, a majority or even a minority of MLAs are just, My Lords,
12 they... let's forget the majority, supposing a minority. We don't sometimes need the majority
13 to topple the government. We only need a minority. Supposing it's a minority My Lords and
14 the minority outside the state of Maharashtra says I have formed. I am the political party. And
15 then a judicial order is passed on a disqualification petition, that - no, no, no if a petition is
16 filed, you can file your reply after 10-15 days. In the meantime, the minority gets in touch with
17 the other party topples the government. A new Chief Minister is appointed. Can you ever
18 imagine that the Tenth Schedule would allow that? Can it ever be countenanced My Lord?
19 This is harakiri. This is Legislative harakiri. Political harakiri. And you can't interpret the
20 Tenth Schedule My Lords in this particular fashion to allow an elected government to fall.
21 That's why I said it is judicial orders of this Court that resulted in this.

22
23 Then My Lords 27th of June, as several other members of the SSLP had also openly indulged
24 anti-party activity. Now can anybody say, My Lords, that this is not anti-party or this is not
25 giving up membership of the party. One of you, one of you sitting there say that we are forming
26 a new party called Shiv Sena Balasaheb and you are sitting in a state ruled by the opposite,
27 ruled by a party My Lords, which was in the opposition. First you go to Gujarat, then you go
28 to Assam. There are no dispute on that. These actions per se amount to giving up membership
29 of the party, apart from the fact that you don't attend the meeting on 21st-22nd of June. So
30 what is the Speaker going to decide? What can he decide given these facts?

31
32 Then 28th of June, My Lords, late in the evening the leader of opposition in the state of
33 Maharashtra, Devendra Fadnavis went to meet the Governor and requested him to hold a floor
34 test.... after the stay. That is where the role of the Governor comes in. On 28th of June,
35 immediately after meeting the Devendra Fadnavis, and with utmost haste, the Governor sent
36 a communication dated 28th of June though received in the early hours of 29th of June to the
37 then Chief Minister directing him to face a floor test in the House on the very next day, 30th

1 of June. It is relevant to note that the Honourable Governor did not even attempt to ascertain
2 from the Chief Minister, whether they enjoyed the majority of the House. On 28th of June, the
3 Governor by way of a separate communication dated 28th of June, which was received in the
4 early hours directed the latter to forthwith. It directed the latter to forthwith on 30th June to
5 convene an assembly and hold a floor test. 29th of June, Sunil Prabhu filed a writ petition
6 before this Honourable Court seeking a stay. So My Lords, we said please stay the matter.
7 Please don't allow this to happen. Of the directions of the floor test in view of the fact that the
8 disqualification petition of 42 MLAs under the Tenth Schedule were pending, by order dated
9 29th June in writ petition so and so. This court was pleased to direct as follows. Having given
10 our thoughtful consideration to the rival submissions, we do not find any ground to stay
11 convening of the Special session of the Maharashtra Assembly. How?

12
13 Vidhan Sabha on 30th June, tomorrow at 11:00 AM and with the only agenda of a trust vote.
14 So therefore you give legitimacy to those against whom disqualification petitions are pending,
15 and such legitimacy that they are able to topple the government by colluding with another
16 party which is an opposition in that very state. That's the effect of the judicial order. So first
17 stay the proceeding before the Deputy Speaker, then allow another this collusion. And get an
18 elected government toppled. What used to be My Lords the misuse of 357 has now been
19 substituted by the misuse of the Tenth Schedule. 356 is now misuse of the Tenth Schedule.

20
21 And this. The proceedings in the trust vote to be convened on 30th of June, shall be subject to
22 the final outcome of the instant petition. That's another interesting thing My Lords,
23 proceedings of the Trust Vote shall be subject to the final outcome of the instant Writ Petition,
24 as well as the Writ Petitions referred to above. So therefore My Lords every action of the
25 Governor resulting in a new Government having been formed is subject to Your Lordships'
26 decision in these petitions. So you cannot give it the colour and clothe it with legality because
27 the judicial order itself says that it's subject to. So you cannot say now the trust vote has
28 happened. Now a Chief Minister has been installed. Now a government is in place. Now you
29 can't do a thing about it. The special session of Maharashtra Vidhan Sabha shall be conducted
30 in accordance to the directions that contained in the communication dated through 28th June
31 of the Governor of Maharashtra. Then on 29th June, Chief Minister Uddhav Thackeray
32 resigned. He knows the writing was on the wall. Have been given legitimacy to those who.

33
34 Then 30th of June at around 3 p.m. Eknath Shinde and Devendra Fadnavis met the Governor
35 and staked claim to form the government. This is also anti-party activity. No evidence is
36 required on this.

37

1 Then 30th of June, the Governor, without taking into account the fact that the membership of
2 Eknath Shinde itself was in dispute. Here again, the question of the Governor comes in My
3 Lords, in dispute in the imminent disqualification petition pending against him swore Shri
4 Eknath Shinde in as the Chief Minister and Devendra Fadnavis as the Deputy Chief Minister
5 of Maharashtra. The honourable Governor, thereafter, directed Eknath Shinde to prove his
6 majority on the floor of the house. We knew that he, everybody knows that he would have the
7 majority in the House. You can fool the Constitution, but not the arithmetic. Then the
8 Governor without taking into account the fact that the members and I had read that. Then
9 30th June due to their antiparty activities which unquestionably amounted to relinquishing
10 membership of the Shiv Sena political party, Shri Shinde, Tanaji Savant, Uday Samant and
11 Gulabrao Patil were removed from their positions in the organizational set up of the party by
12 the undisputed President of the Shiv Sena Shri Uddhav Thackeray . My Lords, let's just note
13 here, no meeting of any political party took place at the instance of Eknath Shinde and you will
14 see that tomorrow in the in the petition before the Election Commission that alleged meeting,
15 alleged meeting, which I will show is bogus, happen to have taken place on 18th July after all
16 this was over. And the petition for getting the symbol was filed on the 19th July, on the very
17 next day.

18
19 Then My Lords, 1st of July 2022 Shiv Sena Secretary sent a letter to the Election Commission
20 intimating the authority regarding the removal of Eknath Shinde from the positions of Shiv
21 Sena and change in the organizational setup of Shiv Sena there to. Also by the separate letter,
22 the Shiv Sena Secretary intimated the ECI regarding the removal of Tanaji Sawant and Uday
23 Samant from the organizational position of Shiv Sena. Similarly Shiv Sena Secretary sent
24 another letter to the Election Commission of India intimating the authority regarding the
25 removal of Gulabrao Patil from the organizational position of Shiv Sena.

26
27 On 1st of July an applicant for directions in IA such an such was filed by Sunil Prabhu in the
28 present writ petition seeking an interim order suspending the delinquent MLAs against whom
29 disqualification petitions have been filed till the final adjudication of the Tenth Schedule
30 proceedings. The said application was mentioned before this Court for urgent interim hearing
31 listing wherein this Honourable was directed to list the application along with the writ petition
32 on 11th of July.

33
34 Then 2nd of July, the Principal Secretary Maharashtra Legislative Party Assembly circulated
35 working order for conducting elections to the office of Speaker on 3rd of July. The said agenda
36 showed that the name of Rahul Narvekar was proposed by the BJP MLA and the name of

1 Ranjan Prabhakar Salvi was proposed by Shiv Sena. This Rahul Narvekar was proposed by a
2 BJP MLA because he happened to be member of the BJP.

3

4 Then 2nd July Sunil Prabhu acting as chief Whip issues a whip. Now till that day Sunil Prabhu
5 is still the whip. Acting as Chief whip of SSLP issued whip to the members of SSLP regarding
6 the election of the Speaker scheduled on 3rd July, all the party members were asked to remain
7 present in the assembly and vote for the Shiv Sena candidate Rajan Salvi. Sunil Prabhu issued
8 a further whip to the members of SSLP regarding confidence motion scheduled on 4th of July.
9 All the party members were asked to remain present in the assembly and till the end of the
10 session and vote against the Confidence Motion. My Lords, Your Lordships, just keep one
11 thing in mind, it's not their case that they merged with any party, it's their case that they belong
12 to the Shiv Sena so if they belong to the Shiv Sena, then how can they disobey the whip and
13 vote for a BJP candidate against the Shiv Sena member? There's no evidence required here My
14 Lords.

15

16 Then, on 3rd of July, Ajay Chaudhary, acting as a leader of the SSLP, submitted a letter to the
17 Deputy Speaker requesting him to conduct the election of the Speaker of the Legislative
18 Assembly by division of votes. Ajay Choudhary on the 3rd of July submitted a letter to the
19 Deputy Speaker, requesting that the votes cast by the members of the Legislative Assembly
20 who have incurred disqualification should not be considered during the election of the
21 Speaker.

22

23 3rd of July the election for the office of the Speaker of Maharashtra Legislative Assembly was
24 held, Rahul Narvekar, the candidate for the Bharatiya Janata Party was unconstitutionally
25 elected as the Speaker of the Maharashtra Legislative Assembly after getting a total of 164
26 votes. During the elections it was recorded by the Deputy Speaker that 39 delinquent MLAs of
27 Shiv Sena in a Legislative party led by Eknath Shinde had voted against the party whip. Now,
28 My Lords, at this point in time there is no other whip. Now you will see on the evening of the
29 3rd...

30

31 **CHIEF JUSTICE CHANDRACHUD:** How many votes did the rival candidates poll on the
32 3rd of July?

33

34 **MR. SIBAL:** That's all. We are not on majority minority. That's correct. I'm glad that my
35 learned friend pointed it out, My lords. Correct.

36

1 **CHIEF JUSTICE CHANDRACHUD:** Therefore, if these 39 are excluded from 164, will
2 they still have 125?

3

4 **MR. SIBAL:** I am not on that My Lords, I'm only saying that they voted against the Whip
5 therefore, they are deemed to be disqualified. That's all I'm saying. I'm not saying, that he
6 would have, supposing My Lords all of them are disqualified, because on that particular day
7 they voted against the Whip.

8

9 **CHIEF JUSTICE CHANDRACHUD:** These 39?

10

11 **MR. SIBAL:** All 39.

12

13 **CHIEF JUSTICE CHANDRACHUD:** No, but therefore if you exclude these 39 from the
14 164.

15

16 **MR. SIBAL:** Yes.

17

18 **CHIEF JUSTICE CHANDRACHUD:** They're still down to, they still get 125. Right?

19

20 **MR. SIBAL:** Your Lordship is right, at the moment My Lords, I am not challenging. At the
21 moment My Lords...

22

23 **CHIEF JUSTICE CHANDRACHUD:** Because this comes soon on the heels of the trust
24 vote, which takes place on the 30th.

25

26 **MR. SIBAL:** Yes.

27

28 **CHIEF JUSTICE CHANDRACHUD:** So this is now an indicator within three days...

29

30 **MR. SIBAL:** My Lords, that's what happened on the 4th...

31

32 **CHIEF JUSTICE CHANDRACHUD:** Because, Mr. Sibal...

33

34 **MR. SIBAL:** That don't happened on the 30th My Lord.

35

36 **CHIEF JUSTICE CHANDRACHUD:** Right, you don't, ultimately you don't, you don't face
37 the trust vote.

1
2 **MR. SIBAL:** Yeah, I don't My Lord and therefore it is held on the 4th. And we challenged the
3 trust vote also. We've challenged all deficient, the elections, the speaker, the trust vote
4 whatever. All that is challenged. My Lords the question is, at the moment as we are dealing
5 with a very very limited issues. One, should the courts have given time?
6

7 **CHIEF JUSTICE CHANDRACHUD :** That is a separated issues because it's an order which
8 is an Interim Order.
9

10 **MR. SIBAL:** Yeah. It's an Interim Order. What was the result of that My Lords? These people
11 were able to topple the Government without the Disqualification Petitions having been
12 decided. There was an elected government My Lord which was in power. The Tenth schedule
13 was used for the purposes of toppling an elected government and supposing tomorrow, Your
14 Lordship's posed by these actions which are uncontroverted that they disqualified themselves.
15 Both, on both counts 2-1A, and 2-1B. What will be the result? And if Your Lordship's pose
16 otherwise, let's assume against me. Then this will be, you have given them a model to topple
17 every elected Government.
18

19 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal, are we not still down to, if you are really
20 looking at the numbers here, are we not down to the situation where the Speaker's election at
21 least indicates that if you, because 38 was sought to be disqualified. There were
22 Disqualification Petitions against the 38. Now if we exclude the 38 for a moment from the 164
23 who voted in favour of the resolution for the Speaker, you still have a situation where you,
24 that's in very close proximity to the date on which the Trust Vote was to be held, on the 30th.
25

26 **MR. SIBAL:** Yes.
27

28 **CHIEF JUSTICE CHANDRACHUD:** Now you resign, right, on the 30th?
29

30 **MR. SIBAL:** Yes.
31

32 **CHIEF JUSTICE CHANDRACHUD:** And therefore, is this not really clearly an indicator
33 that even excluding these 39...,
34

35 **MR. SIBAL:** That's alright, the Speaker could have been, yes, I am not disputing that My
36 Lords. I am not sure what the arithmetic is? Half, 145 is the halfway mark My Lords. Without
37 34, you are below My Lords, I'm sorry. In fact, the arithmetic is the other way.

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MR. KAUL: No, My Lords 288, was the total strength...

MR. SIBAL: Just give us, we'll just give you the...Total strength of the assembly....

MR. KAUL: 288.

CHIEF JUSTICE CHANDRACHUD: That was there from Sibal's chart.

MR KAUL:...Actual votes received by Mr. Narweker were 164, which is over the 50% Mark of 144.

CHIEF JUSTICE CHANDRACHUD: I just, one second, total strength?

MR. SIBAL: Half mark would be 145.

MR KAUL: Yes, so if 144 is the halfway mark, 145. 164 votes were received by Mr. Narveker if the strength was taken to be 288. If 39 MLAs are excluded from the strength of the Legislative Assembly, the effective strength comes down to 249. And out of those..

CHIEF JUSTICE CHANDRACHUD: Just one second.

MR. KAUL: And the effective votes received by Mr. Narveker were 125, which is over 50% of the votes required. So under any circumstances, even if 39 MLAs are removed.

[?]: Only 16 disqualified.

MR. KAUL: Yes, plus on that date there were only 16 disqualifications. But I'm going a step further, even if there were 39 disqualifications, even then, Mr. Narvekar was proved.

JUSTICE NARASIMHA: What is the halfway mark of 249?

MR. SIBAL: 124 My Lords. 125.

MR. KAUL: 125. And he had 125.

CHIEF JUSTICE CHANDRACHUD: Exactly the same.

1
2 **MR. KAUL:** Yes. And at 12:01, they moved a resolution expressing disqualification,
3 expressing no confidence, it is defeated and later again and defeated.

4
5 **MR. SIBAL:** My Lord, there were three independent disqualifications also, apart from this.
6 One second, sir, there were three disqualifications independent also were subject to
7 disqualification. So it makes it below 125. Total is 41.

8
9 **MR. KAUL:** But then the strength of the House also comes down.

10
11 **MR. SIBAL:** That's all right. But you don't get the majority then. But as I said, we are getting
12 involved in issues that are not an issue before the Court.

13
14 **JUSTICE NARASIMHA:** With 249, we will have to explore the independents also. And
15 therefore the halfway mark will accordingly be that. Is that what you are saying?

16
17 **CHIEF JUSTICE CHANDRACHUD:** So the total is, go over it again. Total strength of the
18 assembly is 288. The halfway mark is 145.

19
20 **MR. KAUL:** That's right.

21
22 **CHIEF JUSTICE CHANDRACHUD:** Excluding the 39 Shiv Sena MLAs and plus three
23 independent MLAs...just 1 second.

24
25 **MR. SIBAL:** Will be 246, My Lords. And they would be having 122. But My Lord, the tenth
26 Schedule doesn't talk of any of this. You can do the arithmetic..

27
28 **CHIEF JUSTICE CHANDRACHUD:** So, we would be down to? Yeah, that is 42. So the
29 effective House, strength of the House comes to 288 minus 42.

30
31 **MR. SIBAL:** Yes, yes.

32
33 **CHIEF JUSTICE CHANDRACHUD:** Which is 248 and 246.

34
35 **MR. SIBAL:** 123 is a halfway mark. My Lords, whether they won or lost is not the issue. They
36 will still be disqualified.

37

1 **CHIEF JUSTICE CHANDRACHUD:** No, we just. That's all right. The constitutional...

2

3 **JUSTICE KOHLI:** 123...

4

5 **MR. SIBAL:** 124 is the halfway mark. 124. My Lords one more has to be given for to have half
6 way mark.

7

8 **CHIEF JUSTICE CHANDRACHUD:** So half way mark is 123 and Narvekar gets 125?

9

10 **MR SIBAL:** Three more My Lords, that were disqualified.

11

12 **CHIEF JUSTICE CHANDRACHUD:** You have included those three.

13

14 **MR SIBAL:** 164 minus 42, My Lords. So 122.

15

16 **CHIEF JUSTICE CHANDRACHUD:** So when you, if you exclude those three then he gets
17 122.

18

19 **MR. SIBAL:** Yeah, 122. So it's below the halfway mark, but these are, the Tenth Schedule, is
20 not concerned with this. We're not concerned with that according to me. One second, one
21 second because we have said so.

22

23 **MR. KAUL:** How can three independent MLAs...

24

25 **MR. SIBAL:** Now how can that is to be decided by the Speaker.

26

27 **MR. KAUL:** You can say what you want. But if there are three independent MLAs, they can't
28 be disqualified by you.

29

30 **MR. SIBAL:** Who says that

31

32 **MR. KAUL:** Procedure. They can't be...

33

34 **MR. SIBAL:** My learned friend....Mr. Kaul you have to read the 10th Schedule. Please read
35 the 10th Schedule before you make that submission. My Lords, unnecessarily there's no point
36 in making a submission which is contrary to the 10th Schedule.

37

1 **MR. JETHMALANI:** No, but the most crucial fact is that the Disqualification Petitions are
2 only against 16 and not not 39.

3

4 **MR. SIBAL:** Doesn't matter.

5

6 **MR. JETHMALANI:** But the disqualified MLAs were only 16, not 39.

7

8 **MR. SIBAL:** One second, in fact, on the third, all 39 are under Disqualification because they
9 voted against the Whip.

10

11 **MR. KAUL:** That's after the Speaker's...

12

13 **MR. SIBAL:** No, no. Before the Speaker.

14

15 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** We are proceeding towards the
16 entirety of the 38 function, where is the position?

17

18 **MR. SIBAL:** My lords, I don't think this arithmetic exercise is of any relevance for the
19 purposes of the 10th Schedule.

20

21 **CHIEF JUSTICE CHANDRACHUD:** We get your point that it's a 10th Schedule issue.

22

23 **MR. SIBAL:** Yes correct. It is just a matter of arithmetic. My lords majorities are made up
24 like this only. I was on 14th.
25 [NO AUDIO]

26

27 **MR. JETHMALANI:** Minus that 39, it was 125.

28

29 **MR. SIBAL:** My Lords we are not on 39, we are on 42.

30

31 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Just give us the number of, number
32 that he has gotten, Narvekar.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Narvekar gets total 125 votes.

35

36 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Is that right?

37

38 **MR. JETHMALANI:** No, he gets 164.

1 **CHIEF JUSTICE CHANDRACHUD:** Actual votes are 164.

2

3 **MR. SIBAL:** Yes.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Now we have to, we have to now consider I mean, we
6 just saw the, from 164, you suppose deduct 39, which are the 39 persons against whom you
7 say, they are disqualified?

8

9 **MR. SIBAL:** No. Even the other three we said the same My Lord. We filed a Petition to that.

10

11 **CHIEF JUSTICE CHANDRACHUD:** Therefore if you exclude 39, the Shiv Sena MLAs and
12 three independents. So you exclude from 164, 42, you are down to 122.

13

14 **MR. SIBAL:** That's correct.

15

16 **MR. JETHMALANI:** But they only had a 107. They got a 107 votes for their Speaker
17 candidate.

18

19 **MR. KAUL:** The actual strength was 287. Right.

20

21 **MR SIBAL:** If they had obeyed the Whip, we'd be in majority, he would not have got elected.
22 107 plus 39 or whatever. So, this is, we are going into areas which have really not our concern
23 at the moment. My concern is what happened and how the 10th Schedule, in fact, which was
24 meant to deal with.

25

26 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal, that for it also appears that apart from the
27 39, who according to you were disqualified, the three independents of course, that you say they
28 shouldn't have, they are also liable to be disqualified. There are other members of your
29 Legislative Party who also voted in favor of Mr. Narvekar that day.

30

31 **MR. SIBAL:** No, there some remained absent My Lord. They didn't vote. They didn't vote for
32 that.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Mr. Narvekar polls 122.

35

36 **MR. SIBAL:** Yes.

37

1 **CHIEF JUSTICE CHANDRACHUD:** After excluding 39 S S MLAs and three
2 independents,

3

4 **JUSTICE HIMA KOHLI:** 42.

5

6 **CHIEF JUSTICE CHANDRACHUD:** Narvekar still polls 122.

7

8 **MR. SIBAL:** Some must have been absent, some would have been absent. There were 13
9 Independents, My Lords. There are 13 independents, various parties, SP, BJP, CPM, VBA,
10 MNS, Swabhiman Party, Rashtriya Samaj Paksha, ASP. All kinds of parties are there. My
11 proposition has nothing to do with the Speaker.

12

13 **JUSTICE NARASIMHA:** We get that point.

14

15 **CHIEF JUSTICE CHANDRACHUD:** What you are really saying is that look, irrespective
16 of the numbers games, so to speak. According to you the, first the Speaker could not have been
17 thwarted from deciding the disqualification.

18

19 **MR. SIBAL:** Yes, yes.

20

21 **CHIEF JUSTICE CHANDRACHUD:** And second, a trust vote could not be held when the
22 Disqualification Petition was still pending before the Speaker. That really is too...

23

24 **MR. SIBAL:** Those are the two points My Lord. And the Governor should not have sworn
25 him in, that's the action of the Governor. He could not have sworn him, a man My Lords who
26 is being, who is facing disqualification.

27

28 **CHIEF JUSTICE CHANDRACHUD:** But this is what we also have to go into the wider
29 issue as to whether can a trust vote, in that sense or should a trust vote be postponed?

30

31 **MR. SIBAL:** Yeah.

32

33 **CHIEF JUSTICE CHANDRACHUD:** Mainly because a Disqualification Petition is
34 pending?

35

36 **JUSTICE HIMA KOHLI:** Pending.

37

1 **MR. SIBAL:** No My Lords, is the question is whether time should have been given to them?
2 It all comes down to 27th of June.

3

4 **CHIEF JUSTICE CHANDRACHUD:** 27th, yes. That's the...

5

6 **MR. SIBAL:** So My Lords, the trust vote only happened after that. Had that not happened,
7 the trust vote would not have happened.

8

9 **JUSTICE NARASIMHA:** So therefore in other words what you are arguing is that the issue
10 relating to the 10th Schedule must be done later and what is to be decided is about the status
11 of the party outside the Legislative Assembly which is to be determined whether there is a split
12 or a dissent in the party as a primary issue...

13

14 **MR. SIBAL:** Yes, correct, I am deeply obliged.

15

16 **JUSTICE NARASIMHA:** And once that is decided, the question of 10th Schedule triggers
17 in thereafter, is your argument.

18

19 **MR. SIBAL:** No, the Tenth Schedule triggers immediately, My lord.

20

21 **JUSTICE NARASIMHA:** Haan, Tenth Schedule will trigger immediately.

22

23 **MR. SIBAL:** Immediately, yes.

24

25 **JUSTICE NARASIMHA:** But for the Tenth schedule, what is to be seen is the events with
26 respect to the political party, not the Legislative Party.

27

28 **MR SIBAL:** No, no. The Tenth schedule cannot be subverted by members of the Legislative
29 Party...

30

31 **JUSTICE NARASIMHA:** Correct.

32

33 **MR SIBAL:** Taking a decision that there is a split in the party.

34

35 **JUSTICE NARASIMHA:** That is what I am saying.

36

37 **MR SIBAL:** Without there being a split in the party.

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JUSTICE NARASIMHA: That's what I am saying.

MR SIBAL: Correct.

JUSTICE NARASIMHA: So your primary argument is that.

MR. SIBAL: My Lord, is saying what I'm saying, that is what My Lord is saying. So I can't contradict that.

[NO AUDIO]

MR. SIBAL: Now My Lords, Disqualification relates back to 21st of June. That's the day that they have to show what is their defense under the Tenth Schedule. That's the day.

JUSTICE SHAH: According to you the Speaker under the Tenth Schedule only gives the declaration?

MR. SIBAL: Yes, yes. That's correct.

JUSTICE SHAH: So whatever has happened after 21st June, it is always subject to the Disqualification from them is what you have submitted.

MR. SIBAL: That's right. My Lord because it relates back. That's Your Lordships five judges have held that, Constitution Bench has held that.

JUSTICE SHAH: So this is also one of the issues which is referred. What will be the consequences in between?

MR. SIBAL: That's correct. Your Lordship is right. So that's why I've always said, Nabam Rebia and all that has to be decided by Your Lordships one day. All this has to go ahead.

JUSTICE NARASIMHA: Today because the applications are pending, complaints are pending, the House is continuing.

MR. SIBAL: Yes.

JUSTICE NARASIMHA: It's not lapsed by flux of time.

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MR. SIBAL: No.

JUSTICE NARASIMHA: So the Speaker is there for the House. Speaker decides today, 10th Schedule complaints, it should relate back to....

MR. SIBAL: That's 21st of June.

JUSTICE NARASIMHA: 21st of June, 2022.

MR. SIBAL: That's correct. That's correct.

JUSTICE NARASIMHA: Then in simple cases we should ask the Speaker to decide.

MR. SIBAL: But My Lords, why ask the Speaker to decide for the simple reason, I'll tell Your Lordships why?

JUSTICE NARASIMHA: Your other argument that Court should decide is a different matter. If the 10th Schedule should operate, the complaints must be decided by the Speaker prima facie to start with. So that the argument is just this.

MR. SIBAL: Yes. Your Lordship is right.

JUSTICE NARASIMHA: Decide now, he should decide now. Speaker is speaker irrespective to whoever it is.

MR. SIBAL: Correct.

JUSTICE NARASIMHA: If he decides it will relate back.

MR. SIBAL: Correct, correct.

JUSTICE NARASIMHA: In other words to say, that we direct the Speaker to take a decision.

MR. SIBAL: The same thing should have happened to the Deputy Speaker on 27th of June.

1 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal assuming you are right in everything that
2 you have argued. That look first, the 27th Order should not have been passed, that the Speaker
3 should have been allowed to take a decision on the Petitions for Disqualification. What is the
4 net consequence of your argument? I mean what direction...

5

6 **MR. SIBAL:** Facts are undisputed. What is the Speaker to decide in this? My Lords, what is
7 the Speaker? I want to know, what is the speaker to decide? What is the ...My lords what is
8 the Speaker...they have not filed a reply till date.

9

10 **CHIEF JUSTICE CHANDRACHUD:** No, but the question is who decides? I mean the court
11 can't take a decision on this?

12

13 **MR. SIBAL:** Why not? My Lords, the court decided. The court decided My Lords in Rana.

14

15 **CHIEF JUSTICE CHANDRACHUD:** They have the power to decide a disqualification...

16

17 **MR. SIBAL:** They decided on Rana My Lords, five judges decided in Rana, saying that we
18 will not send it back. The facts were undisputed. My Lords, what is, what is that... there can
19 be no defense My Lords because other the Tenth Schedule there is no defense except a merger.
20 What is the Speaker to decide? And then Your lordships will say we can't issue a mandamus
21 to the Speaker to decide within seven days. Then there will be a constitutional issue referred
22 to five judges, then? Because you can't issue a mandamus to the Speaker. Justice Nariman,
23 says, within three months, you should decide. No Speaker accepts that judgment. Where are
24 we going?

25

26 **JUSTICE NARASIMHA:** That has got referred to Constitution Bench.

27

28 **MR. SIBAL:** What are...Where are we going My lords? My lords the point...

29

30 **JUSTICE NARASIMHA:** Since you are raising the question, it will require reconsideration
31 of the court.

32

33 **MR. SIBAL:** I am myself saying so My Lords. No, no, you please, whatever it is. I have said
34 so twice already.

35 [NO AUDIO]

36

37 **MR. SIBAL:** That's only a merger My Lords. That is not their case.

1
2 **CHIEF JUSTICE CHANDRACHUD:** But Mr. Sibal, just as you say that look, on the 27th,
3 the Speaker could not have been stultified in taking a decision on the Disqualification
4 Petitions, once we adopt that principle, then we have to be consistent and apply the principle
5 across the spectrum because there's a very valid point which you are making which is that the
6 Speaker himself is a constitutional...or the speaker themselves. I shouldn't say himself, the
7 speaker themselves are constitutional authorities. Therefore the Speaker has to take a decision
8 under the Tenth Schedule. If that is so, then we have to be extremely circumspect about, you
9 know, replacing the mechanism, the institutional mechanism, which has been provided by the
10 Tenth Schedule itself.

11
12 **MR. SIBAL:** The problem in this case is My lords that this is because we perpetuated an
13 illegality. Now the speaker came into existence by perpetuating an illegality. And now you are
14 giving the clothe of authority to that Speaker who has actually come into place because by....

15
16 **CHIEF JUSTICE CHANDRACHUD:** We can't reinstate the... we can't reinstate the earlier
17 Speaker because there we are clenching upon the....

18
19 **MR. SIBAL:** In Nabam Rebia you did it. In Nabam Rebia you did it. In fact, you reinstated
20 the entire government. I'm not saying you should do it, My Lords. But if Your Lordships ask
21 me that question, that's exactly what happened in Nabam Rebia.

22
23 **JUSTICE KOHLI:** Mr. Sibal, would the court not be getting into the thicket of the entire
24 gamut by virtually clothing itself with the powers of the Speaker?

25
26 **MR. SIBAL:** No, because the facts are undisputed. My Lords that's why I said these are
27 undisputed documents. There is no political thicket here.

28
29 **JUSTICE KOHLI:** What you're saying is put the clock back in every which way. When you
30 say a Speaker....

31
32 **CHIEF JUSTICE CHANDRACHUD:** Ultimately Mr. Sibal, it will boil down to this. You
33 have to say that well, if you are logically consistent that retrace your steps to the position in
34 which we were before the 27th of, before the 27th of June.

35
36 **MR. SIBAL:** That's what I said. When I argued Nabam, that's what I said and the court
37 accepted it. That's exactly what I said. Because you cannot My Lords... this is all staring us in

1 the face. As I said, forget a majority, minority. Even five people can dislodge a government by
2 saying that all right, we have a trust vote now. New speaker is appointed. Then every time the
3 same thing will happen. My Lords, Your Lordships looks at the other point of view. If you do
4 not My Lords, stop this menace now. It will be perpetuated. That's the other issue. I'm not
5 saying Your Lordships, whatever Your Lordships will do will be acceptable.

6

7 **CHIEF JUSTICE CHANDRACHUD:** No, we are trying to explore that even assuming that
8 your argument is correct, where does it lead the Constitutional Court to? I mean, therefore,
9 that is something which would like to....

10

11 **MR. SIBAL:** There are many things you can do. Your Lordships can say you decide it within
12 seven days only and you challenge the order if it's against you, before us after seven days.

13

14 **JUSTICE NARASIMHA:** Sorry come again?

15

16 **MR. SIBAL:** You decide it within 7 days. They have not even filed a reply. Let's assume. I am
17 giving Your Lordships the options. Decide it within 7 days. We are sitting here. If there is an
18 order against you, you come up and appeal and then we decide the matter.

19 [NO AUDIO]

20 In fact, the Speaker issued Notice against us on the 8th of July. He has not even issued Notice
21 in their matter, in our matter.

22

23 **CHIEF JUSTICE CHANDRACHUD:** So, to have clarity Mr. Sibal, you say that we ask this
24 Speaker to decide the disqualification of the 39 MLAs. Ask him to do so within a stipulated
25 period, we will then challenge. The two options that Speaker may come to the conclusion that
26 they are disqualified. Then what happens?

27

28 **MR. SIBAL:** My Lords, then what happens? They will come in appeal.

29

30 **CHIEF JUSTICE CHANDRACHUD:** No, but how does that affect? What is consequence
31 practically in terms of the trust vote which takes place? Speakers, alright, assuming that the
32 court has the power...

33

34 **MR. SIBAL:** Chief Minister will go. The Chief Minister will go.

35

36 **CHIEF JUSTICE CHANDRACHUD:** How?

37

1 **MR. SIBAL:** 164-1B. He cannot hold office.

2

3 **CHIEF JUSTICE CHANDRACHUD:** 39 people will go out.

4

5 **MR. SIBAL:** And he will not be Chief Minister...

6

7 **CHIEF JUSTICE CHANDRACHUD:** Disqualifies them..

8

9 **MR. SIBAL:** And he will not be the Chief Minister.

10

11 **CHIEF JUSTICE CHANDRACHUD:** 39 people then, if your argument is right, if the
12 Speaker holds that well, they are not disqualified those. Then you have a right to challenge that
13 order before an appropriate court.

14

15 **MR. SIBAL:** Not appropriate, before Your Lordship.

16

17 **CHIEF JUSTICE CHANDRACHUD:** Whatever. If the Speaker comes to the conclusion
18 that there is a disqualification, those 39 persons go. In this case according to Eknath Shinde
19 also, therefore has to move out.

20

21 **MR. SIBAL:** Yes.

22

23 **CHIEF JUSTICE CHANDRACHUD:** Then what is the next? What is the sequitur?

24

25 **MR. SIBAL:** Nothing. Then whoever is the Chief Minister will get back on the trust vote. We'll
26 see about that.

27 Then this court order on 29th said, trust vote is subject to these petitions, all proceedings, all
28 proceedings. Well this is the problem My Lord, the judicial orders are passed law. We are put
29 in these situations. Then we are asked, what can we do now?

30

31 **CHIEF JUSTICE CHANDRACHUD:** We are not saying, what can we do. What we are
32 asking is what is your submission on what we can do?

33

34 **MR. SIBAL:** No, no My Lords...

35

36 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal, ultimately you are arguing a constitutional
37 point, but we have to also factor relief which a Constitutional Court then should give or can is

1 capable of granting within the format of the Constitution to take the argument to its logical
2 conclusions. So we are not, we're not for a moment saying that your argument is incorrect.
3 What we are trying to do now is to test what are the limits of your argument. How far should
4 the court go....

5

6 **MR. SIBAL:** As I told Your Lordships, Your Lordship is right. That's why, why did I say seven
7 days, because Your Lordships puts it to me, ultimately, what should be done? And I said, Your
8 Lordships its alright, give him seven days. But then the question will arise, can you issue a
9 mandamus to the Speaker to decide within seven days? And there will be a constitutional crisis
10 because the Speaker will not obey.

11

12 **JUSTICE NARASIMHA:** That we don't know now.

13

14 **MR. SIBAL:** I don't know, It is possible. It has happened before. It has happened before.

15

16 **JUSTICE NARASIMHA:** Nekchandra is the only case where there is a direction for an early
17 disposal of the Petition. That's the only exception. And that again got referred to a Constitution
18 Bench and saying that you can't direct this.

19

20 **MR. SIBAL:** Correct. Now My Lord, Justice Nariman's judgment...

21 [NO AUDIO]

22 In this also the same thing happened. The other problem is...Sorry... Fundamental issues.
23 We've challenged decisions of 3rd of July, of the Speaker. My lords, we are the party that's
24 fundamental. Before anything is done by the Speaker. So Your Lordships, my respectful
25 submission...please consider the decisions and then whatever the outcome is, let the outcome
26 be. But a shortcut of this nature will lead us nowhere.

27

28 <<LUNCH BREAK>>

29

30 **MR SIBAL:** So My Lords as I was on the list of dates, let me finish that first. So I was on item
31 47. Now 48 - as the delinquent MLAs of SSLP voted against the party whip on 2nd July, issued
32 regarding the election office of the Speaker, election of the Office of the Speaker. Fresh
33 disqualification proceedings were initiated against the delinquent MLAs as per the provisions
34 of 2(1)(b) of the 10th Schedule. Because whether they voted against the party Whip so all 39
35 were involved in there. So 16 earlier, then on the 27th My Lords the balance 22, for which My
36 Lords notice has not yet been issued, and all 39 now. This is 2(1)(b). That is 2(1)(a) and even
37 for this notice has not been issued.

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CHIEF JUSTICE CHANDRACHUD: So this 3rd July, issued against how many you said?

MR. SIBAL: 39, 39 for two under 2(1)(b) for violating the Whip. I'm sorry.

CHIEF JUSTICE CHANDRACHUD: Fresh One?

MR. SIBAL: Fresh one, 2(1)(a) My Lord, 16 earlier for which notice was issued and 22 later for which petition was filed. But then, of course, next day was a trust vote. I mean, there was a decision and therefore, no notice has been issued. Even now, notice has... no notice has been issued. So those are all pending.

CHIEF JUSTICE CHANDRACHUD: And now the 39.

MR SIBAL: Now the 39. That's correct. That's correct. So and the election of the Speaker was held in complete violations of provision. Certain MLAs submitted letter notices to the Principal Secretary of Maharashtra led to removal a resolution, for removal of Rahul Narvekar from the office of Speaker under 179. This is the tit for tat My Lords. This is not an argument that I wish to make.

On 3rd of July 2022, just after being elected as the speaker of the House, Narvekar entered the political thicket and issued a communication late in the evening on 3rd of July illegally recognizing Bharat Gogawale as the Chief Whip and Eknath Shinde as the leader of the party. And what basis did he do that My Lords? This is under challenge. Under which power did the Speaker do that? Your Lordship knows My Lords. This has to come from the political party. Leader of the House has to come from the political party that he is our leader of the House. My Lords that letter is written by the Speaker My Lords. For example, recently when My Lords, Mr. Kharge became the leader of the Congress Party. It is Mrs. Gandhi, who wrote a letter saying that now instead of Gulam Nabi Azad, Mr. Kharge is the leader of the party, I have the letter with me. So this is the this is the... On what basis did the Speaker do it?

The aforesaid communication of the Speaker of 3rd July was challenged by Sunil Prabhu before this Honorable Court, wherein the Honorable Court by the order Dated 4-7 and writ petition directed to list the writ petition along with other connected writ petitions, so that's also pending.

1 Then 4-7, as the Speaker has misconducted himself by entering into the political thicket and
2 attempted to recognize Bharat Gogawale as the Chief Whip of the Shiv Sena, certain MLA
3 submitted a notice to the Principal Secretary, Maharashtra Legislative Assembly to move a
4 resolution for removal of Narvekar from the office. Then, on 4-7, the Confidence Motion was
5 called for on the floor of the Maharashtra Legislative Assembly by Eknath Shinde. On 4th July
6 Confidence Motion was carried out in favor of Eknath Shinde. Again several MLAs of Shiv
7 Sena voted contrary to the Whip issued by the official Chief Whip of Shiv Sena.

8

9 4-7-2022 Bharat Gogawale, and My Lords when Your Lordships will see the petition before
10 the Election Commission, till the 18th of July, there is no reference to any meeting of any
11 political party. So all this was happening outside the political party. Bharat Gogawale also files
12 disqualification petitions against 14 MLAs under the 10th Schedule for the alleged breach of
13 the Whip issued by him. It is submitted that Bharat Gogawale has not been authorized by Shiv
14 Sena political party to issue Whips on behalf of the Shiv Sena.

15

16 5-7-2022, since the delinquent MLAs of the SSLP has openly defied the Whip dated 2-7-2022
17 in the floor test, Confidence Motion held on 4-7. Sunil Prabhu has filed fresh disqualification
18 petition against 39 delinquent MLAs seeking their disqualification under 2(1)(b).

19

20 Then 07-07-2022 Uddhav Thackeray, in his capacity as President of Shiv Sena wrote a letter
21 to the Speaker objecting to the illegal recognition of Bharat Gogawale as the Whip of the Shiv
22 Sena, and reiterated the decision of the Shiv Sena political party to recognize Sunil Prabhu as
23 a Whip of the SSLP. So My Lords, what's happening here is, that the legislative party, a
24 majority in the legislature of the Maharashtra Legislative Assembly is treating itself as the
25 political party and making orders for its own benefit. That's the constitutional issue that Your
26 Lordships will have to decide.

27

28 **CHIEF JUSTICE CHANDRACHUD:** But who represents the Political party is a.....

29

30 **MR. SIBAL:** As I said, My Lords, it's the two offices. My Lords, that is the leader of the three
31 offices, Chief Whip and Whip are appointed by the political party and conveyed to the...

32

33 **CHIEF JUSTICE CHANDRACHUD:** Chief Whip and the...?

34

35 **MR. SIBAL:** And the Deputy Whip. These are.. these are offices My Lords, that are bridge
36 between the political party and the legislative party.

37

1 **CHIEF JUSTICE CHANDRACHUD:** And according to you who determines who is the
2 political party?

3

4 **MR SIBAL:** I'm sorry,

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6 **CHIEF JUSTICE CHANDRACHUD:** Who determines who is the political?

7

8 **MR. SIBAL:** There's no challenge here.

9

10 **CHIEF JUSTICE CHANDRACHUD:** No. I mean, ultimately, who is entrusted with the
11 authority to decide.

12

13 **MR. SIBAL:** They have to have a split in the party first otherwise, how do you determine
14 another 10th Schedule party.

15

16 **CHIEF JUSTICE CHANDRACHUD:** If there is a contest then who represents the political
17 party? Who will decide?

18

19 **MR. SIBAL:** There's no contest. My Lords, this is not their case. My Lords please appreciate.
20 Till all this is happening, it is not their case that there is a split in the political party. It is
21 nobody's case. They say they are the Shiv Sena .

22

23 **CHIEF JUSTICE CHANDRACHUD:** That's here. But who will then have the authority to
24 decide who is the political party?

25

26 **MR. SIBAL:** That's right. Now you go, what you do is call a meeting of the political party.
27 Supposing My Lord, let's forget about the 10th Schedule. Let's not talk about 10th schedules.
28 My Lords, I happen to be a faction in the party and I say, look, actually, the majority of the
29 party is with me. So like an requisition of meeting of the party. Forget the 10th schedule and
30 after a requisition of meeting in the party My Lords, I take over. So I am the party. By majority
31 I take over.

32

33 **JUSTICE NARASIMHA:** 10th schedule.

34

35 **MR. SIBAL:** And there's nothing to do with the 10th schedule. I'm not talking about the 10th
36 Schedule now. I'm sorry.

37

1 **JUSTICE NARASIMHA:** The test as they have said. The test in Sadiq Ali...

2

3 **MR. SIBAL:** In Sadiq Ali has nothing to do with this issue. I mean that's not. I'm not talking
4 of the 10th schedule now. I'm talking generally how a faction in a party can take over the party.
5 Forget the 10th Schedule. Now My Lords forget that 1985 10th Schedule was not there. Then
6 also this question would arise. But this question would arise only if there is a division in the
7 Legislative party. Dehors the 10th schedule. I hope My Lords, I have made myself clear. Dehors
8 the 10th schedule this question can arise, that people in the legislative party can say that -
9 Look, no, we don't agree with your policies. Let's call a meeting of the party. Right? In that
10 meeting My Lords, they feel that they are a faction who are entitled My Lord to the symbol of
11 the party. We want to set up a separate party, right? They can go and say that we, the
12 legislators, along with the organizational structure, are the party... separate party. Give us the
13 symbol. We are the majority. Forget the 10th Schedule. It can happen even out. But that can
14 only happen if there's a split in the legislative party. Correct, My Lords? It can only happen
15 then, otherwise, it's a normal procedure of taking over the presidentship of the party. Sadiq
16 Ali the same thing happened. There was a split in the in the legislative party and the political
17 party. And in Sadiq Ali they said that look as far as the organizational structure is concerned,
18 on both issues, on both issues, they are entitled. The other side is entitled to the symbol. That's
19 fine. No issue. Here, My Lords this split should have happened on the 21st of June. That is
20 nobody's case in the political party. Why? Because Para. 15 of the 10th Schedule says that if
21 there are two factions, and the Symbols Order says, if there are two factions resulting from a
22 split in the political party then the question of symbol will arise. Right, My Lords? It is
23 nobody's case here. Nobody. They say they are the Shiv Sena? Why? Because they are 40. So
24 how does a majority in the Legislative Assembly become the Shiv Sena. Then My Lords if in
25 the Congress in Goa, if majority of the Congress legislators join, as they do My Lords, I have
26 been seeing this happen again and again, My Lords, then they are the Congress. You can say
27 they are the Congress. How can they say that? Therefore, My Lords this has grave
28 consequences on the polity of this country. Because now the legislative party seems to believe
29 that it can under the 10th Schedule proclaim itself to be the political party and throw out office
30 bearers, who are appointed by the political party in the House. Constitutionally that cannot be
31 countenanced. Who appoints the Leader of the House? It says... in exercise of my power as
32 Chairperson of the Congress Parliamentary Party, I hereby make the following appointment
33 to the Rajya Sabha, Sri Kharge MP leader of the Congress Party against the vacancy of Ghulam
34 Nabi Azad, whose term in the Rajya Sabha has come to an end on 15th February. This is a letter
35 written by the Congress UPA Chairperson to the Speaker. So the Chairman of the Congress
36 ...of the Rajya Sabha. That's how that's how My Lords, people are appointed. Can My Lords

1 Mr. Kharge on his own, could he have said that I am the leader? I have so many MPs, so I am
2 the leader? The same thing with the Whip.

3

4 Now My Lords 57. The newly elected Speaker in an illegal, arbitrary and blatant display of
5 malafide, how do you know allows the speaker to decide this matter when he's been doing
6 these things? Your Lordships, My Lords have great, great, What should I say....confidence in
7 the Constitutional office of the Speaker My Lords. Great confidence... but do they discharge
8 this confidence?

9

10 **CHIEF JUSTICE CHANDRACHUD:** That confidence you also have when you say that that
11 Speaker had to decide that disqualification petition.

12

13 **MR. SIBAL:** Yes. Correct My Lords.

14

15 **CHIEF JUSTICE CHANDRACHUD:** And that is not dependent..

16

17 **MR. SIBAL:** It will be subject to challenge. Subject to challenge.

18

19 **CHIEF JUSTICE CHANDRACHUD:** And that is not dependent on who is the Speaker Mr.
20 Sibal?

21

22 **MR. SIBAL:** No My Lords, I am sorry. That Speaker did not do anything like this. My Lords,
23 you have to now see... kindly see look what is happening.

24

25 **CHIEF JUSTICE CHANDRACHUD:** But the constitutional authority of the Speaker to
26 decide is not based on who the Speaker is or what it decisions he take.

27

28 **MR. SIBAL:** My Lords, can ever finding of a bias be reached by a Constitutional Court. Your
29 Lordships will say - No. Let's put it another constitutional issue. If a constitutional authority
30 has so conducted itself. That a constitutional Court comes to the conclusion that such a
31 constitutional authority cannot discharge the functions that it is discharging because it's open
32 bias. Your Lordships will say - no, we let them decide. I don't know My Lords. I don't have the
33 answer for it.

34

35 **JUSTICE NARASIMHA:** No not necessarily. Rameshwar Prasad with respect to a
36 Governor...

37

1 **MR. SIBAL:** Governor yes...

2

3 **JUSTICE NARASIMHA:** Judgement of this court that if there is an allegation of bias, then
4 Government has to come and defend it.

5

6 **Mr. SIBAL:** My Lords that's exactly.

7

8 **JUSTICE NARASIMHA:** It's possible not that the court will naturally do it. But then we all
9 are proceeding on the premise that... in fact, your argument had been in the first part also, that
10 so far the Speaker is concerned it is the constitutional authority.

11

12 **MR. SIBAL:** No. But see what he has done? He has appointed the Whip. He has appointed
13 the leader of the House. Then what kind of confidence can we have this, in this constitutional
14 authority who without reference to the political party is doing all this? Do you think he can
15 ever decide in my favor? There is no way.

16

17 **CHIEF JUSTICE CHANDRACHUD:** Then you have a first Speaker who in defiance of the
18 legislative rules gives two days' notice.

19

20 **MR. SIBAL:** I'm sorry. No... that is....

21

22 **CHIEF JUSTICE CHANDRACHUD:** In defiance of the legislative rules gives two days'
23 notice.

24

25 **MR. SIBAL:** That Your Lordships have.

26

27 **CHIEF JUSTICE CHANDRACHUD:** They all... this is the way everybody is behaving.

28

29 **MR. SIBAL:** That is correct. So what do we do My Lords? Your Lordships will then have to...

30

31 **CHIEF JUSTICE CHANDRACHUD:** There are two options. Either you debunk the
32 authority of the Speaker or you say that irrespective of what the...

33

34 **MR. SIBAL:** I said that on day one....

35

36 **CHIEF JUSTICE CHANDRACHUD:** Alternately irrespective of what lesser mortals
37 decide, ultimately, in a democracy you value the office of the institution.

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MR. SIBAL: Then that 27th order should not...

CHIEF JUSTICE CHANDRACHUD: If we start...if we say...

MR. SIBAL: Then that 27th order should not have been passed.

CHIEF JUSTICE CHANDRACHUD: Denigrating constitutional offices, including the office of the Speaker, it's a....

MR. SIBAL: My Lord they are denigrating themselves. They are denigrating themselves. We are not denigrating...

JUSTICE NARASIMHA: No, Mr. Sibal, there is some problem...

CHIEF JUSTICE CHANDRACHUD: It is a race to the bottom then.

MR. SIBAL: Yes we are. We have to start My Lords...What to do? What to do? But the problem is My Lords, that problem is very serious and therefore, therefore....

JUSTICE NARASIMHA: It is the...they are the Legislators, Parliamentarians, who have decided upon the Speaker to be the Tribunal per the 10th Schedule is parliamentarian's decision.

MR. SIBAL: Correct. I agree.

JUSTICE NARASIMHA: So therefore, Court is only interpreting that.

MR. SIBAL: Fine My Lords. Then we must go back to 2017....

JUSTICE NARASIMHA: Take this anywhere Mr. Sibal, the difficulty repeatedly uses at one stage it poses a very big problem for the Court. On the one hand, if the speaker is with you, you would say that it's a constitutional authority. What's wrong with the Speaker? If you have some difficulty, you would say -- You means not YOU. You would say, look at the way the Speakers have behaved. So therefore, for us as long as the Constitution Bench judgment is there, we will go by the fact.

1 **MR. SIBAL:** I agree.

2

3 **JUSTICE NARASIMHA:** Speaker he is the tribunal and he is the presiding officer per the
4 10th Schedule.

5

6 **MR. SIBAL:** Correct, correct.

7

8 **JUSTICE NARASIMHA:** And we will not, go back the decision. That's the final decision so
9 far as we are concerned.

10

11 **MR. SIBAL:** Fine. I don't... I don't want to My Lords say anything contrary to that except that
12 on that logic the 27th Order could not have been passed. Then we come back to that My Lords.
13 Then that's what led to what we... where we are where we are today.

14

15 **JUSTICE KOHLI:** And again, it's merely because one or two Speakers have gone astray
16 would the court be inclined to debunk the whole procedure as laid down and the 10th
17 Schedule?

18

19 **MR. SIBAL:** No. My Lords. My intention is not that. I'm just My Lords telling Your Lordships
20 what has been happening.

21

22 **JUSTICE KOHLI:** So it's a conundrum?

23

24 **MR. SIBAL:** Yes, it's a conundrum. It's a Constitutional conundrum. But Your Lordships will
25 one day have to sort it out.

26

27 **JUSTICE NARASIMHA:** Sorry for.... another question. Every time this question is raised
28 before the court, I would want to ask you how many times did the parliamentarians raise this
29 question in the Parliament saying that let us actually amend the Constitution, change the
30 Speaker? How many times the discussion took place in the Parliament to review the conduct
31 of the Speaker? Why is that question raised before for the Court, which is not the forum for us
32 for the consideration? How many times the parties have sat down together and decided that
33 this is not working?

34

35 **MR. SIBAL:** Once Kihoto Hollohan was rendered My Lords, what would Parliament would
36 say?

37

1 **JUSTICE NARASIMHA:** It only upheld the 10th Schedule. It is you are making the 10th
2 Schedule.

3

4 **MR. SIBAL:** No My Lords, it is the political party in power, wherever it is, wants to use the
5 office of the Speaker to do what they are doing. The political party would never empowered,
6 would never like to change it.

7

8 **JUSTICE NARASIMHA:** This will take us nowhere Mr. Sibal, frankly and this will... unless
9 there's an Amendment to the Constitution, unless there is a reference, a direct challenge....

10

11 **MR. SIBAL:** Justice Sabharwal says....

12

13 **JUSTICE NARASIMHA:** We have to proceed on that premise.

14

15 **MR. SIBAL:** Justice Sabharwal said it in a judgment of this court. Jagjit Singh.

16

17 **CHIEF JUSTICE CHANDRACHUD:** Jagjit Singh.

18

19 **MR. SIBAL:** Exactly that. 'Undoubtedly our constitutional scheme, the Speaker enjoys a
20 pivotal position. The position of the Speaker is and has been held by people of outstanding
21 ability and impartiality without meaning any disrespect for any particular Speaker in the
22 country, but only going by some of the events of the recent past....recent past. Certain
23 questions have been raised about the confidence in the matter of impartiality on some issues
24 having political overturns which are decided by the Speaker in his capacity as a tribunal. It has
25 been urged that, if not checked, it may ultimately affect the high office of the Speaker. Our
26 attention has been drawn to the recommendations made by the National Commission to
27 review the working of the Constitution, recommending that the power to decide on the
28 question as to disqualification on the ground of defection should vest in the Election
29 Commission.' - I dread that as of today My Lords, Election Commission, instead of the Speaker
30 of the House. - 'concerned. Our attention has also been drawn to the views of a number of
31 other experts, committees, commissioners to the effect that power of disqualification as a
32 result of defection needs to be exercised in accordance with the opinion of the Commission as
33 in the case of decision on questions as to disqualification of members. Whether to vest such
34 power of the Speaker or Election Commission or other institution is not for us to decide' - As
35 Your Lordship rightly said - 'This is for Parliament to decide.'

36

37 **JUSTICE NARASIMHA:** Exactly.

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MR. SIBAL: I agree. I am not disputing that. But I'm just saying that disquiet, that My Lords we have witnessed in the functioning of the Office. That's all that I'm saying. I'm not saying this person is good or that person is good. It's the institutional framework within which he functions My Lords is not consistent with his responsibilities as a tribunal. That's all that I'm saying My Lords. What to do? But the fact is that he had no authority in law to decide on the Whip and on the leader of the house. That's not his....

CHIEF JUSTICE CHANDRACHUD: That is a separate issue. We have made a note of that.

MR. SIBAL: That's why I made that argument. Then My Lords, come to 'The newly elected Speaker in a illegal, arbitrary and a blatant display of malafide and bias, issued notice to 14 MLAs seeking their response to disqualification petitions filed by Bharat Gogawale. The Speaker is still sitting tight on the disqualification petitions filed by Sunil Prabhu and has not even issued notice in them despite their disqualification petitions being filed much earlier.' He issues notice on our... on their disqualification petition, but not on ours. And they haven't filed a reply, My Lords. This court said in the interim we adjourn it to 10th.... 12th of July. My Lords, from July we are in February, where's the reply?

18th of July, the notice issued by the Speaker in the disqualification petitions filed by Bharat Gogawale against 14 Shiv Sena MLAs including Sunil Prabhu was challenged by Sunil Prabhu in writ petition wherein this Honorable Court vide order dated that directed to tag the writ petition along with other connected matter. So that's also before Your Lordships. And now My Lords, the Election Commission says they are the Shiv Sena. Now we will be further disqualified. Any meeting called if we don't attend, then we are... there will be further problems. Despite the fact that this Honorable Court is seized of the issues regarding disqualification of Eknath Shinde under the 10th Schedule, Shinde, filed a petition before the Election Commission under Para 15 of the Election Symbol's Reservation and Allotment Order to declare the splinter group led by him as the Shiv Sena. So this is the first time My Lords that he went. On 20th July vide order dated 20th July, and order connected in writ petition so and so another connected petition, this court issued notice in writ petition so and so, it was directed by this Honorable Court the writ petition shall be treated as a lead matter. 20th July pursuant to the Order of the Court dated 20th July, Shri Subhash Desai made a representation to the ECI vide representation requesting the ECI to not proceed with any petition related to Shiv Sena as substantially similar matters, and issues are pending before this Honorable Court and not to take any preemptive actions.

1 Then IA 100285 was filed on 21st July, was preferred by Sunil Prabhu in writ petition, seeking
2 direction to the Speaker Maharashtra Assembly to produce the following records. All
3 proceedings relating to disqualification of rebel Shiv Sena MLAs filed by Sunil Prabhu. All
4 proceedings related to disqualification filed by Shri Gogawale. All proceedings of the Speaker
5 and Deputy Speaker in relation to recognition of the Leader of the House and Chief Whip of
6 Shiv Sena, proceedings of the House on 3rd July and 4th July.

7
8 22nd July without deference to the proceedings pending before this court as well as without
9 considering that no adjudication can take place till disqualification petition is pending against
10 delinquent MLAs are decided, Election Commission issued notice to Uddhav Thackeray on
11 the petition file by Eknath Shinde. And on 25th July aggrieved by the issuance of the notice by
12 the Election Commission in Shinde's petition, Subhash Desai has filed two applications IA so
13 and so, seeking impleadment of Election Commission of India as Respondent 51 in writ
14 petition so and so and seeking stay of proceedings initiated by the Commission on 22-7 till the
15 final adjudication of the present petition. On 4th of August this court, after hearing the
16 Election Commission and the parties, recorded the submission of the Commission that no
17 orders may need to be passed by this court interdicting proceedings before the Election
18 Commission. Liberty was granted to the Petitioner to file an application before the Election
19 Commission for seeking time. Accordingly, 6th August - Petitioner, in terms of the order of
20 4th August filed an application with a prayer to defer/adjourn the proceedings in dispute on
21 one... on Dispute No. 1/ 2022 for four weeks and extended the time for filing a response for
22 four weeks. 10th August, Election Commission communicated to the petitioner for extending
23 time.

24
25 23rd August Honorable Court vide it's Order held that the present batch of petitions raised
26 important...then those questions were My Lords. Then Your Lordships please come to 23rd
27 August. Made a request on the very same date to the Commission to defer proceedings. Then
28 this went on My Lords and on 22nd of September a further request was made by the Petitioner
29 to the Commission for deferment of proceedings by two weeks till this Court decides the
30 question as to whether proceedings before the Commission should go on and then 27
31 December Your Lordships dismissed the application.

32
33 So that created another problem My Lords because the Election Commission decided the
34 matter de hors My Lords, these pending proceedings. And on the basis of that majority in the
35 Legislative Assembly has given them the symbol. With that very majority subject of
36 disqualification petitions. So we have another problem. And we went to the Commission and
37 said - please await the decisions. The Supreme Court did not stay... didn't stay the proceedings.

1 But the Supreme Court did not say that you decide it on merits based on... based on majority
2 in the Legislative Assembly. Because those disqualification petitions are pending. But he said
3 - No. Supreme Court has said no stay. So I will decide the entire matter. That's, that's the other
4 problem that happened. But I never thought Your Lordships meant stay of proceedings only
5 meant that you decide that whatever the matter is, you hear the arguments. Decide the ... on
6 law, on the submissions made, where they took it. The High Court also took it the same way
7 My Lords. We went to the High Court also. They rejected it, saying, Your Lordships have said
8 No stay. Therefore the Commission can decide what it likes. And I told the Commission that
9 look, if supposing you give this symbol to them based on this majority, and ultimately they are
10 disqualified, then what happens to the symbol? Will we get back the symbol? So My Lords we
11 have another problem on our hands. So only Your Lordships can decide this matter.
12 We can only place the facts before people. You have to.... You have to do something to be able
13 to ensure that there is confidence in institutional frameworks in the system, in this country.
14 That's my only concern. Winning or losing doesn't matter. These are political battles, will be
15 won today and lost tomorrow or lost today and won tomorrow, but the institution must go on.
16 The people of India must have confidence in that institution, whether it's the Election
17 Commission or the office of the Speaker or the Court.

18
19 Now My Lords, then we come to 4th October, Eknath Shinde filed an application before the
20 Commission under Para 15 of the Symbols' Order to urgently hear, dispose off, and allow the
21 petition filed by Shinde under paragraph 15. On 7th October, Thackeray filed a preliminary
22 reply to the application under para 15 with a prayer requesting Commission not to pass any
23 order without an opportunity of oral hearing to Thackeray. My lords on 8th October,
24 Thackeray filed a reply to the application of Shinde under para 18 of the Symbol's Order.
25 Election Commission without hearing either of the parties -- this is another curious thing --
26 on 8th October, without hearing either of the parties and merely hours after the reply of
27 Uddhav Thackeray was filed passed an order in Dispute No. 1/ 2022 inter alia freezing the
28 symbol of bow and arrow. And Your lordship knows my lords, that the hearing is required. It's
29 mandatory under Paragraph 15.

30
31 Also, the Election Commission directed Uddhav Thackeray and Eknath Shinde to first furnish
32 their preferences for interim party names and interim symbols. Uddhav Thackeray under
33 protest and without prejudice to his right to challenge the impugned order freezing the symbol
34 bow and arrow proposed three interim names and interim symbols of his own choice in the
35 order of preference.

36

1 10th October, Shinde proposed his preferences of symbols out of which first two were identical
2 to the interim symbols proposed by the Uddhav Thackeray. The first interim name proposed
3 by Shri Shinde was also identical to the first interim name proposed by Thackeray. On 10th
4 October, Election Commissioner rejected the first two interim symbols proposed by Thackeray
5 on the basis of Shinde had also proposed. Due to some same reason Shri Uddhav Thackeray
6 was denied the interim name Shiv Sena Balasaheb Thackeray. On 10th October aggrieved by
7 the arbitrary freezing of symbol without affording an opportunity of oral hearing, vide order
8 dated that passed by the Commission, in Dispute No. 1/ 22 Uddhav Thackeray filed a writ
9 petition in the High Court of Delhi seeking inter alia to quash the aforesaid order. Election
10 Commissioner allotted the interim name, Balasahebanchi Shiv Sena to Shri Eknath Shinde
11 and requested Shinde to furnish a fresh preference list of symbols. 11/10 Eknath Shinde
12 submitted a fresh list of preferred symbols. Election Commissioner allotted, the symbol of *Do*
13 *Talwarein aur Ek Dhaal* to Shri Eknath Shinde. The present batch of matters was listed before
14 the Constitution Bench for directions on such and such date.

15

16 Then my lords Election Commission addressed a letter to Uddhav Thackeray and Shinde
17 asking to submit all the details, particulars documents to dispute one and the High Court of
18 Delhi dismissed the petition filed by Uddhav Thackeray.

19

20 **JUSTICE NARASIMHA:** We'll have.. the date of the decision. Yesterday or day before?
21 Election Commission.

22

23 **MR. SIBAL:** Now the Election Commission. 17th February. So that My lords is really the list
24 of dates and the list of events. My lords having said that, just let's go to the Tenth Schedule
25 straightaway.

26

27 In this schedule, unless the context otherwise requires, House means...in this Schedule, unless
28 the context otherwise requires House means either House of Parliament or the Legislative
29 Assembly or as the case may be either House of the State Legislative of the State.' Legislation
30 party in relation. Just My Lords justice to have the facts straight My Lords out of 55, 38 are
31 with them in the Maharashtra Legislative Assembly, right My Lord? And in the Lok Sabha, out
32 of 18, they allege that 13 are with them but they have filed affidavits of 12. The Legislative
33 Council My Lords in Maharashtra all of them are with us. All 12 are with us.

34

35 **JUSTICE NARASIMHA:** Twelve out of twelve?

36

1 **MR. SIBAL:** All of them are with us. And in the Rajya Sabha, three out of three are with us.
2 And in the Lok Sabha six are with us, according to us.

3

4 **JUSTICE KOHLI:** Mr. Sibal, will you repeat the numbers?

5

6 **MR. SIBAL:** Yes my lord. In the Legislative Council in Maharashtra, all 12 are with us. All
7 twelve are with us. But in the Legislative Assembly My Lords, 38 are with them, you say 40,
8 but they have the affidavit of 38. It's all right, you can say 40. I don't mind. Yeah, it's all right.
9 40 and 15 with us, doesn't matter. In the Rajya Sabha, all 3 are with us and in the Lok Sabha,
10 My Lords, out of 18...19? 13 are with them and 6 are with us. So it is not as if, it is some
11 overwhelming majority with them. And in the organizational structure, and my lords...

12

13 **CHIEF JUSTICE CHANDRACHUD:** What about Rajya Sabha you said?

14

15 **JUSTICE KOHLI:** Lok Sabha?

16

17 **MR. SIBAL:** Three Rajya Sabha, are all with us.

18

19 **JUSTICE KOHLI:** And Lok Sabha?

20

21 **MR. SIBAL:** Lok Sabha, My lords, 6 are with us out of 19. Out of 18. So in two Houses they
22 have majority and in two Houses we have majority. But be that as it may, this is, the issue is
23 ultimately not that. But just so that Your Lordship knows, in the organizational structure, the
24 other surprising thing is My Lords, we both argued on the Constitution of 2018.

25

26 **JUSTICE NARASIMHA:** What is organization?

27

28 **MR. SIBAL:** Pratinidhi Sabha. There is the Pratinidhi Sabha and there is the Karya Karini,
29 which is the executive, largest executive body, 13 members of the Karya Karini. Upto 260 odd
30 members of the Pratinidhi Sabha, which we will come to later.

31

32 **JUSTICE NARASIMHA:** Okay.

33

34 **MR. SIBAL:** The point that I'm making is that we both relied upon the 2018 Constitution.
35 But the Commission in it's order without letting us know during the argument, said that 2018
36 Constitution is not recorded in the, in... the Election Commission. Never put it to us. Never
37 told us, not their argument, not my argument. Both argued on the 2018 Constitution and the

1 Commission without ever informing us, says that Constitution is not on our record. Anyway,
2 be that as it may. Anyway, so even though we have majority in the organization, they say we
3 will not consider that. So they don't consider the organization. They consider these majority
4 of those who are according to us disqualified and give them the symbol. So you move from the
5 Speaker to the Election Commission. And then from there, where do you go? Anyway, so let's
6 now come to 10th Schedule.

7

8 The Legislature Party, in relation to a member of a House belonging to any political party, in
9 accordance with the provisions of paragraph 2 or 4, means the group consisting of all the
10 members of that House for the time being belonging to that political party in accordance with
11 the said provisions. So Your Lordships, sees the symbiotic relationship between the Legislative
12 Party and the Political Party. The original political party in relation to a member of a House,
13 means the political party to which he belongs for the purposes of sub-paragraph one of
14 paragraph two. Paragraph means paragraph in this Schedule.

15

16 Then two, subject to the provisions of paragraphs 4 and 5, a member of a House belonging to
17 any political party shall be disqualified from being a member of the House, if he voluntarily, if
18 he has voluntarily given up his membership of such political party. Or if he votes or abstains
19 from voting in such House, contrary to any direction issued by the political party to which he
20 belongs or by any reason or by any person or authority authorized by it in this behalf, without
21 obtaining in either case the prior permission of such political party, person or authority and
22 such voting or abstention has not been condoned by such political party, person or authority
23 within 15 days from the date of such voting or abstention. So My Lord, what's important here
24 to note is that he cannot vote contrary to any direction issued by the political party. So
25 obviously, in terms of Paragraph 3, it is the Political Party which issues the direction not the
26 Legislative Party. And the direction is issued through the leader of the political party, normally
27 the Whip or the leader of the political party. Such person authorized. So therefore, the political
28 party will authorize such person and he is my lords the Whip. The Whip, term is not used in
29 the 10th schedule as you will notice. The term used is direction. Or by any person or authority
30 authorized, without obtaining in either case the prior permission of such political party. Now,
31 My Lords, whose permission has to be obtained if I want to vote against the Whip? Political
32 party's permission. And political party is outside the House, not within the House. Within the
33 House are only Legislatures. So you'll have to go to the Whip, you'll have to go to the Whip or
34 the person authorized, that look, I want to vote against or I want to make a speech against. I
35 don't agree with this Bill. And some times actually Whips do agree. It has happened so often
36 with us. You say, no, these particular clauses I don't...Allow me to speak, but I will vote for you

1 ultimately, because I don't want to violate the Whip. But allow me to speak. And sometimes
2 we are allowed.

3

4 Then My Lords, kindly come to the explanation. For the purposes of this sub-paragraph, an
5 elected member of a House shall be deemed to belong to the political party, if any, by which
6 he was set up as a candidate for election as such member. A nominated member of a House
7 shall, where he is a member of any political party on the date of his nomination, as such
8 member be deemed to belong to such political party. In any other case he deemed...be deemed
9 to belong to the political party of which he becomes, or as the case may be, first, becomes a
10 member before the expiry of six months from the date on which he takes his seat after
11 complying with the requirements of 99 or as the case may be Article 180. So a nominated
12 member within six months actually can join a party. Not after six months. Then subsection-
13 two, is very important. An elected member of a House who has been elected as such otherwise
14 than as a candidate set up by any political party shall be disqualified for being a member of the
15 House if he joins any political party after such election. I belong to that category My Lords. If
16 I try and join any other party, I shall be disqualified.

17

18 **JUSTICE NARASIMHA:** Anglo Indians.

19

20 **MR. SIBAL:** That's right. That's for nomination My Lords.

21

22 **JUSTICE NARASIMHA:** Three.

23

24 **MR. SIBAL:** Yes. Three is, a nominated member shall be disqualified being a member of the
25 House if he joins any political party after six months. That's what I told Your Lordships, from
26 the date on which he takes his seat after complying with the requirements of 99.
27 Notwithstanding anything contained in the foregoing provisions of this paragraph, a person
28 who on the commencement of the Constitution is a member of a House whether elected or
29 nominated as such, shall where he is a member of a political party immediately before such
30 commencement be deemed for the purposes of subparagraph-one of this paragraph, to have
31 been elected as a member of such House as a candidate set up by such party. In any other case,
32 be deemed to be elected, this we don't, really worry about that. Para three, is now deleted. Let's
33 see what para 3 said. Your lordships will find that in statutes My Lords, item number three.

34

35 **JUSTICE NARASIMHA:** Page 48. PDF 50.

36

37 **MR. SIBAL:** Yes, PDF page 50. Your lordship has that?

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JUSTICE HIMA KOHLI: Yes.

JUSTICE NARASIMHA: Yes.

MR. SIBAL: My Lords, Justice Shah has it? Now, Disqualification account a defection not to apply in case of split. Where a member of a House makes a claim that he and any other members of his Legislature Party, constitute the group representing a faction which has arisen as a result of a split in his Original Political Party and such group consists of not less than 1/3rd of the members of such Legislative Party, he shall not be disqualified under subparagraph-one, of paragraph 2. So paragraph 3, as it then stood operated on the assumption that there is a split in the original political party. A split in the Legislative Party could not have been a defense even if it is more than one-third.

CHIEF JUSTICE CHANDRACHUD: There has to be a split in the original political party.

MR. SIBAL: Correct. Now how does that split happen? Because he makes a claim before all this happened. Demonstrates in the claim that a split has occurred. Calls for a meeting of the original political party, as a faction, has a resolution passed, breaks away... Breaks away My Lords and then if he is one-third, it's a defense. Even if he loses in capturing the party, he shall not be disqualified in the paragraph two, that he has voluntarily...Sorry, that such group consists of not less than one-third of the members of such Legislative party, he shall not be disqualified under subparagraph-one of para two, on the ground that he has voluntarily given up his membership of the original political party or that he has voted or abstained from voting in such House contrary to any direction issued by such party, or by any reason or authority authorized by it in that behalf, without obtaining the prior permission of such party, person or authority, and such voting or abstention has not been condoned by such party, person or authority within 15 days from the date of which such voting or abstention. And from the time of such split, such factions shall be deemed to be the political party to which he belongs, for the purposes of subparagraph one of two, and to be his original political party for the purpose of that paragraph. So the splinter group of that party can be a separate political party. He will, because he is one third in the legislature belong to that party. Because that becomes his original political party. None of this has happened here.

CHIEF JUSTICE CHANDRACHUD: The quantum of the split interestingly was not defined in terms of numbers. So long as there is a split, the 1/3rd in relation to the group representing the Legislative Party.

1
2 **MR. SIBAL:** Yes, yes. I agree My Lord. That split may be minority, majority, it doesn't matter.

3
4 **CHIEF JUSTICE CHANDRACHUD:** Right. So long as you know, there is a split.

5
6 **MR. SIBAL:** There is a split.

7
8 **CHIEF JUSTICE CHANDRACHUD:** In the original political political party.

9
10 **MR. SIBAL:** Correct, correct. So that's not the case here My Lords. On 21st June, they were
11 in Gujarat, and they were in the Northeast, only the Legislative members. And they never said
12 there's a split. They said we are the Shiv Sena. So that claim was also not there. Then came the
13 91st Amendment, 2003. Sorry, 1st January 2004. No, no. Yes, yes an Act of 2003, but came
14 into force on 1st January 2004.

15 [NO AUDIO]
16 Then My Lords, Ten was amended. That's important.

17
18 **CHIEF JUSTICE CHANDRACHUD:** Yes.

19
20 **MR. SIBAL:** Now My Lords, kindly see this Constitutional Amendment. They have amended
21 164, of the Constitution which you will find in PDF page 52. In Article...I'm sorry. Article 164
22 of the Constitution after Clause-one, the following clauses have been inserted.

23
24 **CHIEF JUSTICE CHANDRACHUD:** Where are we?

25
26 **MR. SIBAL:** PDF page 52.

27
28 **CHIEF JUSTICE CHANDRACHUD:** PDF page 52.

29
30 **MR. SIBAL:** Yes. This is the, the amendment starts at PDF page 51. And the relevant part,
31 because 1A and 1B have been added. And if you see Section-C, of that. In Article 164, of the
32 Constitution after Clause-1, the following clauses shall be inserted namely,
33 1A, the total number of ministers including Chief Minister in the Council of Ministers in the
34 state shall not exceed 15% of the total number of members of the legislative assembly of that
35 State. Provided, the number of ministers including the Chief Minister shall not be less than
36 twelve. Provided further, we are not concerned with that.

1 1D, My Lords, a member of the Legislative Assembly of a State, or either House of the
2 Legislature of a State having Legislative Council belonging to any political party who is
3 disqualified for being a Minister of that House under paragraph 2 of the 10th Schedule shall
4 also be disqualified to be appointed as a Minister under Clause 1 for duration of the period
5 commencing from the date of his disqualification till the date on which the term of his office
6 as such member would expire or where he contests any election to the Legislative Assembly of
7 a State or either House of the Legislative of a State having Legislative Council, as the case may
8 be before the expiry of such period till the date on which he is declared elected, whichever is
9 earlier. This also creates a lot of problems. That problem doesn't confront us in this case,
10 because most of these people then resign, join the other party, get elected and become
11 ministers. So there is some scope for challenge to this particular provision, on it's
12 Constitutionality. But be that as it may, we are concerned with the earlier parts that if you are
13 disqualified, you can't be a Minister. Now your disqualification is pending, matter is before the
14 Constitution Bench, matter is before the Speaker, whichever it may be and you are appointed
15 by the Governor.

16

17 **JUSTICE NARASIMHA:** And also there's a provision of Representation of Peoples Act,
18 where they can't contest again.

19

20 **MR. SIBAL:** That's right. Not for this My Lords, not for the 10th Schedule. That is for other
21 corrupt practice. There is no period here. That's why I say this is subject to challenge.

22

23 **CHIEF JUSTICE CHANDRACHUD:** Right.

24

25 **MR. SIBAL:** They are My Lords for all kinds of other reasons, corrupt practice and he's been
26 convicted for X number of years. Now, what is happening in a ordinary case of a dharna on a
27 road, trial court convicts you for two years and you lose your membership of the Legislative
28 Assembly. That's also happening. We can see it, headline news everywhere. What do we do?
29 We can't keep on coming to court, every other day. Your Lordships will also get fed up with us.
30 Sorry. How many times do we give you justice?

31 Now kindly...So therefore now the bottom line is, there is no concept of a split anymore. Then
32 the statement of objects and reasons for deletion of the paragraph, paragraph at PDF page 54.
33 This is para 2, the Committee on Electoral Reforms. Demands have been made from time to
34 time to certain, in certain quarters for strengthening and amending the anti-defection law.

35

36 **CHIEF JUSTICE CHANDRACHUD:** Where that is?

37

1 **MR. SIBAL:** My lords at PDF page 54. The objects and reasons of the deletion. May I read
2 that My Lords?

3

4 **JUSTICE KOHLI:** Yes.

5

6 **MR. SIBAL:** Demands have been made from time to time in certain quarters for
7 strengthening and amending the anti-defection Law, as contained in the 10th Schedule to the
8 Constitution of India, on the ground that these provisions have not been able to achieve the
9 desired goal of checking defections. The 10th Schedule has also been criticized on the ground
10 that it allows bulk defections while declaring individual defections as illegal. The provisions
11 for exemption from disqualification in case of splits as provided in paragraph three of the 10th
12 Schedule to the Constitution as in-particular come under severe criticism on account of it's
13 destabilizing effect on the Government. Please see this. Please mark this. The purpose of the
14 amendment is that we will not allow you to destabilize the government by bulk defection and
15 that's exactly what has happened here. So you have to interpret the Tenth Schedule and its
16 provisions to ensure that there is no bulk defection and the concept of minority is over. Bulk
17 majority also will be subject to disqualification. And one-third of it was a defence. Majority is
18 not a defence anymore. There is no defence as far as a split is concerned in the Legislative
19 party. My lords paragraph two there, the Committee on Electoral Reform, the Dinesh Goswami
20 Committee, in its report of May 1990, the Law Commission of India, and 170th Report on
21 Reform of electoral laws 1999 of the National Commission to review the working of the
22 Constitution in its report of 31st March 2002, have inter alia recommended omission of said
23 paragraph 3 of the Tenth Schedule to the Constitution pertaining to exemption from
24 disqualification in case of splits. The NCRWC is also of the view that a defector should be
25 penalized for his actions by debarring him from holding any public office as a Minister in any
26 other remunerative political post for at least a duration of the remaining term of the existing
27 Legislature or until the next fixed election, whichever is earlier, it is
28 proposed to accept these suggestions.

29

30 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal, not with sending the deletion of paragraph
31 three of the Tenth Schedule, the issue is to who represents the political party is still a moot
32 issue?

33

34 **MR. SIBAL:** No.

35

36 **CHIEF JUSTICE CHANDRACHUD:** But that has to resolve outside the legislative party.

37

1 **MR. SIBAL:** No my lords.

2

3 **CHIEF JUSTICE CHANDRACHUD:** That cannot be still according to you resolved within
4 the fold of the legislative party.

5

6 **MR. SIBAL:** No my lords that question doesn't arise in this case...

7

8 **CHIEF JUSTICE CHANDRACHUD:** May not be in this case. But that question as to who
9 represents...

10 **MR. SIBAL:** That will happen outside the house.

11

12 **CHIEF JUSTICE CHANDRACHUD:** That will happen outside the house. That cannot be
13 resolved by the number of legislators within the House.

14

15 **MR. SIBAL:** That's my only submission my lord. How that is resolved outside the house is
16 actually given in a judgment of this court in Brahmananda Reddy.

17

18 **CHIEF JUSTICE CHANDRACHUD:** Director of the internal constitution.

19

20 **MR. SIBAL:** That's right. We have to call a meeting. You have to raise the issue. For two and
21 a half years, the gentleman was a Minister.

22

23 **CHIEF JUSTICE CHANDRACHUD:** The procedure, the bylaws of that party.

24

25 **MR. SIBAL:** Yes, yes you have to follow those bylaws, you have to call a meeting, you have to
26 resolve that issue. And then you can do all this when paragraph 3 was there. Otherwise, my
27 lords, what you do, what you're doing is exactly what the object says. You shouldn't be allowed
28 to do bulk defections. Toppling the government. As I said, what what this would result if you
29 were to uphold this... my lords my humble submission. If you were to uphold this, then any
30 government can be toppled. My lords for the simple reason you take those people become
31 majority appoint your Speaker my lords and have a trust vote and you are in government. You
32 don't need anything else.... you do not need to have a split in the political party. That's a matter
33 of matter of dispute that will arise and it will go to courts. And the courts will decide in their
34 own time. In the meantime, the five years will pass. So if you wanted to remedy this menace,
35 you can't allow the perpetuation of this menace by recognizing a split in the legislative party
36 as if there is a split in the political party which is not even, which is not even addressed, which

1 is not even claimed. What is claimed is that we are the party. Now we are the Party can't be
2 claimed within the Legislative Party.

3

4 My lords for two and a half years....I'm sorry.

5

6 **CHIEF JUSTICE CHANDRACHUD:** What two and a half years?

7

8 **MR. SIBAL:** For two and a half years, he was a Minister. This very government never raised
9 any issue. There is no public document saying that he is dissenting, or this is he is a
10 conscientious objector, nothing. No evidence. No document filed. No evidence of that. No
11 public statement, no newspaper report. Nothing. He was a leader of the house till 21st of June
12 and overnight my lords...the facts stare you in the face. The only way my lords...this is not what
13 Parliament will be ready to do. The only way to remedy this is to have a five year period of no
14 public post the moment you defect. No minister, no public post, no public sector, no nothing.
15 All this will stop. That is the only way. 164(1)(b) now gives you a way out. Instead of defecting,
16 you can resign and then you become Minister. You were a Minister before, all you have to do
17 is resign. This is the only way. If you want to maintain morality in public life you will not be
18 given any public office. No governorship. No remunerative posts.

19

20 **JUSTICE KOHLI:** Kind of cooling off.

21

22 **MR. SIBAL:** I'm sorry?

23

24 **JUSTICE KOHLI:** Cooling off of sorts.

25

26 **MR. SIBAL:** Yes. Even in 361 my lords in fact disqualification for appointment on
27 remunerative political post, capital B my lords. If he was disqualified, he can't hold a
28 remunerative post. Actually 91st Amendment my lords was very careful in trying to sort of
29 settle part of the problem, but one thing was clear they did not allow for bulk defections.

30

31 Now My Lords, Paragraph 4 if I may read my lords of the Tenth Schedule. 4(1) My Lords. I'm
32 just waiting for.... Your Ladyship to...A member of a House shall not be disqualified under
33 subparagraph 1 of paragraph 2, where his original political party merges with another political
34 party and he claims that he and any other members of his original political party have become
35 members of such other political party, or, as the case may be, of a new political party formed
36 by such merger. So My Lords if the Congress or if a small party in a state merges with another
37 big party to form a new party, that becomes his original political party. Therefore, a member

1 of a House shall not be disqualified where his original political party may be a small party
2 merges with another political party, and he claims that he and any other members of original
3 political parties have become members of such other political party... that is they merge into
4 that party or as the case may be of a new political party. Both of them may form a new politics
5 party formed by such merger.

6

7 **CHIEF JUSTICE CHANDRACHUD:** So A merges with B or A and B merged together to
8 form C.

9

10 **MR. SIBAL:** Form a new party. So therefore no disqualification. It's a merger of the political
11 party. 'Or have not accepted the merger and opted to function as a separate group.' So I say,
12 look, I don't accept the merger.

13

14 **JUSTICE NARASIMHA:** There is no compulsion to merge.

15

16 **MR. SIBAL:** No compulsion. I may be majority. I may be a minority within the legislature.

17

18 **JUSTICE NARASIMHA:** This will be called the unattached member?

19

20 **MR. SIBAL:** Uh yes. No. But if he, if he has not merged, My Lords, he can form a separate,
21 he will belong to the original. Supposing two parties merged and form a new party. Correct,
22 My Lords? And he belongs to the original political party on which he won the election he will
23 continue to be the original political party.

24

25 **JUSTICE NARASIMHA:** I think Amar Singh sat like that.

26

27 **MR. SIBAL:** Amar Singh yes. He will become the.. he will continue with the original political
28 party that also issue is before the larger bench. The larger bench. So if there's a new political
29 party formed pursuant to merger, and I belong to the original political party on the basis of
30 which I was elected, I continue to be in that original political party.

31

32 **CHIEF JUSTICE CHANDRACHUD:** But Clause 2 now again has (unclear) requirement.
33 At least two thirds of the existing members of the party....

34

35 **MR. SIBAL:** I'm coming to that. That's a very interesting provision which doesn't call for
36 interpretation now, but it has some nuances that's important for us to understand. And from
37 the time of such merger such other political party or new political party or group, as the case

1 may be, shall be deemed to be the political party to which he belongs, for the purposes of
2 subparagraph 1 of paragraph 2 and to be his original political party for the purposes of this
3 sub paragraph.

4
5 So from the time of such merger either to a party or to a new political party he is deemed to be
6 a member of that political party to which he belongs for the purposes of subparagraph 1. So
7 may belong to that original political party and he has dissociated himself or after merger he
8 belongs to the other political party. No issue. Now comes the problem. 'For the purposes of
9 subparagraph one of this paragraph, the merger of the original political party of a member of
10 a House shall be deemed to have taken place if and only if not less than two-thirds of the
11 members of the Legislative Party concerned have agreed to such merger.'

12
13 Now My Lords if two-thirds of the members don't agree, then there is no merger as far as the
14 legislatures are concerned. First, the merger takes place, then the question arises whether you
15 are two-thirds or not. If you are two-thirds and you agree, it is fine. It is a defense. If you are
16 not, two-thirds, My Lords, then you can be a separate group. So two-thirds happens to be a
17 defense after the merger.

18
19 **JUSTICE NARASIMHA:** This deemed is also very important.

20
21 **MR. SIBAL:** Yes.

22
23 **JUSTICE NARASIMHA:** Because what Tenth Schedule does is that it doesn't create a new
24 category. By saying deemed it is relating back to the position of the Assembly as it were. When
25 the people legislators got elected and come to the Assembly. That position will be deemed the
26 instead of creating a new category.

27
28 **MR. SIBAL:** Correct. For the purposes of one, the merger of the original political party of a
29 member of the House shall be deemed to have taken place only if not less than two thirds of
30 the member are concerned have agreed to such merger. So two thirds of the member, less than
31 two thirds of members My Lords question defense doesn't arrive. But if two thirds of the
32 members agree, then My Lords, that's a defense. That's a perfect defense. So My Lords looked
33 at it from any standpoint, these 40 people have no defense under the Tenth Schedule. They
34 don't claim that there's a merger. They say that they are majority in the Legislative party. They
35 claim that because of that majority, they can change the Whip. They claim that they can change
36 the leader of the House. They can call themselves, Eknath Shinde can call himself the leader
37 mainly because he happens to be one of 40. And so what happens My Lords to the political

1 party to which he belongs? What morality are we talking about? What conscience My Lords,
2 conscientious objectives are we talking about? 'Conscientious defectors' is the word that I used
3 last time. And you don't raise a voice for two and a half years, you are the leader. You enjoy
4 the fruits of minister-ship, and suddenly you say that - look, now, I am free to do what I want.
5 I can join up with the BJP. I can go to Guwahati or wherever I want to go to and that's it. So
6 the questions that Your Lordships will have to ask My Lords - how does the Tenth Schedule
7 come to their aid at all? Under what provision of the Tenth Schedule can they have a defense?
8 The schedule doesn't give them a defense. Whether it's a minority bulk moving away or a
9 majority moving away. Which is when we last time My Lords were discussing this matter. This
10 is what I mentioned. That the schedule doesn't, the 10th Schedule doesn't make a distinction
11 between majority and minority. It just ensures that this habit of bulk defections, which is
12 destroying the polity of this country and by which governments... elected governments can
13 be...The objective is that you should not allow an elected government to be overturned. That's
14 the fundamental premise on the basis of which Paragraph 3 was deleted. You cannot
15 destabilize government and if you uphold such an Act through a judicial process you are
16 enabling future defections and therefore destabilizing elected governments which has far
17 reaching consequences for the polity of this country. That's the issue that Your Lordships have
18 to decide.

19

20 **CHIEF JUSTICE CHANDRACHUD:** Yes.

21

22 **MR. SIBAL:** My Lords Paragraph 6 of the Tenth Schedule. But My Lords I'll take up the next
23 topic tomorrow if your lordships don't mind.

24

25 **CHIEF JUSTICE CHANDRACHUD:** The transcript which we have made today.
26 Transcription will be cleaned up in the early part of the evening today. And we will you give a
27 copy so that you can have a look at it if there is something you know, you can know what you
28 argued.

29 **JUSTICE SHAH:** You can know what you have argued.

30

31 **MR. SIBAL:** That'd be wonderful.

32

33 **JUSTICE NARASIMHA:** Don't file an application for amendment.

34

35 **MR. SIBAL:** Thank you. Appreciate it. I hope you continue to be well.

36

37

END OF DAY'S PROCEEDINGS

CHIEF JUSTICE'S COURT
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE M.R. SHAH
HON'BLE MR. JUSTICE KRISHNA MURARI
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE PAMIDIGHANTAM SRI NARASIMHA

Subhash Desai

v.

Principal Secretary, Governor of Maharashtra and Ors.

W.P.(C) No. 493/2022

Item No. 501

TRANSCRIPT OF HEARING

22-Feb-2023

11:00 AM IST

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MR. SIBAL: My Lords be kind enough to turn to Common Convenience Compilation Volume 2. My Lords what I had done was taking Your Lordship through the bare list of dates. And I have finished the reading of the Tenth Schedule My Lords, and my interpretation of the Tenth Schedule that I... it's over My Lords.

CHIEF JUSTICE CHANDRACHUD: Yes.

MR. SIBAL: So now I just want Your Lordship to go through the documentation. So if My Lords have that Common Convenience Compilation Volume 2. First document Dated 27th February 2018. Ladyship has that?

JUSTICE KOHLI: I got that.

MR. SIBAL: It's at page...PDF page 14.

JUSTICE KOHLI: Does it start with the indexation at serial number 37 please?

MR. SIBAL: No.

JUSTICE KOHLI: *Ramesh Thakur versus State of Madras?*

MR. SIBAL: My Lords, the date is 27th February 2018. Page 14, Convenience Volume 2, serial number five.

CHIEF JUSTICE CHANDRACHUD: It's called Convenience compilation.

JUSTICE KOHLI: I'm just trying to check.

CHIEF JUSTICE CHANDRACHUD: What is the PDF page?

MR. SIBAL: Page 14, PDF 14. My Lords, prior to 2018, the elections took place in Shiv Sena in 2013. Then they took place in 2018, then they were due to take place in 2023. So, this only reflects that the last elections took place in 2018, and a letter was written to the Election Commission saying organizational elections of Shiv Sena were conducted on 23rd January 2018, at Mumbai and the information regarding the designations and names of the party office bearers sought by office Election Commission of India is being endorsed herewith in format of

1 your record. Along with this, along with this letter, the amendments to the Constitution were
2 also enclosed. Anyway.

3

4 **CHIEF JUSTICE CHANDRACHUD:** Yes.

5

6 **MR. SIBAL:** Then My Lords, the office bearer names, Your Lordship will see. Shiv Sena
7 Paksh Pramukh Uddhav Thackeray, Shiv Sena leaders, deputy leaders, secretaries, and all that
8 is set out. And Shiv Sena's deputy leaders is My Lords, annexure one. And the National
9 Executive Meet, held on 23rd January, that set out Shiv Sena Paksh Pramukh Uddhav
10 Thackerayji, appointing the following members as deputy leaders, and Your Lordship will see,
11 Shiv Sena Paksh Pramukh Uddhav Thackeray appointing the following members as Shiv Sena
12 leaders which includes Eknath Shinde at serial number 4. Your Lordship see that? So all this
13 information already sent to the Election Commission.

14

15 **CHIEF JUSTICE CHANDRACHUD:** Serial number four, is at which page?

16

17 **MR. SIBAL:** Sorry.

18

19 **CHIEF JUSTICE CHANDRACHUD:** Serial number four is at what page?

20

21 **MR. SIBAL:** Serial number four, My Lord is at PDF page 17.

22

23 **CHIEF JUSTICE CHANDRACHUD:** National Executive Meet held on 23rd January, 20...

24

25 **MR. SIBAL:** Correct. Normal as the election were due in January 2023, when all this
26 happened. So,...we're in the midst of a lot of mess. That's all. Now, My Lords kindly see, then
27 the party Whip.

28

29 **CHIEF JUSTICE CHANDRACHUD:** What is meant by appointing the, appointed the
30 following person that Shiv Sena leader?

31

32 **MR. SIBAL:** Some are elected, some are appointed, but...

33

34 **CHIEF JUSTICE CHANDRACHUD:** But, oh, but appointed the following members of
35 Shiv Sena leaders to which, to, Shiv Sena leaders appointed to where?

36

37 **JUSTICE KOHLI:** Which platform?

1
2 **MR. SIBAL:** Rashtriya Karya Karini, My Lords.

3
4 **CHIEF JUSTICE CHANDRACHUD:** For the National Executive..

5
6 **MR. SIBAL:** Yes, yes.

7
8 **CHIEF JUSTICE CHANDRACHUD:** Oh, I see. So this is a meeting of the National
9 Executive held on 23rd January 2018.

10
11 **MR. SIBAL:** Yes, yes.

12
13 **CHIEF JUSTICE CHANDRACHUD:** At which these four persons were nominated as
14 members of the National Executive for...

15
16 **MR. SIBAL:** Yes, the Rastriya Karya Karini. Elected are at page 15. Your Lordship will see
17 that at page 15, PDF page 15.

18
19 **CHIEF JUSTICE CHANDRACHUD:** Yes.

20
21 **MR. SIBAL:** You see the elected ones, My Lords. Name of office bearers elected. Your
22 Lordship sees that, fourth column from the left?

23
24 **CHIEF JUSTICE CHANDRACHUD:** Yes.

25
26 **MR. SIBAL:** So, some are elected, some are nominated.

27
28 **CHIEF JUSTICE CHANDRACHUD:** Right.

29
30 **MR. SIBAL:** And see if the last column, you say, list of names of leaders and deputy leaders
31 appointed co-opted by Shiv Sena Paksh Pramukh, is also attached for your record. And that's
32 annexure-two My Lords. So all this is informed, My Lords. So there are no dispute on any of
33 this. Of course, the Election Commission ultimately says, I don't have the Constitution. So I
34 will not look at it. Though it was annexed along with this very document, the Amendment to
35 the Constitution, anyway. So, then My Lords kindly see June 21, PDF page 19. My Lords one
36 other fact, Your Lordship may be kind enough to note is at page 15, PDF page 728.

37

1 **JUSTICE KOHLI:** 15?

2

3 **CHIEF JUSTICE CHANDRACHUD:** PDF page?

4

5 **MR. SIBAL:** 728. My Lords. Your Lordships will see this is important.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Same compilation.

8

9 **MR SIBAL:** Yes. This is important because this is Dated 25th November 2019. Just note that
10 date. It's important. My Lords on that particular day, My Lords the Uddhav Thackeray was
11 neither a member of the Legislative Council nor was he Chief Minister. He was only President
12 of the party. On 25th November 2019. The reason why I'm inviting My Lords' attention to this
13 document is, please have a look at it. It is to the Honourable Speaker, Legislative Assembly.
14 The Shiv Sena... Ladyship has it?

15

16 **JUSTICE KOHLI:** 715 did you say?

17

18 **MR. SIBAL:** 715, yes. Shiv Sena's newly elected MLAs meeting was convened at Shiv Sena
19 bhavan on Wednesday, 31st October. Meeting was chaired by Uddhav Thackeray, Shiv Sena
20 Paksh Pramukh. All the newly elected MLAs of Shiv Sena party unanimously resolved that all
21 the decisions of today's meeting be decided by Uddhav Thackeray and authorized Uddhav
22 Thackeray to take on the decisions. Shri Eknath Shinde and Sunil Prabhu were appointed as
23 group leader and Chief Whip of Shiv Sena legislature party in the Maharashtra Legislative
24 Assembly. Resolution passed in this are regard as follows. 'That it is resolved that elected
25 MLAs meeting of Shiv Sena party of the party with Eknath Shinde is appointed as group
26 leader.' So he becomes the leader My Lords of the House in a sense. 'And it is resolved that in
27 the newly elected MLAs meeting of the Shiv Sena party Sunil Prabhu is appointed as the Chief
28 Whip.' So their the appointment is by the party.

29

30 **JUSTICE NARASIMHA:** This is information to the speaker.

31

32 **MR. SIBAL:** That's right. That's information to the speaker. That's how it happens My Lords.
33 When the leader of the House, My Lords, or the leader of the Opposition, that's how the party
34 conveys the...

35

36 **CHIEF JUSTICE CHANDRACHUD:** This letter is addressed by Shri Uddhav Thackeray.

37

1 **MR. SIBAL:** That's correct. Just see.

2

3 **CHIEF JUSTICE CHANDRACHUD:** Because that last the signature doesn't appear there.
4 That's why I just asked.

5

6 **MR. SIBAL:** Oh.

7

8 **CHIEF JUSTICE CHANDRACHUD:** Maybe. Maybe right also because it's addressed by
9 those..

10

11 **MR. SIBAL:** It doesn't matter, My lords. It's an information of the decision of the party to
12 appoint these two people as the leader, group leader, as well as the Chief Whip. Yes. It is
13 chaired by the Uddhav Thackeray and it says the party has appointed. There's no doubt about
14 that. First Para itself says so My Lords.

15

16 **JUSTICE SHAH:** No.. It was in the meeting of the MLAs ?

17

18 **MR. SIBAL:** No, no Shiv Sena's... Meeting was convened by Shiv Sena Bhavan. And the
19 meeting was chaired by Uddhav Thackeray. All the newly elected members unanimously
20 resolved that all decisions of today's meeting will be decided by Uddhav Thackeray.

21

22 **JUSTICE SHAH:** Okay. Okay. Now read a Resolution Number one.

23

24 **MR. SIBAL:** Yes, 'It is resolved in the newly elected MLAs meeting...

25

26 **JUSTICE SHAH:** MLAs meeting of so and so.

27

28 **MR. SIBAL:** That he is appointed resolution. Yes. He is appointed as a group leader of the
29 Shiv Sena party. Resolve the newly elected MLA meeting of Shiv Sena party. Sunil Prabhu is
30 appointed as the Chief Whip the Shiv Sena.

31

32 **JUSTICE SHAH:** So this was a resolution which was communicated was, prima facie subject
33 to what you can say, the elected MLAs meeting was convened. It was resolved like one and
34 two, which was intimated to the Speaker.

35

36 **MR. SIBAL:** Yes. But no My Lords, the decision was of the Uddhav Thackeray. It's the
37 decision of Uddhav Thackeray.

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CHIEF JUSTICE CHANDRACHUD: It doesn't appear to be so Mr.

MR. SIBAL: It says so.. My Lords, the first paragraph. First and the second paragraph both. First and second paragraph both says so...

JUSTICE NARASIMHA: Second says - the meeting was chaired and third says - elected MLAs unanimously resolved that all decisions of Today's meeting be decided by Thackeray .

MR. SIBAL: Uddhav Thackeray. So he is and.. authorized Uddhav Thackeray to take all the decisions of the meeting. The decision is of Uddhav Thackeray.

CHIEF JUSTICE CHANDRACHUD: But having said that, it also appears that the decision attains a certain degree of legitimacy because it is communicated by the MLAs to the Speaker, it appears, it may be, that of course, as the unquestioned party leader at that time, he was to decide who would be the group leader and who would be the Chief Whip. But the communication to the Speaker is signed by all the 56 MLAs and they eventually resolve that who will be the group leader and the Chief Whip. It seems to be that.

MR. SIBAL: As I showed Your Lordship, the law on the subject and the decision of the subject, it will be clear that it is only the party that appoints. No, no member of the legislature.

CHIEF JUSTICE CHANDRACHUD: I understand that, because your submission yesterday was that the appointment of the Chief Whip or the group leader is something which is never done by the...

MR. SIBAL: Never done.

CHIEF JUSTICE CHANDRACHUD: It's always done by the party.

MR. SIBAL: I'll do. Yes My Lords.

CHIEF JUSTICE CHANDRACHUD: So your second limb of the submission was, if there is a split, that split also, of course, there's no concept of a split in the Tenth Schedule, but even assuming there's a split in the party, that split is outside the Legislative Assembly.

MR. SIBAL: Correct.

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CHIEF JUSTICE CHANDRACHUD: And it can't be that the 56 MLAs decide that, well, we have now merged or we have...there is a split in our party.

MR. SIBAL: It is settled law as I mean, I'm just indicating this is how it happened. But it is settled law, that as far as the Whip is concerned, and that's in answer to My Lord's question, as far as the Whip is concerned and the leader is concerned, it's always decided by the party.

JUSTICE SHAH: That you said yesterday.

MR. SIBAL: Yes. I'm just saying the process was in this particular case this, say if a letter is written, I don't My Lords we will find out. I'll find out. The letter is communicated.

CHIEF JUSTICE CHANDRACHUD: And Mr. Sibal, on that you may be right also for this reason that a Whip is a direction to the elected members of the Legislature, whether it's in Parliament or a Legislative Assembly or Council that you shall vote in a particular manner, or this is our position on this particular aspect, on the discussion on a bill, or whatever you are doing as a... as an elected legislator. Therefore that direction to the members is also always...

MR. SIBAL: Always by the Whip.

CHIEF JUSTICE CHANDRACHUD: Offside, outside the...

MR. SIBAL: Outside, yes.

CHIEF JUSTICE CHANDRACHUD: Outside the Legislature.

MR. SIBAL: I'm sorry. I'm sorry.

CHIEF JUSTICE CHANDRACHUD: Show the relevant rules of the Legislature.

MR. SIBAL: I will, in fact, My lords, I will show that and it will be clarified. But My Lord is right that from the perspective of the format, Your Lordship may be right that it is forwarded, but we will have to check that. But assuming it doesn't make difference to the substance of...

1 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal, why don't we take, go straight to the rules
2 of the, because the rules of the assembly must be telling us how a Chief Whip is nominated.
3 How a Group Leader is... would be....

4

5 **MR. SIBAL:** The rules of the assembly don't say that. There is no rule of the assembly. But
6 this is what has been decided. But this is the convention in every political party. Why My lords?
7 Because the legislators come into the House on the basis of the symbol given and the election
8 My Lords. Pursuant to by which they are in the House. They are governed by the discipline of
9 the Party, not their internal discipline in the House and that discipline of the Party.... I will
10 please.

11

12 **CHIEF JUSTICE CHANDRACHUD:** So the rules, Mr. Sibal, the rules of the Legislative
13 Assembly are silent? There is no guidance?

14

15 **MR. SIBAL:** No, no, there is no. But there is also My Lords, there is a particular rule,
16 Maharashtra Legislature Members Removal of Disqualification Act, under which it is made
17 clear. That Your Lordship will find at page 140 of the statute compilation. Just let's go there.

18

19 **CHIEF JUSTICE CHANDRACHUD:** Let's quickly go to that.

20

21 **MR. SIBAL:** Let's quickly go there.

22

23 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal, anything here in this compilation so that
24 we are closing it now. We're closing this compilation screen so we can go, if there's something
25 else to be shown here, you can quickly show us and then go to the rule.

26

27 **MR. SIBAL:** My Lords let's see this as this question has arisen, then I'll go back.

28

29 **CHIEF JUSTICE CHANDRACHUD:** So, we might as well complete it from this part here.

30

31 **MR. SIBAL:** Just let's complete this part.

32

33 **JUSTICE KOHLI:** Mr. Sibal, if I may? Please look at page 710, PDF 723. Just in case the
34 essence of the English translation has been lost. This is the same document letter at 710. The
35 same letter that you were pointing out, 25th November 19. It's in Marathi and that probably
36 will be the essence, because it's a translation that you have shown us.

37

1 **MR. SIBAL:** My Lords, the Chief...

2

3 **JUSTICE KOHLI:** Perhaps Chief can throw more light on that. Hon'ble Mr. Justice.

4

5 **CHIEF JUSTICE CHANDRACHUD:** It says '*Guruwar, Dinank 31 October 2019 roji*'- I am
6 sure, my learned brothers will get some flavour of it - '*Roji Shiv Sena Bhavan, Dadar Mumbai*
7 *yethe Shiv Sena Pakshachya navnirvachit amdaranchi baithak Shiv Sena Paramukh*
8 *Mananiya Shri Uddhavji Thackeray yanchya upasthitit sampann jhali. Maharashtra Rajya*
9 *Vidhansabha nivadanuk 2019 madhe nivadun aalelya sarv navnirvachit amdarani*
10 *baithakichi suruwatilach ya baithakit honyarya nirnayanche sarvasvi adhikar adhyaksh*
11 *mhanun Shiv Sena Paramukh Shri Uddhavji Thackeray yana dile. Yapramane baithakit*
12 *Maharashtra Rajya Vidhimandalatil Shiv Sena pakshachya Gatneta mhanun Amadar Shri*
13 *Ek Nath Sambhaji Shinde va Vidhansabhetil Mukhya Pratod mhanun Amadar Shri Sunil*
14 *Prabhu yanchi ekmatane nivad karnyat aali. Ya donhi nivadinche donhi tharav*
15 *pudhilpramane aahe.'*

16 So it says that, well, all the decisions, they have power to take all the decisions are entrusted
17 to Mr. Uddhav Thackeray and an election was then held at which so and so was nominated as
18 a group leader, and So and So was nominated as the Chief Whip.

19

20 **MR. SIBAL:** That is what I thought. My Lords. The *Adhikar* was given to him.

21

22 **CHIEF JUSTICE CHANDRACHUD:** And then it is sort of ratified by all the MLAs.

23

24 **MR. SIBAL:** So My Lords, kindly come to PDF 55 of the statute compilation. This is what it
25 is. 55. Oh, sorry 140. Sorry.

26

27 **CHIEF JUSTICE CHANDRACHUD:** And then *Tharav Kramank Ek* also says - '*Shiv Sena*
28 *Pakshachya navnirvachit amdarnchya ya baithakit tharav karnyat yet aahe ki Shiv Sena*
29 *Pakshachya Vidhimandal Gatnete padi Amadar Shri Ek Nath Sambhaji Shinde yanchi nivad*
30 *karnyat yet aahe.'* That's the resolution .

31

32 **MR SIBAL:** My Lords, the Statute compilation just and then I'll come back to the other
33 documents. Let's clear this issue My Lords.

34

35 **CHIEF JUSTICE CHANDRACHUD:** 140.

36

1 **MR. SIBAL:** Now kindly see My Lords at 142. PDF 142. These are My Lords, the Maharashtra
2 Legislature Members Removal of Disqualification Act and removal of certain disqualifications.
3 See Paragraph 2 at Page 142, Section 2, at Page 142.

4

5 **CHIEF JUSTICE CHANDRACHUD:** 142?

6

7 **MR. SIBAL:** I hope Your Lordship are feeling much better today.

8

9 **CHIEF JUSTICE CHANDRACHUD:** Little better yes. Thank you. Just professional
10 hazards.

11

12 **MR SIBAL:** Page 142 Section 2. 'A person shall not be disqualified from being chosen as of
13 being a member of the Maharashtra Legislative Assembly or Maharashtra Legislative Council
14 nearly by reason of the fact that he holds any of the offices specified in Schedule 1. And that at
15 145. You have schedule 1 My Lords. 23, item 23 there is the 'offices of the Chief Whip or Whip
16 in the Maharashtra State Legislature'. Now kindly read the explanation with me if Your Lord
17 Ships and Ladyship has it... 'the offices of the Chief Whip - The expression Chief Whip or Whip
18 in relation to the Maharashtra Legislative Assembly means that member of the House, who is
19 for the time being declared by the party...

20

21 **JUSTICE NARASIMHA:** Was it redacted?

22

23 **MR SIBAL:** I'm sorry?

24

25 **CHIEF JUSTICE CHANDRACHUD:** It's actually highlighted it. So much so that there is
26 nothing except yellow here.

27

28 **JUSTICE KOHLI:** Already highlighted.

29

30 **CHIEF JUSTICE CHANDRACHUD:** *Mere pass hai.* It's all just yellow.

31

32 **MR. SIBAL:** Why, My Lords? How?

33

34 **CHIEF JUSTICE CHANDRACHUD:** They must have highlighted it and then scanned it.

35

36 **JUSTICE KOHLI:** So it has come black.

37

1 **MR. SIBAL:** I'm sorry, My Lords for this.

2

3 **CHIEF JUSTICE CHANDRACHUD:** It's surprising.

4

5 **JUSTICE KOHLI:** I was also wondering that I have not done it.

6

7 **MR. SIBAL:** I am surprised myself.

8

9 **JUSTICE KOHLI:** Doesn't matter.

10

11 **CHIEF JUSTICE CHANDRACHUD:** You don't read it slowly then I think.

12

13 **JUSTICE NARASIMHA:** You can give us a copy later. But now you can read.

14

15 **MR. SIBAL:** I can pass on My Lords...

16

17 **JUSTICE KOHLI:** I can share it.

18

19 **CHIEF JUSTICE CHANDRACHUD:** on a returnable basis or what?

20

21 **MR. SIBAL:** pass on another one, please

22

23 **JUSTICE KOHLI:** I have, mine is fine.

24

25 **MR. SIBAL:** Just give another for the Chief Justice, please.

26

27 **CHIEF JUSTICE CHANDRACHUD:** No, I have. My pen drive is okay.

28

29 **MR. SIBAL:** Okay. Now, may I read My Lords?

30

31 **CHIEF JUSTICE CHANDRACHUD:** Yes, yes.

32

33 **MR. SIBAL:** The expression Chief Whip or Whip, in relation to the Maharashtra Legislative
34 Assembly means, that member of the House, that member of the House, who is for the time
35 being declared by the party forming the Government to be the Chief Whip or Whip in that
36 House and recognized as such by the Speaker and includes a member of the House who is for
37 the time being declared as such by the party, having at least 10% of the total members of the

1 House and recognized as such by the Speaker. The expression Chief Whip or Whip in relation
2 to the Maharashtra Legislative Assembly means the member of the House, that member of the
3 House who is for the time being declared by the party forming the Government to be the Chief
4 Whip or Whip in that House and recognize as such by Chairman and includes a member of the
5 House who is for the time being declared as such by the Party, having at least 10% of the total
6 members of the House and recognized as such. It's clear, My Lords, this is, there's no doubt
7 about these things, My Lords, I read to Your Lordship yesterday, in fact, the communication
8 by the Chairperson of the UPA to the Chairman of the Rajya Sabha that after Mr. Ghulam Nabi
9 Azad, Mr. Kharge is the leader, is the leaders of the legislative party. So on this there is no,
10 really no issue My Lords.

11

12 **CHIEF JUSTICE CHANDRACHUD:** Yes.

13

14 **MR. SIBAL:** Now My Lords, now I come back to Volume-2, page 17. Then this is My Lords,
15 21st of June, the meeting of all members of the Shiv Sena, PDF 19. PDF 19. PDF 19 of
16 Convenience Compilation, Volume-2. I am coming back to that compilation list. Page 6
17 otherwise.

18

19 **JUSTICE SHAH:** Party Whip.

20

21 **MR. SIBAL:** Party Whip, a meeting of all members of the Legislative Assembly on Tuesday
22 on 21st June at 12:30 has been arranged at the Honourable Chief Justice, Chief Minister's
23 residence Varsha Bungalow. Therefore, all members of the Shiv Sena should positively remain
24 present for the said meeting. So that's how the issue starts. And this is given by the party Whip.
25 And those who were present, they have signed it. We don't have to go into that at the moment.
26 So typed copy is there. And then kindly come to page, PDF page 32. As per Whip, My Lords
27 have 32 PDF? As per Whip issued by the Chief Speaker of Shiv Sena Shri Sunil Prabhu, the
28 meeting of members of the Shiv Sena party was concluded on Tuesday, 21st of June, at Chief
29 Minister's residence at Varsha Bungalow, and under the chairmanship of the Party President
30 Uddhav ji. In the meeting, the following resolution was passed unanimously. Resolution
31 Eknath Shinde, the member of Legislative Assembly has been removed forthwith as the post
32 of group leader of Shiv Sena legislative party, Ajay Choudhary member of Legislative Assembly
33 has been immediately elected unanimously on the post of group leader of Shiv Sena legislative
34 party that has become vacant. A copy of the aforesaid resolution vide Article 180 as a
35 Constitution, be forward it to the Hon'ble Vice President Maharashtra Legislative Assembly,
36 who is discharging the duties of the post of President Maharashtra Legislative Assembly.

1 Presented by Ravindra Waikar and Uday Samant and the others. So My Lords we changed
2 him, the party's decision to remove him as the group leader.

3

4 Then comes My Lords, PDF page 34. Again on 21st of June.

5 Yes, we communicated this decision to the Deputy Speaker and that Your Lordship will see to
6 the Vice President Maharashtra Legislative Assembly.

7

8 **CHIEF JUSTICE CHANDRACHUD:** Page?

9

10 **MR. SIBAL:** It is actually Vice President is the wrong translation. It's the Deputy Speaker. At
11 Page 34 PDF Page 34.' A meeting of members of Shiv Sena Legislative party was held under
12 the Chairmanship of so and so. In this meeting the following resolution was passed and that
13 is sent for appropriate action.' Your Lordship see that. You don't have to read the whole
14 document. Sent for appropriate action.

15

16 Then PDF Page 36. Again 21st of June, because the party decides to make Ajay Choudhary the
17 group leader that also is communicated to the Deputy Speaker and that Your Lordship will
18 find at Page 36. I don't have to read it ,just the waste of time. 'That I am directed to inform you
19 this is the request made vide above letter to record approval to the election of Shri Ajay
20 Choudhary, member of the Legislative Assembly to the post has been accepted by the President
21 Maharashtra Legislative Assembly.' So he accepts that, Deputy Speaker accepts that. That's
22 how the process is My Lords, Party conveys to the Deputy Speaker. Deputy Speaker accepts it.
23 That's in all assemblies in India, including Parliament. Then My Lords kindly come to...

24

25 **JUSTICE SHAH:** Could the resolution which you read, the communications. One removing
26 Mr. Eknath Shinde. Correct? And appointing Ajay Choudhary, were in the meeting of the
27 legislative party. Please see.

28

29 **MR. SIBAL:** Yes, yes.

30

31 **JUSTICE SHAH:** They were not the decisions taken. Other resolutions were passed in the
32 party meeting.

33

34 **MR. SIBAL:** That doesn't happen My Lords. That never happens. What happens..

35

36 **JUSTICE SHAH:** Just to clarify my point. Both these resolutions were in the meeting of a
37 legislative party.

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MR. SIBAL: Yes. I'll tell Your Lordship why. My lords what happens is it's the legislative party that has to accept a leader. There is always a consultation with the party, the party is represented by Uddhav Thackeray.

JUSTICE SHAH: Just what we want to say, just speaking of myself it was not in the meeting of the party.

MR. SIBAL: No, it is never. It is never My lords. It is never. I'm explaining that to you, explaining that. Ultimately, My Lords, a group leader or a leader in the House has to be chosen right? So what the party Whip and what the leader of the party does is, calls the legislators and says, who would you like to leap in the leader. They take their view, and the party takes the decision. It's not a party meeting, Your Lordship is right. It doesn't happen in the like in the AICC or the DPCC. It happens My Lords with the leader, namely, the Chairperson, the Chairperson, or the Prime Minister My Lords, acting in his capacity as the head of the BJP, he will be consulted. But it's why? Because it is the legislative members who have to accept somebody as a leader. So the decision is given by the party that this is the person who is...we choose as the leader. Now you cannot. This is not...doesn't happen in the plenary My Lords. That's the process and I will demonstrate that. Your Lordship is absolutely right. Because ultimately, My Lords who has to work? Somebody within the Legislature is to work with the leader. So they are the ones who are concerned. So their views will be taken and the party will decide. So therefore they say, Okay, let's Uddhav Thackeray decide, we will accept what you say. That's how it happens.

JUSTICE SHAH: So according to you. The decision in the legislative party meeting would always be on the advice of the party?

MR. SIBAL: Always. That's right. Always. And it's recognized by this court My Lords in several decisions. So actually and this is a practice. This is a norm everywhere in every political party.

JUSTICE NARASIMHA: Leader as well as Whip, both you are saying?

MR. SIBAL: Sorry?

JUSTICE NARASIMHA: Leader as well as the Whip.

1 **MR. SIBAL:** That's right. That's right. My Lords, what happens, may I just explain that also?
2 Leadership will decide who the Chief Whip will be, leadership will decide who the group leader
3 will be but the Chief Whip will decide, not pursuant to, Chief Whip will decide carry out the
4 instructions of the leader when matters are in the House. There the leader doesn't come in.
5 Chief Whip will say, we'll go to the leader and say, look, this is the issue before the House. How
6 do we deal with it? Leader will discuss it with the Chief Whip. Chief Whip will communicate.
7 That's how Parliamentary democracy works.

8

9 **JUSTICE NARASIMHA:** Yes.

10

11 **MR. SIBAL:** But Your Lordship is absolutely right, it's a good point that Your Lordship have
12 pointed out so that I can clarify it. Then My Lords, kindly see 22nd of June. In the backdrop
13 of causing party crossing over and thereby attempting to destabilize the government and
14 considering the consequential political situation that has been created in the State and an
15 urgent meeting has been arranged on 22nd of June at 05:00, at Varsha Bungalow, Mount
16 Crescent Road to face such situations. Your presence for this meeting is necessary, which
17 please note, the said Notice has been forwarded on your email ID registered in the
18 Maharashtra Legislative Assembly that apart, that apart you have also been informed through
19 social media WhatsApp and SMS. You cannot remain absent for this meeting unless valid and
20 sufficient reason in writing is given. If you fail to remain present for the meeting, it will be
21 presumed that you have clear intention to leave membership of Shiv Sena party voluntarily as
22 a result of which action is provided in the Constitution of India with respect to disqualification
23 of members will be taken against you. Note of which is taken. This is communicated to Eknath
24 Shinde, by whom? By the Whip. By Sunil Prabhu, who represents the party.

25

26 **JUSTICE KOHLI:** So, is it a typo at the end of that Chief Speaker? It should be Chief Whip?

27

28 **MR. SIBAL:** Yes, it's Chief Whip My Lords, It's not Chief Speaker. It must be a translation
29 issues.

30

31 **CHIEF JUSTICE CHANDRACHUD:** Yes, it's a, I was reading the Marathi. It's Chief Whip.

32

33 **MR. SIBAL:** Yes, and then My Lords, the 22nd June Notice is sent, which is PDF-39. In the
34 background of the recent concluded Maharashtra Legislative Council elections held on 20th
35 of June, and in view of the volatile political situation emerging in the State, on account of
36 repeated attempts being made to destabilize the government by orchestrating defections
37 within the Shiv Sena and to discuss and draw out a political strategy to address and contain

1 any such exigency. You are urgently called upon to attend the meeting of the Shiv Sena
2 legislative party today, on 22nd to be held at so and so place. Please note that failure to
3 participate in the meeting without providing valid and adequate reasons in writing,
4 communicated in advance to the undersign will result in consequential action against you
5 under the relevant provisions of the Constitution. This Notice is being sent on email address
6 provided by the legislators and registered with the Maharashtra Assembly along with soft
7 copies being served on SMS and WhatsApp as well. This again is sent by the Chief Whip My
8 Lords. And next document is page 40, PDF page 40, 22nd of June, says subject Notice of Shiv
9 Sena legislative party meeting. An emergency meeting has been organized on Wednesday
10 22nd June at 05:00 p.m. at Varsha whatever, to deal with situation as there is an attempt to
11 destabilize the government by shifting parties in the background and therefore the political
12 situation created in the state. It is important to note that this meeting requires your presence.
13 Notice has been sent to you by email you have registered with the Maharashtra Legislative
14 Assembly in addition to you then SMS, WhatsApp. It should be noted that if you do not attend
15 then you're liable in accordance with the Constitution. Action will be taken. This is sent by the
16 Chief Whip, and then this is sent to all these people and they don't attend. Then Your Lordship
17 may go straight away....

18

19 **JUSTICE NARASIMHA:** What is the Annexure 10?

20

21 **MR. SIBAL:** Annexure?

22

23 **JUSTICE NARASIMHA:** Annexure 10, that is the next page of PDF 41.

24

25 **MR. SIBAL:** That's for people My Lords, people who attended, and those people who didn't
26 attend.

27

28 **JUSTICE NARASIMHA:** So attended?

29

30 **MR. SIBAL:** That's right. That's what it is. Yes. Now My Lords, now comes the document
31 which is crucial for this case.

32

33 **CHIEF JUSTICE CHANDRACHUD:** What is that document Mr. Sibal?

34

35 **MR. SIBAL:** This is at PDF 51. This communication, which I have read, was sent to Eknath
36 Shinde My Lords, by the Chief Whip. Now Eknath Shinde replies to it.

37

1 **CHIEF JUSTICE CHANDRACHUD:** Just one second.

2

3 **MR. SIBAL:** Not Eknath Shinde but hopefully....

4

5 **JUSTICE NARASIMHA:** <UNCLEAR> Sunil Prabhu by Eknath Shinde.

6

7 **MR. SIBAL:** Now kindly see to Sunil Prabhu. This document. Now it says, 'you have misused
8 the authenticate letter of the Office of the Shiv Sena Legislative party. Meeting of 45 MLAs of
9 Shiv Sena party was held under the Chairmanship of Honourable group leader Eknath Shinde.
10 And in the said meeting you have been unanimously removed from the post of Chief Speaker
11 of the party, Chief Whip of the party Shiv Sena MLA Bharat Gogawale has been appointed as
12 a post of Chief Speaker... Chief Whip of the Legislative Assembly. As per letter of 22nd June
13 Shiv Sena Legislative Party office. Despite you having no authority to sign has send to me a
14 notice which is legally invalid. You have no right to send me the said notice. Therefore it is not
15 binding upon me to remain present.'

16 Now My Lords, this act, the fact that you did not attend the meeting the fact that you wrote
17 this letter, the fact that you appointed the Chief Whip. You 45 people or whoever, whether it's
18 40 or 45 at the moment, we are not on that, that you are members of the Legislative Assembly.
19 You have appointed your own Chief Whip. You have you say that you are no longer the Whip,
20 is all... there is no as far as I am concerned. My Lords, this is *per-se* illegal. This doesn't
21 terminate from the party. They cannot... Members of the Legislature cannot my Lord pass such
22 a resolution. Cannot defy the Whip. Cannot remove the Whip. So the 40 odd members My
23 Lords sitting in Assam convert themselves into the party and decide to remove everybody.

24

25 The next document is at Page 52, again June 22nd 2022. Same thing that- 'You have misused
26 the official letterhead in a meeting of 45 MLAs, under the chairmanship of group leader
27 Eknath Shinde. You have been unanimously removed from the position of Chief Whip.' So he
28 is acting as a group leader of the members of the legislature. So therefore, My Lords let's put
29 it in simple terms. In any assembly, ten people can get together and remove My Lords, the
30 Chief Whip and then they can go to the opposite party and My Lords with the numbers' game
31 that is going on, they can remove, the they can actually destabilize the government and have
32 their own Chief Minister. This is what... this is the outcome, if, if this is upheld to be... if this
33 is held to be valid. If such an exercise is held to be valid, the outcome is that you can remove,
34 an elected government can be removed anytime, depending on the arithmetic.

35

1 **CHIEF JUSTICE CHANDRACHUD:** To put it in the flip side. Therefore, Mr. Sibal, your
2 contention would be then if this outcome has to be lawfully achieved of removing the Chief
3 Whip or the group leader. Then what is the course of action to be followed according to you?

4

5 **MR. SIBAL:** You have to go to the party. Call up, call a meeting of the party. Call the meeting
6 of the party or you merge.

7

8 **CHIEF JUSTICE CHANDRACHUD:** Party would mean the the National Executive or
9 what would be meaning?

10

11 **MR. SIBAL:** If you have to call My Lords.. the National Executive. The Pratinidhi Sabha, the
12 general body, the Pratinidhi Sabha. Not the Karyakarini My Lords. That's a 13 member. The
13 Pratinidhi Sabha has 262 odd members.

14 My Lords, point is, they have never been to the party.

15

16 **CHIEF JUSTICE CHANDRACHUD:** Of course, the only chink in that submission. I mean,
17 we must put it to you straight so that you can deal with it, is that, that was not the process
18 which was originally followed when the Chief Whip or the group leader was nominated unless,
19 unless we also postulate that when the group leader and the Chief Whip were originally
20 nominated, Uddhav Thackeray was acting as the Party.

21

22 **MR. SIBAL:** Yes, because he was neither member of the Council, nor was he the Chief
23 Minister. He was nothing. He is the Paksha Pramukh, under the Constitution.

24

25 **CHIEF JUSTICE CHANDRACHUD:** One thing as brother Justice M R Shah pointed out,
26 very clear is it's obvious that the appointment and the nomination of the group leader and the
27 Chief Whip was made by at a meeting of the MLAs. Now because it clearly says
28 '*amadaranchya baithakit.*'

29

30 **MR. SIBAL:** I will answer that straightaway My Lords.

31

32 **CHIEF JUSTICE CHANDRACHUD:** But it is also in the presence of Mr. Thackeray and
33 the MLAs begin by saying that we are assigning to Mr. Uddhav Thackeray the right to take all
34 decision. Then they pass a resolution at the meeting of the MLAs. So, it's a sort of a hybrid
35 situation where the group leader powered to nominate a Group Leader and the Chief Whip is
36 delegated to Shri Uddhav Thackeray. But there is a so to speak, an anointment of them at the
37 meeting of the MLAs. So the only way really that can be, the two can be reconciled is by

1 postulating that in that sense, that at the original meeting, Mr. Uddhav Thackeray was the
2 party. He was whether you like it or not, he was the party. It was not a meeting of the National
3 Executive. It was not about a member of meeting of the plenary of the party, but he was really
4 the whole and soul because he was not an elected member at that point of time at all.

5

6 **MR. SIBAL:** He was the President of the party.

7

8 **CHIEF JUSTICE CHANDRACHUD:** He is the President..

9

10 **MR. SIBAL:** Paksha Pramukh.

11

12 **CHIEF JUSTICE CHANDRACHUD:** He was the Paksha Pramukh?

13

14 **MR. SIBAL:** Yes. My Lords, that's, it's very interesting you have raised this. Your Lordship
15 raised this, let's analyse it. Let's analyse the circumstances against me. Let's assume this all
16 can be done within the legislature. I'll assume that My Lords that the party has no role. So My
17 Lords therefore 50 people in the House can actually have a leader in the House without
18 reference to the party, if that logic is accepted. 50 members of the House can actually oust the
19 party Whip appointed by the party. That's the consequence.

20

21 **JUSTICE NARASIMHA:** When were the elections held?

22

23 **MR. SIBAL:** 2018.

24

25 **JUSTICE NARASIMHA:** The first document that page PDF 14.

26

27 **MR. SIBAL:** 23rd January, 2018.

28

29 **JUSTICE NARASIMHA:** 17th February, 2018.

30

31 **MR. SIBAL:** No, but that's the communication, but the elections are 23rd January 2018.

32

33 **JUSTICE NARASIMHA:** 23rd January, it speaks about that.

34

35 **MR. SIBAL:** Yes. The point that I'm making to Your Lordship, is this is unheard of, in any
36 democracy, in any legislature.

37

1 **CHIEF JUSTICE CHANDRACHUD:** Elections were held on 23-01-18 you said?

2

3 **MR. SIBAL:** Yes, yes. My Lords it will be entirely unworkable because you will then say that
4 there is no relationship between the members of the Legislature and the party. They are
5 independent of the parties. They can take whatever decision they like. It will be destructive of,
6 if you ask me the basic structure of a system of governance which allows the party and the
7 legislatures to be intertwined in matters where the decisions have to be taken on various very
8 significant issues as they come up in the assembly or in Parliament.

9

10 **JUSTICE NARASIMHA:** Mr. Sibal, you can tell me later, but what I want to know is, this
11 letter speaks about organizational elections.

12

13 **MR. SIBAL:** Yes.

14

15 **JUSTICE NARASIMHA:** It talks about organizations.

16

17 **MR. SIBAL:** That's corrections.

18

19 **JUSTICE NARASIMHA:** So what are this? It is to the different tiers, is it?

20

21 **MR. SIBAL:** Yes, It is in different tiers.

22

23 **JUSTICE NARASIMHA:** So, there is something called a General Body, is it?

24

25 **MR. SIBAL:** There is a Rashtriya Karyakarini, which is the National Executive, 13 members.
26 Then there is the Pratinidhi Sabha, which is about 262 members.

27

28 **JUSTICE NARASIMHA:** What is at the bottom?

29

30 **MR. SIBAL:** Sorry?

31

32 **JUSTICE NARASIMHA:** What is representing the General Body?

33

34 **MR. SIBAL:** Pratinidhi Sabha.

35

36 **JUSTICE NARASIMHA:** Pratinidhi Sabha.

37

1 **MR. SIBAL:** Pratinidhi Sabha. My Lords of course you can't hold a meeting of all the
2 members of the party all over Maharashtra.

3

4 **JUSTICE NARASIMHA:** I am just asking for information.

5

6 **MR. SIBAL:** Right. There is a tier system, there's a tier system.

7

8 **JUSTICE NARASIMHA:** It is virtually like a General Body.

9

10 **MR. SIBAL:** Yeah, there is a tier system, by which people are both appointed and elected.
11 Appointed...

12

13 **JUSTICE NARASIMHA:** Pratinidhi Sabha?

14

15 **MR. SIBAL:** Yes, Pratinidhi Sabha.

16

17 **CHIEF JUSTICE CHANDRACHUD:** And Mr. Sibal, possibly this line of argument of yours
18 is also buttress by 2B of the Tenth schedule which says if he votes or abstains from voting in
19 such House, contrary to the direction issued by the political party to which he belongs or by
20 any person or authority authorized by it in this behalf.

21

22 **MR. SIBAL:** That's correct.

23

24 **CHIEF JUSTICE CHANDRACHUD:** So the Whip is really a person who is authorized by
25 the political party.

26

27 **MR. SIBAL:** That's correct. That's how it functions.

28

29 **CHIEF JUSTICE CHANDRACHUD:** Because the direction has to be given by the political
30 party. It can't keep on giving a direction. It's a larger body. So therefore it delegates its power
31 and is authorizes a person who will then issue a direction on which way to vote in the Assembly.

32

33 **MR. SIBAL:** And the matter, when it came up before the Law Commission it will be
34 disastrous for democracy, disastrous for the country if the legislature party is allowed to act
35 independent of the political party.

36

1 **CHIEF JUSTICE CHANDRACHUD:** So the actual Whip, without it says all by any
2 personal authority authorized by it in the...

3

4 **MR. SIBAL:** I read that, yes.

5

6 **CHIEF JUSTICE CHANDRACHUD:** So the party really nominates or authorizes a person.

7

8 **MR. SIBAL:** That's correct.

9

10 **CHIEF JUSTICE CHANDRACHUD:** And the act of defection lies in voting or abstaining
11 from voting contrary to a direction given by the party or by that person.

12

13 **MR. SIBAL:** I want to ask myself, supposing, there's a bill in Parliament, the legislature party
14 on its own can't decide what the position will be. It cannot. Naturally, they'll have to be
15 consultation with the party because they are not living in asylum. They are not acting in as a
16 separate entity.

17

18 **CHIEF JUSTICE CHANDRACHUD:** They are the really the voice of the party in
19 Parliament or the State Legislator.

20

21 **MR. SIBAL:** That's correct.

22

23 **JUSTICE NARASIMHA:** It's the political party.

24

25 **MR. SIBAL:** The genus is the party. They are the species.

26

27 **JUSTICE NARASIMHA:** Political party either sends the MLAs, who because of majority
28 form the government or they could even send members of Legislative Assembly who will be
29 sitting in the opposition. So nevertheless, the controlling factor is the political party which will
30 through its MLAs operate either as

31

32 **MR. SIBAL:** Because they are there because of the party.

33

34 **CHIEF JUSTICE CHANDRACHUD:** They are the mandate is the mandate of the party
35 and therefore, how they function in the House is determined by the mandate which has
36 brought them into the house. And I think that is seems to be a fair understanding of the Tenth
37 schedule.

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MR. SIBAL: My Lords you have to maintain the integrity of the political party within the House. It's programs, its views, it's views on reservations, it's views on Tenth schedule. it's views on foreign policy. Individual members of the legislature don't decide on foreign policy issues. But the party decides. And party systems are such that you have committees where My Lords, people who are in the past also were members of the party who have experience in foreign policy, Ex Ministers of Foreign policy, they become members of the committee. They advise the party as to what position should be taken and a matter comes up the legislators are only told that this is what should be done within that framework you can make your case out.

JUSTICE KOHLI: So they articulate the views of the party in the House.

MR. SIBAL: That's correct.

JUSTICE NARASIMHA: One important distinction...

MR. SINGHVI: Just to take 15 seconds of bizarre example of how the party governs. With very interesting approval Lordship. I happened to be Chairman of the Parliamentary standing committee in 2011, and the most contentious Lokpal Bill came. We had a report signed by all except three descents. Three descents and every 31 member committee which is a mini Parliament. Everybody signed. All political parties 70 political parties. Matter went to Rajya Sabha. All of them supported the report because they had signed it. Overnight My Lords the party stand of one particular party, I'll not name it, changed. The matter came to Lok Sabha. The same party which has signed took a different stand Lok Sabha because the instructions from the party to the legislative wing of the Lok Sabha was that - no this has to be opposed. Lok Pal has to be opposed. This is in the record of Parliament. So My Lords, the party decides. This is an extreme example that the party which had agreed with the report, actually opposed it in Lok Sabha because the members are only legislators, but they received the instructions. It's an important, well known regional party. But the policy changed that - no, we must oppose Lok Pal. So they opposed in Lok Sabha. That is validation of this kind of example.

MR SIBAL: Any number of examples like that any number of examples..

JUSTICE NARASIMHA: It's a reverse engineering.

MR. SINGHVI: It's a political factor...

1 **MR. SIBAL:** Legislative members controlling the party is actually reverse engineering.

2

3 **MR. SIBAL:** Yes, Your Lordship is right. Exactly. Therefore, these documents become
4 exceptionally important because they determine the outcome of this litigation. If you give
5 validity and legality.

6

7 **CHIEF JUSTICE CHANDRACHUD:** So Mr. Sibal, we have seen all the documents now?

8

9 **MR. SIBAL:** Not yet My lords

10

11 **CHIEF JUSTICE CHANDRACHUD:** No, because the next step I was going to request you
12 to formulate it in two or three submissions for us. But you can complete the documents and
13 then give us.

14

15 **MR. SIBAL:** Yes, yes I will.

16

17 **CHIEF JUSTICE CHANDRACHUD:** Give us a formulations of two or three.

18

19 **MR. SIBAL:** My Lords and then I have to read Your Lordship some judgments which actually
20 deal with this.

21

22 **CHIEF JUSTICE CHANDRACHUD:** Before we go into the judgments, you can just
23 formulate it for us in two or three submissions.

24

25 **MR. SIBAL:** Yes, yes. I will take it down.

26

27 **CHIEF JUSTICE CHANDRACHUD:** But let's complete the document, then formulation,
28 and then the judgment.

29

30 **MR. SIBAL:** Yes, let me just quickly go through the documents now.

31

32 **CHIEF JUSTICE CHANDRACHUD:** Yes.

33

34 **MR. SIBAL:** So page 52, I have read. Then kindly come to My Lords, resolution of the meeting
35 of the Shiv Sena Maharashtra Legislative Assembly 1990 to 2024. That document is at page
36 50...PDF-55. Now this is what is passed, very interesting.

37

1 **CHIEF JUSTICE CHANDRACHUD:** What is the date?

2

3 **MR. SIBAL:** My Lords it is signed by Bharat Gogawale. Very interesting document. This tells
4 you the story. Resolution of the meeting of the Shiv Sena Legislative Assembly, Maharashtra
5 Legislative Assembly 1990 to 2024, we the following members of the 14th Maharashtra
6 Legislative Assembly belonging to the Shiv Sena. We are notified as the members of the
7 Maharashtra Legislative Assembly as members of Shiv Sena legislature party, we had
8 unanimously elected Eknath Sambhaji Shinde on 31st October 2019 as group leader of the
9 Shiv Sena legislature party. There was a pre-poll alliance between the Bhartiya Janata Party
10 and Shiv Sena party for the 14th Maharashtra Legislative Assembly. There has been great
11 dissatisfaction prevalence among the members of our party Shiv Sena and our party cadre at
12 large on account of corruption in the government administrations regarding police posting,
13 corruption by then Home Minister so and so, sitting Minority Minister so and so. Apart from
14 above reasons our party cadre faced tremendous harassment and distress on political as well
15 as personal grounds from the opposition. Ideological parties who are now a part of the
16 government and were using their office and power to undermine the base and the foundation
17 of Shiv Sena. There is enormous discontent amongst the cadres of our party Shiv Sena for
18 forming the government with NCP and INC, who are ideologically opposed to our party. There
19 has been a compromise on the principles of our party Shiv Sena, which has been a party of
20 fierce ideological base and was formed for fighting for the rights of local Marathi people. For
21 last two and a half years, our party and its leadership have compromised party principles by
22 aligning with the contrasting ideologies for the sake of achieving power. The ideology of our
23 party leader late Balasaheb Thackeray was to give clean and honest government to the people
24 of Maharashtra and also without compromising on the principle of Hindutva, which was
25 defeated on the first day itself by aligning with the opposing ideologies. Shiv Sena and Bhartiya
26 Party has forged a pre-poll alliance for 2019 Maharashtra Assembly. They saw the blessings of
27 the voters of the Sena BJP alliance, which the voters accepted and voted in favour of alliance.
28 After results were out the Shiv Sena severed, it's ties with the BJP and formed an alliance of
29 the opposing parties which they had fought against in 2019. This act of our party leaders had
30 a tremendous negative impact upon the voters and the party cadre. There was a continuous
31 hue and cry towards party leadership for the act of aligning with the opposing parties. Ignoring
32 this party leadership went ahead and formed the Maha Vikas Aghadi Government. For the last
33 two and a half years, we the Shiv Sena Legislative Party members were facing tremendous
34 pressures from the electorate. We the members of the legislative party as well as all leaders
35 and workers throughout the country, were facing a lot of humiliating questions. Our leader,
36 Balasaheb Thackeray, was always a strong nationalist. We've also been subjected to a lot of
37 criticism for being part of the corrupt Maharashtra. In view of the above, the members of the

1 Maharashtra Shiv Sena legislative party have met today and resolved this under. What has
2 they resolved? Hereby resolved and reaffirmed that Shinde, who was appointed as leader of
3 Shiv Sena Legislative Party, is in continuation to be the leader of the Shiv Sena legislative party
4 of the 14th Maharashtra Legislative Assembly. And this is proposed and seconded by members
5 of the Legislature and I hereby further resolve that Bharat Gogawale elected and appointed as
6 Chief Whip of the 14th Maharashtra Legislative Assembly is cancelled with immediate...And
7 Sunil Prabhu is cancelled with immediate effect, proposed and seconded.

8

9 Now My Lords, there is no reference to any meeting of the party. There is no reference to any
10 grievance made prior to this date. They are all members. He was serving as a minister for two
11 and a half years. There is no reference to any grievance that he has ever had. No reference. No
12 reference to any statement he made in any organizational election.

13

14 This suddenly could not have happened on the 21st June My Lords. This sudden realization
15 that this grave injustice has been done My Lords. Obviously, this was planned. My Lords if
16 anybody had any grievance of this nature, it would be in public statements. It will be in
17 organizational meetings. After all, this is from 2018. We are in 2023 now My Lords. Not a
18 single statement anywhere, so obviously. And what this statement is being made from Assam.
19 Why Assam? So it not something. It's all pre-planned. It's a conspiracy. It's not something that
20 happened overnight and you are talking about poll promises. Let me My Lords, talk of history
21 then. My Lords the poll promise was broken at the time when My Lords Devendra Fadnavis
22 and Ajit Pawar were sworn in the early hours of the morning by the Governor. What about that
23 poll promise? So let's not go into politics.

24

25 **CHIEF JUSTICE CHANDRACHUD:** I was just going to say that now you're clinching into..

26

27 **MR. SIBAL:** No, no.

28

29 **CHIEF JUSTICE CHANDRACHUD:** Politics.

30

31 **MR. SIBAL:** No, but this is all politics.

32

33 **CHIEF JUSTICE CHANDRACHUD:** You're now leaving the area of constitution.

34

35 **MR SIBAL:** No, no. I know. I said it in the context of the grievance that he has made. He has
36 made a grievance of poll promise. That's why I said we are. I'm sorry. I'm sorry but

37

1 **CHIEF JUSTICE CHANDRACHUD:** But therefore, Mr. Sibal, ultimately, I mean, we are
2 just sort of pushing your argument to its logic and conclusion in constitutional terms.
3 Therefore, what you are saying is that look, when Eknath Shinde was nominated as a group
4 leader and the Whip was then nominated. The Whip was also notified. It was at the behest of
5 the party. Be at the MLAs meeting. An alteration of that position was made at the meeting,
6 which was chaired by Mr. Uddhav Thackeray, the legislatives could not have either abstained
7 from the meeting, which was convened by the Party President nor could the legislators have
8 replaced, the Whip or the group leader.

9

10 **MR. SIBAL:** That's correct.

11

12 **CHIEF JUSTICE CHANDRACHUD:** So that all that they did was really therefore invited..
13 was contrary to Law, and therefore invited a disqualification under the Tenth Schedule. All
14 this, really then leads us to this that, therefore they have incurred the disqualification. They
15 have incurred disqualification.

16

17 **MR. SIBAL:** That is correct.

18

19 **CHIEF JUSTICE CHANDRACHUD:** Now, having said that therefore, this is, therefore
20 case where the Speaker has to ultimately decide upon the disqualification which they have
21 incurred, isn't it? Mr. Sibal, that is an area which we are not able to come to bridge.

22

23 **MR. SIBAL:** I will My Lords. I will. Yes. I made that argument. Yes, I will try.

24

25 **CHIEF JUSTICE CHANDRACHUD:** Of course the constitutional position of the Speaker
26 to decide.

27

28 **MR. SIBAL:** I'll tell Your Lordship the problem in that in that area. But..

29

30 **CHIEF JUSTICE CHANDRACHUD:** There are still problems in the area. We see that. But,
31 you know also we understand the significance of the point which you have made, which is a
32 very significant point for Constitutional Democracy that ultimately the party is supreme and
33 legislators get there into the House or the Parliament or the Legislative Assembly on the
34 mandate of the Party. What the Party means to the people. Therefore, you are really elected as
35 a representative of the Party. Your behaviour must be governed by what the party dictates and
36 a group of legislators, whether you are one-third or 1/10 even 75%, cannot be really
37 determinative of the wishes of the parties. You can alter that position if the party authorizes

1 you or you leave the party. So far, so good. I mean, that's a very significant point which you
2 have made. But...

3

4 **MR. SIBAL:** I understand.

5

6 **CHIEF JUSTICE CHANDRACHUD:** But my point is the next point what is the
7 consequence. Which you are really telling us that look the facts stare you, now why go to the
8 Speaker.

9

10 **MR. SIBAL:** That what my submission is what is it that the Speaker is going to do in this.

11

12 **CHIEF JUSTICE CHANDRACHUD:** It could be twofold. One - as you say. Well, the
13 Speaker himself cannot be trusted, as an impartial arbitrator.

14

15 **MR. SIBAL:** I withdraw that My Lords because we are talking about the Constitutional
16 position.

17

18 **CHIEF JUSTICE CHANDRACHUD:** The second would be where the facts are so clear then
19 you take the decision with your Speaker ought to have to decided. That there is only one and
20 one conclusion.

21

22 **MR. SIBAL:** That's right.

23

24 **CHIEF JUSTICE CHANDRACHUD:** That Mr Sibal, honestly, that is, that is the matter of
25 disquiet for speaking for myself. I mean should the Court be taken into that, entering into that
26 area. That's an area..

27

28 **MR. SIBAL:** Lordships have been persuaded it in the past. I hope they pursued it in the
29 future.

30

31 **CHIEF JUSTICE CHANDRACHUD:** There are very serious ramifications..

32

33 **MR. SIBAL:** I'll address that My Lordships.

34

35 **CHIEF JUSTICE CHANDRACHUD:** The ramifications which you have referred to for
36 constitutional democracy if individual legislators start bucking the party discipline there are
37 very serious ramifications that we start taking over these functions.

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JUSTICE NARASIMHA: Very dangerous.

MR. SIBAL: No, My Lords, what happened was in one particular case which is the Constitution Bench My Lords where they said that this illegality cannot be continued even for a day. So we will take the decision. They're occupying the post of the Minister. This cannot continue even for a day. I will not send it back.

CHIEF JUSTICE CHANDRACHUD: Right or wrong, this is the system which we have now assumed to ourselves as we the people and when the Courts try and breach the system there is a very...

MR. SIBAL: No. My Lords I understand.

CHIEF JUSTICE CHANDRACHUD: That's what is worrying us...

MR. SIBAL: I put it to you right up quite frankly, quite frankly, a Constitutional Court should be worried, because if you create this as a precedent, it can happen in other situations as well, and that will not be a good precedent. My Lords, I am not disputing that. Please, please. I am not.... I know the limitations of a Constitutional Court. I know that My Lords. But what has happened in this case, unfortunately, is that this has happened because of a judicial order. This would never have happened.

CHIEF JUSTICE CHANDRACHUD: Alright we also go to this extent that, you know, if some...a situation transpires because of a judicial order, we are not saying that it has...

MR. SIBAL: I understand, I understand.

CHIEF JUSTICE CHANDRACHUD:your argument. And therefore it's the duty of a court to rectify a situation which emerges as a result of its own order.

MR. SIBAL: That's right.

CHIEF JUSTICE CHANDRACHUD: Alright? In various other contexts we always say....

MR. SIBAL: You have said that in several judgments My Lord.

1 **CHIEF JUSTICE CHANDRACHUD:** But assuming that is so, and we place ourselves in
2 the position in which the court was say immediately before the 27th, what would the court
3 then have done that look let the Speaker decide keeping aside the issue of 2 day or 7 day notice.

4

5 **MR. SIBAL:** Yes. Yes.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Let the Speaker decide.

8

9 **MR. SIBAL:** Yes.

10

11 **CHIEF JUSTICE CHANDRACHUD:** So if we have to restore the position as it would have
12 been but for that order of the 27th, we would have said, let the Speaker decide. Possibly your
13 argument would be if the.... until the Speaker is deciding no trust vote. Let them take a decision
14 first and then because the trust vote....

15

16 **MR. SIBAL:** Because everything happened....after that happened because of this order.

17

18 **CHIEF JUSTICE CHANDRACHUD:** But therefore if you have to restore the situation as
19 it stands immediately before the interim order of this court, we can restore it by saying that,
20 well, the speaker has to take a....[UNCLEAR]

21

22 **MR. SIBAL:** Yes.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Had they incurred a disqualification. But we, it
25 would be very difficult for us to take over that function.

26

27 **MR. SIBAL:** My Lords, I don't mind. Let that Deputy Speaker decide. I have no problem with
28 that. That's what happened....

29

30 **CHIEF JUSTICE CHANDRACHUD:** Which Deputy Speaker?

31

32 **MR. SIBAL:** The Speaker My Lords who was denied the, who was denied the right to continue
33 with the disqualification. This has happened in the other case.

34

35 **CHIEF JUSTICE CHANDRACHUD:** So then we restore a putative state of affairs.

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37 **MR. SIBAL:** Yes Your Lordship have done that.

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CHIEF JUSTICE CHANDRACHUD: Completely overtaken by events.

MR. SIBAL: In *Nabam Rebia*, Your Lordship have done exactly that. Exactly that. Because when I argued this before the Constitution bench then, I said My Lords what is happening is you let things happen, and then you will tell me later that we can't reverse it. He said, no, we will reverse it.

CHIEF JUSTICE CHANDRACHUD: Mr. Sibal, then you support *Nabam Rebia's* course of action, when it suits you. And when *Nabam Rebia* is creating a problem you wanted to....

MR. SIBAL: No My Lords, there are two different issues in *Nabam Rebia*, My Lords.

CHIEF JUSTICE CHANDRACHUD: Alright.

MR. SIBAL: I'm sorry, My Lords, you cannot put that argument.

CHIEF JUSTICE CHANDRACHUD: No, no, not at all.

MR. SIBAL: They are two different issues My Lord. My Lords, in fact, I was wondering when Your Lordship are going to decide to refer it to seven, because this is a real problem. Because that's intrinsically at the heart of the matter which is why I said you take it up as a preliminary submission because ultimately this can only be decided.

CHIEF JUSTICE CHANDRACHUD: But Mr. Sibal, look at the consequence. You today have a Speaker. You have a Speaker in a democratically elected House. Tomorrow you may have a Speaker in Parliament. Can the Supreme Court say sorry, we are now overriding the mandate of this Speaker? We will retrace our steps back to say now, something which is eight months ago, restore a Speaker who is now no longer holding the office of the Speaker. And we tell you we now decide that somebody is the Speaker.

MR. SIBAL: He is still Deputy Speaker.

CHIEF JUSTICE CHANDRACHUD: Huh!

MR. SIBAL: He is still Deputy Speaker.

1 **CHIEF JUSTICE CHANDRACHUD:** And ask that...

2

3 **MR. SIBAL:** But he is still Deputy Speaker My Lords.

4

5 **CHIEF JUSTICE CHANDRACHUD:** ...take a consequence. I mean...

6

7 **MR. SIBAL:** He is still Deputy Speaker. My Lords, all right. One second, one second, one
8 second, hold on, you got a lot of hurdles to cross. But anyway let me...

9

10 **CHIEF JUSTICE CHANDRACHUD:** They 're all very seasoned, constitutional laws but
11 you know what is worrying us. You understand what is worrying us.

12

13 **MR. SIBAL:** I am not going to make a proposition that will in fact destroy the fabric of a
14 constitutional structure that has been placed since Independence, since we are a Republic. I
15 am not going to do that. But see what has happened. First of all, the no stays they are given
16 time till 12th July, but more important, on the 29th, this court says that we will set aside
17 everything that happens thereafter. See My Lords where we are now. We say please stay
18 everything. Don't allow the trust vote to happen. Decide this matter. It could have been decided
19 on the 12th of July. Then the court tells us no, no, no doesn't matter. On the 29th all that is
20 subject. Now Your Lordship are telling me how can it be subject? Now, Your Lordship are
21 telling me rightly maybe that how can we go back on 27. But that's exactly because of the two
22 court orders. What do we do?

23

24 **CHIEF JUSTICE CHANDRACHUD:** But the court order was also prompted by what your
25 Speaker did.

26

27 **MR. SIBAL:** I said, you stay. Don't do, don't allow them to take view. Don't have a trust vote.
28 We said that. Then on 29th June that order is passed. Thereafter all, matters are placed.

29

30 **CHIEF JUSTICE CHANDRACHUD:** Had your speaker, had your Speaker chosen to follow
31 the law by giving them seven days' notice...

32

33 **MR. SIBAL:** No My Lord. The law is not *Nabam Rebia*, law is *Hollohon*.

34

35 **CHIEF JUSTICE CHANDRACHUD:** Court would have....the court would have said
36 alright, go and respond to that.

37

1 **MR. SIBAL:** The law is Hollohon. My Lords I tell Your Lordship now, I can't in hindsight say
2 what the court should have done or stayed everything, allow them to file a reply and allow after
3 12th of June for the Speaker to decide. What is the problem? There was no problem but the
4 status quo changed. My Lords, they were given time till 12th of July. All right, let them give
5 time. Despite the fact that it is contrary to Hollohon. Forget it. They should have been given
6 time. They should have filed a reply. The Deputy Speaker would have decided. Why allow the
7 status quo to be changed? And that also because a judicial order says doesn't matter. Even if
8 the status quo is changed, we'll restore it back. So we had two judicial orders then and now
9 Your Lordship rightly Your Lordship rightly puts now under the proceedings of the House a
10 new Speaker, has been appointed. But then you yourself said that we will deal with it. All that
11 will be subjective.

12

13 **CHIEF JUSTICE CHANDRACHUD:** So essentially, we'll therefore have to invalidate the
14 trust vote which never took place on the...

15

16 **MR. SIBAL:** It was only on the basis of these 39...

17

18 **CHIEF JUSTICE CHANDRACHUD:** A trust vote which we will have to invalidate. A trust
19 vote which never took place.

20

21 **MR. SIBAL:** No, no, no. Even the trust vote that took place on 4th is subjective. I'm sorry. All
22 other actions are subject to ...

23

24 **CHIEF JUSTICE CHANDRACHUD:** My learned brothers are....

25

26 **MR. SIBAL:** I'm sorry My Lords, I'm sorry.

27

28 **JUSTICE SHAH:** Mr. Sibal just what...

29

30 **MR. SIBAL:** Yes.

31

32 **JUSTICE SHAH:** On your submission that as per the interim order dated 29 June correct,
33 all subsequent proceedings are subject to ultimate...

34

35 **MR. SIBAL:** Yes, yes.

36

1 **JUSTICE SHAH:** Now see factually, we have to consider that. On 29th you challenged that
2 trust vote to be held on 30th June.

3

4 **MR. SIBAL:** Yes.

5

6 **JUSTICE SHAH:** Correct? You challenged that only.

7

8 **MR. SIBAL:** That's correct, that's correct.

9

10 **JUSTICE SHAH:** Correct? Now see the order, interim order which is passed by this court on
11 29th. Please read it.

12

13 **MR. SIBAL:** Yes My Lords, I will read it. Also an order compilation My Lords. Let's see that.

14

15 **JUSTICE SHAH:** That is....page 7 of the Order Compilation.

16

17 **MR. SIBAL:** Orders compilation Volume-1.

18

19 **JUSTICE SHAH:** Volume-1.

20

21 **MR. SIBAL:** Yes, I have it. PDF page is 7.

22

23 **JUSTICE SHAH:** Order dated 29th June.

24

25 **MR. SIBAL:** It starts...We will just see my Lords.

26

27 **JUSTICE KOHLI:** PDF 8 at 10, para 8.

28

29 **MR. SIBAL:** I will just read it. Yes. Page My Lords, the writ petition is order to be listed for
30 hearing.

31

32 **JUSTICE SHAH:** Para 8.

33

34 **MR. SIBAL:** Para 8. Having given our thoughtful consideration. That's the one?

35

36 **JUSTICE KOHLI:** Yeah.

37

1 **MR. SIBAL:** Yes, yes. We do not find any ground to stay convening of the special session or
2 the Maharashtra Vidhan Sabha tomorrow at 11:00 AM, with the only agenda of a trust vote.
3 The proceedings of the trust vote to be convened on 30th shall be subject to the final outcome
4 of the instant writ petition as well as the writ petitions referred to above.

5

6 **JUSTICE SHAH:** Correct?

7

8 **MR. SIBAL:** Yes, and the special session of the Maharashtra Vidhan Sabha shall be
9 conducted... So as well as writ petitions referred to above.

10

11 **JUSTICE SHAH:** Okay. And what? What?

12

13 **MR. SIBAL:** Write petitions referred to above is that...

14

15 **JUSTICE SHAH:** What was the subject to ultimate the outcome? The proceedings of the
16 convening meeting on 30th....

17

18 **MR. SIBAL:** I agree.

19

20 **JUSTICE SHAH:** Not all the...

21

22 **MR. SIBAL:** My Lords I don't dispute that. I am saying...

23

24 **JUSTICE SHAH:** The fact remains that on 30th June for whatever reason....

25

26 **MR. SIBAL:** I had resigned earlier. Your Lordship is right. Your Lordship is absolutely right.
27 But My Lords....

28

29 **JUSTICE SHAH:** Your submission that all...as per the order dated 30th June, all other
30 subsequent will be....

31

32 **MR. SIBAL:** My Lords, I just asked myself a simple question. Had I not resigned, had I not
33 resigned, the trust vote it would have happened and I would have the same thing would have
34 happened.

35

36 **JUSTICE SHAH:** Correct.

37

1 **MR. SIBAL:** Correct? The same thing happened on the 4th.

2

3 **JUSTICE SHAH:** <UNCLEAR> Council.

4

5 **MR. SIBAL:** The same thing happened on the 4th.

6

7 **JUSTICE SHAH:** Provided the meeting would have been convened on 30th.

8

9 **MR. SIBAL:** My Lord the same thing happened on the 4th. A trust vote was happened on the
10 4th. And that is also subject to writ petition was filed. Your Lordship said we will consider that.
11 That will also be subject to.

12

13 **JUSTICE SHAH:** No, no we were on your submission....

14

15 **MR. SIBAL:** Your Lordship is right.

16

17 **JUSTICE SHAH:** Technically...

18

19 **MR. SIBAL:** Technically, what My Lord is saying is absolutely right. I cannot have any two
20 opinions or there can be no two opinions. But the fact is in substance, it's the same thing. Yes,
21 Your Lordship is right. I mean, I can't get away from the fact that he said, What's the point of
22 going to the... these people are going to vote for him. That's exactly what happened on the 4th.
23 That's why we challenged the 4th. That's also the writ petition is here. So My Lords, are we
24 going into the technicality or are we going into the substance of the matter? Whether these 39
25 could have voted in favour despite the Whip. There is a Whip issued My Lords on the 3rd.
26 Whip is issued on the 3rd that you vote against the trust vote. They did not. And who is the
27 Whip? Sunil Prabhu, voted against the Whip. So My Lords, where does it take us? It doesn't
28 take us anywhere. So he votes against the Whip and My Lords Gogawale is then appointed. He
29 can't be appointed by the Speaker. And Gogawale - they have issued, Speaker has issued notice
30 to us. Those notices can't be issued. I can't be subject to any disqualification proceedings. And
31 my notice has been given by the Speaker to me to be disqualified. Your Lordship will strike it
32 down on the facts. So all these issues will have to be decided My Lords, I am sorry.

33

34 **JUSTICE NARASIMHA:** Which are the issues that you want us to decide?

35

36 **MR. SIBAL:** My Lords that is exactly what I will just show. Let's give it to My Lords. I am
37 sorry My Lords it has taken... what Your Lordship might or might not choose to decide.

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JUSTICE NARASIMHA: No, no, the crucial facts which you have told us....

MR. SIBAL: It is not finished yet My Lords.

JUSTICE NARASIMHA: ...leading to the 22nd.

MR. SIBAL: Yes.

JUSTICE NARASIMHA: I think those are completed, right?

MR. SIBAL: Yes. Those are complete. Then what happens thereafter My Lords another letter is....the letter of 22nd....

JUSTICE NARASIMHA:notices on the Tenth Schedule notices.

MR. SIBAL: That's correct, that's correct. And thereafter on 24th another notice. Then on 25th...

CHIEF JUSTICE CHANDRACHUD: Mr. Sibal, we were at page 55 of that...

MR. SIBAL: You want me to finish that first My Lords?

CHIEF JUSTICE CHANDRACHUD: So that, that part is over. Just for the sake of completeness, let's...

JUSTICE NARASIMHA: Indicate those dates....

CHIEF JUSTICE CHANDRACHUD: Let's go to page 55, you were at page....

MR. SIBAL: I will just go back to my documents My Lords. The Convenience compilation...

CHIEF JUSTICE CHANDRACHUD: Convenience Compilation 2 at....

MR. SIBAL: We are at 49 My Lords. Now this is at PDF 62, this is that document which Your Lordship have already read. Dated 22nd... dated 21st, but served on 22nd at 11:30, which Your Lordship have already read.

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CHIEF JUSTICE CHANDRACHUD: We will just make a note of it since we have already...

MR. SIBAL: That is right. I am not going to read....

CHIEF JUSTICE CHANDRACHUD: Relevant from *Nabam* Page 62 right?

MR. SIBAL: Except My Lords the fact that they are a majority, no other cause was shown. So 179C, I've made my job submissions on 197C already My Lords. And that this connects with *Nabam Rebia*, this document. So that issue is over. Then kindly come to My Lords page PDF 71. This only gives you My Lords what is happening. 40 members form the MLAs in Assam. No dispute on any of this. And then is the disqualification petition filed on the 25th. That is at page 72.

JUSTICE KOHLI: Page 62. Mr. Sibal, page 62 PDF that we have just touched upon, notice to move a resolution, what does para 2 say?

MR. SIBAL: At page 62?

JUSTICE KOHLI: Yes please.

MR. SIBAL: Para two says my lords: We all respectfully submit that you no longer have the right to continue as Deputy Speaker, as you no longer enjoy the support of the majority of the House.

JUSTICE KOHLI: Majority of the House.

MR. SIBAL: More particularly the following members...

JUSTICE KOHLI: Majority of the House.

MR. SIBAL: Yes.

JUSTICE KOHLI: Is that what you're trying to....this is your emphasis.

MR. SIBAL: Yes.

1 **JUSTICE KOHLI:** That here also the reference is to the majority of House. And goes on to
2 say particularly the following members of the party.

3

4 **MR. SIBAL:** That's correct because My Lords, what is party means the legislature party.

5

6 **MR. JETHMALANI:** My Lords that is not quite correct. My learned friend repeatedly says
7 this. But every member of the Legislative Assembly and of Parliament is ex-officio member of
8 the Pratinidhi Sabha. They are also part of that.

9

10 **MR. SIBAL:** Yes, that's right. No doubt. Hold on, hold on. Hold on. No dispute. The 39
11 members of the legislative party are also members of the party.

12

13 **CHIEF JUSTICE CHANDRACHUD:** No dispute. No question about it.

14

15 **MR. SIBAL:** I have not said anything contrary to that.

16

17 **CHIEF JUSTICE CHANDRACHUD:** <UNCLEAR>

18

19 **MR. SIBAL:** I have not said anything against that. Only thing is that 39 members cannot
20 hijack the party.

21

22 **JUSTICE KOHLI:** That's all.

23

24 **MR. SIBAL:** That we will see that's the issue. Of course we welcome you. So My Lords, Your
25 Ladyship was right. Exactly My Lords. Then kindly come to 59 My Lords. First, yes. 71. PDF
26 71, Page 58. Maha Trouble for Uddhav. Hemanta Meets Eknath. 40 MLAS in Assam.
27 Photograph...

28

29 **CHIEF JUSTICE CHANDRACHUD:** Sorry where are you? Hindustan Times article?

30

31 **JUSTICE KOHLI:** Hindustan Times article.

32

33 **MR. SIBAL:** It just shows My Lords that you know the surroundings are comfortable.

34

35 **JUSTICE NARASIMHA:** Relevant for Tenth Schedule no doubt. Not for a Speaker,
36 relevant.

37

1 **MR. SIBAL:** Then My Lords, the notices.

2

3 **JUSTICE NARASIMHA:** Inference.

4

5 **MR. SIBAL:** Now the notices we don't have. No more My Lords, documents. All kinds of
6 statements have been made My Lords that we are forming a separate party. But be that as it
7 may, that all happens in Assam. It's a given My Lords. So let's not go into that. So this is all My
8 Lords as far as the documentation is concerned. Now let's see what the issues are.

9 The first My Lords deals with *Nabam Rebia* basically that Your Lordship will have to decide
10 that does the Constitution permit an institutional hiatus by tying the hands of the Speaker in
11 functioning under the Tenth Schedule through proceedings initiated by a member of the
12 Legislative Assembly under 179C. That I've argued that Your Lordship will decide. All I can say
13 in that regard is that if you allow that law to stay it will be misused. It will be a new model of
14 toppling governments. Safety valve for the defectors. Now My Lords, second, what are the
15 consequences in law when members, whether in minority or majority of the Legislature party
16 in the House act de hors the Political Party and our contrary to the directions of the political
17 party and assert their separate identity by forming a separate group within the Legislature
18 Party in the legislature. Squarely My Lords that is an issue. Squarely. That can in any
19 legislature X number of people form a separate identity and say we will not listen to the party.
20 We will decide what to...

21

22 **CHIEF JUSTICE CHANDRACHUD:** That you have been arguing.

23

24 **MR. SIBAL:** Then will a group... next third, will a group within the Legislature party asserting
25 their separate identity and acting de hors, the political party, or contrary to its directions, have
26 per se, incurred disqualification under para 2 of the Tenth Schedule? There is no evidence to
27 be led here. Admittedly there is a Whip, Sunil Prabhu on the 3rd saying vote against the trust
28 vote. Admittedly on the record of the House they voted in favour of the trust vote. Even by that
29 time, Gogawale would not been appointed by the Speaker. Though Speaker had no right to
30 appoint Gogawale. He appointed Gogawale on the 3rd evening which he can't do otherwise,
31 but that's another matter. So My Lords, what is there for the Speaker to decide? There's a
32 violation, the vote is on the record. You are not usurping anything. you are only declaring.

33

34 **JUSTICE NARASIMHA:** This question is inchoate. This issue is inchoate. What is the
35 logical follow-up? Speaker will say it is per se case.

36

37 **MR. SIBAL:** I am sorry?

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JUSTICE NARASIMHA: Speaker will say it's a per se case.

MR. SIBAL: I hope so.

JUSTICE NARASIMHA: So you are...

MR. SIBAL: I hope so My Lords, I hope so.

JUSTICE NARASIMHA: It is a different matter. What you're trying to say in 3 is in per se cases should the court not decide.

MR. SIBAL: Yes. That's the point. So that's why I put per se there My Lords, only for that reason.

JUSTICE NARASIMHA: Got that. It is inchoate.

MR. SIBAL: We have to ultimately persuade you My Lords, so we have to... I always say, without the court on your side, there's no point arguing. And the only way to have the court on your side is to be as reasonable as possible. Though politics is essentially unreasonable. The art of politics is to do the make the unreasonable look reasonable.

JUSTICE NARASIMHA: Necessary. Politics can be very reasonable also.

MR. SIBAL: Three: will a group within the Legislature party asserting their separate identity and acting de hors the political party or contrary to its directions, have per se, incurred disqualification under paragraph 2?

Then four, can a group within the legislature party asserting their separate identity and acting de hors, the political party, or contrary to its directions, have the constitutional authority to alter the leadership of the political party in the House or the Whip appointed by the political party of the House. Directly in issue. Because of those documents, that I've shown to Your Lordship already, that you are removed from Assam, you are removed as a Chief Whip and I continue to be the party and you are removed as leader. I continue to be the group leader.

Five, given that an elected government should be allowed to serve its full term, this is now a constitutional premise My Lords on the basis of which I made this proposition. Given that an elected government should be allowed to serve its full term, as a matter of constitutional law, can a group within the legislative party asserting a separate identity dislodge an elected

1 government while proceedings for disqualification under the Tenth Schedule appending that
2 is, before the Speaker decides on the issue of disqualification. Directly an issue. But what you
3 are doing in this process is side-tracking the disqualification proceedings, toppling a
4 government and then saying, now my Speaker will decide. Actually the constitutional premise,
5 and every constitutional authority should in fact help in ensuring that an elected government
6 continues to be in power. My Lords, that is something that I am going to argue later, but I want
7 to just tell Your Lordship something very interesting. The Governor is to decide to administer
8 the oath of office. So, 30 people go to him. 20 people go to him. The Governor must first know
9 which party they belong to. Either it is post-poll alliance, or pre-poll alliance. Right? So the
10 Governor must first ask them, which is that party? Now My Lords, their position, 39 members
11 position is inchoate. They can't represent the Shiv Sena. This is the first time this issue has
12 arisen in this country. So My Lords, how does the Governor decide that I'll administer oath of
13 office? There is no party before him. Just touching it. This is an issue that Your Lordship will
14 have to consider.

15

16 So My Lords let's come to six. Should the Governor, who is constitutionally obliged to sustain
17 the continuity of an elected government, change the status quo by allowing for a change in
18 government before disqualification proceeding that decided by the Speaker.

19 Then next, whether the Governor can swear in as Chief Minister, a person against whom a
20 Notice for disqualification has been issued by the Speaker acting as a Tribunal under the Tenth
21 Schedule and is pending adjudication? What is the impact of pending disqualification petitions
22 on the ability of members to participate in a test of strength on the floor of the House when
23 their vote would have the effect of toppling of government? I can understand in a situation,
24 that it clearly doesn't matter. The outcome would be the same. But here the hard facts are,
25 their vote topples the government. So you have allegedly according to me, a member who
26 should be disqualified, voting to topple an elected government without the Governor asking
27 him which party you belong to, without the Governor even finding out for himself or the
28 Governor saying, look, there is some disqualification petitions, by this an elected government
29 to be toppled. Let's stay our hands. We will not administer oath of office till this
30 disqualification is decided. He can say that. Should he say that? Should he not say that? That's
31 My lords, some in area where Your Lordship have never looked at, so to say. Obviously it's
32 premised on constitutional morality.

33

34 Then My Lords, can a constitutional court in a matter relating to disqualification of the Tenth
35 Schedule decides the matter on its own without referring the matter to the Speaker for decision
36 and if so, under what circumstances? Right? Directly what My Lord put to me. And we are
37 aware of it. If the decision of the Speaker that a member has incurred disqualification under

1 the Tenth Schedule relates back to the date of the action complained of, then what is the status
2 of proceedings that took place during the pendency of a disqualification petition? Because it
3 relates back? He is the Chief Minister. What do we do? Which is why time is of the essence.
4 What is the impact of removal of Para 3 of the Tenth Schedule? I've already argued that.
5 In what circumstances do the Speaker recognize the Whip and the Leader of the political
6 party? I'm arguing that.
7 What is the scope of powers of the Commission with respect to determination of a split, that
8 is something I'll argue later.
9 This is My Lords, according to me, the issues that Your Lordship might wish to look into.
10 Now My Lords kindly have a look at my overview document which is document for the...our
11 submissions, the petitioners submissions.

12

13 **CHIEF JUSTICE CHANDRACHUD:** A.

14

15 **MR. SIBAL:** A, My Lords correct and kindly have a look at outlines and over PDF Page 5.
16 Overview. Your Lordship may skip that. I want Your Lordship straight away to take you to the
17 issue of the Whip. Chapter 7 yes, yes. Of whips and the role of political parties. This is that PDF
18 page 70.

19

20 **JUSTICE KOHLI:** Which File?

21

22 **MR. SIBAL:** Of the written submissions of petitioner. Same document. Written submissions
23 A, My Lords, of the petitioner. Page 70. I hope to finish today, My Lords so that I don't take
24 too much of Your Lordship's time.

25

26 **JUSTICE KOHLI:** Did you say it's PDF page?

27

28 **MR. SIBAL:** Page 70.. 70. Chapter 7 - What is the scope and power of the Speaker to
29 determine the Whip and the leader of the house? What is the interplay of the same with respect
30 to the provisions of the Tenth Schedule? 'The petitioner respectfully submits that the
31 leadership of the original political party is exclusively empowered to determine which member
32 of the House shall be the Whip, and also the leader. Petitioner respectfully submit that the
33 leadership of the original political party is exclusively empowered to determine which member
34 of the House shall be the Whip and also the leader of the House Legislature Party the speaker
35 is bound to recognize the person who are communicated by the leadership of the original
36 political party to be its Whip and Leader of the House Legislature Party. The Speaker's role in
37 this regard is really administrative in nature the speaker cannot abuse his role to defeat the

1 spirit and intent behind the provisions of the Tenth Schedule. Now, it is submitted that the
2 respondents case is hinged on illegal misconception that the Whip under Paragraph 2(1)(b) of
3 the Tenth Schedule, can be issued, changed by a majority of the members of the legislative
4 party, which is what they did on the 22nd June. The defence is in the teeth of the plain reading
5 of 2(1)(b), which My Lord has already read. That's exactly what we were wanting to do. A bear
6 reading of the aforesaid provision, which shows as the framers of the Tenth Schedule were
7 conscious that the disqualification was to be incurred for violation of the Whip issued by the
8 political party or any person or authority authorized by the political party, there is no reference
9 at all to the legislature party in Para 2(1)(b) of the Tenth Schedule . This distinction between
10 political party and legislative party is also born out from a reading of paragraph 1(b), and 1(c)
11 of the Tenth Schedule, which brings out the difference between the meaning ascribed to the
12 legislator party and the original political party. The Respondents in defence have sought to
13 intermingle the definition of political party with that of the legislature party and have sought
14 to extrapolate the legislature party in place, in the place of a political party into 1(b). It is
15 further submitted that Para 1 of the Tenth Schedule makes a clear distinction between the term
16 legislature party and original political party. The term legislature party is defined as the group
17 consisting of all the members of that House for the time being belonging to that political party.
18 And the term original political party is precisely defined as the political party to which a
19 member belongs. Further, the definition makes it clear that the said term is specifically defined
20 for the purposes of two one of the Tenth Schedule in this regard. My Lords Kuldeep Nayar's
21 case. Kindly have a look at a Paragraph 4. I, just a quote there. 'Authorities are certainly not
22 one thing which indicates that Court should interpret in a broad and generous spirit, the
23 document which contains the fundamental law of the land or the basic principles of
24 government. Nevertheless, the rule of plain meaning or literal interpretation described in
25 Maxwell's interpretation of statues, as the primary rule, could not be altogether abandoned
26 today in interpreting any document. Indeed, we find Lord Evershed, the length and detail of
27 modern legislation is undoubtedly reinforced the claim of literal construction as the only safe
28 rule. It may be that the great mass of modern legislation, a large part of which consists of
29 statutory rules, make some departure from the literal rule of interpretation more easily
30 justifiable today than it was in the past. My Lords the next is very important. But the object of
31 interpretation and of construction, which may be broader than interpretation, is to discover
32 the intention of the lawmakers in every case.

33

34 C), Crawford. The object can obviously be best achieved by first looking at the language and
35 used in the relevant provisions. Other methods of extracting the meaning can be resorted to
36 only if the language used is contradictory, ambiguous, or leads really to absurd results. This is
37 an elementary and basic rule of interpretation, as well as of construction processes which from

1 the point of view of principles applied, coalesce and converge towards the common purpose of
2 both, which is to get at the real sense and meaning. So far as it may be reasonably possible to
3 do this or what is found there laid down, the provisions whose meaning is under consideration
4 are therefore to be examined before applying any method of construction at all. And 2(1)(a)
5 and 2(1)(b) makes it very clear. Violation of the Whip and giving up, voluntarily giving up
6 membership. And Your Lordship with experience knows what act amounts to voluntarily
7 giving up membership.

8 We endorse and reiterate the view taken in the above quoted paragraph is a judgment. It may
9 be desirable to give a broad and generous construction to the constitutional provisions but
10 while doing so, I'll just read this, to the rule of plain meaning or literal interpretation, which
11 remains the primary rule, as also to be kept in mind. In fact, the rule of literal construction is
12 the safe rule unless language used is contradictory, ambiguous, or leads really to absurd
13 results. I'll continue after lunch.

14

15

<< LUNCH BREAK >>

16

17

18 **CHIEF JUSTICE CHANDRACHUD:** Mr. Maninder Singh you are not the only personal
19 who is feeling hot in the court. We agree with you. We have to start the ACs.

20

21 **MR. MANINDER SINGH:** Yes, My Lords.

22

23 **CHIEF JUSTICE CHANDRACHUD:** Mr. Maninder Singh, is it the heat of the weather or
24 the heat of Mr. Kapil Sibal's arguments?

25

26 **JUSTICE KOHLI:** Both together.

27

28 **CHIEF JUSTICE CHANDRACHUD:** Only light.

29

30 **MR. SIBAL:** This is the generosity of the Bar, My Lords.

31

32 **CHIEF JUSTICE CHANDRACHUD:** We'll start the ACs.

33

34 **MR. SIBAL:** My Lords. I was reading PDF-72 and I was at the end of the paragraph. I am
35 reading now Para 174.

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37 **CHIEF JUSTICE CHANDRACHUD:** 174?

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MR. SIBAL: Yeah 174, at PDF Page 72.

CHIEF JUSTICE CHANDRACHUD: Yes.

MR. SIBAL: It is submitted that Parliament in its wisdom, had used the term political party under the provisions of 2(1)(b), wherein a member attracts the disqualification for going against the wishes or directions of its political party. The Respondents in substance are asking this Honourable Court to read the term political party as legislature party which has a completely different meaning altogether, as pointed out here and above. In this regard it is well settled that when the language of a statute is amply clear and also the words used are self-explanatory, the Court ought not to read any other interpretation to the language or the statute. It is further submitted that the question whether the term political party under the provisions of 2(1)(b) of the Tenth Schedule, refers to the legislative party was considered by Justice Srinivasan in a separate opinion in Mayawati.

Now My Lords kindly have a look at that, Para 17. The argument of the appellant is the expression political party in subparagraph (b), means political party in the House. In other words, the legislature party. This argument runs counter to the definition contained in 1(c). Your Lordship will notice that 1(c) says 'original political party.' 2(1)(a) and 2(1)(b), makes no distinction. So the political party relates back to 1(c). Therefore, it's the original political party so therefore it cannot be the legislative party.

That's what My Lords held. According to that definition, original political party in relation to a member of a House means the political party to which he belongs for the purposes of subparagraph 1 of Para 2. The expression original political party is used in para 3 only. Para 2, does not at all use the expression original political party. The said expression in Para 3, is equated to the expression political party in Para 2(1). The definition Clause in Para 1(c), does not make any distinction between sub-para (a) and sub-para (b) of part 2, but the appellant's counsel wants us to make such a distinction. According to him, political party in sub-para (a) would refer to the original political party. But the same expression in sub-para (b) would refer only to the legislature party. The term legislature party, having been defined in 1(b), which would well have been used into 1(b). Instead, the term political party of the intention of Parliament was to refer only to the legislative party. There is another feature in 3(b), which negatives the appellant's argument. According to 3(b) from the time of the split in the original political party, such as the one referred to in the first part of the Para, the faction referred to therein shall be deemed to be the political party to which a member concerned belongs for the

1 purposes of subparagraph 1 of Para 2, and to be his original political party for the purposes of
2 Para 3. The entire sub-para 1 of Para 2 is referred to therein, meaning thereby both Clauses A
3 and B of sub-para 1, and no distinction is made between the two Clauses. Hence, for the
4 purposes of Clause A as well as Clause B, the faction referred to in the first part of Para 3 shall
5 be deemed to be the political party mentioned in sub-para, and the same faction shall be
6 deemed to be the original political party mentioned in Para 3. It is thus clear that political
7 party in Clause B of sub-para 1 of Part 2 is none other than the original political party
8 mentioned in 3.

9

10 The argument that the context in Para 2(1)(b) requires to equate political party with legislature
11 party, even though the definition Clause runs differently, is not acceptable. A reading of sub-
12 para B and the explanation of 2(1) places the matter beyond doubt whether a political party in
13 sub-para B refers to the original political party only and not to the legislature party. According
14 to the explanations for the purpose of the entire sub-para, an elected member of the House
15 shall be deemed to belong to the political party, if any, by which he was set up as a candidate
16 for election as such member. Certainly the legislature party could not have set up the member
17 concerned as a candidate for election. According to the Learned Counsel for the appellant, the
18 legislature party may have to take decisions now. This is of the argument. May have to take
19 decisions on urgent matters in the House and as it represents the original political party in the
20 House, whatever direction is issued by the leader of such legislature party must be regarded
21 as a direction issued by the political party. There is no merit in this context. When the
22 provision in the Constitution has taken care to make a distinction between the legislature party
23 and the original political party and prescribed that the direction should be one issued by the
24 political party or any person or authority authorized in this behalf, there is no meaning in
25 saying that whatever the Leader of the legislature party directs must be regarded as that of the
26 original political party.

27

28 It squarely answers My Lords the argument. Their argument is we are 38. We are therefore
29 the political party. So 38 people My Lords in the Legislative Assembly as members can't be the
30 political party. We are the legislative party. Members of the legislative party. The reason is not
31 far to seek. Disqualification of a member elected by the people is a very serious action. And
32 before that extreme step is taken, it should be proved that he acted contrary to the direction
33 issued by the party which set him up as a candidate for election. Then they go to Hollohon, We
34 don't have to go there. We've already... now I'll come to 176.

35

36 Okay My Lords, my Learned Colleague, My Lords, points out just one part. Middle of that
37 paragraph, My Lords... I am just seeing that. Yes. It says My Lords 'the said object would be

1 achieved with the disqualification incurred on the ground of voting or abstaining from voting
2 by a member is confined to cases by the change of government is likely to be brought about or
3 is prevented as the case may be as a result of such voting or abstinence, or where such voting
4 or absence is a matter which was a major policy and program on which the political party to
5 which the member belongs went to the polls. For this purpose direction given by the political
6 party to a member belonging to it, the violation of which may entail disqualification thereto
7 would have to be limited to a vote on a motion of confidence and no-confidence in the
8 government, or where the motion under consideration relates to a matter which was an
9 integral policy and program of the political party, on the basis of which it approached the law'.
10 Now My Lords kindly come to 176. 'It is humbly submitted that the interpretation sought by
11 the Respondents is accepted. If the interpretation sought by is suspected the same would result
12 in a far reaching consequences and would destabilize the framework of the party system by
13 taking away the powers assigned to a political party to prevent defections within. The reading,
14 this reading would negate the meaning ascribed to 2(1)(b) of the Tenth Schedule, as well as
15 defeat the entire purpose of insertion of the Tenth Schedule to curb the menace of defection.
16 The entire edifice of our parliamentary democracy is based on a party system. A candidate is
17 chosen by the elected or the symbol of the political party. The legislature of the legislature
18 party is only a product of the political party. My Lords, the Chief Justice has just articulated
19 that earlier. The legislature party is the species and the political party is the genus. There is an
20 umbilical cord which links the political party and the legislature party. The actions of that
21 umbilical cord cannot be out of line with the objective of political party. In Kyoto, this court
22 said the following, My Lords this is important. But a political party functions on the strength
23 of shared beliefs. Its own political stability and social utility depends on such shared beliefs
24 and concerted action of its members in furtherance of those commonly held principles. Any
25 freedom of its members to vote as they please, independent of the political parties declared
26 policies will not only embarrass it's public image and popularity, but also undermine public
27 confidence in it, which, in the ultimate analysis, is the source of such sustenance. Nay, indeed
28 it is, in its very survival. Intra-party debates are, of course, a different thing. But a public image
29 of disparate stance by members of the same political party is not looked upon in political
30 tradition as a desirable state of things. Loyalty to party is a norm being based on shared beliefs.
31 A divided party is looked on with suspicion by the electorate. It is natural for members to
32 accept the opinion of their leaders and spokesman on the wide variety of matters on which
33 those members have no specialist knowledge. Generally, members will accept majority
34 decisions in the party even when they disagree. It is understandable, therefore, that a member
35 who rejects the party Whip, even on a single occasion, will attract attention and more criticism
36 than sympathy. To abstain from voting when required by party to vote is to suggest a degree
37 of unreliability. To vote against party is disloyalty. To join with others in abstention of voting

1 with the other side smacks of conspiracy. That's exactly what happened here and it started on
2 the 21st of June.

3

4 Clause B of para 2(1) of the Tenth Schedule gives effect to the principle and sentiment by
5 imposing a disqualification on a member who votes or abstains from voting contrary to any
6 directions. The provisions, however, recognized two exceptions. One, when the member
7 abstains from the political party, prior permission to vote or abstain from voting. And the other
8 when the member is voted without obtaining such permission but his action has been
9 condoned by the political party. This provision itself accommodates the possibility that there
10 may be occasions when a member may vote or abstain from voting contrary to the directions
11 of the party he belongs. This in itself, again, may provide a clue to the proper understanding
12 and construction of the expression, any direction in Clause B of paragraph 2(1), whether really
13 all directions or Whips from the party entail the statutory consequences on whether having
14 regard to the extraordinary nature and sweep of the power, very serious consequences that
15 flow, including the extreme penalty of disqualification. The expression should be given a
16 meaning confining its operation to the context indicated by the objects and purposes of the
17 Tenth Schedule. We shall deal with this aspect separately. It is thus submitted that it is the
18 political party which appoints the Chief Whip and not the legislative party. The political party
19 is headed by the leadership, and this factum of leadership is not in dispute. Organizational
20 elections in Shiv Sena were held on 27-02-2018. My Lords that's a wrong date. It actually is
21 23rd January 2018. And the leadership structure of the party was intimated to ECI, wherein it
22 is clearly stated, that Uddhav Thackeray is the Paksh Pramukh. It may not be out of place that
23 under the Maharashtra Legislative members removal of disqualification rule... which I have
24 already read.

25

26 **JUSTICE SHAH:** That you have already shown.

27

28 **MR. SIBAL:** So, My lords, I'll skip that. It is clear that the Whips are the directions issued
29 by the political party and not the members of the legislative party or the leaders of the
30 legislative party or the leaders of the legislature. Then Erskine May says, Whip serves as an
31 intermediate between the leaders and parliamentary membership of their parties in order to
32 keep each informed of the views of the other, which is what I was mentioning to Your Lordship.

33

34 The phrase Adopted by Burke caught public fancy and soon became popular. Then, My Lords
35 kindly come to 183, skip the 5-6 lines on top and the sentence on the right side. The
36 keep....'They keep members supplied with information.' They were talking about Whips. Your
37 Lordship has that? 'They keep members supplied with information about the business of the

1 House.' My Lords, what happens traditionally is My Lords, the members do not know the
2 business of the House because the business of the House is decided by what is called the
3 Business Advisory Committee. And only some members of the House of political parties are
4 members of that committee. So every week couple of times we can probably... My Lords every
5 week a meeting takes place as to what should be the business for the next week. So My Lords
6 that's decided? And then it is announced in the House. On that basis, the Whip then informs
7 the members of the House that this is going to be the business. These are the bills that are to
8 be, that are to be debated. This is the position that we have to take on the bills. Therefore, you
9 please prepare your speeches in the context of the position of the party. That's the job of the
10 bill. Now My Lords, now that is not the job of somebody who says, I am a Group Leader and I
11 will decide. That is why the Whip is appointed by the political party, for that very reason.

12

13 **CHIEF JUSTICE CHANDRACHUD:** On general parliamentary business, how specific are
14 the Whips? I mean, this is not.. unrelated to this case.

15

16 **MR. SIBAL:** My Lords a WhatsApp message is sent to us. Three lines at the end underlining
17 otherwise you have to be present otherwise action will be taken. And you come and vote. And
18 this is how you have to vote. <UNCLEAR> and Whip will come. Vote for this bill. Vote against
19 this resolution. So each one on our WhatsApp, that message is sent. So we have to be present.
20 They are very generous because while we argue our cases, proceedings are going on. So we are
21 not present. So they don't trouble us too much.

22

23 **MR. MAHESH JETHMALANI:** Exception of Ninth Schedule.

24

25 **CHIEF JUSTICE CHANDRACHUD:** That holds for Mr. Jethmalani also, Right?

26

27 **MR. SIBAL:** My personal opinion is this is my personal... I don't want to say it the fact of the
28 matter is if you want to practice, you should practice. You want to be in Parliament, devote
29 your time to Parliament. That should be. Otherwise My Lords we can only perform one
30 function. We can't perform both. Anyway, that's another matter. It's not that. It's not that. It's
31 what happens is that the key issues of the party are nowadays before the court. They want us
32 to be here and slowly, Mr. Jethmalani will realize as the burden increases, that he might also
33 have to do that.

34

35 **MR SINGHVI:** Just one second, aside about coming out of the Hall of Parliament, a very
36 leading left leader mentioned inside the House that lawyers, chartered accountants, doctor
37 and other similar people should not be in Parliament. They should concentrate on their

1 profession. Mr. Jaitley and I were talking in the lobby . So when he came out, a good friend of
2 mine. He told him that you want Parliament only to consist of unemployed and unemployable
3 persons.

4

5 **MR SIBAL:** Don't say that, don't say that publicly.

6

7 **MR SINGHVI:** This is what happened with... I am taking his example. He said it for a large
8 class of profession, not lawyers alone. So My Lords there is a certain amount of input you bring
9 in if you are otherwise also gainfully employed.

10

11 **MR. SIBAL:** That's true. But lawyers in many jurisdictions are not allowed My Lords to do
12 both things. That's also true.

13 'They keep members supplied with information about the business of the House and enforce
14 party discipline, being constantly in touch with the members and the lobbies of the House, the
15 Whips acting as intermediaries between the leaders and the rank and file of their parties keep
16 the former in touch with the currents of opinion not only within their own party and thereby
17 nip the incipient revolt in the bud, but also to some extent with other movements of opinion
18 inside the House. And it is through the Whips that members of a party come to know about
19 their leaders' views and the plans into which the leader thinks it is necessary or experience to
20 initiate them. The Whips are the active agents within the parties, a channel of communication,
21 whereby one party negotiates with another concerning topics of debate or conduct of business
22 in the House'. In the handbook of the working of the Ministry of Parliamentary Affairs, the
23 background of origin of Whips is noted in this regard. It is stated that 'Whips who are drawn
24 from various political parties are vital links in the internal organization of parties inside the
25 legislature'. The expression Whips is derived from the...My Lords we don't have to go into that.
26 Then come as the House of Commons library, that also My Lords goes to Edmund Burke.
27 We've already read that. Let's not waste our time on it.

28

29 Then My Lords, kindly see further Para 186. Further is elucidating the duties of the Whip it is
30 stated as follows. The primary role of the Chief Whip is to get the Government's business
31 through Parliament and in particular, to secure the Government's majority in votes on its
32 legislative and policy programs. The duties of the Whip include keeping MPs and peers
33 informed of forthcoming parliamentary business, as I told Your Lordship, maintaining the
34 party's voting strength by ensuring members attend important debates and support their party
35 in parliamentary divisions and passing on to the party leadership, the opinions of back-bench
36 members. The note also relies upon Roger and Walter, let's leave that. Kindly come to Law
37 Commission. This is very important. Para 188.

1
2 The Law Commission, recognized the importance of the Whip necessarily by abiding for the,
3 by the Whip, for abiding by the Whip and observed in Para 3.4.4, is as follows. Necessary for
4 abiding by Whip, the necessity for abiding by the Whip -- 'In such a case the endeavour should
5 be to strengthen the political parties by providing for internal democracy and internal
6 structures rather than to weaken them. In as much as we are recommending in this report
7 insertion of a new chapter, governing the political parties, the political parties including the
8 provisions ensuring internal democracy, internal structures and transparency in the conduct
9 of affairs. There should be no objection to strengthening of the political parties so that they
10 will... the will of the majority, the will of the majority prevails in their political party. Freedom
11 of speech is undoubtedly precious. But when a person becomes a member of the political party,
12 accepts it's ticket and fights and succeeds on that ticket, he renders himself, subject to the
13 discipline and control of the party. It should also be noticed that when a person applies for the
14 ticket of a political party, he knows and is expected to know about the leadership, internal
15 working, policies and programs of the party. He must also reckon with the fact that in future
16 the leadership may change, policies and programs may change, and so on. If he with his eyes
17 open, applies for and obtains the ticket and contests and wins on that basis, he cannot plead
18 later that he does not agree with the leadership or policies of the party. This is all this
19 argument, My Lords, that was made. Freedom of expression. We have a right. We feel that
20 your policies are wrong. You have deviated from ideology. You knew the ideology, you knew
21 that he is the Paksh Pramukh. You knew what he stands for, you took his ticket, you were a
22 minister, you never raised your voice. And suddenly in Assam, you go to say that, no, no, we
23 are very, very concerned about it. Prior to 2000.....before 21st June, where is the single
24 statement that is on the record of this case? Not a single statement. That is because you got
25 lured into it. That you thought that maybe by using your majority in the legislature, you could
26 actually topple the government and become the Chief Minister.

27
28 So then it says My Lords, any difference of opinion must be first ventilate and fight within the
29 party. Kindly see that. Your Lordship asked me that question. And what does he do? He has to
30 ventilate it within the party. Call a meeting. Then My Lords more important, the membership
31 of the House does not become his private property, nor can he trade in it. How patient these
32 words are. That is not his private property nor can he trade in it. I mean, I am sure My Lords,
33 he wasn't in Assam for cleansing his conscience. Either there were bigger issues that were to
34 be dealt with in Assam. Somewhat akin to some ground issues. Anyway, it is a trust that he is
35 in the members of...in the members of a trustee. He cannot also say that he will take advantage
36 of the same, of the name and facilities of a political party, fight the election of the ticket of that
37 party, and succeed, but he will not subject to the discipline of the political party. This is simply

1 unthinkable besides being unethical and immoral. He has to abide by the party discipline
2 within the House. He might fight within the Party to have his point of view or policies adopted
3 by the party. But once the party takes a decision one way or the other and issues the Whip, he
4 shall have to abide by it or resign and go out.'

5

6 This, in essence, tells you, My Lords, what the contours of the conduct of a member of the
7 legislature in the House should be and in what circumstances? And there are only two that he
8 can actually disobey the Whip. One, we can take the permission of the leader, and two, he says
9 something contrary to the Whip and the party condones it. And this Law Commission Report
10 led to the 91st Constitutional amendment deleting Paragraph 3.

11 So in practice, the connection between the political party and its elected legislators is
12 maintained by the office of the Chief Whip, who, in his essence, is the representative of the
13 political party amongst legislators. Then *Perumal versus* that My Lords. Just kindly have a
14 look at the Paragraph 12, but I won't read the whole thing, The paragraph starting.... second
15 paragraph. 'The Whips have to know their men.' Your Lordship has that paragraph?

16

17 'The Whips have to know their men. This involves a close contact with all members and
18 knowledge of their interests, special aptitudes, qualities and potentialities. Whips take these
19 aspects into account while sending list of Speakers to the chair in the interest of quality of
20 debate and deliberations. They keep members...' - now My Lords I cannot go to the Speaker.
21 No member of the legislature can go to the Speaker in Parliament or Rajya Sabha or Lok Sabha
22 that I want to speak. He has no choice in the matter. The party will decide who to, who is the
23 party My Lords? It's the leader. That on this issue on cooperative societies, my member in the
24 legislature knows more about cooperative societies than somebody else. Therefore, allow him
25 to lead the debate. In finance, who leads the debate in Rajya Sabha? Mr. Chidambaram. Who
26 decides that? The party. So My Lords, each person has his expertise on education, on telecom.
27 Every different people in the House who will be espousing the cause of that subject matter
28 because he has expertise and who decides that? Not even the leader. Leader will put up the
29 name to the party president or the UPA Chairperson of the party. And then they will say, okay,
30 now you let him decide. Let him debate. So this whole argument and sitting in Assam, I can
31 throw you out and I can throw the Whip out and I can change the leader of the House and I'll
32 proclaim myself as the leader of the House. What is the Speaker going to do when you send it
33 back to the Speaker? And this realization dawned two years afterwards My Lords, when he
34 was, he was a Minister and all that.

35

36 'So being constantly in touch with the members of lobbies of the House, the Whips acting as
37 intermediaries between the leaders and the rank and file of their parties. Keep the former in

1 touch with the current opinion, not only within their own party and thereby nip the incipient
2 revolt in the bud, but also to some extent with other movements of opinion. And it is through
3 the Whips that members of a party come to know about their leaders views and the plans into
4 which the leader thinks it necessary, experience initiate them. The Whips are the active agents
5 within the parties, a channel of communication whereby one party negotiates.' And I'll leave
6 that out.

7
8 Then, My Lords, kindly come to the next paragraph Para 13. 'The Chief Whip is the eyes and
9 ears of the leader of the party.' So far as the members are concerned. 'He conveys the wishes
10 of the leader to the members of the party and keeps the leader informed of the current opinion
11 in the party and also the moods and inclinations of individual members when these deserve
12 special notices. During sessions in his capacity as advisor to the leader, he normally meets the
13 Prime Minister, not only on one set interview daily but also several times in the course of the
14 date for brief consultations.' Why My Lords, what happens is there is *hungama* in the House.
15 There are not.. people are going go to the well, you immediately have a meeting with the leader.
16 What should we do? Because the House is adjourned for 15 minutes, 20 minutes, half an hour.
17 You go back to the leader, you have a quiet meeting My Lords, the Whip will have a quiet
18 meeting, a decision will be taken, conveyed to the legislature. So to say that I am a 40 members
19 of the legislative party, I can do what I like, I am a separate group, I'm a separate entity, I could
20 remove you. It's unthinkable in Parliamentary Democracy. Unthinkable. And this per se, that's
21 why I used the expression "per se". He has voluntarily given up his membership of the party,
22 "per se". Apart from making the House and keeping essentials for transactions of business, the
23 Chief Whip has the Whip hand in shaping the core tone and tenor of debate on special
24 occasions for he selects the Speakers from his party and hands over list to the Speaker for
25 facilitating the process of catching his eyes.

26
27 The responsibility of keeping everybody at his post and keeping his party united, strong and
28 well-knit falls on him. He selects members for the select committees and other Parliamentary
29 and government assignments, keeping in view the background experience, the aptitude
30 qualifications of members of his party. This gives him...Supposing My Lords, a select
31 committee is to be formed and the person to be nominated. Who decides that? If 40 members
32 of the House will say no, no. Because we are 40, we nominate this person. No. The Whip will
33 tell the Speaker that this is our nominee on the select committee or this joint committee or the
34 standing committee. So this gives him wide power, power of patronage which comes handy
35 and keeping with party members amenable to his influence. It is thus clear from a reading of
36 the aforesaid that the Whip forms an important link and umbilical cord between the political
37 party and the legislators. The Whip enforces the directions of the political party.

1
2 Then My Lords, there is a discussion about how the term political party as My Lords actually
3 was not there in the Constitution earlier or not Constitution even otherwise, was not there in
4 a statute. Then 29(A), of the representation. I don't have to go through the representation. We
5 are short of time and I don't want to take time unnecessarily. My learned friend can, if he
6 wishes to deal with some of this.

7
8 Then My Lords, kindly come to...there is a judgment of this Court in 2018, Volume-9, SCC.
9 (2018) 9 SCC page 100. This is *Sailesh Manubhai Parmar versus Election Commission Of*
10 *India*. My Lords, in this case, they wanted to introduce NOTA option in the Rajya Sabha
11 elections, for elections to the Rajya Sabha. In that context at page 116, the judgement starts at
12 100. I will just read one paragraph, paragraph 19, at page 116. Page 116, paragraph 19?

13
14 **JUSTICE SHAH:** Yes we all are here.

15
16 **MR. SIBAL:** Yes, My Lords, I'll just read it. The aforesaid passages throw immense light on
17 the distinction between direct and indirect elections, and especially on the concept of indirect
18 election which encompasses proportional representation. There is voting by open ballot, and
19 it has been so introduced to sustain the foundational values of party discipline and to avoid
20 any kind of cross voting, thereby ensuring purity in the election process. They have been
21 treated as core values of democracy and fair election. It is worth to note that in a voting for
22 members of the Council of States, the nature of voting by an elector is a grave concern. It is
23 because in such an election, there is a party Whip and the elector is bound to obey the
24 command of the party. The party discipline in this kind of election is of extreme significance,
25 for that is the fulcrum of the existence of political parties. It is essential in a parliamentary
26 democracy. The thought of cross voting and corruption is obnoxious in such a voting. In this
27 context we may refer with profit to the...

28
29 Then Para 22 at Page 118. 23 actually. 23 at page 118. If I may read My Lord? 'In a democracy
30 the purity of election is categorically imperative. The Democratic body politics, as has been
31 held in *Manoj Narula* stipulates that the quintessential idea of democracy is abhorrent to
32 corruption and laws, emphasis on prevalence of genuine orderliness, positive propriety,
33 dedicated discipline, and sanguine sanctity by constant affirmance of constitutional morality
34 which is a pillar stone of good governance. The purity of democracy does not withstand
35 anything that has the potential to create an incurable chasm in the backbone of a democratic
36 setup. The law is meant to eradicate the same. When one analyses the exercise of choice NOTA
37 in the voting process of the Council of States where open ballot is permissible and secrecy of

1 voting has no room and further, where this discipline of the political party/parties matters, it
2 is clear that that such choice will have a negative impact.' That's all My Lords that I wish to
3 state.

4

5 Now My Lords coming back to.... so I skip that and I come My Lords now to.... I have dealt
6 with the facts now My Lords and I don't want to take too much time now. Then My Lords, now
7 I come to the Governor's decision.

8

9 **JUSTICE KOHLI:** Chapter 9?

10

11 **MR. SIBAL:** Yes My Lords, Chapter 9. I'm not going to intra-party decisions My Lords. I'll
12 just save time. Come to Chapter 9. Now My Lords, this is, as I said, an issue that has arisen for
13 the first time. A member of the BJP, along with...

14

15 **CHIEF JUSTICE CHANDRACHUD:** Where does Chapter 9 begin? At Page 100?

16

17 **MR. SIBAL:** My Lords sorry. Page 100. I'm sorry. My Lords 235, 'It is respectfully submitted
18 that the exercise...

19

20 **JUSTICE NARASIMHA:** Is it the 28th June decision of the Governor ?

21

22 **MR. SIBAL:** Sorry.

23

24 **JUSTICE NARASIMHA:** 28th June, decision of the Governor. Decision of the Governor
25 which...

26

27 **MR. SIBAL:** To invite Shinde My Lords.

28

29 **JUSTICE NARASIMHA:** 28th of June.

30

31 **MR. SIBAL:** 30th.

32

33 **JUSTICE NARASIMHA:** 30th?

34

35 **MR. SIBAL:** 30th. 28th is our trust vote. We do not go to the trust vote.

36

37 **JUSTICE NARASIMHA:** 30th.

1
2 **MR. SIBAL:** 30th My Lords he is sworn in. Now Your Lordship knows that under the
3 Constitution there are areas where the Governor has discretionary power, subject to three
4 exceptions, which are given in *Nabam Rebia* which is in... this is an area when in the beginning
5 My Lords, there is an election that takes place. Who is to form the government? There is
6 enough discretion with the Governor. He will see as whether there's a pre-poll alliance. And if
7 the pre-poll alliance has majority, he'll call the leader. Normally. I mean, there are exceptions.
8 There's a post.... if he doesn't get a pre-poll alliance majority, he'll call a post-poll alliance and
9 if not, My Lords, he will otherwise see if the majority can be cobbled up by a leader who has
10 the confidence of the House, who may have the confidence of the House. That discretion is
11 always with him My Lords. Now we are talking of the discretion of a Governor, post the
12 formation of a government. That's the first issue. So post the formation of an elected
13 government if ten people go to the Governor, what is his discretion in the matter? Because the
14 Governor has to ascertain - one, that look these people along with others, the leadership that
15 I will administer the oath to will have the confidence of the House. That's one criteria on the
16 basis of which he will swear him in.

17
18 Two My Lords, he will ask the question, which party do you belong to? He has naturally have
19 to ask. I am sure he will know that before even he asks that question. So he knows My Lords,
20 that the Shiv Sena is not before him. On the 30th he knows Shiv Sena is not before him. So
21 what is his discretion in administering the oath of office to Eknath Shinde? Except the fact that
22 all the 39 rebels will support or the BJP along with the 39 rebels, will oust the government and
23 will support the new Chief Minister. He also knows that there is a disqualification petition
24 pending. So Your Lordships will have to decide for the first time in situations of this nature,
25 when there is an already an elected government in place and there is a taint, alleged taint of a
26 certain set of members pursuant to the fact that disqualification proceedings are pending,
27 whether the Governor can exercise discretion in a manner which will topple an elected
28 government, not await the outcome of the disqualification proceedings, the Governor could
29 have done two things. Could have said, I know for a fact that there is a disqualification notice
30 against you all or against 16 of you. You who claim, want me to administer an oath of office to
31 want to be the Chief Minister. The Court has given you time till the 12th of July, please first
32 file your reply on the 12th of July, see the outcome of those proceedings. And if there is no
33 taint as far as your membership is concerned, I will administer the oath of office to you. That
34 I think is a constitutionally moral path that the Governor ought to have adopted. My Lords,
35 institutional morality demands that he follows that path. The Constitution in fact, persuades
36 him to follow that path. Why? Because there is an elected government in place of which he was
37 a member. He himself. Eknath Shinde was a member. So why would a Governor My Lords

1 administer an oath except that he himself knows that the elected government will be toppled?
2 That's a very serious matter according to me My Lords. You looked at the Sarkaria Commission
3 Report My Lords, Your Lordship will find no such eventuality My Lords consider to it. The
4 Governor which...

5

6 **JUSTICE SHAH:** Eventualities are to be considered on experience.

7

8 **MR. SIBAL:** That's true, that's true. My Lords ultimately democracy only thrives when
9 institutions uphold the sanctity of the Constitution.

10

11 **JUSTICE SHAH:** Correct.

12

13 **MR. SIBAL:** And quite frankly My Lords, and this is again my personal opinion, no court, no
14 institution should balk from that. Should withhold it's hands from that. Because ultimately it's
15 the message sent by Court, by institutions, that we are above the vicissitudes of fortune that
16 come with politics. That is the only way to gain respect within the public and to uphold the
17 values for which our forefathers gave us this Republic. But unfortunately, that's not to be. So
18 My Lords here there is a big conundrum. Very big conundrum. So, first the 27th order, the
19 29th order, then the Governor. Even the Governor could have stopped it. Even he chose not to
20 stop it. So Your Lordship will have to evolve some principle in the context of it because this, if
21 *Nabam* is not overruled this will happen time and again. And the Governor will play. I'm sorry
22 to say My Lords. I have seen the Governor, we did. It happened in Arunachal. And we have
23 seen My Lords, and I mean no disrespect to the institution of the Governor. We have seen
24 Governors performing a more proactive role as institutional heads within the State which has
25 created disturbances within the polity. So therefore, how Your Lordship will evolve a principle
26 to ensure that Constitutional morality is upheld, is something that I leave it to Your Lordships.
27 I cannot give an answer.

28

29 I can only say in the facts and circumstances of this case, the Governor should not have
30 administered the oath of office to Eknath Shinde, because he was not the leader of the Shiv
31 Sena. There was a pending disqualification petition against him. He did not.... He belonged
32 to the Shiv Sena, but had dissociated himself with the Shiv Sena. And he had no locus who was
33 to go to the... supposing, whether the Shiv Sena form a government with the BJP, who was to
34 go to the Governor? The leader of the Shiv Sena. That's the Paksh Pramukh, Uddhav
35 Thackeray. It is he, who would represent the Shiv Sena before the Governor and say, okay, we
36 want to join hands with the BJP. In what capacity was Eknath Shinde before the Governor? In
37 which capacity? And in which capacity did the Governor accept or give him audience and

1 administer the oath of office? And My Lords, kindly see Shinde has never disputed that
2 because he is the... he is in the... He says, I am Shiv Sena and he has never disputed that
3 Uddhav Thackeray is the Paksh Pramukh. He has not disputed it even today. So in what
4 capacity did he go to the Governor? Where did he get authority from? Not from Uddhav
5 Thackeray, not from the Paksh Pramukh. In fact, My Lords what the Governor does in this
6 process, it revives the concept of a split and allows it to be alive before him, even though Para
7 3 has been deleted from the... gives it legitimacy. Now all this is a violation of 2(1)(a). All this
8 per se My Lords. What is the Speaker to decide? From the 21st June right up to 30th June,
9 when he is sworn in, each Act amounts to voluntarily giving up membership of the party. Each
10 Act. And under the Tenth Schedule, he has no defence because there is no amalgamation.

11

12 May I, My Lords, Your Lordships My Lords the Chief Justice asked me a very pertinent
13 question, My Lords, as to what a person should do if he's unhappy. Actually the answer lies in
14 a judgment of the Election Commission, Brahmanand Reddy, which was came up in SLP to
15 Supreme Court. SLP was dismissed. I will just give it to My Lords.

16

17 **JUSTICE NARASIMHA:** That is the judgment of which Court? That's the judgment of?

18

19 **MR. SIBAL:** The Election Commission.

20

21 **JUSTICE NARASIMHA:** Election Commission.

22

23 **MR. SIBAL:** Yes. Just give it to My Lord please. My Lords, when you proclaim that you
24 continue to be member of the Shiv Sena you also proclaim that you are working under the
25 Constitution of the Shiv Sena. Naturally, My Lords, you must assume that. And the
26 Constitution of the Shiv Sena allows you to voice your opinion in the form of a dissent or
27 otherwise. And to get support from primary members of the party or from the Pratinidhi Sabha
28 as well as the Karyakarini, so that you can actually articulate your concerns. And so it is in this
29 context My Lords this order was passed by the Election Commission, and this judgment, My
30 Lords, I want My Lords' attention to paragraph...[NO AUDIO]
31 My Lords had a couple of questions for me.

32

33 **JUSTICE NARASIMHA:** There's two things. Lots of the submissions I don't know whether
34 they will join issues with you. Straightforward from the interpretation of the Constitution and
35 the provision. Two aspects. One relating to the leadership issue which is staring in the face of
36 the Speaker at least. That is one aspect of the matter. How does one deal with it?

37

1 **MR. SIBAL:** Other is?

2

3 **JUSTICE NARASIMHA:** That is what is staring in the face of the Speaker. Leadership issue.
4 Particularly in the context of the legislators.

5

6 **MR. SIBAL:** Correct.

7

8 **JUSTICE NARASIMHA:** Now another aspect I want your exposition on that is that
9 legislators double up as the political leaders in every district. They are the same legislator.
10 Here he is a legislator. In a district he is a leader. And normally, we all know that in the district,
11 the legislators are the top leaders invariably. An MLA in a district is not. So therefore, he wears
12 the hat of the political leader and he comes into the Legislative Assembly and he is a legislator
13 there. So therefore he in a way represents the political perspective also while he is performing
14 the function of a legislator.

15

16 **MR. SIBAL:** Sure, sure.

17

18 **JUSTICE NARASIMHA:** So therefore, the question arises as to how, whether... where is..
19 there is some kind of an overlap with respect to the position of a legislator as a person
20 representing the political part of the political party. At what stage and what is the test to
21 determine it? Sadiq Ali is in a different context. But of course, substantially what you have told
22 us that batting order or for the Speaker is first to determine the Tenth Schedule issue. But in
23 the context of these two factors, I just wanted your...

24

25 **MR SIBAL:** My Lords what happens is, I'll tell Your Lordship. I represent a particular
26 assembly constituency in a state. The nature of that constituency may be entirely different
27 from the nature of another constituency, a 100 miles away. The nature of issues may be entirely
28 different My Lords. As Your Lordship knows, My Lords, the spread of the other backward
29 classes and constituencies are different in different States. Different in one state also. The
30 nature of the population, the SC/ST may be more, SC may be less, backward may be more. My
31 Lords are highly complex issues. But when you come to the legislature, you are not looking at
32 your constituency. You are looking at the issues of the State and the politics of the State in the
33 context of, including the nature of the problem that you may face in your constituency. So My
34 Lords, in fact, the interest of the legislature, when it comes to the interests of the State, are
35 subjugated.... the interest of his district or his particular parliamentary state is subjugated
36 to the larger interests of the State. That's why it's the Whip who decides what should be done,
37 what should not be done. But you are right. There is an element of interplay My Lords. But he

1 can't on the context of that element in his own interest qua his constituency say that I will not
2 obey the Whip of the party. That's the nature of the animal My Lords. And therefore My Lords,
3 he has to do that. As far as the Speaker is concerned, My Lords the Speaker has no choice in
4 the matter. Speaker is only conveyed what the party conveys to him. Speaker has no individual
5 right to say you are the Whip or you are, I now proclaim you to be the Whip. They can't....

6

7 **JUSTICE NARASIMHA:** Here there is no over tact in the nature of the legislators calling
8 the members of the party to have a prior meeting and thereafter the legislators themselves...

9

10 **MR. SIBAL:** Even that can be done. My Lords even according to me even that can be,
11 supposing, all of them said and the party Whips said otherwise.

12

13 **JUSTICE NARASIMHA:** You are saying that the legislatures can sit together and take a
14 decision.

15

16 **MR. SIBAL:** Yes, My Lords because they will have to obey the party.

17

18 **JUSTICE NARASIMHA:** No, no, no. Can the legislators sit together and say that now we
19 are the party?

20

21 **MR. SIBAL:** No, they can't. They can't. They can't. Only that's, only merger then My Lord.
22 That's the only difference is paragraph four. That can't be. This is the conundrum. This is a
23 conundrum which was...

24

25 **JUSTICE NARASIMHA:** But the same legislators don't sit in the Parliament, but go out and
26 call for a meeting...

27

28 **MR. SIBAL:** On the political party, Yes.

29

30 **JUSTICE NARASIMHA:** As a political party?

31

32 **MR. SIBAL:** Only political party. Yes, they can.

33

34 **JUSTICE NARASIMHA:** As a political, as if it's under the banner of a political party?

35

36 **MR. SIBAL:** That they can't do My Lords. That they can't do.

37

1 **JUSTICE NARASIMHA:** But then if they are the majority?

2

3 **MR. SIBAL:** No, no. They are majority in the legislature. They have the majority of the
4 legislature there's no doubt about that, but they can't call a meeting of the political party
5 because they are bound by the constitution of the party.

6

7 **JUSTICE NARASIMHA:** You'll have to slightly also explain to us, how in Sadiq Ali they got
8 over this problem.

9

10 **MR. SIBAL:** For Sadiq Ali, I'll tell Your Lordships straight away, *Sadiq Ali* My Lords, it's
11 Congress J, and Congress O. And the Court said in Sadiq Ali that both Congress...Congress J
12 both in the organizational wing as well as in the legislature in Parliament, have a majority. So
13 there's no issue at all.

14

15 **JUSTICE NARASIMHA:** Then that Kerala Mani...

16

17 **MR. SIBAL:** Both. Both you have to see. The organizational wing as well as that. Not one.

18

19 **JUSTICE NARASIMHA:** Additional.

20

21 **MR. SIBAL:** That's correct, that's correct.

22

23 **JUSTICE NARASIMHA:** There were, there were.

24

25 **MR. SIBAL:** So that's what and...

26

27 **JUSTICE NARASIMHA:** There were also identical in that, I don't know what that name in
28 Kerala, that Mani?

29

30 **MR. SIBAL:** Unnikrishnan?

31

32 **JUSTICE NARASIMHA:** Mani.

33

34 **MR. SIBAL:** Unnikrishnan? Mani? I'll find out, My lords we will find out.

35

36 **JUSTICE NARASIMHA:** Recent judgment of the High Court.

37

1 **MR. SIBAL:** But the question is, they are bound by the Constitution, there is a constitutional
2 procedure given by the party constitution, through which they can articulate their opinions.
3 Which is exactly what Brahmanand says. That's why I was reading it.

4

5 **JUSTICE NARASIMHA:** Let's state.

6

7 **MR. SIBAL:** Precisely the point. Paragraph, Page 12 at the bottom, about 10th line from the
8 bottom, to take a view that the Commission, page 83 of the compilations. My Lords the Chief
9 Justice also asked me that question. I'm trying to answer that. Page 83 My Lords, about 10th
10 line from the bottom of that paragraph, to take a view that the Commission ... Lordship has
11 that?

12

13 **JUSTICE NARASIMHA:** You can mail it to the Court Master. They will mail it to us. Yes,
14 even the airdrop is not coming.

15

16 **CHIEF JUSTICE CHANDRACHUD:** Which para?

17

18 **MR. SIBAL:** Para 83, 10th line from the bottom, to take a view that the Commission while
19 deciding cases falling under Paragraph 15. My Lords, have that? As Your Lordship know
20 paragraph 15 says when factions are very pursuant to a split in the political party. 72 at 83, My
21 Lords. My Lords the Chief Justice has that?

22

23 **CHIEF JUSTICE CHANDRACHUD:** Yes.

24

25 **MR. SIBAL:** To take a view that the Commission, while deciding cases falling under
26 Paragraph 15 of the Symbol's Order, should not be concerned with the party constitution
27 would be to introduce utter chaos in the functioning of the political parties in the country, and
28 the operation of the Symbol's Order would be rendered a play thing between the various
29 shades of opinion or groups in the political party. It cannot be gainsaid that a group claiming
30 to be a particular party must abide by its own Constitution which imposes contractual
31 obligation on its members, unless it is shown that it is, that a clear impasse had been reached
32 where the functioning of the Party could not be carried out in accordance with its own
33 Constitution. To ensure a healthy standard of political life the Commission should not lay
34 down any procedure which will make it easy for the established political parties to break up at
35 the slightest pretext. The commission considers that a group or section which wants to form a
36 rival group within a party, must declare itself a rival group and assert that there has been a
37 split in the party. It must show that it has exhausted all the remedies available to it under the

1 Constitution of the Party to assert its majority but that the other group has frustrated its efforts
2 whimsically or capriciously, and is not itself function in accordance with the province of the
3 Constitution of the Party or Democratic norms. The rival group must also show that it has no
4 alternative but to come to the Commission to establish its majority in the party.' So the answer
5 My Lords to the question is you have to under the Constitution, go to the party, make all efforts,
6 raise your voice, articulate your opinion. Get a membership of substantial number of members
7 of the party. They may not be majority, even minority of the party with you, claim then that
8 there is a split in the party. Attempt to change the leadership. You can't do that. If you can
9 muster up majority My Lords, you will become the party. If you can't muster up a majority My
10 Lords, then you say there is a split in the party. Then the Election Commission will decide who
11 gets the symbol and that also from a future date My Lords. Now the question here
12 unfortunately is, there is no meeting of any party. Meeting of party of legislators is in Assam.
13 What is the political party and the members of the political party in Maharashtra have
14 anything to do with the meeting, with meeting legislators in Assam My Lords? And it's not
15 even their claim. So you don't call a party meeting. You have not called it prior to 21st June.
16 Now My Lords, what's very interesting is that in Sadiq Ali. That's the principle that, Your
17 Lordship must keep in mind the court said that I will not go into the actions that have taken
18 place after there has been a dissonance between two factions because each section has thrown
19 out people in the other section, and vice versa. I will take the position prior to that. That is
20 what was the state of the party prior to that, in this case prior to 21st June. What is there?
21 There is nothing prior to 21st June. There is no split. There is no attempt to split. There is no
22 talk of split. So My Lords how does Paragraph 15 come in? Paragraph 15 comes in only when
23 there are two factions pursuant to a split. There is no case of a split. The case of a split happens
24 My Lords, on the 18th July according to the petition before the Election Commission. We are
25 dealing with disqualification on 21st of June. And 18th of July there is no meeting of the party.
26 There is no notice, there is no venue, there is no time, there is no evidence of any meeting.
27 Because if there is a meeting of the party notices must also come to us because we happen to
28 be the party. No notice. No notice even to their own people is shown. So My Lords the question
29 of Paragraph 15 also doesn't arise. That we will argue at 330 My Lords. This is the problem. So
30 you don't go by the Constitution. You don't claim to have a split. You say the legislature party
31 or 30 of them, 38 of them are the political party and then My Lords you go with the BJP and
32 get yourself anointed as a Chief Minister of the State.

33

34 Now I will quickly go through what I have said so that finish it. Now I'm at Para 235 My Lords.
35 "It is respectfully submitted that the exercise of discussion by the Governor in inviting a person
36 to form the Government must be in accordance with constitutional provisions and values.
37 While democracy and rule by majority is part of the constitutional scheme, the prohibition on

1 defection is equally a constitutional mandate. Hence while according respect to the principle
2 of rule by majority as envisaged in a democracy Governor must have regard to the
3 constitutional prohibition on defection. Consequently, the Governor is duty bound to refuse
4 to recognize the majority that has been secured through unconstitutional means. The scope of
5 judicial review of the exercise of discretion by Governor would necessarily extend to ensuring
6 that the discretion was not exercised in a manner that disregard... was exercised in a manner
7 disregarding the constitutional methods of securing the right to govern."

8 My Lords that decision of the Governor is justiciable. All decisions of the Governor are
9 justiciable. So whether he could have administered an oath of office or not, My Lords, in the
10 context of the facts before you, is a matter that is to be decided by Your Lordships. And if that
11 decision goes, My Lords, everything goes. Admittedly the fact of the present case, there was no
12 merger, as envisaged under paragraph four of the Tenth Schedule. These rebel MLAs have not
13 merged in any other political party or formed a new politic party. Therefore, even if it is
14 assumed that their two-third strengths of legislature party para four, is not at all attracted. The
15 President of the Shiv Sena Uddhav had publicly admittedly not aligned supported the BJP. In
16 these circumstances the satisfaction of the Governor for the purposes of calling upon
17 Respondent number 4 to be Chief Minister. As the head of 39 rebel MLAs of Shiv Sena, which
18 is not endorsed by the Shiv Sena political party, is by itself ex facia unconstitutional. The
19 Constitution prohibits recognition of rebel MLAs of a political party under the Tenth Schedule
20 and the action of the Governor legitimizes what is expressly prohibited by the Constitution.
21 The Governor has sought to recognize what the Constitution prohibits. The Governor is also
22 not empowered under law to recognize who is the Shiv Sena. Who is the Governor to say that
23 My Lord? That is the domain of the Election Commission, admittedly recognition of the Shiv
24 Sena and it's leadership by Uddhav Thackeray has been endorsed by the Election Commission,
25 and there is no dispute whatsoever or challenge before the appropriate authority, as on 30th
26 of June. In these circumstances the Governor and his *ipse dixit* guided by his political masters,
27 acted mala fide. Legally mala fide. I don't mean any other way My Lords, mala fide and in the
28 teeth of the provisions of the Constitution granted de facto recognition to the 39 rebel MLAs
29 by inviting Respondent 4 to be the Chief Minister. It is submitted My Lords, I'll finish it
30 tomorrow, now, I'll talk for not more than 10-15 minutes. I'm done My Lords.

31

32 **CHIEF JUSTICE CHANDRACHUD:** All right come back...We'll resume tomorrow
33 morning.

34

35

36

37

END OF DAY'S PROCEEDINGS

CHIEF JUSTICE'S COURT

1

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE M.R. SHAH
HON'BLE MR. JUSTICE KRISHNA MURARI
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE PAMIDIGHANTAM SRI NARASIMHA

Subhash Desai

v.

Principal Secretary, Governor of Maharashtra and Ors.
W.P.(C) No. 493/2022
Item No. 501

TRANSCRIPT OF HEARING

23-Feb-2023

Transcript to be read with the video recording of the hearing.

11:00 AM IST

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MR. SIBAL: Come back to My Lords on the issue of the Governor that I had raised.

CHIEF JUSTICE CHANDRACHUD: Yes.

MR. SIBAL: And I was at PDF Page 100, Paragraph 237. That is petitioner's written submissions A.

JUSTICE NARASIMHA: You are at Chapter 9?

MR. SIBAL: Yes I was and I said, the action of the Governor..

JUSTICE NARASIMHA: Sorry. Which page number?

MR. SIBAL: PDF Page 100, Paragraph 237. Justice Shah doesn't have it at the moment. PDF Page 100, Paragraph 237. Justice Narasimha has it?

'The President of Shiv Sena, Uddhav Thackeray had publicly and admittedly not aligned supported the BJP. These circumstances are the satisfaction of the Governor for the purpose of calling respondent for to be the Chief Minister of 39 rebel MLAs of the Shiv Sena, which is endorsed by the Shiv Sena political party is by itself ex facie unconstitutional. The Constitution prohibits recognition of rebel MLAs of political party under the Tenth Schedule and the action of the Governor legitimizes what is expressly prohibited by the Constitution. The Governor has sought to recognize what the Constitution prohibits. The Governor is also not empowered under the law to recognize who is the Shiv Sena. That is the domain of the Election Commission. Admittedly recognition of the Shiv Sena and its leadership by Uddhav Thackeray has been endorsed by the Election Commission and there was no dispute, whatever or challenge before the appropriate authority on the 30th June.' There was petition before the Election Commission on the 30th June. That was filed only on the 19th of July . The Uddhav Thackeray was the Chief Minister of the Shiv Sena. So in what capacity is a Governor My Lords give an audience to Eknath Shinde and administer the oath of office to him? How is that the discretion of the Governor to do that? Which party was the Governor recognizing for the purposes of forming the government with the support of the BJP? That is the heart of the matter and that's nothing to do with the power of Speaker now My Lords. This is an independent challenge on the appointment of Eknath Shinde as Chief Minister by the Governor and the act of the Governor is subject to judicial review.

1 'In this circumstances, the Governor, in his ipse dixit , guided by his political Masters in
2 mala fide and in the teeth of the provisions of the Constitution, granted a *de facto*.'

3 What is.. what it does My Lords, what Paragraph 3... when Paragraph 3 is deleted. The
4 Governor by his action recognizes Paragraph 3. He recognizes the split. This is not a stage
5 where My Lords a Government is to be formed. This is a stage when an elected Government is
6 running. So Your Lordships for the first time will have to decide what are the discretionary
7 powers of the Governor in that context and can his discretion be used to topple a Government
8 with respect to a set of people who say they are split from the Shiv Sena when a Shiv Sena Chief
9 Minister is already in place, and the Governor does not ask the Shiv Sena Leader as to whether
10 you are endorsing this or not. By not asking the Shiv Sena, he is recognizing a split. My
11 Lords, there is no discretion after the elected Government is formed. The Government then
12 will fall, on the floor of the House. Then the question of the discretion of the Governor will
13 come in. If there's a no confidence motion, Government falls, then the question will come in
14 as to who the Governor will call. But the Governor cannot by his act topple the Government .
15

16 The question is not that. When My Lords the Governor was approached, when the Governor
17 was approached by BJP as well as Eknath Shinde and the Governor told us to have a
18 trust vote, on what basis did he ask us to do that? He obviously recognize the 39. Otherwise he
19 wouldn't have asked us for the trust vote. There was no occasion to because they continue
20 to be in the Shiv Sena. That's their own case. That they did not move away from the Shiv Sena.
21 So if they did not move away from Shiv Sena, which is their own case, on what bases does the
22 Governor say, you have a trust vote unless he recognizes that the 39 members are rebels, they
23 have a split from Shiv Sena and therefore they and the BJP, have a majority, therefore you go
24 and show your majority in the House and have a trust vote. That is My Lords logical. That's
25 the only way to look at it. And the Governor must act consistent with Constitutional morality.
26 What's the morals foundation of such an act? I've already said deletion of Paragraph 3. I don't
27 have to repeat. Of course, it's a principle of constitutional morality.

28 My Lords, just note the page in Nabam Rebia at Page 1145...1144. Paragraph 210. Just note
29 that. Para 210, don't take the book, but just note that. I'll just read it, last four lines of that
30 paragraph. 'Admittedly the Governor never called for a floor test, nor did he ever require the
31 Chief Minister to establish his majority in the House. The Governor's actions based on
32 feuds and wrangles of a breakaway group which is not recognized under the Tenth Schedule,
33 cannot be constitutionally condescended.'

34

35 **CHIEF JUSTICE CHANDRACHUD:** What was the last sentence? The Governor...

36

1 **MR. SIBAL:** I will just read it again. 'Admittedly the Governor never called for a floor test
2 nor did he ever require the Chief Minister to establish his majority in the House. The
3 Governor's actions based on feuds and wrangles of a breakaway group which is not recognized
4 under the Tenth Schedule, cannot be constitutionally condescended.' It is directly on
5 point, because the Governor, by asking me to go for a floor test, having a trust vote has
6 condescended to recognize as breakaway group. Express the prohibited as the Governor's
7 action struck down in Nabam Rebia. So we don't have to go into the issue whether the matter
8 should be sent back to the Speaker or not. If you decide this issue, the matter is, nothing else
9 is required to be decided. So we challenge the trust vote. We challenge the action of
10 the Governor to swear in as a Chief Minister. If that goes then everything else goes, then we
11 don't have to go into the problematic issue of sending disqualifications back to the Speaker.
12 And ultimately My Lord, I mean...the facts are so crystal clear that there can't be the subject
13 of yet another interpretation. There can't be My Lords. The Constitution doesn't give him that
14 power. The Tenth Schedule he is far away, far removed from him. Para-three has been deleted,
15 breakaway groups can't be recognized. That way My Lords everyday a breakaway group will
16 be recognized by the Governor and governments will fall. I don't think the Republic
17 extracted this. And our Constitution ever envisaged a situation that, that can happen in a
18 constitutional democracy. The whole integrity of the political process comes to naught. And
19 My Lords Nabam says that three areas in which the Governor has discretion beyond
20 that none. 371, Article 200 and My Lords, forming a Government at the initial stage after
21 election. There is no discretion with the Governor. He acts otherwise on the aid and advise of
22 the Council of Ministers. That is settled law. And of course, 356, sending a report to the
23 Central Government. That's not something on the aid and advice. So 356, 200 and 371, these
24 are three areas.

25

26 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal, once a person incurs a
27 disqualification under the Tenth Schedule, then the consequence in the Article 193 (3), is
28 that his seat shall thereupon become vacant.

29

30 **MR. SIBAL:** Vacant. Yes.

31

32 **CHIEF JUSTICE CHANDRACHUD:** Yes, because 193 in turn refers to 191 (2).

33

34 **MR. SIBAL:** Yes.

35

36 **CHIEF JUSTICE CHANDRACHUD:** Which refers to the Tenth Schedule.

37

1 **MR. SIBAL:** That's correct.

2

3 **CHIEF JUSTICE CHANDRACHUD:** So the seat shall there upon become vacant. So
4 suppose a group of MLAs, forget this case. Suppose a group of MLAs incurs a disqualification
5 by being a split, which otherwise is not recognized by the Tenth Schedule.

6

7 **MR. SIBAL:** Correct, that's correct.

8

9 **CHIEF JUSTICE CHANDRACHUD:** So the strength of the House therefore comes falls by
10 the extent of the disqualification.

11

12 **MR. SIBAL:** Absolutely.

13

14 **CHIEF JUSTICE CHANDRACHUD:** In which case the majority required for a motion of
15 confidence would also be altered. So suppose that the House of 200 members, 20 have become
16 disqualified, then it would be 90 instead of a 100 for the vote of confidence.

17

18 **MR. SIBAL:** Correct.

19

20 **CHIEF JUSTICE CHANDRACHUD:** So would the Governor, in such a case, be justified in
21 saying that, well, I still without, I still want a vote of confidence because assuming that these
22 people now are disqualified. I still want to test the legitimacy of the Government after
23 excluding these persons. Can he do that?

24

25 **MR. SIBAL:** If the arithmetic is so stacked, he can. But nothing more than that. If the
26 arithmetic is so stacked, he can.

27

28 **CHIEF JUSTICE CHANDRACHUD:** Because the consequences that those people have to
29 be excluded from the house.

30

31 **MR. SIBAL:** I agree.

32

33 **CHIEF JUSTICE CHANDRACHUD:** Number comes down and then he can say, Well, I
34 want [UNCLEAR] minus these people who are disqualified to establish...

35

36 **MR. SIBAL:** No dispute on that proposition. But that the arithmetic will decide.

37

1 **CHIEF JUSTICE CHANDRACHUD:** That the arithmetic will decide.

2

3 **MR. SIBAL:** Here that question doesn't arrive. We know he is made Chief Minister. You
4 think, by now the judges don't know he is been made the Chief Minister. Your Lordship is
5 right. But that the arithmetic will decide. There is no discretion there. He'll call the Chief
6 Minister. He'll say - these people are excluded. This is the arithmetic. This is what the numbers
7 are. Prove your majority.

8

9 **CHIEF JUSTICE CHANDRACHUD:** No. But then look at it this way for a moment. I
10 mean, we are not at all on the facts here, but just to test the position, which is that say the
11 or...we can just for the sake of clarity the Shiv Sena has 56? Or had 56 when the Government
12 was formed, right?

13

14 **MR. SIBAL:** 55 My Lord.

15

16 **CHIEF JUSTICE CHANDRACHUD:** Sorry? 55. Now disqualification notices were issued
17 to 22 plus 16, 38.

18

19 **MR. SIBAL:** That's right.

20

21 **CHIEF JUSTICE CHANDRACHUD:** So for a moment for the argument to proceed with
22 your hypothesis that this a split and therefore they are disqualified, right? Then the Shiv
23 Sena is left with 17, if these people are to be disqualified. So it comes down to then 17
24 plus NCP has how many... 44 of.. How much?

25

26 **MR. SIBAL:** 54.

27

28 **JUSTICE NARASIMHA:** 53.

29

30 **CHIEF JUSTICE CHANDRACHUD:** 53 plus 17. 70. And Congress has 44, right?

31

32 **MR. SIBAL:** Yes, yes. 44.

33

34 **MR. SIBAL:** BJP has 106. Even then it will be fine.

35

36 **CHIEF JUSTICE CHANDRACHUD:** Right. So in such a situation would the Governor be
37 justified in saying that - look, assuming that these people have incurred a

1 disqualification, I still call for a trust vote. Because the impact of these 39, at that stage he is
2 not deciding the disqualification. At that stage, the Governor says, Well, according to me, as a
3 constitutional, as a constitutional head, it appears that these people have now they're split. I'm
4 not deciding that they are split because that's the discretion of the Speaker. Can the Governor
5 now not say in a given case that look these facts now stare at me. I postulate that these people
6 have incurred a disqualification. I don't treat these as members of the House at all. But
7 therefore, because these people stand excluded and the strength of the ruling of the
8 Government, then falls down to the extent of the split. I want a trust vote.

9

10 **MR. SIBAL:** My Lords, just let me, just let me analyse that in two ways. Number one, you
11 can't then administer an oath of office to one of those who are disqualified.

12

13 **CHIEF JUSTICE CHANDRACHUD:** That's right. Absolutely correct. Your line of thinking
14 and line of argument on this is...That we'll keep aside not that.

15

16 **MR. SIBAL:** Let's forget that. Somebody should tell the Governor that constitutionally what
17 happens, with my little experience. The numbers if stacked against the Government will go to
18 the Governor and say that the Leader of the House has lost the confidence of the House.
19 Then he will analyse that and call. But Governor will not do this. That's not his job. There is
20 a sitting Chief Minister. It's an elected Government.

21

22 **CHIEF JUSTICE CHANDRACHUD:** You're right. At that stage, the Governor is not really
23 calling upon someone else to form Government but what he can certainly do is that - well,
24 according to me, you have a ruling party with say, which is supported in a coalition with say,
25 60 members. Out of the 60, 40, which is a split, the Governor says, well, this is a split. And this
26 is a split which is not recognized now by the Tenth Schedule. The Speaker is going to take his
27 own time to decide on the disqualification. But as a Constitutional Head of State, I do believe
28 that with these 40 having, contrary to Constitution, moved away at least I was as a Head of
29 a State, I require a trust vote in the floor of the Legislative Assembly. That I don't believe the
30 Governor will be wrong in calling for a trust vote.

31

32 **MR. SIBAL:** My Lord, I'll say it's wrong and I'll constitutionally provide an answer.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Why would that...

35

36 **MR. SIBAL:** The moment the Governor does that My Lords, take Maharashtra there are any
37 number of parties. Any number of parties apart from Shiv Sena, apart from NCP, apart from

1 Congress, there are so many small parties. Now those small parties at the moment supporting
2 the whoever there is in power. The moment the Governor raise that, the buying and selling will
3 start. In fact, the Governor will be inviting by his unilateral act of saying prove your majority.
4 There's no question of proving majority. He is the Chief Minister. Somebody else has to tell
5 the Governor that there is no majority. These are the signatures. These are the people who are
6 with us. He doesn't have majority. If you allow that as a constitutional principal, it will be
7 disastrous for democracy.

8

9 **CHIEF JUSTICE CHANDRACHUD:** No. But that very fact that the disqualification notice
10 has been issued initially to 16 and 22. This is not a case whether the Governor is sort of, you
11 know, finding facts, you know, in the political spectrum. The Governor is informed. The
12 Governor knows that well disqualification notices have been issued to 16 plus 22 or a group of
13 person. Which disqualification, the wrath of disqualification the moment it attaches to a very
14 sizable portion of the MLAs who are part of the ruling, the ruling coalition, can the Governor
15 be said to be not justified in saying that - well, I'm not deciding the disqualification, but now
16 please establish that you have a majority in the House and I'll decide whether your majority
17 depends on these 39 or your majority is safe, irrespective of these 39.

18

19 **MR. SIBAL:** Even otherwise the arithmetic, the numbers are that time on favour of...

20

21 **CHIEF JUSTICE CHANDRACHUD:** Because you know Mr. Sibal, you are also right. For
22 the present purpose, because you still have to hear them on the on that aspect. So as a
23 hypothesis, we proceed on the basis that you are right. That these 39, they had really split, that
24 too a split is not recognized by the Tenth Schedule. Therefore, they necessarily have to go
25 out. Asking Mr. Eknath Shinde to form the Government that's a separate issue. We keep that
26 aside for a moment. Maybe we'll have to hear them on that. But as an abstract constitutional
27 principle for the Governor, what else does he do?

28

29 **MR. SIBAL:** Let's analyse the numbers now My Lords. He still has a numbers. He still has
30 the numbers. They are only 106. There are independents. There are other parties.

31

32 **CHIEF JUSTICE CHANDRACHUD:** Point is Mr. Sibal, that is again, you know, because,
33 can we say that then the Governor, the governor is, you see a lot of times what happens is that
34 the Governor may have done something which is absolutely within his power, something
35 which may run afoul of constitutional principle. But we have to shift, we have to separate the
36 grain from the chaff. Per se, when there is a Disqualification Notice moved to the Speaker in
37 respect of a sizable group of MLAs belonging to the ruling party, how can we say that

1 the Governor is not justified and they are going to the Government sake. Come on now prove
2 your...

3

4 **MR. SIBAL:** When does a Governor, My Lords we have to go into that question. And when
5 does a Governor call for a floor test? Then we have to go into that question. Has ever a
6 Governor called for a floor test on his own, when there is a Government in power? Never.
7 Never in the Constitution history of India. Never. My Lords, the reason is simple. There is an
8 elected Government. He has proved his confidence on the floor of that House. There may be
9 disqualification.

10

11 **CHIEF JUSTICE CHANDRACHUD:** You see, because the defection has two
12 consequences. At one level, the defection results in persons who have defected by virtue of a
13 split ceasing to be members of the House but that very defection, which operates to exclude
14 them from the membership of the House also affects the legitimacy of the Government.
15 Legitimacy in the sense, the strength of the Government on the floor of the House. So can
16 therefore the very same Act which is unlawful of a group of persons forming a split and going
17 out of the party fold. They incur the wrath of disqualification.

18

19 **MR. SIBAL:** That stage would have arisen if the disqualification petitions had been decided.
20 Let's assume that Your Lordship's example is right. But that stage will arise if the
21 disqualification petitions are decided and they are out of the House.

22

23 **CHIEF JUSTICE CHANDRACHUD:** No. But for that purpose, can the
24 Government, Governor not say, well I assume that they will be disqualified, therefore I need a
25 show of strength on the floor of the House.

26

27 **MR. SIBAL:** My Lord, the Governor has to... the debate is, are the constitutional process, the
28 outcome of constitutional process. Governor cannot say I'll assume this, I'll assume that. My
29 Lords, I am sorry, this is a proposition of constitutional law. With the greatest respect that will
30 ultimately encourage, encourage the kind of things that are happening today and we
31 see all around. Toppling of the Government should be the [INAUDIBLE] priority as far as the
32 Governor is concerned.

33

34 **JUSTICE NARASIMHA:** Mr. Sibal, you are saying that constitutionally it's
35 impermissible for the Governor to take cognizance of any of those events which are all over.

36

37 **MR. SIBAL:** Correct.

1

2 **JUSTICE NARASIMHA:** Nevertheless, he has no power to take cognizance of either
3 the Tenth Schedule Notices, or even the earlier Notices with respect to the Speaker, or
4 even those representations of violation of the Whip and all that that has happened in the
5 papers all over. He cannot by himself take cognizance of anything like that and ask the
6 legislator or the Chief Minister to prove his strength in the in the floor of the House.

7

8 **MR. SIBAL:** Correct. Because they are part of the Shiv Sena. They themselves say...

9

10 **JUSTICE NARASIMHA:** We are not on Shiv Sena, we are on the power of the Government.

11

12 **MR. SIBAL:** That's right. Even then. Even then. My Lords when an elected Government
13 is running the constitutional principle. My Lords, I humbly submitted the following.

14

15 **JUSTICE NARASIMHA:** [INAUDIBLE]

16

17 **MR. SIBAL:** If the numbers are stacked against the elected Government for whatever reason
18 they can go to the Governor and say these are our numbers, these are how they are stacked.
19 Governor verifies that issue. Verify the signatures, normally My Lords that's a practice that
20 used to happen. But Governor, now says we don't want to enter into the political thicket.
21 But be that as it may. That may be a possibility then for the Governor to say, look, I feel that
22 you have lost majority because these people have come to us. But Governor, on his own can't
23 do that. This is not the power in the Governor to help in toppling an elected Government. My
24 Lords Governor... You assume Governors will act constitutionally. But how many
25 times have you struck down actions of the Governor who have acted unconstitutionally?
26 And once that happens, then everybody else will get into the act. All this independents and all
27 those people belonging to small parties. I don't want to say anything more. So My
28 Lords please, please don't play down a constitutional principle. That will create havoc.

29

30 **JUSTICE SHAH:** Mr. Sibal, suppose in a given case, not in this case, the majority of the
31 people in power. Correct? So we are part of the Government. They along with the other
32 party goes to the Governor and says that, sir, the present Government has lost the confidence,
33 we are the persons. In that case, the Government...

34

35 **MR. SIBAL:** Cannot, cannot.

36

37 **JUSTICE SHAH:** Governor can. Why? Because the Governor has to settle...

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MR. SIBAL: No, they are still in the party My Lord. They are still in the party, it is against paragraph three. But paragraph three doesn't recognize majority, minority.

CHIEF JUSTICE CHANDRACHUD: Apropos what my learned brother has said, and I remember when we were much younger, there would be that parade of MLAs before the Governor in the 90s.

MR. SIBAL: Yes, yes. That's correct.

CHIEF JUSTICE CHANDRACHUD: We don't see that now. That used to happen in 1980s and [UNCLEAR].

MR. SIBAL: But that's why My Lords is the right question. But majority is now prohibited under three.

CHIEF JUSTICE CHANDRACHUD: No can, but just taken the line of the reasoning which my learned brother put forth, could the Governor not say that, well, I want you to demonstrate that you have your majority in the House, all that I exclude 20 people who have in a 80 Member House. I exclude the 20. I learned that there are disqualification petitions against 20 out of an 80 member House. Come before me, or, demonstrate to me that you still have 40 MLAs before you.

MR. SIBAL: But we could have demonstrated and we could have won. If those 40 are, even if they are excluded.

CHIEF JUSTICE CHANDRACHUD: So therefore Mr. Sibal, the Governor can, even you say that...

MR. SIBAL: No, but I don't agree to that proposition.

CHIEF JUSTICE CHANDRACHUD: No, but the Governor can certainly say that demonstrate to me that you have 40 out of 80 MLAs in the 80 member House.

MR. SIBAL: Nobody for that. This is not for the Governor to say that. It's for those people in the House to go to the Governor and say they have lost majority. It's not for the Governor to enter into political thicket.

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CHIEF JUSTICE CHANDRACHUD: Fair enough. But suppose those people therefore, obviously the opposition in the House would say, well, they've lost their 40. In which case what does the Governor do? Had a primary level, the Governor says, well, now I have learned from the opposition that you have, you cease to have 40 out of 80, which you had originally or say 45 out of 80, because 20 I have now been issued this disqualification Notices. So then your strength comes from 45 to 25. Now please prima facie demonstrate to me that you still have 40.

MR. SIBAL: Okay, let me try and answer that.

CHIEF JUSTICE CHANDRACHUD: How does the Governor then proceed, what does the Governor do in a situation like this?

MR. SIBAL: Let me try and answer that. My Lords One, Governor prima facie on the arithmetic of the House must first come to the conclusion that the leader of the House has lost the confidence of the House.

CHIEF JUSTICE CHANDRACHUD: Absolutely correct.

MR. SIBAL: How will he decides that? If somebody goes to him. My Lords somebody goes him and says, This Chief Minister has lost the majority, lost the confidence of the House because these are the numbers.

CHIEF JUSTICE CHANDRACHUD: Now two sets of people could go, either the opposition would go, or even the defecting MLAs would go. I mean, they have.

MR. SIBAL: No, they can't.

CHIEF JUSTICE CHANDRACHUD: Why? They will say that well....

[NO AUDIO]

MR. SIBAL: Hypothetical examples ultimately, when and if it comes to Your Lordships, because we are not dealing with that situation, we're dealing with a person who has been recognized by the Governor who happens to be part of the 39, and who has given oath of office. We're only dealing with that issue as and when that issue...some hypothetical stage comes in, we can debate that constitutional issue provided...

1 **CHIEF JUSTICE CHANDRACHUD:** But it's not hypothetically here at all. It's a live issue
2 here, for the reason that once the Governor is in possession of facts, which indicates that very
3 substantial...

4

5 **MR. SIBAL:** Which is a fact that indicates that he has lost the majority of the House?

6

7 **CHIEF JUSTICE CHANDRACHUD:** No, but that out of 55, out of 55 MLAs, 38, their
8 Disqualification Notices issued by the ruling, by the ruling coalition.

9

10 **MR. SIBAL:** Show, 50 plus 53 plus....We have the ex facie My Lords. These are the, Please
11 My Lords...why go into the number. Just see the facts.

12

13 **CHIEF JUSTICE CHANDRACHUD:** Alright let's have the arithmetic. Shiv Sena had 55.
14 Shiv Sena had 55, Congress had 44,

15

16 **MR. SIBAL:** PDF page 62.

17

18 **CHIEF JUSTICE CHANDRACHUD:** Congress *kitna tha*? 44 is Congress, NCP is 53.

19

20 **MR. SIBAL:** My Lords, my request to Your Lordships, please call for the records of
21 the Governor whether he has gone through this exercise or not?

22

23 **JUSTICE NARSIMHA:** Yeah, that's the point we are making.

24

25 **MR. SIBAL:** Please call for the records, if that's the case.

26

27 **CHIEF JUSTICE CHANDRACHUD:** And how much was the BJP? 106.

28

29 **MR. SIBAL:** 106.

30

31 **CHIEF JUSTICE CHANDRACHUD:** And Independents and other parties?

32

33 **MR. SIBAL:** We would have been...

34

35 **CHIEF JUSTICE CHANDRACHUD:** That would be about 20 or no? 20.

36

37 **MR. SIBAL:** They would be 123 My Lords. Halfway back is 124, 120...

1
2 **CHIEF JUSTICE CHANDRACHUD:** So as a result of, say that disqualification notices,
3 which are given to 39. Out of 152. The ruling coalition comes down to 113.

4
5 **MR. SIBAL:** My Lord, First of all, only 34 dissidents are written to the Governor. Not
6 39, only 34.

7
8 **CHIEF JUSTICE CHANDRACHUD:** 34 dissidents ..

9
10 **MR. SIBAL:** Only 34 wrote to the Governor.

11
12 **CHIEF JUSTICE CHANDRACHUD:** Right.

13
14 **MR. SIBAL:** Let's My Lords, get the arithmetic now.

15
16 **JUSTICE NARASIMHA:** 246 is the house. Half of it will be 123. Correct?

17
18 **MR. SIBAL:** Yes. Then they will become 126.

19
20 **CHIEF JUSTICE CHANDRACHUD:** How much do they have? 164?

21
22 **MR JETHMALANI:** Page 59 PDF 62.

23
24 **CHIEF JUSTICE CHANDRACHUD:** We have now got Mr. Sibal. 55 SS, 44 C, 53 NCP.

25
26 **MR. SIBAL:** That's correct.

27
28 **CHIEF JUSTICE CHANDRACHUD:** Comes to 152. Now 288 is the number.

29
30 **MR. SIBAL:** -34 went to the Governor.

31
32 **CHIEF JUSTICE CHANDRACHUD:** -34. But there were 39 disqualifications.

33
34 **MR. SIBAL:** No. No. But what went to the Governor, if the Governor has to look at it then
35 he has to look at 34 My Lord.

36
37 **CHIEF JUSTICE CHANDRACHUD:** Certainly. So 288 minus 34. So 254.

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MR. SIBAL: 287-34 [UNCLEAR]

CHIEF JUSTICE CHANDRACHUD: 288 right?

MR. MAHESH JETHMALANI: 287. One passed away. So 288 was 287. One passed away.

MR. SIBAL: One passed away. So 287.

CHIEF JUSTICE CHANDRACHUD: So 287-34 is 253. So 253 divided by 2.

MR. SIBAL: 2 My Lords. 127.

CHIEF JUSTICE CHANDRACHUD: 127, yes,

MR. SIBAL: They don't have 127.

CHIEF JUSTICE CHANDRACHUD: No but the point is the Governor will say, if you exclude the people in respect of whom there is an allegation of defection from your side.

MR. SIBAL: We have 127 My Lords. And that's arithmetic.

CHIEF JUSTICE CHANDRACHUD: How do you have 127?

MR. SIBAL: I have been telling you My Lord. 54, 44 and 15 is 113 plus 14 MLAs. Independent MLAs and small parties, it's 14. In fact Shiv Sena will be 21.

CHIEF JUSTICE CHANDRACHUD: Mr. Sibal, look at it this way. 55 plus 44 plus 53 is 152. 152 was your strength, of the basic three parties who formed the Government. From that instead of exclude...

MR. SIBAL: That is 14 who are supporting us. Why are you excluding? They are independent Supporting us.

CHIEF JUSTICE CHANDRACHUD: Fair enough. Now 152 -34 also if you take, you are down to 118 right?

1 **MR. SIBAL:** Yes.

2

3 **CHIEF JUSTICE CHANDRACHUD:** Which is below the, below the 125 Mark, right? Now
4 127 Mark. Below the 127 mark. Now you say you have some independents who are supporting,
5 right?

6

7 **MR. SIBAL:** All independents supporting us.

8

9 **CHIEF JUSTICE CHANDRACHUD:** There are some independents who are supporting
10 you.

11

12 **MR. JETHMALANI:** Both sides had independents supporting them.

13

14 **CHIEF JUSTICE CHANDRACHUD:** One second. We are just trying to... Look, these
15 examples are only to see what the Governor should in a situation...

16

17 **MR. SIBAL:** My Lords How...My Lords it's not just what. Did he apply his minds to
18 this issue? This is all very well happening in a Court of Law. But did he apply his minds to this
19 issue?

20

21 **CHIEF JUSTICE CHANDRACHUD:** But Mr. Sibal one thing which we
22 cannot therefore discount. The Governor has two responsibilities. One, the Governor cannot
23 enter into the thicket of disqualification. Two, the Governor cannot do anything which seems
24 to protect those who have incurred a wrath of disqualification. There we are with you
25 completely. Equally, what is of concern to us is that the Governor in all these political
26 wranglings and you know, whatever goes on in the polity, there is a very high constitutional
27 principle, which is that whoever is sworn in as a Chief Minister must ultimately have
28 accountability to Parliament and therefore to the people. Otherwise, what we will be doing is
29 that the defections have two consequences. The defectors have a personal consequence that
30 they get out of the house, that their seat become vacant. But equally, we cannot gloss over the
31 fact that the defection affects the stability of the Government itself.

32

33 **CHIEF JUSTICE CHANDRACHUD:** And how does a Governor, as an elected, as a head of
34 the state, ignore the consequence of...

35

36 **MR. SIBAL:** Where is that question that arises here My Lords? Where is that question?
37 Please. How does it arise here? How did the Governor, Governor did not look at all this, what

1 Your Lordships are putting to me. Ask for the records. Why go into a hypothetical situation?
2 With the greatest respect, My Lordships have so much experience. Let's not tread into areas
3 which we are not called upon to tread upon. We are here as to how 39 or whatever 34, go to
4 the Governor and the Governor recognizes the 34, knowing that they are in the Shiv
5 Sena. There is the leader of the Shiv Sena recognizes, Uddhav Thackeray, he recognizes the
6 split and administer an oath of office. How does all this enter into this...into the reckoning
7 here?

8

9 **JUSTICE NARASIMHA:** As a principle, you are saying that the Governor could not have
10 got into it has not got into it.

11

12 **MR. SIBAL:** Yeah, yes he has not.

13

14 **JUSTICE NARASIMHA:** Number one, and the premise for that is that the Governor cannot
15 do it constitutionally.

16

17 **MR. SIBAL:** That's right. That's all that Your Lordships needs to consider and I can
18 understand a situation. There can be another hypothetical. I am sorry.

19

20 **CHIEF JUSTICE CHANDRACHUD:** So once there is an existing Government according
21 to you, which this was. This is not the Government formation for the first time, then
22 the Governor short of a no confidence vote, which is brought in the floor of the House. The
23 Governor must ensure that the existing position continues until somebody brings a no
24 confidence.

25

26 **MR. SIBAL:** That's the only way. Now, Your Lordships have laid that down.
27 No longer parading, no longer comparing signatures. All that is over. So, if they think, if the
28 BJP thought that we had lost confidence, they should have moved a motion.

29

30 **JUSTICE NARASIMHA:** That is because of Bommai which said that it's only the floor of
31 the House.

32

33 **MR. SIBAL:** That's correct. So you move a no confidence. How do these issues come in at all?
34 There is no discussion.

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36 **CHIEF JUSTICE CHANDRACHUD:** So according to you, as a matter of principle, absent
37 a motion of no confidence, the Governor must continue with the existing position.

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MR. SIBAL: That's right. That's correct. Because there is an elected Government that we have already got.

CHIEF JUSTICE CHANDRACHUD: Alright. I understand what you mean.

MR. SIBAL: This is much worse, that he recognizes the slit and administer an oath of office.

JUSTICE SHAH: And thereafter the floor test was subsequently?

MR. SIBAL: Yes.

JUSTICE SHAH: On 4th?

MR. SIBAL: Yes, on 4th.

JUSTICE SHAH: 3rd or 4th?

MR. SIBAL: Including those 39.

JUSTICE SHAH: But there, so far as speaking about myself. Can the Governor correct, because the...under the Tenth Schedule, it is for the Speaker to take a decision, correct?

MR. SIBAL: Right.

JUSTICE SHAH: Can the Governor on his own without any disqualified, the Speaker can take cognizance that they are disqualified?

MR. SIBAL: Your Lordship is right. Absolutely right, but they are still the Shiv Sena. That question will still have to be answered. What is that, what are the 39? They are still the Shiv Sena. So then he recognizes the split. That's the problem My Lord. That's why the Tenth Schedule, that's why the whole paragraph. This is the whole, the issue when three was eliminated, it was only for the purposes, deleted only for the purposes. Majority of minority, you can't de-stabilized an elected Government. And Constitutional morality was a linchpin. And that's why I told Your Lordships, ideally the Governor should have said, no further action, get your disqualifications decided, then I will see. I told that to Your Lordships earlier.

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JUSTICE SHAH: Well, suppose the Speaker doesn't decide.

MR. SIBAL: Now, My Lords...

JUSTICE SHAH: Listen, listen. Suppose disqualifications are not decided at all. In the meantime, the Governor is satisfied. Correct?

MR. SIBAL: He can't be.

JUSTICE SHAH: No, no. He might...on the basis of the material of...

MR. SIBAL: He can't. That's not his job. It's the no confidence motion in the House. That is the Government. Government satisfaction after election doesn't arise, My Lord, I am sorry, as a constitutional principle, it doesn't arise. Don't give that discretion to the Governor. You'll have toppling governments every other day. First the ED will go. Then the CBI will go, then the Governor will exercise discretion and Governments will be toppled. How is the discussion here?

JUSTICE NARASIMHA: So, Speaker versus Governor. Speaker versus Governor as I had said. So now the flip side of it is that, without any chance for all that to be panned out the Speaker shows over anxiety to take up the matter and immediately disqualify all those who are intending to...

MR. SIBAL: The speaker should decide. Your Lordships have now said within three months. This is the judgment of this court that within three months Speaker must decide. Normally earlier, but latest within three months. Justice Nariman's judgment, My Lords.

JUSTICE NARASIMHA: No, no. I was telling you about the flip side of it is.. On the one hand, yes. Governors over anxiety saying that - Okay, you prove the majority. On the other hand, we have a Speaker exercising that discretion and says - now, come on, you immediately show. I will disqualify all of you. So these are the two constant [UNCLEAR].

MR. SIBAL: But My Lord, there is difference, one is subject to judicial review and the other is not. Difference is one is subject to judicial review and the other is not.

JUSTICE NARASIMHA: All are subject to judicial review.

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MR. SIBAL: No My Lord. But once the new Government is formed My Lords, if he calls for a trust. The new government is formed. what judicial review?

JUSTICE NARASIMHA: True. Remedy is a different matter. I agree with you. There is a remedy. But really speaking, it's that what we need to interpret is the scope of the jurisdiction of the Governor and the scope of the jurisdiction of the Speaker also.

MR. SIBAL: No. The speaker. Of course, the scope of jurisdiction is clear. He has to decide the matter and My Lords...

JUSTICE KOHLI: So really, the Governor keeps his hands off [MUTED].

MR. SIBAL: The second [UNCLEAR] of it is, how does he call Eknath Shinde to administer oath of office? Now My Lords, now kindly just come to Para..

MR. JETHMALANI: My Lord, I don't say anything right now but factually..

JUSTICE SHAH: Mr. Jethmalani will you please [UNCLEAR]

MR. JETHMALANI: All right. But factually he made the incorrect statement, that there was no input given to the Governor. There were two letters sent to the Governor, which the Governor has referred to in a letter to Mr. Uddhav Thackeray before he called for a floor test.

MR. SIBAL: Correct Absolutely.

MR. JETHMALANI: There was enough material for the Governor to decide that this Government is weak.

MR. SIBAL: I think my learned friend's...

CHIEF JUSTICE CHANDRACHUD: What was the material before the Governor on the basis of which he asked Mr. Shinde to form Government? One and particularly when he knew that this was really a breakaway faction obviously.

1 **MR. SIBAL:** Yes. How does he justify that? The question is, how do you
2 administer an oath of office to Eknath Shinde? Now My Lords I can understand. There is
3 another situation, there are multi parties, not just in this case. In several states we have a multi
4 party system. Several parties come together. And suddenly, suddenly a no confidence is
5 moved. Or somebody seeks. And in the meantime, some disqualification petitions are
6 pending. At that stage, the Governor doesn't bother about the
7 disqualification petitions. There's a no confidence. These fellows will vote. Kindly see the
8 consequences. We will take the 39 to be validly members to the House, not
9 disqualified, disqualification petitions pending. Move a no confidence motion.

10

11 **MR. SIBAL:** Now, they can't move the no-confidence motion because the 39, would be
12 subject to the Whip. So they know that they don't have majority. Therefore, what do they do?
13 39, go to the Governor and say that now recognize me. So please appreciate, the way to ensure
14 that the Government falls is to move the no confidence. Why did they not move it? They could
15 have, the 39 could have voted. They are members of the legislature. They did not move it
16 because they knew that they are part of the Shiv Sena, subject to the Whip. The Government
17 will sustain, will not fall so the only way out was this conspiracy. And that was hatched much
18 earlier. That's how they want to Gujarat and Assam. Having done that, they wrote that later,
19 which I read to Your Lordships. I read that letter that, you know this present Government, the
20 party members are very unhappy with it. We have been not following the ideology of
21 Balasaheb. All that, letter I read to Your Lordships. And then they go to the Speaker. So
22 whether it's majority, minority really doesn't matter. So how could the trust vote be called?
23 Trust vote means that you have, prima facie has lost confidence. Governor knows that this
24 Government is not got.... why we go into the matter that the Governor will presume that these
25 people will be disqualified. Why do we even presume that? They are qualified till such time as
26 they are disqualified. So move a no confidence. So, Your Lordships must ask the question why
27 he didn't do that? And My Lords, let me put it this way, if they were so concerned, they should
28 have voted against the Whip. They should have voted against the Whip. And if they had voted...

29

30 **CHIEF JUSTICE CHANDRACHUD:** This part we are over with.

31

32 **MR. SIBAL:** I am sorry. This part we are over with. Now, My Lords I just wanted to point
33 out, para 240. The Sarkaria Commission, is quoted, I just want to deal with that. Para 4.11.04
34 of the Sarkaria, Lordship has that? Page 101 of the Sarkaria Commission report specifically
35 deals with the situation where there is no single party obtains absolute majority and provides
36 the order of preference the Governor should follow in the selecting of a Chief Minister. The
37 order of preference suggested is an Alliance of parties that was formed prior to the elections.

1 Kindly just mark the word Alliance. The largest single party is taking a claim to form
2 the Government with the support of others, including independents. Then a post
3 electoral coalition of parties with all the partners in the coalition joining the Government.
4 Kindly mark the word coalition of parties, post electoral, electoral coalition of parties. And
5 then a post electoral alliance of parties with some of the parties in the alliance forming
6 a Government and the remaining parties including independents supporting the Government
7 from outside. No other exception is there. Now, kindly mark this, that there has to be a party
8 supporting for the purposes of the floor test. There has to be an alliance as a matter of law.
9 Therefore, the Governor cannot exercise any discretion. He must ask what party you belong
10 to.

11

12 **MR. SIBAL:** I'm done with this issue, My Lords. Now just two more issues then I am finished
13 with. Number one, Your Lordship, have now noticed that Gogawale was appointed as
14 the Whip from Assam. If Your Lordships agree with me as a proposition of law that the
15 Whips cannot be appointed in this fashion. Ultimately, the Speaker once that Government is
16 formed on the 3rd recognizes Gogawale. Right My Lords? And then I am issued, our
17 legislators are issued the notice for disqualification on the 8th July. If Your Lordship agree
18 with my proposition of law that Whips cannot be appointed in this fashion. Then
19 our notices should be quashed by this court.

20

21 **JUSTICE NARASIMHA:** Subsequent notices. Under 2(1)(b) or 2(1)(a)?

22

23 **MR. SIBAL:** Yes. Against us. Notices against us.

24

25 **JUSTICE NARASIMHA:** Correct. Correct.

26

27 **MR. SIBAL:** 2(1)(B).

28

29 **JUSTICE NARASIMHA:** But they are virtually a nonissue, right?

30

31 **MR. SIBAL:** No It's not a nonissue. My Lord, there are these notice of disqualification
32 against me. Because they say Gogawale gave a Whip.

33

34 **JUSTICE NARASIMHA:** You are right.

35

36 **MR. SIBAL:** So My Lords, it's a live issue for us.

37

1 **JUSTICE NARASIMHA:** Legislator's Whip not the political party.

2

3 **MR. SIBAL:** Yes yes. Legislature's Whip. So My Lords therefore, my
4 request to Your Lordships is that notice for disqualification must be struck down by Your
5 Lordships. If Your Lordships of course agree that you cannot appoint a Whip from outside.

6

7 **JUSTICE NARASIMHA:** But that's the direct challenge also.

8

9 **MR. SIBAL:** Yes. We have challenge that. I have challenged that. Now one
10 more point My Lords. In September when a whole petition was argued that
11 the Election Commission should not proceed. Your Lordship said - no stay. Fine My
12 Lords, No stay. We went back. My Lords what happened was, we thought and this
13 is my...we interpreted that order to mean that the proceeding before the Commission shall go
14 on. Fine My Lords let them go on. The problem arose that we told the Commission that if you
15 take this test of organization and representation in the legislature, you necessarily will have to
16 include 38 or 39. And therefore if you take that into account, your outcome, your
17 result well may be that they get the symbol. But that very matter is pending before the
18 Supreme Court over the disqualification of these 39. So please stay your hands and let the
19 Supreme Court decide. Now I personally feel that was not countered. It was not antithetical to
20 Your Lordships order of stay. After all Election Commission has also to decide on accordance
21 with law. The result was...I mean this is again sad part of it. The result was the Commission
22 says I am not going to bother about the organization. These 39 members are majority therefore
23 they get the symbol. In fact Your Lordships order was misused.

24

25 **JUSTICE SHAH:** But we are not considering the validity of the order passed for
26 the Election Commission .

27

28 **MR. SIBAL:** No. I am not asking My Lords, I am merely saying - the
29 Commissioner said, the High Court said, Supreme Court has said - No Stay. So they have to
30 decide.

31

32 **JUSTICE SHAH:** That has to be tested in those proceedings no?

33

34 **MR. SIBAL:** That's right. But kindly see the consequences. Kindly see how we are hurt. That
35 is why the reference what is the scope of powers of the Election Commission in respect of
36 determination split within the party. I'm not... in Your Lordships passed rightly so according
37 to me that let the Commission -- but the Commission doesn't have to, can't disregard basic

1 principles that you are giving symbol to a party on the strength of those 39 whose
2 disqualifications are pending.

3

4 **CHIEF JUSTICE CHANDRACHUD:** And that issue spending before this..

5

6 **MR. SIBAL:** That's pending and I said to them please stay your hands. They said no
7 but Supreme Court has said, we have to go on. That's how the Symbol is given. See that
8 injustice caused to us. I just make the point My Lords and not to move further. And then the
9 last thing. My Lords, kindly read now paragraph 115, then I'm done.

10

11 **CHIEF JUSTICE CHANDRACHUD:** Para?

12

13 **MR. SIBAL:** 115 of the Symbol's Order. 15 of the Symbol's Order. I am sorry, 15, Statute
14 compilation. Sorry. Page 91, it starts, and paragraph 15, is at page
15 103. PDF 103. It says, when...Lordships have it? Where the Commission is satisfied on
16 information in its possession that there are rival sections or groups of a recognized political
17 party each of whom claims to be that party. I will just stop here. So the jurisdiction of the
18 Commission starts when there is a claim that there are rival groups within the party. And it
19 has, it must have evidence in its possession, information in its possession, and must be
20 satisfied with the information that is in their possession that they are rival groups.
21 Now Your Lordships have seen the correspondence 21st June onwards. There is not a whisper
22 of any rival group, not a whisper. It's only the 39 sitting there.

23

24 **CHIEF JUSTICE CHANDRACHUD:** So, this, just to rephrase it. According to you there
25 was no information in the possession of the EC to show that there are rival groups and it has
26 to be satisfied.

27

28 **MR. SIBAL:** Yes. Now My Lords the petition...

29

30 **CHIEF JUSTICE CHANDRACHUD:** Can you rephrase your submissions Mr. Sibal, again
31 on this point?

32

33 **MR. SIBAL:** I am saying My Lords, the jurisdiction of that Commission will commence when
34 the Commission has in it's possession information on which it is satisfied that there are two
35 rival factions within a political party.

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37 **CHIEF JUSTICE CHANDRACHUD:** Right. And in this case what is the...

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MR. SIBAL: Now My Lords kindly see, therefore in that context of this Tenth Schedule, now just that proposition, in the context of the Tenth Schedule the only way you can get a Symbol is when there are two rival factions within the party. It has nothing to do with the Tenth Schedule.

CHIEF JUSTICE CHANDRACHUD: No, this has nothing to do with the Tenth Schedule.

JUSTICE NARASIMHA: Correct.

MR. SIBAL: Right? So, there has to be a faction emerging, take for example majority of the people in the Tenth schedule, let's ask with Thackeray. Let's assume all 55 are with Thackeray. Then also para 15, can be invoked.

JUSTICE NARASIMHA: Why somebody making an application?

CHIEF JUSTICE CHANDRACHUD: Because 15 refers to the party.

MR. SIBAL: That's right. So, the split has to...

CHIEF JUSTICE CHANDRACHUD: [UNCLEAR]

MR. SIBAL: I am agreeing. I saying exactly, the split has to take place within the party.

CHIEF JUSTICE CHANDRACHUD: Correct.

MR. SIBAL: That split did not take place on 21st June or immediately thereafter. Never took place. A petition is filed on the 19th of July.

JUSTICE NARASIMHA: Correct, correct. 19th of July.

MR. SIBAL: Just note that My Lords.

JUSTICE NARASIMHA: 19th of July. Absolutely.

MR. SIBAL: Correct? And on the 18th of July, it is alleged what is submitted along with the petition is minutes of meetings.

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MR. SIBAL: Minutes of Meetings. Will My Lords allow me to just place before Your Lordships. Just give it to My Lord please. We will give you the copy. This is on 18th July. The matter was fixed in this court on 20th July. The petitions, all petitions were to come up for direction. So from 21st June to the 18th July nothing happened. No faction, no claim for faction. Just give it to My Lords, please. Now My Lords, on 18th July, just kindly come to Page 7 of this compilation.

JUSTICE NARASIMHA: What is this Mr. Sibal? Minutes of meeting of?

MR. SIBAL: Minutes of meeting. Translation of the Pratinidhi Sabha. Page 7.

CHIEF JUSTICE CHANDRACHUD: Where is the Marathi start? Just I can read to English.

MR. SIBAL: Reverse to that is Marathi My Lords.

CHIEF JUSTICE CHANDRACHUD: What page?

MR. SIBAL: It says on top page 48. Three pages before that My Lords, the English version. Now, what do you have here? Your Lordships must take it there is no summons for any meeting. No venue for any meeting. No time for any meeting. No signatures obtained of at the meeting. Nothing. Just note that My Lords. No time, no place, no... date is given 18th July, no summons. I suppose this is a meeting of the Pratinidhi Sabha of the Shiv Sena. So it must be known to everybody where the meeting is going to be. Summons must be sent like we sent to them, right? What they do is they give a translation of the minutes of the Pratinidhi Sabha, and in the minutes they show some resolutions have been passed. Minutes as Your Lordships will know is the after meeting. It can't be before the meeting. Right? It has to be after the meeting.

So the minutes of the Pratinidhi Sabha and there are also minutes of the Karyakarini. That Your Lordship will see at Page 10. Again minutes. Again when it is held, what time is it, where it is held? Yes, they say it happened. It is held in Bombay. I guess My Lords some place in Bombay, they must have known. Now My Lords, so two minutes are placed before the Election Commission. These two minutes.

JUSTICE KOHLI: Subsequent minutes also of what date?

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MR. SIBAL: 27th July. That's even more interesting. My Lord just note 27th July. And then go back to the petition My Lords that they filed. It's very interesting. These are the two documents that they placed, nothing more. Plus, of course, appointment of people, we are not into that. Convenience Volume two. Yes. Kindly see PDF Page 699, Paragraph.... sorry, 698. 698 (XXVI)

CHIEF JUSTICE CHANDRACHUD: PDF Page?

MR. SIBAL: PDF page 698, this petition is filed on the 19th of July. Just mark that My Lords. This averment is made, while the petition is filed on 19th July.

JUSTICE SHAH: What is the page number?

MR. SIBAL: 698. PDF 698. And just above that (xxv), at 697, the last two lines of that page, if Your Lordship has that?

JUSTICE KOHLI: What is this document that you have pointed out?

MR. SIBAL: It says, further a meeting of the Pratinidhi Sabha, was convened on 18th of July, Your Lordship has that sentence? Where by the petitioner Eknath Shinde was appointed a senior leader. And Shiv Sena Mukhya Neta main leader. Minutes of the meeting of the Pratinidhi Sabha. So they say minutes of the meeting are there. No meeting, no place where it was held, who was some...nothing, nothing. Right. Then come to the next para. A meeting of the Rashtriya Karyakarini was also convened, whereby the Rashtriya Karyakarini has affirmed, now please note this, has affirmed the election of the petitioner as the Shiv Sena senior leader and Shiv Sena Mukhya Neta. Now, this is on 19th July and the minutes of that are 27th July. I showed that to Your Lordships. This petition is filed on 19th of July, it says that the petitioner was elected as a senior leader and senior Mukhya Neta, the minutes are dated 27th of July. This has what they filed My Lords. So, 19th July they could not have known, what would happen on 27th of July. And that also in the minutes of meeting. These are the only two documents with the Commission. That's why I read paragraph 15. These are the two documents with the Commission, in respect of to prove that there are two factions arising. And second document was submitted during the course of hearing. But please My Lords, I just don't want to go into that. I'm just interpreting 15. This is the documents in their possession, information on the basis of which the

1 Election Commission is satisfied that there are two factions within the party. So minutes of
2 meeting.

3

4 **CHIEF JUSTICE CHANDRACHUD:** Where are the minutes of meeting here in this
5 compilation, PDF page?

6

7 **MR. SIBAL:** Yes, we've just shown that. Here it's not there. That's why we...

8

9 **JUSTICE KOHLI:** No, it's not have annexure.

10

11 **MR. SIBAL:** That's why we gave that to Your Lordships.

12

13 **JUSTICE KOHLI:** Mr. Sibal, but that's not an annexure with the petition. Are we right?

14

15 **MR. SIBAL:** Not here. It's not here My Lords, that's why I gave Your Lordships.

16

17 **JUSTICE KOHLI:** No, no.

18

19 **MR. SIBAL:** Let me hear My Lord.

20

21 **JUSTICE KOHLI:** What you have read of this para 26. Para 25 refers to annexure P-5, which
22 is the minutes of the meeting of the petition.

23

24 **MR. SIBAL:** I will put it My Lords, that's why...

25

26 **JUSTICE KOHLI:** We don't have. But the petition also doesn't enclose it as what we are
27 trying to understand.

28

29 **MR. SIBAL:** Yes, yes. That was handed over My Lords. It doesn't say. That's why I, we gave
30 it to Your Lordships. Now it says the 27th. This petition was filed on 29th. P-5 they enclosed.
31 So My Lords these are the two documents with the Commission. Now if you read read
32 paragraph 15, this represents a two factions in the party. The minutes of meeting. That's how
33 the Elections Commission, has got the jurisdiction. According to them. And this is the final
34 order. This is, kindly just look at it. I can understand if the Commission says lead evidence, I
35 can understand please prove your case, on this basis a final order is passed. Which is the
36 subject matter of challenge in the other proceeding. That's how they got the Symbol. So what
37 does the Governor do? What does the Election Commission do? And this is the evidence and

1 then we have to, we must ensure, we must trust that all institutional authorities function in
2 accordance with the law. And if this kind of manipulation takes place in the processes of
3 institutional decision making, where we go, where we will go, I don't know.

4
5 **MR. SIBAL:** I am done My Lords. I just want to make one statement I stand here. Not for
6 this case. I may lose it, I may win it. That's another matter. But I stand here My Lords for the
7 protection of what we so....what is so close to our heart. Institutional integrity and to ensure
8 that processes of constitutional processes survive. Otherwise if Your Lordships endorse such
9 a position it will be the death-knell of what we have cherished since 1950. Thank you.

10
11 **CHIEF JUSTICE CHANDRACHUD:** Thank you Mr. Sibal. Yes Dr. Singhvi.

12
13 **DR. SINGHVI:** I would, we should take Your Lordships principally to some very interesting
14 underlying juristic principles. Your Lordships have now seen the facts for two days. I'm not
15 going to repeat. Juristic principles which should impel Your Lordships to decide this matter
16 here and not consider the various options or suggestions of sending it back to the Speaker.
17 That's going to be the bulk of my argument. But My Lords I want to start with where we are
18 ending up with. I was here the whole morning and I heard -- the very important question which
19 fell from the bench and the Honourable Chief Justice in particular about the role of the
20 Governor. And I'm not going to repeat anything. I'm going to try and give a different facet. My
21 Lords this is a very unique and a strange case and I would say, from this side, a sorry case
22 where Your Lordships has double whammies and triple whammies. Let me explain how. My
23 Lords put the question of the Governor's role. And in one sentence the question is that if Your
24 Lordships found....if the Governor found that there is something to be decided by way of
25 unstable majorities, even if you exclude 39 why can't he go and have a trust vote etc. or a
26 decision on the true majorities in the confidence of the House. My Lords, the first thing when
27 you start on that query has been perhaps for us not given sufficient weight. And the first thing
28 is that Your Lordships fundamental rock solid principle of interpretation of Constitution and
29 statutes is that is intentionally a constituent assembly in its amending power of the
30 Constitution deletes something, Your Lordship gives full effect and scope to the intendment
31 behind that deletion. That is My Lord axiomatic. It is obvious that a contract, or a statute,
32 much less a constitutional amendment, where Your Lordship's intention is to give effect to
33 that intention.

34
35 **CHIEF JUSTICE CHANDRACHUD:** So Para 3 has been deleted.

1 **DR. SINGHVI:** Now My Lords, Para 3 deletion is not a small thing. There are debates, there
2 is a SOR. The constituent Assembly.... the constituent Parliament in its constituent capacity
3 said, look, we must delete it. Why this case is bizarre is that there are My Lords three, at least
4 two circumventions of the deletion directly by high constitutional authorities. Circumvention,
5 one is clearly this way or that way. Whether the Governor can do it or not do it Your Lordship
6 will decide separately. But clearly and specifically, the Governor is acting on a presumption of
7 a split in whatever way he is acting. Now as the Governor most of all is supposed to know the
8 Constitution. All of us are supposed to know the Constitution and ignorance in the law is no
9 excuse much less ignorance of the Constitution. There is no system and I'm not talking of Your
10 Lordships' narrower question of trust vote, non-trust vote. There is no basis on
11 which Your Lordships can reconcile and harmonize the factual invitation and oath giving on
12 the one hand with the legal deletion of Para 3. That's my proposition.

13

14 **DR. SINGHVI:** The two are irreconcilable. And My Lords, that is a very major constitutional
15 sin underlying this whole supposition and context.

16 The second makes this even more bizarre. There is no counterpart to curious and curiouser. It
17 can't be bizarre and bizarre. My Lords there is a direct finding in not one but many paras of
18 the EC order that this is a split. I'm not asking Your Lordships, Justice Shah is right. We have
19 not done an appeal on that. That's not the point that I am arguing. I am on the context My
20 Lords. People are here going around merely on the assumption of split then Your Lordship
21 might have as well wind up the Tenth Schedule, the Constitutional Amendment, the deletion.
22 What's the point of it? I'll give the paras, more than four paras or the three paras in the EC.
23 Now My Lords therefore, Your Lordships and those cases don't have to be given to Your
24 Lordships of elementary forms of interpretation that if I delete something, Your Lordship will
25 effect to that deletion. I'll supply them, not necessary to do it. The second answer or the second
26 response in the larger context of that query. So this is the first response. The second is Your
27 Lordships decides cases not that your Lordships decides the narrowest of narrow issue, Your
28 Lordships decides on the whole context but Your Lordships doesn't decide beyond the context
29 of a case. Your Lordships must be very careful, otherwise, the things of [UNCLEAR] and all
30 that will come in and Your Lordships doesn't have time to spend on hypothetical questions.
31 But let us see the context. The context of this case can be divided into broadly two or three,
32 three or four categories. And that context makes it clear that Your Lordships need not be
33 bothered about the Governor coming into the picture at all. The first phase of this context is,
34 the expedient of giving a disabling Notice. I call it a Disabling Notice before I intend it to defect,
35 now that will be awaiting Your Lordships decision on Nabam. So phase one or part one of this
36 context is Disabling Notice, Your Lordship must decide on Nabam. That's the whole argument
37 we made for two days. But clearly the context is that step one. And if that is wrong then a lot

1 of things fall down. And that is wrong in case Your Lordships doesn't agree with the literal text
2 of Nabam. The second part is that we are also forgetting repeatedly the object of the Tenth
3 Schedule. More than any other jurisprudence in this part subject of Constitutional law is our
4 cases again and again talking of two things. The evil prior to 84, the object of plugging that evil,
5 the mischief rule. And what Your Lordship is doing for the Tenth Schedule?

6 The third is that if Your Lordships accepts that the basic object of the Tenth Schedule is a
7 constitutional sin being precluded or stopped or reduced, then 2-1 (A) or 2-1 (B), as the case
8 may be, has to be decided first. It's logically prior to everything. Not only is it prior in terms of
9 serial number but conceptually it has to be logically prior to any decision of any kind in any
10 case. I'm talking of concept. I'm not talking of a delay by an individual Speaker. My Lords
11 a Kerala Speaker will decide tomorrow, Nagaland Speaker may take six months
12 or Manipur Speaker will take, that's it not the point. Conceptually the logically prior decision
13 has to be Para 2, not a Governor's intervention collaterally in any which way. That's the
14 structure of the Tenth Schedule and that scheme and structure must be endorsed and
15 strengthened by Your Lordships *inter alia* by not accepting any collateral incursion
16 horizontally, sideways by a Governor. While that 2 (1), is still pending.

17

18 **DR. SINGHVI:** The other aspect of this My Lords, which has to be given a lot of weight is
19 apart from what we just talked about the trust vote, people tend to forget that in every almost
20 every assembly there is very interesting rule. You cannot bring repetitive no-confidence
21 motions also. Your Lordships knows six months. So I bring a no-confidence against you. I
22 loose it. I can't come after next and say - I have no-confidence against you. So what is the next
23 facet of this is the processes within the Parliament and assembly have to be allowed to work
24 themselves out first before external intervention and one of the important processes is to
25 notify a confidence or a lack of confidence. If Your Lordship is so careful about not even
26 allowing repetitive bites at the apple to destabilize the Government, Your Lordship will allow
27 an external incursion without even a single no-confidence motion. I'm not repeating well, as
28 I'm giving in addition, larger context. Not even a attempt. As they say the proof of the pudding
29 is in the eating. If you have the confidence, move the no-confidence. It is your lack of
30 confidence which makes you not move the no confidence. Because you know how the no-
31 confidence will be met. And may the best man win. If you have the guts and the courage do it.
32 Whatever will happen, will happen. That's the process of democracy on the floor. Incidentally
33 My Lord, I have done the math. That chart I mean is it not that Your Lordship will only ask
34 them to show the material. We are having a preliminary objection that the Governor doesn't
35 come into irrespective of the material, even if he has seen the material. I am now on concept.
36 I'm on juristic principle. There is no role of the Governor till now till whatever I've said 2(1)
37 etc. Process. No confidence, no role for the Governor. It's a second separate question on facts,

1 what the Governor saw or did not see. But he had no locus to see or not to see. So what's the
2 point of going into that down that path. The Governor had no locus at that stage to see or not
3 to see. It would really amount to a very strange thing. Governors are My Lords
4 now...obviously [UNCLEAR] debates of Mr. Ambedkar and now this is a vast difference. But
5 Governors are also creatures of political connection. The Governor would say, Well, I see a
6 group of people here. Why are you bothered about moving a no confidence. Come to me. We
7 will see something. There's no need for us. The assembly gets substituted. You will be
8 circumventing and short circuiting the entire process with no confidence on the floor. Now
9 just having given that answer, let me turn to my larger point on which I was really going to
10 address Your Lordships. I'll give Your Lordships just bullet facets. And then I will give Your
11 Lordship the material underlying. The juristic principles as to why Your Lordship should deal
12 with the matter here. Now I understand that it is easier not to deal with it here. It is also equally
13 possible not to deal with it here. There is a Speaker. My Lord have heard enough facts.
14 So Lordship we'll take those facts are given. I will touch upon the facts here and there but
15 mostly know. In the event that the facts in the context suit Your Lordships discretion on this
16 issue should Your Lordships in law juristically refer it or should you hear it. Is my respectful
17 submission. There are four or five legal facets, there I will give the case law. The first is
18 My Lords that there were two.

19

20 **DR. SINGHVI:** One negative and one positive order by this Hon'ble Supreme court that
21 should be remembered. In whichever way it is worded, the negative, I'll call it injunction on
22 27-06-2022, was that by the expedient of extending time, the Speaker was effectively de facto
23 could not pronounce on disqualification. It is nothing but an injunction in substance.

24

25 **CHIEF JUSTICE CHANDRACHUD:** Till 12th.

26

27 **DR. SINGHVI:** Till 12th, correct. Then events took over My Lords, the events took over but
28 My Lords is right, till 12th. Therefore, My lords, let us look at it because Your Lordship is
29 always a court of substance. We can camouflage in so many forms. But Your
30 Lordships ultimately see this. In substance it's a judicial injunctive interim
31 relief qua a Speaker's future action under the Tenth Schedule. That is the correct way of
32 putting it. It is a Judicial Interim intervention. It's a negative injunction. And the second was
33 a positive injunction, if I may call it or an order of 29th, allowing the trust vote to be held. So
34 not injuncting the second day, injuncting the first day. So there is a negative judicial
35 intervention, followed by an affirmative judicial intervention. My Lords I am not making any
36 value judgment. Your Lordships would have heard it next week, two weeks later. Who knows,
37 everything could have been reversed. I mean, I'm not saying that at all. I'm not saying right or

1 wrong. But I'm saying one thing is clear that the formation of a Government...I'm making a
2 neutral statement. I'm not as allocating... is clearly the direct and inevitable result of the
3 combination of these two orders. Your Lordships would have heard it next week and upheld
4 it, so Your Lordships will be right. If Your Lordships will reversed it, Your Lordships will be
5 wrong in the interim then. That's not the point, the point is, let us not see this case as the
6 abstract in an ivory tower unrealistic approach. Let us see it in reality. We have to smell the
7 constitutional coffee, if I may say so. The reality is this My Lords. That absent these two
8 negative and positive orders, Your Lordships can not have this consequence of a change or a
9 new Government. This will have correctly an effect on Your Lordship's needing to decide this
10 here.

11

12 Then My lords the second aspect, I am only giving the legal bullets, I cite the case law later.
13 The second legal aspect, the juristic principle is, the language of that order. Now, we all say
14 this casually, sometimes Your Lordships is also made to say it casually but these are terms of
15 art. Your Lordships have used them for decades and centuries in law. And these common law
16 terms of art have to be given effect to. Don't go to the page just note Your Lordship's order and
17 29th read like this one line, "subject to the final outcome of the instant writ petition as well as
18 the writ petitions refer to above".

19

20 That's Your Lordship's order. This is my second facet. subject to the final outcome of the
21 instant writ petition as well as the writ petitions referred to above which means the whole
22 batch of writ petitions. By then many petitions had come.

23

24 What is the meaning of this frequently used phrase? And normally the phrase doesn't come
25 up. Your Lordships has some very, forget this case for just one minute. Your Lordships
26 will notice some very interesting examples in building law and construction. My Lords the first
27 time Your Lordships ordered demolition. The first time, not now, of a 20 story structure was,
28 almost 15 years ago. Ironically, I think the second was also from Lucknow. Both are Lucknow
29 examples which came here. Your Lordships had passed only subject to, construction will go
30 on, ultimately Your Lordships held against. Your Lordships ordered demolition. Demolition
31 in that sense, with people living and concrete and mortar in the building is much more
32 irreversible than merely a political thicket or a scrambled political egg created from 22 to now.
33 Now I come to what subject to means. The object of this phrase. Subject to, are two and three
34 folds of this. One, if Your Lordships well as speaks in REM not just bilaterally between the
35 parties, Your Lordships speaks to the whole system, to the whole world. And second, Your
36 Lordships is giving a fair warning that everything which is happening after this is subject to,
37 but on your risk and cost. And thirdly your risk and cost means all consequences, equities,

1 vested right, all status quo you create each day after that, is at your risk and cost. We are
2 warning you. Don't blame us later. That's the meaning of this. And I'll cite a case presently on
3 that. Therefore the moment, either Lordship doesn't say it, the moment Your Lordship says
4 that, no one can come and plead equities, vested rights, event, scrambled egg, irreversibly, etc.,
5 etc. Because Your Lordships takes into account this in advance. If Your Lordships passes
6 subject to, today it is different from passing in 2022 June.

7 The fourth facet of law, which I will develop in a moment is...

8

9 **JUSTICE KOHLI:** Third.

10

11 **DR. SINGHVI:** Third. I'm sorry. This is now it is called pointillism. It's not a bad technique,
12 it makes it for specificity and certain amount of clarity. It may not always be, it is liable for
13 some intellectual property protection also My Lords.

14

15 **JUSTICE NARASIMHA:** [UNCLEAR] anything you know you are going.

16

17 **DR. SINGHVI:** Now My Lords the third one, is Para 110 of Kihoto, which Your Lordships
18 has seen right at the beginning of the Nabam Rebia argument, but Your Lordships may kindly
19 be reminded of that. Just turn to 110. The first compilation PDF Page
20 74, judgment compilation. Basically the very strong Constitution Bench injunction when the
21 jurisprudence of Tenth Schedule was starting,. Kihoto is virtually the first, I mean there are
22 some cases, certainly the first Constitution Bench. And the most important Tenth Schedule
23 judgment is that time is. They started this jurisprudence with this great warning and
24 mandate. 74, the Kihoto starts at 134. At 134. Para 110. In view of the limited scope of judicial
25 review...May I read it?

26

27 **CHIEF JUSTICE CHANDRACHUD:** Yes.

28

29 **DR. SINGHVI:** 'In view of the limited scope of judicial review that is available on account of
30 the finality Clause in Para 6.' So Your Lordship gives a basis for it - finality clause in Para
31 6. 'and also having regard to the constitutional intendment and the status of the repository of
32 the adjudicatory power Speaker Chairman, judicial Review cannot be available' - mark these
33 words 'cannot'. Constitute mentioned saying - 'cannot be available at a stage prior to the
34 making of a decision by the Speaker Chairman and a qui tam action would not be permissible
35 juristically threshold nor would interference be permissible at an interlocutory stage of the
36 proceedings. Exception will however, have to be made in respect of cases where
37 disqualification or suspension is imposed during the pendency of the proceedings and such

1 disqualification or suspension is likely to have grave immediate and irreversible repercussions
2 and consequences.'

3 I will just pause here. It has some very startling consequences. Your Lordship should read this,
4 it's a Constitution Bench. It makes only one exception when I, the Speaker by an interim order
5 disqualify you. That has happened hardly ever. My Lords this happened once or twice, but it
6 is not really happening in the Tenth Schedule. Maybe that will be a new technique adopted in
7 the future. I don't know, but today hardly any case.

8

9 **JUSTICE SHAH :** You are giving the idea.

10

11 **DR. SINGHVI:** Kihoto gave that idea. Kihoto has given the idea already, but that's why I am
12 saying from 92 till now it has not happened despite Kihoto's idea. I mean, may have happened
13 one or two cases, but hardly ever happens. Yes. Kuldeep Bishnoi Case et cetera. But in that
14 exception apart it is per se jurisdictionally bad. So therefore a perceived error of the Speaker's
15 conduct will not justify your interlocutory application. That's important. Let us assume that
16 the Speaker is wrong. Nobody is conceding that. Let us assume that the Speaker is grievously
17 wrong. That will not justify circumventing of a Constitution Bench by saying, normally, we will
18 not interfere, but here, by a matter of degree I opine that he is grievously wrong,
19 therefore we will interfere. Let us take an example. Your Lordship have applied that example
20 for decades. There is not something strange at all. Kihoto was occurring to be saying the
21 obvious in a much more important category. Your Lordship [UNCLEAR] for lesser category.
22 Your Lordship finds genuine problems in a election process. When an election process starts.
23 Your Lordships find genuine cases. My nomination rejected badly. I was stopped at the door
24 by a guard. I couldn't enter. Somebody obstructed me. I couldn't file in time. This man is
25 rejected on a comma. Full stop, wrong ink. They are very compelling argument. Your Lordship
26 says - come after the election in 99% cases, unless there's a special statute because you don't
27 interdict an autonomous self-contained scheme of a code there to let elections go on. Here a
28 much higher constitutional authority to allow unfettered proceeding further. There are many
29 more examples Your Lordship has. Therefore My Lords the position which by a combination
30 of the positive and the negative order inevitably led to the change of Government. Possibly was
31 also constitutionally wrong. Had Your Lordships had occasion to discuss it in the two weeks
32 following that, Your Lordships would have rectified it. Today My Lords it cannot be a bar
33 merely because of passage of time, because this is on the face of it contrary to Your Lordships'
34 Constitution Bench. And My Lords, error of the Speakers was irrelevant. In fact, he hardly
35 had opportunity to commit many errors, except perhaps as a two day notice that would have
36 been decided. I've cited My Lords, in two cases. I cited in the Nabam Rebia, where three day
37 notices were sufficient. Yediyurappa and...Sorry Yediyurappa was the other was Nayak and

1 Balasasaheb Patil. Sorry, Shrimant Patil. Three judges, three days. Sufficient. When the rule
2 said 7 days. I hope My Lord remembers that was in Nabam Rebia I had cited those
3 cases to Your Lordship. Rules said seven days, three days' notice. Two judge bench
4 in Ravi Nayak said okay. Two judge Bench in Yediyurappa doubted it. Three judge bench
5 subsequently affirmed the Nayak principle despite noting and citing Yediyurappa. Then My
6 Lords, the fourth facet is that.

7

8 **DR. SINGHVI:** The more important and the more general principle, but equally important,
9 that Your Lordships respects coequal organs. There is a whole other line of cases. When I come
10 to that My lords, I will cite some of them, where Your Lordships is very careful because Your
11 Lordships now doesn't think of an individual Speaker, but of the institution. Where Your
12 Lordships doesn't enter into coequal branches unless there are compelling reasons. So respect
13 between and mutual balance between judicial and legislative organs is the other legal principle
14 which has to be kept in mind. And all this goes towards making the non-interference principle
15 at that interlocutory stage.

16

17 Then My Lords, the other facet which Your Lordships in case law has used is, there may be a
18 rare, rarest of rare exceptional situation where Your Lordships passes interim order. Not in
19 this case. No case. I am saying generally. Now, I am not going to Tenth Schedule. To maintain
20 a *status quo*. But Your lordship is very, very sensitive and cautious and careful to create a new
21 status quo by an interim order. Maintaining a *status quo* and leading to the creation of a new
22 status quo are two My Lords, different principles of law looked at and dealt with differently by
23 case law. Here clearly a new status quo was created. The fifth principal My Lords is *Actus*
24 *Curiae*. Obviously *actus curiae* arises in the event that Your Lordships find that I am partially
25 right or fully right. Not otherwise. But if Your Lordship finds then My Lords, Your Lordships
26 reverses the most intertwined situations because Your Lordship never allows the act of court
27 to do any harm. *Actus Curiae Neminem Gravabit*. The 6th facet is My Lords...

28

29 **JUSTICE KOHLI:** Seven.

30

31 **DR. SINGHVI:**that if there is a right made out. I am sorry. My apologies.

32

33 **CHIEF JUSTICE CHANDRACHUD:** No, no, six, six. Next.

34

35 **DR. SINGHVI:** Actually I dictated this later on, so my numbering is also in a, b, c, d, e, f, g.
36 Because the main submissions are below in 1, 2, 3 so I don't have those numbers. But My
37 Lords, Your Lordships is right. I'll say next, Your Lordships will have your own numbering.

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JUSTICE NARASIMHA: Yes.

DR. SINGHVI: What Your Lordships, I am sorry. This is not the way I do using Latin, Your Lordships has warned us in recent judgments against using Latin, but these are basic principles. The other one My Lords is *Ubi Jus Ibi Remedium*. If Your Lordship finds that I have a right in this case, a constitutional right, made out by all this which we have been arguing then My Lords, at the end of that right to say that I am remedy-less. The remedy, which is effective and real, is only a reversal of the status quo ante, as would stand immediately prior to the consequence of those two orders in June. The consequence being there change of status quo on 4th July. 30th June is the swearing in. 30th June is the swearing in, I'm sorry. Not 4th July, 30th June. So it must be a status quo ante, in the event that Your Lordship applies the principle, obviously, *Ubi Jus Ibi Remidium* does not arrive unless there is *Ubi Jus* used. If I don't have the use, I don't have the remedium. But on the assumptions that I have then My Lords, Your Lordship will not be told it's a fait accompli.

CHIEF JUSTICE CHANDRACHUD: So what would then be the consequence, Dr. Singhvi. What does the court then...logically what should be the directions of the court?

DR. SINGHVI: Logically the direction is that that particular act of swearing in is wrong and Your Lordships will have the whole thing done again. Your Lordships could then give you a substantive answer straightaway.

CHIEF JUSTICE CHANDRACHUD: Yes, what will be a substantive direction there? Just to...

DR. SINGHVI: I'll give Your Lordships a substantive direction. Of course My Lords, I will develop the law, which has yet to come. In the event that is correct, and that is the majesty of the Law. That is what Your Lordship means when our Lordship demolishes 25 floor buildings and the message goes with Your Lordship is ultimately establishing the supremacy of the law. Supremacy of the law by no other means except by result. By actual *de facto* on the ground result. The rest remains My Lords, paper, and words. It would be My Lords a reversal of that oath. I'm being very My Lords formal and constitutionally proper. A direction.

JUSTICE SHAH: Oath is on third.

1 **DR. SINGHVI:** No that's.... I thought 3rd My Lords, it is 30th. I also thought 3rd, that's why
2 I said 3rd. Apparently, it's on 30th.

3

4 **JUSTICE SHAH:** Because on 29th I did....

5

6 **DR. SINGHVI:** That's right. That's correct.

7

8 **JUSTICE SHAH:** [UNCLEAR] 29th evening.

9

10 **DR. SINGHVI:** That's correct. Doesn't matter 3rd or 30th, but reversal of the day before that.
11 Second My Lords, for the purity of the process Your Lordships will.... there is still a Deputy
12 Speaker should decide what he would have decided, but for Your Lordships injunction.
13 Because Your Lordship is now counting the *status quo ante* on the but-for test. But for these
14 two orders, what would have happened. Obviously, only this would have happened. There
15 would have been no swearing in, and there would be a decision. My Lords, it sounds sometimes
16 difficult, but imagine.

17

18 **JUSTICE SHAH:** When you are on the interim injunction not granting interim injunction
19 on 29th and to see that the status quo ante is maintained, it is only with respect to the floor
20 test on 30th....

21

22 **DR. SINGHVI:** And he resigned. That's what Your Lordship is asking. No, no....

23

24 **JUSTICE SHAH:** No, no, one minute. You can read the... On 30th... On 29th he resigned.
25 The order dated 29th not granting injunction was very clear that the floor test on so and so to
26 be subject to the... floor test on 30th would be subject to the ultimate outcome. Correct? Now,
27 in that case, correct, where is the question of status quo ante?

28

29 **DR. SINGHVI:** Yes. I am very grateful.

30

31 **JUSTICE SHAH:** On the basis of the 29th injunction on not granting injunction.

32

33 **DR. SINGHVI:** I'm very grateful for your query. Your Lordship's put in a different way
34 earlier. I must answer it again. It's very opportune at this moment. My Lords, there are two
35 answers. One answer I gave three minutes ago. My Lords, Your Lordships, Court is a court
36 of substance. Always. Not a form. Let me develop it. I'm answering only My Lord's query.
37 Paramount is substance. The heart of the matter. It is true that on that day on 29th nobody

1 would know what would politically happen on 30th. And it is true that the technical word used
2 is trust vote. But My Lords what was allowed to go on was a test on the floor which is inevitable
3 if 39 vote against the one and only foregone conclusion instead of suffering the humiliation of
4 a vote is to give up in advance. I mean My Lords we are in a real world. There is no
5 arithmetic, no science, no physics, which can change the result on 30th. If these people who
6 comprise this so the floor the well, I argued the matter on 29th and in the earlier dates. One of
7 the main arguments was that the moment Your Lordship permits these people to vote... we
8 were seeking an injunction. Where how can there be a trust vote with a tainted... how can you
9 have a swimming pool with some part of it tainted with poison?

10

11 **JUSTICE SHAH:** No, therefore your submission seems to be...

12

13 **DR. SINGHVI:** That is not accepted.

14

15 **JUSTICE SHAH:** That not granting the injunction, correct, in fact had facilitated those 39.

16

17 **DR. SINGHVI:** No, it was an additional argument My Lord. I am very grateful. One
18 argument was that this trust vote is My Lords completely unreal and futile, because you have
19 not excluded the tainted fruit.

20

21 **CHIEF JUSTICE CHANDRACHUD:** On the other hand...

22

23 **DR. SINGHVI:** The other argument was My Lords, that if Your Lordship has
24 stayed that, stay this also. That is a more important argument.

25

26 **CHIEF JUSTICE CHANDRACHUD:** The flip side would have been...

27

28 **DR. SINGHVI:** Stay both.

29

30 **CHIEF JUSTICE CHANDRACHUD:** Dr. Singhvi, if you had faced the trust vote on the
31 30th, these are open votes.

32

33 **DR. SINGHVI:** Yes, yes.

34

35 **CHIEF JUSTICE CHANDRACHUD:** Right? Because you have to because that is the whole
36 principle of the Whip. If you had faced the trust vote and lost then it would have been clear as

1 to whether these 39 people made a difference, how they voted, and whether that made a
2 difference to the ultimate trust vote.

3

4 **DR. SINGHVI:** So we did not do it. It's a given fact. I can't change it.

5

6 **CHIEF JUSTICE CHANDRACHUD:** Right, right.

7

8 **DR. SINGHVI:** Right My Lords?

9

10 **CHIEF JUSTICE CHANDRACHUD:** Right.

11

12 **DR. SINGHVI:** I'm answering My Lords, let me answer this also. Let me....

13

14 **CHIEF JUSTICE CHANDRACHUD:** And the voting pattern would then determine as to
15 whether these 39 who are otherwise facing disqualification motions, whether they affected the
16 trust vote or otherwise.

17

18 **DR. SINGHVI:** I appreciate.

19

20 **CHIEF JUSTICE CHANDRACHUD:** If you had lost the trust vote only because of these 39
21 then you have absolutely a plausible point that look, these disqualification... if they get if they
22 get disqualified, then I win the trust vote. Isn't it?

23

24 **DR. SINGHVI:** Therefore My Lords, let me... so the first part is the conceptual.

25

26 **CHIEF JUSTICE CHANDRACHUD:** I mean the area, the area is not free from doubt. The
27 reason I am putting it to you is because there is a constitutional question in our mind. That's
28 the...

29

30 **DR. SINGHVI:** No, no, I understand. I hear Your Lordships loud and clear. Because certain
31 given facts My Lords, we can't argue about. The fact of the matter is nothing happened on
32 30th . The man did not My Lords go to the trust vote. No doubt about it. Now My Lords, the
33 first conceptual answer is we are now My Lords on, what I have been saying and Mr. Sibal has
34 been saying earlier, were legal errors, whether they were or not Your Lordship will decide on
35 22nd, 23rd orders. But the argument regarding 29th order was that either you should not have
36 stayed that. But if you stayed that stay both. You can't stay that and allow this vote to go on.

37

1 **CHIEF JUSTICE CHANDRACHUD:** Right.

2

3 **DR. SINGHVI:** That's the first point to be remembered.

4

5 **CHIEF JUSTICE CHANDRACHUD:** If you have stayed the disqualification then stay the
6 trust vote also.

7

8 **DR. SINGHVI:** It's very unfair and uneven and non-level. My Lords, if Your Lordships is
9 hearing the matter next week, I believe it is on a Monday next it will stayed, then My Lords
10 both could have been end afterwards. Your Lordships in the Karnataka late night matter we
11 did your Lordships said, not today, next morning. It will happen at so time. The reverse is also
12 true. Don't have it there have it after four days.

13

14 **CHIEF JUSTICE CHANDRACHUD:** So your argument to therefore restate your...

15

16 **DR. SINGHVI:** All this is [UNCLEAR]

17

18 **CHIEF JUSTICE CHANDRACHUD:** To restate your argument, what you are really
19 arguing is this that once you stayed effectively the Speaker from deciding the
20 disqualification petition, then you should have stayed the trust vote also. Because one was
21 linked to the other at the least.

22

23 **DR. SINGHVI:** See My Lords, the word linked inextricably intertwined, absolutely And that
24 is the answer, the first answer from the conceptual query raised by My Lord Justice Shah. It is
25 true. Technically My Lords one is one is a trust vote. One is a floor test. One is nobody comes.

26

27 **CHIEF JUSTICE CHANDRACHUD:** But you're right. I mean, because at the trust
28 vote those people were going to vote.

29

30 **DR. SINGHVI:** So that's the first. Now My Lords second, I will go further since Your
31 Lordship has put a different question.

32

33 **CHIEF JUSTICE CHANDRACHUD:** But still Dr. Singhvi, the problem still in your path. I
34 mean the problem still arises that...

35

36 **DR. SINGHVI:** It would have been shown on that....

37

1 **CHIEF JUSTICE CHANDRACHUD:** The consequence of these 39 would have really....

2

3 **DR. SINGHVI:** No, no, so let me...therefore My Lords, therefore, therefore. That will not
4 affect this question. Let me be conceptually clear. My Lord's query is right. But that may not
5 affect the question I'm arguing now. That will affect as and when Your Lordship takes up the
6 disqualification and says that we find that no disqualification occurs because we don't have
7 sufficient proof to disqualify. That's all that will mean My Lords. It will only mean that
8 I have insufficient evidence and I will tell Your Lordships why Your Lordships...

9

10 **CHIEF JUSTICE CHANDRACHUD:** Nabam says applying Nabam here the Speaker could
11 not have decided and I'm just... I'm not putting that against you. But I'm just trying to analyse.

12

13 **DR. SINGHVI:** As the principle today stands.

14

15 **CHIEF JUSTICE CHANDRACHUD:** As a principle today stands.

16

17 **DR. SINGHVI:** Correct. Correct My Lord.

18

19 **CHIEF JUSTICE CHANDRACHUD:** Nabam says that where emotion for the removal of
20 the Speaker is pending he cannot decide the issue of disqualification. You say refer Nabam to
21 a larger bench. But suppose you take this that well, these 39 that Nabam therefore should not
22 be construed to prevent the Speaker from deciding disqualification, and these 39 were
23 therefore liable to be excluded because the Speaker would have been justified in hearing the
24 disqualification notwithstanding the pendency of the motion to remove him that the Speaker
25 would have disqualified these 39 because, as Mr. Sibal says, it is a per se disqualification, it's
26 a clear split. What is the ultimate consequence that these 39 have to be taken out of reckoning
27 on their trust vote which takes place.

28

29 **DR. SINGHVI:** My Lord is back to that chart figure.

30

31 **CHIEF JUSTICE CHANDRACHUD:** With these 39 have to be taken out of...

32

33 **DR. SINGHVI:** [UNCLEAR] Governor point. Your Lordships is not coming to the Governor.
34 Governor is constitutionally barred. I'll deal with the chart in a minute. My Lords today
35 can Your Lordships proceed on hypothesis upon hypothesis. What would have happened had
36 this happened? But I will satisfy that conscience also the first part of My Lord.....

37

1 **CHIEF JUSTICE CHANDRACHUD:** Did you not really...

2

3 **DR. SINGHVI:** Governor could have acted on that.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Did you not? Did you not preclude a consideration of
6 this argument by your own [UNCLEAR]

7

8 **DR. SINGHVI:** I'm very grateful.

9

10 **CHIEF JUSTICE CHANDRACHUD:** Face the Legislative Assembly.

11

12 **DR. SINGHVI:** So there are two or three answers,

13

14 **CHIEF JUSTICE CHANDRACHUD:** Because I'll tell you why. And we will rise then, and
15 we can reflect on this at lunch. Because today what you are really asking for, and we're not
16 saying that you are wrong in asking for it because first principle, the court said, subject to the
17 outcome so therefore we have to now treat it. If we come to the conclusion that you are right,
18 then ignore all outcomes

19

20 **DR. SINGHVI:** And My Lords have done it twice. Tenth Schedule cases of big
21 moment, twice?

22

23 **CHIEF JUSTICE CHANDRACHUD:** Fair enough. But before a Constitutional Court does
24 that, namely, to set back a *status quo ante* constitutionally we must be in a position to say that,
25 Well, there is an arguable outcome which would matter.

26

27 **DR. SINGHVI:** Absolutely.

28

29 **CHIEF JUSTICE CHANDRACHUD:** Which would make a difference.

30

31 **DR. SINGHVI:** Absolutely.

32

33 **CHIEF JUSTICE CHANDRACHUD:** If whether there would be a difference or not is
34 really foreclosed, by virtue of the fact that you prevented that difference from emerging before
35 the...

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37 **DR. SINGHVI:** It is not foreclosed. I understand My Lords...

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CHIEF JUSTICE CHANDRACHUD: We will come back at lunch.

<< LUNCH BREAK >>

DR. SINGHVI: Now My Lords, Your Lordship put that question just on rising. So let me answer ABCD...that particular question I'll continue with my sequence after that. But Your Lordship put that question that had you allowed possibly the 30th vote to have worked itself out or other things, then Your Lordship would have had so to say an actual test. So therefore, you should have allowed that to happen. Then we would have had some idea is what Your Lordship put in a nutshell. My Lords, there are five very interesting answers to it. directly to Your Lordships very important query and well as a related query by Justice Shah at that time.

A. This act was followed on 30th by the swearing in, along with BJP persons. Just note My Lords I'll make the point in a minute. Just note, 30th June was the swearing in along with My Lords, senior members of the BJP. 3rd of July, 3 days later the direct answer to My Lord's query. Not on 30th. I agree. Nothing happened on 30th in terms of the vote, but exactly the same trust vote if Your Lordship will call it or a vote of a virtually identical nature happened at the Speaker's election. Now clearly My Lords there is a Whip. There is a direction. You can't vote for the Speaker. You are my party. You cannot vote. Voting was done. These 39 odd voted the other way. No proof is required. Well, this is a 2(1)(b) without going into a single fact. I'll give Your Lordships a judgements.

Each of these acts already held in judgment to be a direct violation of Tenth Schedule without any facts required. My Lords if I vote for a Speaker and I am under a dispute of my party, you can't vote for him. You won't require anything else. You only need to see the voting, did I press that button or not, nothing else is required to be seen. That is on 3rd. So what My Lords is saying nothing could change between 30th and 3rd. Three days My Lords, no majority would change, no numbers would change.

Then the third answer is the 4th of July. Again, an identical trust vote took place for Mr. Shinde. Again you were told not to vote? Again you voted. Same people, same vote, same system, same everything. 4th of July a trust vote in the affirmative for Mr. Shinde. So My Lord has ample proof. My Lord rightly said how will we know, we'll have to go into something. This

1 is a very, very interesting case where 2(1)(b) requires nothing, 2(1)(a) also
2 requires nothing. Normally Your Lordship 2(1)(b) can be a per se completely, but something
3 may be required for 2(1)(a). Here is a case where both 2(1)(a) and 2(1)(b) are per se. Very rare
4 combination.

5
6 Fourth reason, so swearing in with the BJP. It's on cameras. Everybody sees you. 3rd July
7 Speaker's election, 4th July trust vote of Mr. Shinde. Now My Lords, the fourth reason. Even
8 the acts, if Your Lordship were to go back. Now My Lords, these are enough. I'm only giving
9 by addition. I don't need to go back. I am now giving your Lordship the seemingly contentious
10 issue, seemingly, which is not actually contentious. The seemingly contentious issue, which is
11 not contentious, is that on 21st and 22nd of June you did not attend a meeting despite a
12 direction in writing - please attend the meeting. The direction is on record. Your non-
13 attendance is on record admitted. My Lord will now look at it in demurrer. I'm trying to make
14 it as simple as possible. No investigation, no inquiry, no evidence. Just look at it on demurrer.
15 Second event is that you went with the BJP and others to meet the Governor on 30th June.
16 That's also admitted. It's on record, in the press, on photographs, on press reports... admitted,
17 no evidence required. As Your Lordship noted, this visit on 30th led to the swearing in which
18 I have already mentioned. Now which of these will not fall foul of 2(1)(a), forget, 2(1)(b) My
19 Lords. 2(1)(b) is more per se. My Lords what can be the defence? I'm asking myself
20 hypothetically. Your Lordships will also see the practical. I mean, what can be the defence that
21 these photographs are forged. All the media is forged. I was in Timbuktu, I never went to
22 the Governor's House. That can be a valid defence. Nobody has taken the defence you can't.
23 Now note two more interesting things My Lords. Rana, Para 48. Lordship knows Rana very
24 well. The Constitution Bench. Specifically says that the act and conduct of going to a Governor
25 would constitute disqualification. That is Constitution Bench. 2007 4 SCC 270. PDF Page 834
26 of the first compilation.

27

28 **JUSTICE SHAH:** It was read yesterday.

29

30 **DR. SINGHVI:** Read. Only My Lords, Para 48. So...

31

32 **JUSTICE SHAH:** Rajendra Singh Rana.

33

34 **DR. SINGHVI:** Yeah correct. Rajendra Singh Rana. So My Lords, it's very interesting. again.
35 The fact is admitted and the law is covered. What is it that Your Lordship has to do by way of
36 an exercise is my question to myself. With great respect nothing My Lords. Fact is undeniable
37 admitted and the Law is covered and covered too by a Constitution Bench. We are not saying.

1 I can even My Lords bow down with great respect in a very contentious issue, Your Lordship
2 says, why should we not send it back. There is no issue here. Now note the second judgment.
3 Shrimant Patil is a citation. Shrimant Patil is Para 174 and 176. The citation
4 is (2020) Volume 2 SCC 595. Three learned judges.

5

6 **CHIEF JUSTICE CHANDRACHUD: 2020?**

7

8 **DR. SINGHVI:** 2020 2SCC 595. The PDF Page in the First Law compilation is 1249. It's
9 starting page. Starting page. I'm sorry. The relevant para is 174 and 176 at PDF page 130-7 and
10 130-8. This holds the second point. Not attending meetings is culpable This is inception, 21st
11 June and 22nd June, you didn't attend meetings. This judgment holds that not attending
12 meetings is sufficient to disqualify. So My Lords in this five sets of facts, facts are admitted,
13 law is covered. Now you can always say that we want to do this, we want to that. But My Lords,
14 if there is a purity and a social and a political evil to be controlled by Tenth Schedule, then this
15 requires no adjudication of any kind except the formality of a notice and looking into it. And
16 what is it, even till today what can be the defence of this? I am prepared to accept a new defence
17 today. There cannot be a defence to this. This My Lords is the light of, but I was My Lords, I
18 had finished on subject to, putting to you notice and risk, on your own risk and cost, telling
19 you in advance, warning you. Now My Lords, kindly consider why is this principle? It is for
20 what, the phrase is used time and again, the Majesty of the Law. It is not an empty rhetoric.
21 Imagine how much strengthened the rule of law is when Your Lordships in a rightful case,
22 does not one but two or three things. One, Your Lordships accepts fallibility. There is a line of
23 cases of *Actus Curiae* that we were wrong. Justice Bhagwati, in a case My lords, thank Mr.
24 Sibal to point it out, said to accept fallibility is no act of heroism. So My Lords, then the
25 consequence of accepting fallibility must follow. Otherwise, accepting of fallibility is empty. So
26 Your Lordships is now coalescing these principles *Actus Curiae*, *Ubi Jus*, etc. Imagine the
27 strengthening of the rule of law when Your Lordships says demolished this building, even
28 though we believe it's going to cause a lot of misery. My Lords the last one Your Lordships did
29 took almost six months under Your Lordship's supervision because three dates were extended.
30 I believe My Lord Chief Justice was on the Bench. But My Lords it happened because Your
31 Lordships had a finding had a view of the merits and Your Lordships said restitution.
32 Restoration of status quo ante is vital for the necessity for the majesty of law. Now, My
33 Lords just see two striking examples in the Tenth Schedule when Your Lordships did this. We
34 have said, talked about but we haven't shown that actual para. It will tell Your
35 Lordships against what odds. Your Lordships still said no. We must uphold the law. Nabam
36 Rebia first and Rajendra Singh Rana second. And My Lords, this is not at all the upholding of
37 Nabam Rebia. We are challenging Nabam Rebia on the sole point of disabling. The fact that

1 I ran Nabam Rebia for this doesn't at all... I'm entitled My Lords not to be hit by estoppel on
2 that at all.

3

4 Now kindly turn to My Lords, Nabam Rebia. Just go to the paras. 214.1, 214.3 and 214.4. My
5 Lords, this was the case as Your Lordship remembers, Governor, Speaker preponing
6 date. Your Lordship knows My Lords. We have argued for three days. Your Lordship knows
7 the fact. But see what the court did at the end. It could have found a number of reasons to
8 avoid doing this or not giving the answer of postponing it. Deciding not to decide is also a form
9 of adjudication. But because when Your Lordship is convinced of the merits, Your Lordship
10 decides to decide how so ever severe the consequence is. My Lords, kindly see this now. 214.1,
11 is at My Lords, iPad... Sorry PDF page 1158. 1158, first Volume. The compilation
12 first Volume. My Lord has seen, but this part My Lord has not seen. My Lords, this alone
13 vindicates the rule of law. This alone indicates the strength of the court system not only
14 the apex court. And this sends a clear message that My Lords, howsoever high or whatever the
15 consequences, the consequence must flow if Your Lordship is convinced.

16

17 Now My Lords, there could be no more scrambled egg in the context of
18 Tenth Schedule the Nabam Rebia. Your Lordships unscrambled it. Please see 214.1. 'The
19 Order of the Governor of 9th December 2015 preponing the 6th Session of
20 the Arunachal Legislative Assembly from 14th January to 16th December of previous year
21 2015 is violative of Article 163, read with 174 and as such is liable to be quashed. The same is
22 accordingly hereby quashed.'

23

24 I'll skip the next one. Come to the next after next. 214.3. Now this is even more important. My
25 Lords remember time had elapsed in between. Nabam Rebia was decided on... this is
26 important. The date is important 13th July 2016 is the decision. 13th July 2016. These events
27 related to almost eight months earlier. New Government had come in. It was very easy to say
28 so many things and not do this. But the court My Lords, if I may say , did the right thing in
29 terms of consequence.

30

31 'All steps and decisions taken by the Arunachal Pradesh Legislative Assembly, pursuant to the
32 Governor's Order and Message of 9-12-15 are unsustainable in view of the decisions at 214.1
33 and 214.2, the same are accordingly set aside.' It was argued, as is argued frequently, that even
34 if Your Lordship holds it illegal, the intervening decisions will not be set aside. Your Lordships
35 hears those arguments every day from this side of the bar or whatever. But, My Lords, if this
36 is a great, if I may say, it is the constitutional walking of the talk in case My Lords,
37 once Your Lordship is convinced.

1 Next, 'In view of the decision at Paras 0.1 and 0.3 above the *status quo ante*, as it prevailed on
2 15-12-15, is ordered to be restored.' That's My Lords eight months earlier. That's why the date
3 of 13th July versus the date of December 15. There's a hiatus of 8 months. A lot has happened
4 in eight months. Most of all a Government is changed. Otherwise all these principles etc. will
5 remain paper principles My Lords.

6

7 Now in Rajendra Singh Rana, the matter was more directly addressed as a juristic principle
8 about you decide or send it back to the Speaker. So that's my next case. Rana
9 is (2007) 4 SCC 270, first bunch of compilation of Case Law PDF Page 834. And I will
10 read with Your Lordship's permission, Paras 12, 44, 45 and 52, 53. It has nothing do with the
11 law. It is to do with once Your Lordship is convinced what is the consequence? It's *Ubi Jus Ibi*
12 *Remidium*, it is *Actus Curiae*. It is consequence. It is subject to. It is warning. All that is the
13 point I'm reading on.

14

15 **JUSTICE KOHLI:** What page did you say was that please?

16

17 **DR. SINGHVI:** The page starts, the judgment starts Para 12 is at PDF Page
18 849. 834, the case starts. Here the argument was made squarely that kindly decide and the
19 rival argument was - don't decide, let the Speaker decide.

20 'The Respondents in the writ petition the MLAs constituting 37 BSP members who left the
21 party are the appellants with all the appeals except the appeal arising out of the special leave
22 petition filed by the writ petitioner Maurya. Whereas the respondents in the writ petition
23 challenging the decision of the majority of the bench remitting the matter to the Speaker.
24 The writ petitioner in his appeal challenges the order of remand to the Speaker.' -
25 sorry - 'the writ petitioner...remand made by the majority on a plea that on the pleadings in
26 the material available the High Court ought to have straight away allowed the petition filed by
27 the writ petitioner of a disqualification of 13 MLAs.'

28

29 So squarely the issue is joined. Now come to 43. Sorry 44, I think. 44, at Page 865. Now My
30 Lords if I may say so the contentious issues in this case would be far, far more than the
31 contentious issues in my case. Far, far more. Normally, this court might not proceed to take a
32 decision for the first time where the authority concerned has not taken a decision in the eye of
33 the law, and this court would normally remit the matter to the authority for taking a proper
34 decision in accordance with law. And the decision of this court itself takes on the relevant
35 aspects. What is urged on behalf of the Bahujan Samaj Party is that these 37 MLAs except a
36 few have all been made ministers. And if they are guilty of defection with reference to the date
37 of defection, they have been holding office without authority in defiance of democratic

1 principles. And in such a situation, this court must take a decision on the question of
2 disqualification immediately. My Lords, my case has one Chief Minister, forget ministers. One
3 amongst them is a Chief Minister, many are ministers. It is also submitted that the term of the
4 assembly is coming to an end and expeditionary decisions issued by this court warranted for
5 protection of the constitutional scheme and constitutional values. We find considerable force
6 in this submission. This is what the Constitutional Bench is saying. Here the alleged act of
7 disqualification of 13 MLAs took place on 27th of August and this is only 13. We are 39 in this
8 case, 42 actually. My Lords there are three independents also. When they met the Governor
9 and requested him to call the leader of the opposition to form the Government. The petition
10 seeking disqualification of these 13 members based on that action of theirs had been allowed
11 to drag on till now. It is not necessary for us to consider or comment on who was responsible
12 for such delay. But the fact remains that the term of the legislative assembly that was
13 constituted after the election in February 2002, is coming to an end on the expiry of five years.
14 A remand of the proceeding of to the Speaker or are affirming the order of remand passed by
15 the High Court would mean that the proceeding itself may become infructuous. My Lords, it
16 may not become infructuous, but it could be with great delay. Great delay and fruits would be
17 enjoyed for even one more second is bad enough. Here fruits would have been enjoyed for
18 months and years. We may notice that the question of interpretation of Tenth Schedule, the
19 question of disqualification raised earlier with regards to the members of the prior assembly of
20 this very state which led to difference of opinion between two learned judges of this court and
21 which could refer to a Constitution Bench, was disposed off on the ground that it had become
22 infructuous in view of the expiry of the term, the Assembly. They My Lords, cite that judgment
23 earlier in the footnote. Para three of the Tenth Schedule has also been deleted by Parliament.
24 Though for the purpose of this case, the scope of that paragraph is involved. So My Lords, this
25 case involved para 3. In my case, Your Lordship doesn't even have Para 3. What adjudication
26 is required? Rana involved the pre-existing non-deleted 3. With great respect My Lord
27 considering that if the 13 members are found to be disqualified their continuous in the
28 assembly even for a day would be illegal and unconstitutional and their holding of the
29 office as Ministers would also be illegal at least after the expiry of six months from the date of
30 their taking charge of the office of Ministers. We think that the court is bound to protect the
31 Constitution and its values and the principles of democracy, which is a basic feature of the
32 Constitution. This court has to take a decision. Now this is important. This court has to take
33 a decision one way or the other on the question of disqualification of the 13 MLAs based on
34 that action in August 2003. Lastly, my lords, para 52 and 53 where they conclude finally on
35 the result, on the factual result and the result of the case. As we have indicated para 52 above
36 para 52 is My Lords 869. As we've indicated, nothing is produced to show that there was a split
37 in the original political party on 26th August. As belatedly put forward or put forward in alter

1 point of time. But still the plea of split was on 26(8). Now that question Your Lordship does
2 not have headache about. No problem. On the materials the only possible inference in the
3 circumstance of the case is that it has not been proved, even prima facie by the MLAs, sought
4 to be disqualified, that there was any split in the original political party of August 2003 as
5 claimed by them. The necessary consequence would be that the 24 members who later joined
6 the 13 could also not establish a split in the original political party as having taken place on 26
7 August. In fact, even a split involving 37 MLAs is not established. There it was in two
8 batches, two batches there. That was also the inference rightly drawn by the Learned Chief
9 Justice. In view of our conclusion. Not necessary. Sorry, in view of our conclusion, it is
10 necessary not only to show the 37 MLAs that separated, but it is also necessary to show that
11 there was a split the original political party. The above finding necessarily leads to the
12 conclusion that the 13 MLAs sought to be disqualified had not established a defence or answer
13 to the charge of deletion, a defection under Para 2, on the basis of Para 3. The
14 13 MLAs therefore stand disqualified with effect from August 2003.'
15 Supreme Court finding directly My Lords at placitum E.

16

17 'The very giving of a letter to the Governor requesting him to call the leader of the opposition
18 to form a Government by them itself would amount to their voluntarily giving up the
19 membership of their party.' Here they went ahead, they gave.... they event with the BJP to the
20 Governor in my case today.

21

22 'If so, the conclusion is irresistible that the 13 members of the BSP who met the Governor at
23 August 03, who are Respondent so and so in the writ petition filed by Maurya,
24 stand disqualified in terms of 191 read with Para 2, with the effect from 27 August. If so, the
25 appeal filed by the writ petitioner has to be allowed even while dismissing the appeals filed by
26 the 37 MLAs by modifying the issue of the majority of the division bench. Hence
27 the writ petition filed will stand aloud with a declaration that the 13 members who met the
28 Governor on so and so being Respondents so and so in the writ petition stand disqualified
29 from the UP Assembly with effect from August 2003. The appeals are dismissed.'

30

31 My Lords this is really if I may say so with great respect the right approach for the very
32 existence and raison d'etre of Tenth Schedule and for the Majesty of the Law. And My
33 Lords no other court can have more powers in this regard than Your Lordship's court.

34 Now My Lords let me turn to the some of the quotations. Now it will be more focused in terms
35 of just quoting from some judgments. Kindly, take a note which I will go to
36 note now. Kindly take a note I have filed. A-3.

37

1 **CHIEF JUSTICE CHANDRACHUD:** Already circulated?

2

3 **DR. SINGHVI:** A-3. It has been sent in the night. Serial Number A-3. A-3. It says - brief
4 written submissions. My name is there.

5

6 **JUSTICE KOHLI:** Yes, it is there.

7

8 **DR. SINGHVI:** My Lords. I have put date for today because there are earlier
9 submissions. This date is today's date although filed last night I believe.

10

11 **CHIEF JUSTICE CHANDRACHUD:** You have mailed today?

12

13 **DR. SINGHVI:** Yes. Except My Lords, I am going to add one or two cases as I have got only
14 two cases. That Your Lordships will write in the note itself because problem is it is ever
15 incoming wisdom every minute. May I read My Lords?

16

17 **JUSTICE KOHLI:** Just a moment.

18

19 **DR. SINGHVI:** I apologize for the numbering because they were actually a separate note
20 added on the top. So therefore there is some numbering issue, but otherwise Your
21 Lordship will be able to follow it.

22

23 'Short factual Conspectus the formation of.' I will be very quick in the first part, second part I'll
24 deal with it more slowly. 'The formation of a new Government on 30th June was a direct,
25 inevitable result of two orders of the court. A negative injunction of 27th June, not
26 allowing the Deputy Speaker, a positive order of 29th June, allowing the trust vote to be held.
27 Order dated 29/6 made the following' - I have read that quotation - 'subject to. Subject to
28 necessarily and only means that (a) the Court issuing is acting in REM warning that all those
29 who act after the subject to order do so at their own risk in cost. Any
30 consequence, equities, rights or new status quo.' - This is important one -
31 'consequence, equities, rights or status quo created after the subject to order will be liable to
32 be reversed in status quo ante restored since the Court is fairly put everybody on notice in
33 advance.'

34

35 My Lord, I'll just read this case. This is important along with a couple of other cases. But first,
36 let me read on this section first. I'll read this Indore case. It's important. It's a
37 Constitution Bench. 'The consequence of change of Government happened fundamentally

1 because the Speaker was disabled, fettered in the interim from discharging its constitutional
2 duties. The aforesaid disabling with the order of 27th June was clearly contrary to
3 a Five Judge Bench in Kihoto.' I have read that Para. Lordship will remember that, 110. 'It
4 disturbed the coequal and mutual balance between judicial legislative organs, the latter
5 represented by the Honourable Deputy Speaker. Contrary to detailed Supreme Court
6 judgments,' - I have quoted them below they are coming. These are only the bullets first
7 giving Your Lordships a proposition. The orders of 27-06, and 29-06, cumulatively and
8 conjointly were not orders where we could...

9

10 **CHIEF JUSTICE CHANDRACHUD:** Dr. Singhvi, if you had warned us, foreword that you
11 are going to put it down in writing, I wouldn't have been trying my typing skills. I've typed
12 exactly all this that you have mentioned.

13

14 **DR. SINGHVI:** But My Lords some of this is not going to be there in terms of answer to My
15 Lord's query. The answers to Your Lordship's query would have been oral My Lords. Anyway,
16 I'll skip, now there are two principles here which I have not mentioned orally. I'll skip till J.
17 Then come to K, My Lords then I skip again L and M. K is important, I'm sorry J and K both
18 are important. J also. If in fact, in the illegality has occurred and especially after fair warning
19 through subject to orders, the Court's powers and arms are always long enough to unravel any
20 situation and fait accompli cannot be a defence. That's the point. Then K is extremely
21 important, for the purposive of interpretation, Your Lordships have interpreted Tenth
22 Schedule purposively to plug all collateral and subsidiary loopholes also. Directly it is not said,
23 but we find 20 ways of circumventing Tenth Schedule Your Lordships says I will interpret
24 purposively to prevent that circumvention. That judgement will come out also My Lords. The
25 principle of purposive in light of repeated and comprehensive exhortations by diverse
26 Constitution Benches. And the legislative *travaux preparatoires* underlying the object behind
27 the Tenth Schedule and the mischief it sought to remedy necessitates a purposive
28 interpretation in a holistic perspective, to fulfil the true objectives per the Tenth Schedule, and
29 not allow it to be rendered a dead letter or an exercise in futility. Then my lord L is Nabam, M
30 is Rana right My Lords? Now just you can skip Para one in Chauhan's case the first line of the
31 bold face Your Lordship may note. It is struck law that neither the Governor nor for that
32 matter, this court has the power to impinge upon the authority of the speaker to take a
33 decision. This is My Lords the coequal aspect apart from the Kihoto no injunction aspect. So
34 this judgment Your Lordship will note. Justice Chandrachud and Justice Gupta's judgement.
35 Thus the principle of respecting the field of functioning of each constitutional functionary
36 requires a court not to interdict either the disqualification proceeding before the Speaker

1 or the proceedings in the House. However, in the present case that I'll skip My Lords.
2 Then Kihoto My Lords, 125 and 126. This is not that 110. 125 My Lords, just turn to for a
3 minute My Lords, it's in PDF 140 of the first compilation.

4

5 **CHIEF JUSTICE CHANDRACHUD:** That's okay, we can read it from here.

6

7 **DR. SINGHVI:** Yes, yes.

8

9 **JUSTICE NARASIMHA:** You can read it out and then go to 120.

10

11 **DR. SINGHVI:** Yes. This is 126. Your Lordships just add in hand. 125 is important also, I
12 forgot to put that. Just note that. The purpose of interlocutory orders to preserve in status quo
13 the rights of the party so the proceedings do not become infructuous by any unilateral over
14 tax by one side or the other. Then My Lords, Sameer Bhojwani a judgment to which My Lords
15 the Honourable Chief Justice was a party though authored by Justice Khandwilkar, 2018.
16 Distinction between molding of relief and granting a mandatory relief held that interim relief
17 can be granted only to restore the status quo and not to establish a new set of things different
18 from the state which existed at the date when the suit was instituted. You have created a new
19 status quo. That is very different from maintaining a status quo.

20

21 **CHIEF JUSTICE CHANDRACHUD:** Yes.

22

23 **DR. SINGHVI:** Then My Lords Bommai, in para eight, Para 115. It has, however, to be made
24 clear. This is one of three judges out of the seven and is part of the concurring. It is however to
25 be made clear that the interlocutory relief that will be granted on such challenge to prevent
26 the frustration of the constitutional remedy. It is not to prevent the constitutional authority
27 from exercising its power that's discharging its function. This is even more important
28 than Kihoto. This is the origin of Kihoto in the Tenth Schedule. Bommai was
29 not Tenth Schedule, but the principle is important and this is one of seven judges... nine
30 judges. Nine judges and this is the principle which Kihoto applied to the Tenth Schedule. Our
31 conclusion that Justice Sawant is part of the majority My Lords, core majority. Our
32 conclusions, therefore, will be summarized as under. If the proclamation issued is held invalid,
33 then, notwithstanding the fact that it is approved by both Houses of Parliament,
34 kindly note this My Lords. It will be open to the Court to restore the status quo ante to the
35 issuance of the proclamation, and hence to restore the Assembly and the Ministry. In
36 appropriate cases, the Court will have power by an interim injunction to restrain the holding
37 of fresh elections to the Assembly pending the final disposal of the challenge to the validity of

1 the proclamation to avoid fait accompli and the remedy of judicial review being rendered
2 fruitless. My Lords Mr. Hegde never saw to live to see this benefit because Governments
3 changed twice over by the time Bommai was delivered. But subsequent to that Your Lordships
4 will notice that the exercise of 356 is decreased a lot because Your Lordship have been very
5 prompt from the Bihars, the Rameshwarnaths, the Uttarakhands, the Jharkhands to the
6 Karnatakas. It's the promptitude of the Court which has reduced the use and abuse of such
7 articles because My Lords retribution, this way or that way in terms of judiciary deciding it is
8 quick. In the old days it used to take time.

9

10 Now My Lords is Kavita Trehan is the Actus Curiae principle. I will not go to it. Just read the
11 quotation - 'in regard to the law of restoration of loss or damage caused pursuant to judicial
12 orders,' - they quote the privy council - 'one of the first and highest duties of the court is to
13 take care that the Act of Court does no injury to any of the suitors. And when the expression
14 the act of Court is used, it does not mean merely the act of the primary court or intermediate
15 court of appeal but the act of the Court as a whole, from the lowest which entertains to the
16 highest which finally disposes of the case.'

17

18 Then they cite My Lords, this Kedarnath under 144 My Lords. This is the but-for test. 'Restore
19 the parties to the position in which they would have occupied but for such decree or part
20 thereof.' -The but-for test it is called My Lords.- 'nor indeed, that this duty of jurisdiction
21 arisen merely under the said section. It is inherent in the general jurisdiction of the court to
22 act rightly and fairly according to circumstances.' Then My Lords, they consider a submission.
23 I'll skip that. Come to the end Para 23, it's a long para.

24

25 The gold face is sufficient - 'that such a thing was achieved by an ex parte order tends to shake
26 the litigant's space in the jurisdiction process.' That will not apply. Nabam Rebia I will skip.

27

28 Now My Lords here. Before Your lordship comes to the object that is Para 13 onwards there
29 are two important judgments Your Lordship will note. One is Bhullar. This is not there. My
30 Lordship may note it down to the side. These three judgements. This is not there My Lords.
31 No, no. But my proposition is not there. It's not cited here. My Lords first is Bhullar.
32 Devender Bhullar. That death convict case (2011) 14 SCC 770. It's the PDF 926 and the
33 relevant paras are 107 and 108. Please turn to that. My Lords, if there is an initial wrong,
34 the court says...

35

36 **JUSTICE NARASIMHA:** Para?

37

1 **DR. SINGHVI:** I'm sorry 107, and 108. It's a very important principle. Kindly turn
2 to PDF page 967 in the first compilation. Right. First compilation 966.

3

4 **JUSTICE NARASIMHA:** What's the proposition?

5

6 **DR. SINGHVI:** If the initial wrong is found, then all consequential things must be
7 adjusted so as to rectify that initial wrong. And second sentence is very important. This
8 principle applies equally to judicial orders. This is very important. Please turn to 107, 108
9 para number. 107 is at page 966. It is a settled legal proposition that if the initial action is not
10 in consonance with law all I am sorry My Lords, does My Lord, have it? My Lord doesn't
11 have it. It's on substantial and consequential action. My Lords the page is 966, bottom. 'It is a
12 settled proposition of law that a variation action is not in consonance with law. All
13 subsequent and consequential proceedings would fall through for the reason that illegality
14 strikes at the root of the order. In such a situation, the legal maxims' - it is given there -
15 'meaning, thereby that the foundation has been removed. Structure, work falls comes into play
16 and applies on all scores.' Now next para is more important My Lords. Next para. 'In
17 Badrinath and Kerala, this court observed that once the basis of a proceeding is gone all
18 consequential acts, actions, orders would fall to the ground automatically, and this principle
19 will apply to judicial, quasi-judicial, and administrative proceedings equally.' This is
20 the meaning of Majesty of the Law My Lords. I will just take little bit of time on Tuesday. I
21 won't take very long.

22

23 **CHIEF JUSTICE CHANDRACHUD:** We continue on Tuesday.

24

25 **DR. SINGHVI:** Very deeply obliged.

26

27

28

29

30

END OF DAY'S PROCEEDINGS

CHIEF JUSTICE'S COURT

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE M.R. SHAH
HON'BLE MR. JUSTICE KRISHNA MURARI
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE PAMIDIGHANTAM SRI NARASIMHA

Subhash Desai

v.

Principal Secretary, Governor of Maharashtra and Ors.

W.P.(C) No. 493/2022
Item No. 501

TRANSCRIPT OF HEARING

28-Feb-2023

Transcript to be read with video recording of hearing.

11:00 AM IST

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DR. SINGHVI: I'll probably overkeep my word. Only 20-25 minutes I'll have. I'll be very pointed . It's only residual part.

JUSTICE NARASIMHA: So, we take your written submissions that you have, that you were reading earlier?

DR. SINGHVI: That's right.

JUSTICE NARASIMHA: There's only short portion which was left.

DR. SINGHVI: Yes. I'll be reading that part and just oralising the one set of points just to, no repetition. It won't require.

CHIEF JUSTICE CHANDRACHUD: What was the number of that?

DR. SINGHVI: Well. Your Lordship it would start...

JUSTICE SHAH: A3.

CHIEF JUSTICE CHANDRACHUD: Your written submissions are on....

DR. SINGHVI: Your Lordship, written submission.. last time you were using A3.

CHIEF JUSTICE CHANDRACHUD: A3 right?

DR. SINGHVI: So as I'll... just about 7, 8 points, they are included in my written submission but I just want to [UNCLEAR] point. Now My Lords, one aspect which Your Lordship has heard in a somewhat diffused manner, I want to itemize it. The question is, would My Lords not want to prevent such consequences by dealing with the law and laying down the law here, that's the proposition. What are those five deleterious, four deleterious consequences for Constitutional Law, for constitutional morality, for the whole system, the entire edifice, which is an interlocking system of My Lords defections, Speaker, Legislative wing, Governors. They are ultimately interlinked into one scheme. I... My submission is these 5-6, 4-5 deleterious consequences should impel Your Lordships to decide it. What are those My Lords?

1 Number one - can you disable the Speaker so easily, thereby sounding the death knell of Tenth
2 Schedule? My Lord has heard it fully. Nabam Rebia is the main standing obstacle. And we have
3 argued on that. That's consequence number one.

4 Second - My Lords, is the positive and the negative injunction. I am just tying up the ends
5 together into a list....which are against Kihoto. It is not only practical effects of this positive
6 and negative injunctions, but it is juristically against Kihoto.

7 So the second part is My Lords, the positive and negative injunction is not only factually wrong
8 and has caused the change of Government, that has caused, I made that argument earlier, but
9 it is juristically wrong. That's the second consequence, Your Lordships should rectify. Only
10 Supreme Court do the rectification. Nobody else can. It's really futile to have a whole ladder
11 again starting some High Court, some My Lords, the ladder will go all the way to the Supreme
12 Court. It's really futile. My Lords, nobody can touch these are all Kihoto, these are Nabam
13 Rebias. Therefore My Lords....

14 Third, is the consequence of the Governor's direction for a floor test. There is no way in which
15 the Governor can interfere like this, especially in a case where disqualification is sub-judice or
16 pending.

17

18 **CHIEF JUSTICE CHANDRACHUD:** The consequence of the Governor's direction for a
19 floor test.

20

21 **DR. SINGHVI:** Floor test, in a pending disqualification matter sub-judice at two levels. Sub-
22 judice at Your lordship's level, sub-judice at the Speaker's level. It's a double Sub-judice. These
23 My Lords after all deciding in a [UNCLEAR] quasi-judicial capacity there as a Tribunal. This
24 third point....this third aspect can be rephrased juristically in a different way. My lords, Your
25 Lordships is dealing with a legislative issue primarily. Executive has no role to come into it.
26 Laterally, sideways, the executive can't enter it. The Governor is, though, a constitutional post
27 holder, an executive appointee. So this third aspect is really the executive's direct lateral entry
28 into a no-go area. Totally impermissible. That's a consequence Your Lordship alone can rectify,
29 should rectify. That applies to all these consequences, somebody else will decide, this will make
30 a partial decision. Supreme Court for the polity, for the constitutional morality, for the whole
31 system must decide .

32

33 **JUSTICE NARASIMHA:** This is part of your third point only?

34

35 **DR. SINGHVI:** This is under consequences (C). One, first point is consequences, this is the
36 third one. The fourth one is My Lord, it is distinct, but it relates to the Governor. The Governor
37 recognizes the split. My Lords, Your Lordships can't do it, Governor will do it. The Supreme

1 Court with 142, today the judgment is passed on the 141, 142 saying we recognize the split.
2 Your Lordship would be actively contributing to that, the Governor can do it. Directly
3 recognizes in writing a split, with great respect. Here there is an in-built double whammy. The
4 Governor is in error as a constitutional holder and the executive is coming into and
5 recognizing, the central government executive is coming in and recognizing the split. Now that
6 letter Your Lordships may not have seen for some time now, maybe in the beginning it was
7 shown. Just turn to that letter My Lords for a minute, para seven of the PDF, compilation 2,
8 326. Correct? PDF 326, compilation 2, dated 28th June 2022. This is very important My Lords.
9 A constitutional amendment promoting the constituent parliamentary intent to do away with
10 split is collaterally recognized by an executive appointee Governor who has no locus, which
11 the Supreme Court can't also do.

12

13 **JUSTICE KOHLI:** Compilation of, there are...

14

15 **DR. SINGHVI:** CC-2. CC-2 it is called. CC-2 of the document, it is not the case law. 326,
16 convenience 2. 326, is the PDF page. It's in the Governor's name on the 28th of June. In that
17 volume it is serial number 5. in that volume. The Volume is called serial number five. My
18 apologies.

19

20 **JUSTICE SHAH:** P 4. Annexure P4. Yes sir we got it.

21

22 **DR. SINGHVI:** My Lord doesn't have it. Perhaps....My Ladyship has got it?

23

24 **JUSTICE KOHLI:** Yes please.

25

26 **DR. SINGHVI:** Dear Shri Uddhav ji, the Governor writes to the Chief Minister. writes to the
27 Governor. I'm going to emphasize para 7, but I'll read two and three also leading up to seven.
28 It's para 7 I want to read but I just read two and three for backdrop.

29 'I am received of a resolution dated 21-6, signed by 34 members of Shiv Sena legislature party
30 stating that there is enormous discontent within the Shiv Sena cadre and the electorate on
31 account of alliance with NCP and INC. The resolution clearly indicates that the majority
32 members of Shiv Sena legislature party want to exit the alliance with NCP and INC, and to that
33 end they have reaffirmed the appointment of the leader of the Shiv Sena legislative party. I am
34 also in receipt of a letter of 21 June, addressed by Mr. Shinde to the Deputy Speaker stating
35 that the purported appointment of one Ajay Chaudhary is illegal having it made by 16 MLAs
36 without notice, without quorum. Therefore the same is inappropriate.'

1 So this the Governor is saying. My Lord, the Governor can hardly at all interfere with any of
2 these subjects, while disqualification is pending at two levels. But that apart leave 2, and 3.
3 Now come to 7. How can the Governor say this? Kindly read 7. Is it possible? Forget the right
4 or wrong. Why should the Governor say it, how can he say it constitutionally, is my question
5 to myself. 'It is thus clear that a majority of the Shiv Sena MLAs have given a clear indication
6 on behalf of the Shiv Sena legislative party that they intend to exit from the Mahavikas Aghadi
7 Government and you have been made aware of the same and that you are trying to win over
8 your MLAs and cadre vis not democratically. I am therefore confident that you and your
9 Government has lost the trust of the House and the Government is in minority.' I'll just pause
10 and look at this. My Lords just forget this case for two minutes. Look at the consequences of
11 this letter in the constitutional jurisdiction. Number one, it is a certification by an executive
12 nominee that the departing allegedly disqualified members, allegedly by me, are kosher. They
13 are not disqualified. They are not disqualified is his confidence. Number two, that you, Mr.
14 Uddhav, is not the Shiv Sena, but those people are. He is writing to Uddhav Thackeray. Three,
15 he is doing it under the nose of a pending disqualification Tenth Schedule proceeding and a
16 hotly contested Supreme Court matter. When ordinary mortals are doing it Your Lordships
17 take a very serious view. I know Your Lordships can't issue directions to the Governor and
18 content may not lie. But just consider My Lord if anybody else would write a letter like this.
19 When Your Lordship is hearing this, it's a heavily contested matter and the Speaker is dealing
20 with it. I don't know My Lords... normally, we'd expect some contempt notice. Then some
21 appropriate case is to examine how far the arc of immunity applies. Number four, he is My
22 Lords actually setting up the ground as a precursor. Come to me, I will swear you in. This is an
23 advanced intimation. This 7th paragraph read as it is can only say come to me, I am ready to
24 swear you in, because you are kosher. There's no problem with you. There's no stigma. Only
25 step left is that nothing is left.

26 Therefore My Lords, to the other question My Lord the Honourable Chief Justice asked me on
27 Thursday, what is it that you want us to do in the event that we agree with you. Your Lordship
28 put a question like that. One of the simplest level, of course he had asked me for larger
29 answers... simplest level is to quash this letter. Now suppose Your Lordship quashes this letter,
30 just for a minute and I do not press, except for one or two things, in any meaningful way, for
31 other things. Just suppose I am not conceding anything. I'm just giving a supposition. The
32 status quo ante is automatically restored. Lordship doesn't have to say it? And is that
33 constitutional morality? Is that fair play? Is that upholding the greatest traditions of
34 governance? My Lords clearly it is.

35 And certainly My Lords, there can be no bar, immunity, hesitation, legal obstacle,
36 constitutional bar from quashing this letter if Your Lordships otherwise agrees with me. The
37 letter is not a non-quash-able document. It's a direct prayer, directly impugned in all the writ

1 petitions and many other writ petitions. Take it My Lords, take it as impugned. Now, this is
2 the fourth consequence. The fifth is a obvious consequence of this consequence. Next step is
3 swearing in, which happens on, this is 28th... 30th. In fact the seeds of that are very clear in
4 para 7. I told Lordships they are advanced intimations. It happens two days later. So that's a
5 letter saying you are kosher, that is My Lords acting on the letter and giving you a
6 constitutional status of a Minister. In fact, I am sorry, that's swearing in of a Chief Minister.
7 30th My Lords is the swearing of Mr. Shinde.

8

9 **[JUTICE NARASIMHA]:** Chief Minister, correct. 30th.

10

11 **DR. SINGHVI:** So, swearing in as a constitutional head of state. And My Lords, the last
12 consequence is again consequential to the consequences, which is appointment of the Speaker.
13 Which I may say the new Speaker or the Speaker.

14 Now My Lords, I have given Your Lordships six consequences. I mean one can make probably
15 seven or eight also, but let's say six. My respectful submission is, (a), that these are serious
16 consequences, extremely serious for our constitutional polity, b) they are case neutral to the
17 present case. They are extremely serious for our constitutional polity, b) they are case neutral
18 from this present case. They are juristic questions and they are bound to recur, unless Your
19 Lordship plugs the loopholes this way or that way. Third, these are all within Your Lordship's
20 Judicial domain. None of this is a no go area. Fourth, and this is very important My Lords,
21 fourth only Your Lordships, I'm not saying Your Lordships may, I'm saying only Your
22 Lordships can decide and should decide this. I'm not even making it optional. According to
23 me, this is only the Honourable Supreme Court which can and should decide it here. Not
24 delegate it to any other authority.

25 Then My Lords, this is the main point. And then of course it follows that Your Lordships could,
26 as an ancillary because Your Lordships passes ancillary, says...

27

28 **CHIEF JUSTICE CHANDRACHUD:** I have one question, but I don't want to disturb
29 your....

30

31 **DR. SINGHVI:** My Lords I'll just take around ten minutes more. I'm going to make
32 some...Your Lordship will therefore restore in the ancillary sense, the position as on 27th or
33 some such date. That is, ultimately Your Lordship's orders are not going to spurrics. They have
34 to have an effect. That effects has to be only that restoration.

35

36 **JUSTICE SHAH:** To restore position as on?

37

1 **DR. SINGHVI:** 27th of June. This is 28th, so 27th is one day before. Now coming back to my
2 notes, and I will be very quick because that's written down. Come to para 12. This is the other
3 facet, Your Lordships had stopped at 12-13 last time. Just come to para 12 of my Note. A3, A3.
4 The one Your Lordships are using. Now what are the points and I will be very quick My Lords.
5 Purposive interpretation in Tenth schedule legislature cases Your Lordship is repeated,
6 repeated and repeated many times.

7

8 **JUSTICE SHAH:** Which page Dr. Singhvi?

9

10 **DR. SINGHVI:** Para 12 of my note, Page 5. This is at A3 note. It's Page 7. And Your Lordships
11 it maybe Page 7.

12

13 **JUSTICE KOHLI:** Yes.

14

15 **DR. SINGHVI:** Now My Lords, purposive interpretation, what was this new fashion
16 approach, now it's old, and everyone calls teleological approach.

17

18 **JUSTICE KOHLI:** Para 12 commences by saying it is further...

19

20 **DR. SINGHVI:** Respectfully submitted that the above course...the next line is purposive
21 interpretation, My Lordship calls it teleological approach. The most abstract books. Very
22 difficult to read. Now My Lords just see, what is that purposive interpretation? These are the
23 principles. Why does Your Lordship talk of the evil of political defections? Next para. Now It'll
24 be very brief. Kihoto quoted well known to Your Lordships, Kihoto in para 4 cites these
25 statements of objects and then says this. I'm reading - '*The evil of political defections is a*
26 *matter of national concern, if it is not combated, it is likely to undermine the very foundations*
27 *of our democracy and the principles which sustain it. With this object, an assurance was*
28 *given in the address by the President to Parliament that the government intended to*
29 *introduce in the current session of Parliament an anti-defection Bill. The Bill is meant for*
30 *outlawing defection.'* Why Your Lordship is saying all this in Kihoto, which is 20 years ago, 30
31 years ago? Because this says that when you interpret anything in this area, you must push this
32 sentiment, this object. That's the object of this.

33 Next Jagjit Singh. Just see this My Lords, Jagjit Singh. All the citations are given, I'll not go
34 through it. I'll just read it from my notes.' The validity of the orders by the Speaker under 2(2)
35 disqualifying certain independent MLAs of Haryana, three days prior to the elections of the
36 Rajya Sabha, fell for consideration.' Lordship knows in the Rajya Sabha the MLAs vote for us.
37 'This Honourable Court rejected an argument that the Speakers order has been passed in

1 haste. Observing that the disqualified MLAs were interested in prolonging the disqualification
2 proceedings beyond the date of Rajya Sabha. Critically, it was held that an independent MLA
3 cannot be avoided permitted to avoid the consequence of defection merely by not completing
4 the formalities of joining a political party.' So this was not.... My Lords this was only by
5 purposive interpretation. This was extending and stretching by the use of cruder words
6 stretching it, but stretching it for the purpose of promoting this object. Of course this is an
7 irony, there you did it to...they said, we'll prolong the disqualification so he can't vote....so he
8 can vote in the Rajya Sabha. Here My Lords, the same man is with Chief Minister. If Jagjit
9 Singh is right, this is a ten time way for sure [UNCLEAR] case for sure we are arguing now.
10 That was only a Rajya Sabha election.

11 Now 29 is what the Supreme Court says. 'It is also essential to bear in mind the objects' - I am
12 underlining the word objects - 'for enacting the defection law, namely, to curb the menace for
13 defection. Despite defection, a member cannot be permitted to get away with it without facing
14 the consequences of such defection only because of mere technicalities. The substance and
15 spirit of law is the guiding factor to decide whether elected member has joined or not joined a
16 political party after his election. It would not be a valid' etc. I'll skip that.

17 Now see Rajendra Rana, Constitution Bench, very well-known case but it was decided on the
18 basis of purposive interpretation. There were gaps. Your Lordship had to fill the gaps. Your
19 Lordship resorted to purposive interpretation. Kindly see that.

20 'This Honourable Court rejected and argued that the initial defection by 13.' - So this is a two
21 part defection. Initial was 13 'followed by subsequent claim by 37 MLAs. There was a split in
22 the BSP in terms of para 3, meant that there was no disqualification of the initial 13 MLAs.'
23 Now this is a good old days of a split existing. Even then look at the way Your Lordship has
24 interpreted it. Your Lordship had the split existing but see how they interpreted it, by
25 purposive. 'The Court applied the principle of purposive interpretation to hold the
26 disqualification occurs on the date when the add subtract, disqualification are committed.
27 Therefore, the question of disqualification, where there had been a split had to be determined
28 referenced with the initial date, not the subsequent date. Thus, the defence to the plea of
29 disqualification cannot be a subsequent defence and must have arisen at the time in the Acts
30 constituting the disqualification of Committee.' I will just read two marked question. I will not
31 read the whole one.

32 If Your Lordships will permit me. The first six lines of 33 only. It may be the collective descent
33 is not intended to be stifled by the enactment of 1022, but at the same time it is clear that the
34 object, mark the word object My Lords, is to discourage defection, which has assumed
35 menacing proportions undermining the very basis of democracy. The very basis of democracy
36 comes close to basic structure. Democracy is withheld to be basic structure already, obviously.
37 Therefore, a purposive interpretation in para 2 in juxtaposition of three and four is called for.

1 Therefore, therefore. Then My Lords one thing is clear, the defection is a ground for
2 disqualifying a member. He incurs a disqualification who is voluntarily given a membership
3 of his original political party meaning the party on whose ticket he got elected. In the case of
4 defence.... I'll skip that to save time.

5
6 Come to the next marked portion, next para, highlighted portion. The fact that a decision in
7 this regard may be taken in the case of voluntary giving up by the Speaker at a subsequent
8 point of time, cannot and does not postpone the incurring of disqualification by the act of the
9 legislator. Similarly, the fact that the party could condone, could theoretically, there is a para
10 which allows you to condone, the defiance of a Whip within 15 days or that the Speaker takes
11 the decision only thereafter cannot also pitch the time of disqualifications, anything other than
12 the point at which the Whip is defined. I am not only arguing relating back. I'm arguing
13 purposive interpretation, apart from relating back. Relating back has arrived at by adopting
14 purposive interpretation. Therefore, in the background of the object sought to be achieved by
15 the 52nd Amendment and on a true understanding of para 2 with reference to other paras, the
16 position that emerges is that the Speaker has to decide the question of disqualification, with
17 reference to the date on which a member voluntarily gives up his membership or defies it. That
18 is arrived at by purposive interpretation, no other way. It is really a decision ex post facto. The
19 fact that in terms of para 6, a decision in question is to be taken by the Speaker or the
20 Chairman, cannot lead to a conclusion that the question has to be determined only with
21 reference to the date of the decision of the Speaker. An interpretation of that nature would
22 leave the disqualification to an indeterminate point of time to the whims of the decision
23 making authority, same would defeat the very objective enacting the law. My Lords by
24 disabling notice to a Speaker, you will achieve the same. By the Speaker... the Governor either
25 let it achieve the same or all these are nullifying the Tenth Schedule. That's why purposive
26 interpretation is vital. Your Lordships has separately noted with me, paras 12, 52 and 53 of
27 Rana. That is done in the early... that is not quoted here.

28 Now My Lords, Shrimant Balaji Patil, Balasaheb Patil in para 89, which is quoted. Just come
29 to the boldface alone to save time. So I am skipping long paras in between. If we hold that the
30 disqualification proceedings would become infructuous upon tendering resignation..... Now
31 this is another technique My Lords, because if you are disqualified then you have to fight an
32 election again to become a Minister. If you are disqualified, you must fight an election again
33 to become a minister. So people will just resign and then immediately become a minister. Then
34 you get six months to be elected, because to become minister now and need not be elected for
35 a while. So to get around that, this is My Lords, purposive interpretation. If we hold the
36 disqualification proceeding would become infructuous upon tendering resignation any
37 member who is on the verge of being disqualified would immediately resign and would escape

1 the sanctions provided under 751, 164, and 361. These are remuneration consequences and
2 also most importantly that you have to... you can be a minister but be elected within six months
3 after that. That is not available if you are disqualified. Such an interpretation would therefore
4 not only be against the intent behind the introduction of Tenth Schedule but also defeat the
5 spirit of the 91st Amendment.

6 Then DTC an inhibition under the consequence, this is of course not a defection case but on
7 the principle of purposive. An inhibition under the constitution must be interpreted. So as to
8 give a wider interpretation to cure the existing evils. Now this is important, even though it is
9 not highlighted, just read this para, 180. Legislation both statutory and Constitutional,
10 connected and true from experience of evils but in general language should not therefore be
11 confined to the form that evil had taken. Time works changes, brings it to existence, new
12 conditions and purposes and new awareness of limitations. Therefore a principle to be valid
13 must be capable of wider application in the mischief, which gave it birth. It was born for reason
14 X, today Your Lordships will expand it to Y, tomorrow to Z, because we learn from experiences
15 My Lords. As they said it's not spirit of law, not logic, but experience. The famous words of Mr.
16 Wendell Holmes.

17 This is therefore a principle to be valid must be given wider application of mischief it gave it
18 birth. This is particularly true of constitutional constructions. Constitutions are not ephemeral
19 enactments designed to meet passing occasions. They are to use the words of Chief Justice
20 Marshall designed to approach immortality as nearly as human institutions can approach it.
21 The last 2 lines above Para 91 in my.... in my note which is Para 16. At the end of...' in the
22 application of a constitutional limitation and inhibition our interpretation cannot be only of
23 what has been, but of what may be." My Lords, got that para?

24

25 **JUSTICE SHAH:** What is here?

26

27 **DR. SINGHVI:** Within 16, I have quoted judgements. In the quotation there is a Para 91.
28 Two lines above 91. Then My Lords, next 91, I will not read Your Lordships has it but it's
29 coming out of Your Lordship's ears, this judgement, Your Lordship heard this. Only one
30 sentence I'll be emphasizing which was not relevant to the other case. I mean, I didn't argue
31 there. This is a quotation. Last line of 284. 'The Courts must adopt such an interpretation
32 which glorifies the democratic spirit of the Constitution.' I'll skip My Lords. All of 17 I'll skip.
33 18 is a very important paragraph, but I have in a different way covered it factually. It includes
34 an overlap with consequences happened. All the facts are itemized there. So I'll skip it to save
35 time. 18. My Lords seen My 18? Your Lordships can keep it as a factual summary.

36 Now come to 20 - 'Allowing the disqualification petition to be decided by a person who has
37 been appointed as a Speaker with the active support of Respondents and who is conducted

1 himself in a bias in mala fide manner, would result in incentivizing the constitutional scene of
2 defection. ' That's the phrase I want to comment for Lordship's consideration. 'incentivizing
3 the constitutional scene of defection and would be against the spirit and intent behind the
4 Tenth Schedule. The same would be the teeth of constitutional morality. Thus, the principle of
5 purposive interpretation demand that the present Speaker not being entrusted.' This My Lords
6 ends the purposive part.

7 Then Para 22 is an interesting point and not merger. Just see the irony here. Your Lordships
8 has only one defence, apart from condonation, of merger. Merger, this is a supreme irony in
9 this case. Merger is not even alleged by them, claimed by them, raised by them. In case of a
10 merger, suppose, 8 out of 10, 6 out of 10, 9 out of 10 leave, the remaining chap left behind is
11 protected, under Tenth Schedule he is protected. he...otherwise he is a loner, he himself is
12 protected. Here My Lords, but from Your Lordship's interim order, which we argued just a few
13 days ago. I'm not protected. Without claiming merger, I mean, today they are issuing letters
14 and Whips which, I'm not talking Your Lordship's protection. The Whip is being issued as we
15 speak My Lords in various....they are entitled to if the EC has recognized them. But for
16 Lordship's of protection I would be liable to be disqualified for not following his Whip, because
17 without invoking merger, there is no protection. They become the party. These are My Lords
18 consequences. These are consequences I add in my six consequences . These are a very weird
19 consequences. It's a very weird consequence. If you have the defence of a Constitution, you
20 have worse off. If you don't take the defence of Constitution, you are better off. I should have
21 mentioned in the consequences' the list, Your Lordship might consider putting it there. It's an
22 absolutely absurd weird consequence. Then I have extracted Para 4 in Para 23, that is Para 4
23 of the Tenth Schedule and I made this point in Para 24 again. And therefore, I have ended with
24 this. I'm ending my submissions with one judgment, which I have to cite, that's an absolute
25 end. That's an interesting judgement on compilations of judgments Volume 3F. It is a
26 judgement called Indore Development Authority 2020 8 SCC 129. constitutional Bench.

27

28 **JUSTICE SHAH:** On restitution.

29

30 **DR. SINGHVI:** Yes. Your Lordship is a party to it.

31

32 **JUSTICE SHAH:** Restitution

33

34 **DR. SINGHVI:** Restitution. Because that's the 5th facet or 6th facet of setting right a wrong.
35 You call it Actus Curiae. Your Lordship will not allow Your Lordship's acts or judgments to
36 harm a party. Your Lordships calls it a situation created by Your Lordships' order etc. Another
37 facet of saying the same thing is Restitution. My Lord is absolutely right.

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JUSTICE SHAH: Which page you want to read?

DR. SINGHVI: This is in this Volume 3F at PDF Page 33. 33, is the PDF Page of Volume 3F. And the citation of Indore Development is 2020, 8 SCC 129. So the first para I wish to read is far away from the beginning. It's Para 335 at Page... PDF Page 275. May I read it My Lords? The page of the PDF is 275. My Lords have got it? 'The principle of restitution is founded on the ideal of doing complete justice at the end of the litigation,' - I emphasize the word complete justice and I emphasize the word restitution. - 'And parties have to be placed in the same position but for, I said that as but for test, but for the litigation and the interim order. These are very, very important words for the Constitution Bench. But for, that's the test. But for the litigation and interim order if any passed in the matter. In South Eastern Coal Fields, it was held that no party to take advantage of litigation, it has to disgorge the advantage gained due to delay in case the list is lost, the interim order passed by the court merges into a final decision. The validity of an interim order passed in favour of a party stands reversed in the event of a final order going against the party successful at the interim stage. Section 144 of the CPC, is not the fontal source of restitution. It is rather a statutory recognition of the rule of justice, equity and fair play. The Court has inherent jurisdiction to order restitution so as to do complete justice. This is also on the principle that a wrong doer should not be perpetuated by a wrong order, not wrong doer, wrong order should not be perpetuated by keeping it alive and respecting it. In exercise of such power, the courts have applied the principle of restitution to myriad situations, not falling in the terms of 144. What attracts applicability of restitution is not the act of the court being wrongful of mischief. So, this is apart from Actus Curiae, or an error committed by the court. The test is, whether on accountable act of the party persuading the court to pass an order held at the end is not sustainable resulting in one party gaining an advantage which it would not have otherwise earned or the other party having suffered an impoverishment retribute. Very well put for as I would commend each word of this. Litigation cannot be permitted to be productive industry. That is only a fond hope. It is a productive industry. Litigation cannot be reduced to gaming, where there is an element of chance in every case. If the concept of restitution is excluded from application to interim orders then the litigant would stand to gain by swallowing the benefits yielding out of the interim order. Then the court... I will not read the quotation. Just pause here for 5 seconds. I get an interim order, the interim order is obviously not confirmed, if the interim order is confirmed the matter doesn't arise. It is the other way round. But every consequence of the interim order is enjoyed, gorged, eaten and then you piddle your thumb and say tough luck, now the final order has come too late, you can't ask for restitution. That is what Your Lordship seek to address by this passage. It's rather well put, for saving of time I'm not reading I would request My Lords reads

1 Eastern Coal Fields. From where it draws strengths, it's a Constitution Bench and this is the
2 essence of Justice. It's the essence of Justice in a constitutional matter with such grave
3 consequences, it is even My Lords afore sure. I am very deeply obliged.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Mr. Singhvi, one question I have and it's a faux pas.
6 You said, and both Mr. Sibal also said the same thing that, it's not a case where a trust vote is
7 solved when the house is constituted for the first time. It was the Governor's powers, of course
8 the Governor has the power to call for a trust vote when there is no clear majority on the floor.

9

10 **DR. SINGHVI:** My Lords, after election, when you have it for the first time.

11

12 **CHIEF JUSTICE CHANDRACHUD:** It's not after election because here the Government
13 is formed, pretty valid point, you know this is post formation of Government. What is the
14 power of the Governor if he calls for a trust vote post formation of the Government? What is
15 the circumstance in which he can?

16

17 **Dr. SINGHVI:** That means a running government.

18

19 **CHIEF JUSTICE CHANDRACHUD:** Running Government.

20

21 **Dr. SINGHVI:** Correct. My Lords, let me answer on the first principle then we can of course,
22 we can add some materials and give Your Lordships, specifically a note only on this. But My
23 Lords, on first principles. The first answer, is that zero, where because Your Lordship will
24 decide abstract, zero. Answer to Your Lordship's, direct question, direct answer. Zero power,
25 where there are pending disqualification issues in a running Government. Because Your
26 Lordships should not mix up the two. One is a normal vanilla runner Government with no
27 issue of disqualification, one is a disqualification pending at two levels. My candid clear answer
28 to Your Lordship's direct question is zero. Number two, the reason is, what I have given My
29 Lords. It is a lateral entry of the executive in an area where there cannot be any jurisdiction,
30 there is no locus for this. In either Tenth Schedule or Your Lordship's jurisdiction. Number
31 three, if Your Lordship's question is premised, has to be premised and rightly premised on the
32 assumption that the Governor, what he does in the question posed by the Honourable Chief
33 Justice, what is he doing My Lords? He is recognizing ABC as the "majority". There is no
34 relevance to Your Lordship's query unless Governor does that otherwise Your Lordship's query
35 would not be relevant. Obviously, it is supposed, that he is giving some imparting legitimacy,
36 recognition, or some status. My Lords, how is it that possible? In constitutional law, it's not
37 possible.

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CHIEF JUSTICE CHANDRACHUD: These are not [UNCLEAR] perspective. On the facts, that the letter of the 28th June 2022 the Governor [UNCLEAR] You said what the Governor did to essentially to recognize the split. [UNCLEAR]

DR. SINGHVI: With all due [UNCLEAR] split is a full recognition is my submission.

CHIEF JUSTICE CHANDRACHUD: He can't do recognition of a split.

DR. SIGNHVI: Yes. Correct.

CHIEF JUSTICE CHANDRACHUD: Now your answer to that is that the Governor so long as the disqualification petitions are pending, he cannot call for a trust vote for the simple reason that, you are still a part then of a government which is supported when the house was formed.

DR. SINGHVI: Except in one case, where for some freak reason which I cannot think of that will never happen, that nobody decides to seek to disqualify the other. Now My Lords, suppose....

CHIEF JUSTICE CHANDRACHUD: The Speaker what he may do is not disqualifying you at all. [UNCLEAR]

Dr. SINGHVI: I am going to give the juristic answer to Your Lordship's query. It can arise in practice. I am going to give the juristic answer. That will have to be a situation where there is no caveat and dispute. I mean, it is virtually by consent of everybody but with that answer comes the caveat. It goes back to the origin and object of the Tenth Schedule. Why was it enacted? It was enacted not to encourage these trust vote situations by defections. Unless that is so it will arise every week, every two weeks.

CHIEF JUSTICE CHANDRACHUD: One of the last point. May be it can take only two minutes, let me put it to the other side also. There is no clear answer.

DR. SINGHVI: My Lords, I am very grateful. It helps us to clarify in our own minds also.

CHIEF JUSTICE CHANDRACHUD: There is in assessing the strength of a ruling party in a House, whether it is a Legislative Assembly or Parliament, you have a numerator and you

1 have a denominator. The numerator represents the strength of the party when the House was
2 formed. The denominator represents the strength of the House. Now by calling the trust vote
3 on 20th June 2022, the Governor according to you, your argument is that the Governor
4 therefore recognizes that the part of the numerator has evaporated or has been taken out.

5

6 **DR. SINGHVI:** Rather nice way of putting in numerator.

7

8 **CHIEF JUSTICE CHANDRACHUD:** The numerator has been taken away. Therefore how
9 I feel that there is loss of confidence of the House. According to you that is not permissible
10 because of disqualification which was pending.

11

12 **DR. SINGHVI:** And he recognizes and gives legitimacy to the numerator. In Your Lordship's
13 example he is recognizing and giving legitimacy to the numerator.

14

15 **CHIEF JUSTICE CHANDRACHUD:** The only problem which I think you know which is
16 kind of not...which is worrying is, does the Governor not also recognize that the very act by
17 which the numerator may or may not be affected. For instance the numerator would be
18 affected even if you don't treat it as a split and it is a clear disqualification. Then the numerator
19 is reduced by X 'the strength of the ruling party in the House' minus Y the people who have
20 effected from. Who have therefore attain disqualification. But will that same act affect the
21 denominator also?

22

23 **DR. SINGHVI:** Because it reduces the total strength.

24

25 **CHIEF JUSTICE CHANDRACHUD:** The total strength of the house. So though the
26 Governor cannot therefore say, the governor cannot legitimately say that - Look, these people
27 have left you that's why I want the trust vote. But can the Governor not then say that - Look
28 assuming that they have... there is no recognizable concept of the split now under the Tenth
29 Schedule. The effect of all this is that these people have to be reduced both from the numerator
30 and denominator.

31

32 **DR. SINGHVI:** I will take it straightaway My Lords, straightaway. There are many answers.
33 First this exercise cannot be done by the Governor because there is no....

34

35 **CHIEF JUSTICE CHANDRACHUD:** You have been arguing that he can't assume to
36 himself to take a decision.

37

1 **DR. SINGHVI:** First Your Lordships, 3 or 4 answers. Lordships will note down they are very
2 specific answers. This is a exercise itself is very which he cannot embark upon. The Governor
3 has no such jurisdiction to embark upon when there is a running government. Now second
4 answer...

5

6 **CHIEF JUSTICE CHANDRACHUD:** No. He can't embark. But can he not therefore then
7 say I want this exercise to be demonstrated on the floor of the House.

8

9 **DR. SINGHVI:** No, no. I'll say that exercise he cannot embark. Let me answer.

10

11 **CHIEF JUSTICE CHANDRACHUD:** Second option..

12

13 **JUSTICE NARASIMHA:** He has argued that. He won't have

14

15 **CHIEF JUSTICE CHANDRACHUD:** It has to be.

16

17 **DR. SINGHVI:** My Lords numerator denominator you can't start because your Lordships
18 has to premise a direction by me to him. I am the Governor, I am him directions, please have
19 the, you can't give a direction.

20

21 **CHIEF JUSTICE CHANDRACHUD:** Got your point. Therefore to...

22

23 **DR. SINGHVI:** The legislature, the Speaker or the Chief Minister can say sorry, I don't want
24 these directions.

25

26 **CHIEF JUSTICE CHANDRACHUD:** You finish your arguments therefore, until the
27 outcome of the disqualification petitions is known to the Governor, he cannot then call for the
28 trust vote. Possibly, possibly using your line of arguments, we are just trying to understand,
29 [UNCLEAR] to its conclusion. After the disqualification petitions are decided by the Speaker
30 then there is a clarity in the mind of the Governor on what is the extent of the numerator which
31 has been affected...?

32

33 **Dr. SINGHVI:** I am very grateful, I was going answer, I am not conceding but I am going to
34 answer because that question doesn't arise, Your Lordships will be very careful about the
35 hypothetical situation but possibly work [UNCLEAR] because a constitutional, designated,
36 judicial or quasi-judicial Tribunal has given a verdict. After that there is something, as Your
37 Lordships puts it, that verdict unless disturbed by the High Court or the Supreme Court is

1 binding or operated. But here, Your Lordship's query answers the first part. You are doing it
2 well before.

3

4 **CHIEF JUSTICE CHANDRACHUD:** There is another point in your favour actually, which
5 is that the very same unit which affects the numerator affects the denominator also.

6

7 **Dr. SINGHVI:** Yes, yes. Of course.

8

9 **CHIEF JUSTICE CHANDRACHUD:** Right? So, if the Governor cannot postulate until the
10 disqualification petitions are there, then the numerator has been affected. Then he cannot say
11 that the denominator is affected.

12

13 **Dr. SINGHVI:** No, no he cannot. The very arithmetic, it has to be both. It is a very selective
14 otherwise.

15

16 **CHIEF JUSTICE CHANDRACHUD:** Right. Because the same act of defection which
17 reduces the strength of the ruling party, which also then affects the strength of the House..

18

19 **Dr. SINGHVI:** And My Lords, can you start doing this is as a...This is the word premature
20 tells Your Lordships in the face. Constitution says this body will decide. This body is yet to
21 decide, you go and give your decision virtually. I will reduce the denominator, I will reduce the
22 numerator, My Lords that will create chaos. And Your Lordships has to see the....

23

24 **JUSTICE NARASIMHA:** You are saying that he can't take cognizance of the existence of
25 the Tenth Schedule proceedings, he can take only upon an order passed by...

26

27 **Dr. SINGHVI:** Consequence of the tenth schedule proceedings.

28

29 **JUSTICE NARASIMHA:** After the determination by the Tenth Schedule.

30

31 **DR. SINGHVI:** [UNCLEAR] summary the consequences of the Tenth Schedule can be some
32 basis unless disturbed by the High Court or the Supreme Court to act.

33

34 **JUSTICE NARASIMHA:** And till then they continue to be members of the...

35

36 **DR. SINGHVI:** It would be in REM, once they said they...

37

1 **CHIEF JUSTICE CHANDRACHUD:** Otherwise this would be really a method of...

2

3 **DR. SINGHVI:** Then there will be chaos, and My Lords, not that it should come into Your
4 Lordships, Your Lordships cannot ignore the reality. Around the country also, Governors are
5 no more angels.

6

7 **MR. SIBAL:** [UNCLEAR] Just two cents. Number one My Lords, Tenth Schedule doesn't
8 recognize majority, minority.

9

10 **CHIEF JUSTICE CHANDRACHUD:** Absolutely, No question on that.

11

12 **MR. SIBAL:** Tenth Schedule postulates that even if there is a split of a majority, it can't be
13 recognized. The Governor knows that. The Governor knows that. And Tenth Schedule also,
14 para three also says there must be a split in the original political party. Tenth Schedule, para
15 three said original political party. We know that there was no split, Governor knows there was
16 no split in the original political party. So on what basis will he have a recognized? And your
17 answer to Your Lordship's question, how and the Governor call, supposing one of the parties
18 moves away from the coalition and goes to the Governor along with the BJP and says, now we
19 are so.

20

21 **CHIEF JUSTICE CHANDRACHUD:** That's not an individual act of the [UNCLEAR].

22

23 **MR. SIBAL:** Yes, that right. So, this is an individual act. It has to be the act of a party. Now
24 you have recognized the majority as the party and writing a letter to the Chief Minister. This
25 is unheard of.

26

27 **CHIEF JUSTICE CHANDRACHUD:** If a party says we don't support the Government
28 anymore, that's not a disqualification.

29

30 **MR. SIBAL:** That's right. Correct.

31

32 **CHIEF JUSTICE CHANDRACHUD:** Governor says we have lost one of your constituents

33

34 **MR. SIBAL:** That's fine. I am sorry.

35

36 **DR. SINGHVI:** Very deeply obliged.

37

1 **MR. KAMAT:** I will be very brief My Lords. Just for 15-20 minutes.

2

3 **CHIEF JUSTICE CHANDRACHUD:** Okay.

4

5 **MR. KAMAT:** Some point have not been covered.

6

7 **CHIEF JUSTICE CHANDRACHUD:** What are your Point?

8

9 **MR. KAMAT:** Yes My Lords, straight away. I've made a brief written note. But before I come
10 to the note, I made a chart of all the prayers for Your Lordships, and one or two areas which
11 have not been addressed, if Your Lordships have that chart which has the list of four writ
12 petitions on this side and two writ petitions on that side, is document eight, My Lords.

13

14 **CHIEF JUSTICE CHANDRACHUD:** Document 8?

15

16 **MR. KAMAT:** Yes My Lords. Chart, document eight, consolidated prayers. [NO AUDIO]
17 Serial number one and two, are writ petitions filed by my learned friends, challenging the
18 Notice issued by the Speaker. The first two, but that was the subject matter of 27th order. Now
19 My Lords, Item number three is a writ petition challenging the action of the Governor calling
20 for the trust vote. Now that has also been addressed at length. That is Item Number 3. Now
21 Serial Number 5 at Page 5 is a writ petition by us challenging a decision of the Speaker on 3rd
22 July, 2022 after his election changing the recognition of the Whip from Sunil Prabhu to Mr.
23 Gogawale. But this is an area which has not been addressed, which I am going to briefly touch
24 up. Serial Number 6 My Lord, relates to the actions of the Governor in administering oath to
25 Shinde and also whether Your Lordships should decide the disqualification petitions here. And
26 lastly My Lords Serial Number 7 challenges notices of disqualification issued to us. Now I will
27 limit myself to the challenge of 3rd July 2022 and this challenge My Lord is an independent
28 challenge irrespective of a view, which Your Lordship will ultimately take as far as
29 disqualification is concerned or Governor's actions are concerned. Now kindly have a look at
30 the writ repetition itself. The writ petition, starts.

31

32 **JUSTICE SHAH:** What is the writ petition number?

33

34 **MR. KAMAT:** Yes My Lord, that writ petition is 479 of 2022. Starts at My Lords, 470 PDF,
35 common compilation 1....406. My Lord, I am sorry... 406. If I can just quickly My Lord point
36 out my prayer there which is My Lord...

37

1 **CHIEF JUSTICE CHANDRACHUD:** One minute.

2

3 **MR. KAMAT:** I'm sorry.

4

5 **JUSTICE KOHLI:** Trying to pull out there. Which common compilation did you say?

6

7 **MR. KAMAT:** Common compilation 1.

8

9 **JUSTICE KOHLI:** Convenience compilation ?

10

11 **MR. KAMAT:** Serial Number 4. convenience compilation.

12

13 **JUSTICE SHAH:** It is convenience compilation, not common compilation.

14

15 **MR. KAMAT:** Of documents My Lord. Kindly see my prayer.

16

17 **CHIEF JUSTICE CHANDRACHUD:** Page?

18

19 **MR. KAMAT:** Page My Lord. PDF Page 408. This is to quash and set aside the
20 communication of 3rd July 2022 and the grounds taken are that the Speaker could not have
21 acted on the request of the legislature party. The Speaker is obliged only to act on the directions
22 of a political party as far as Para 2(1)(b) is concerned. The decision of the Speaker itself..

23

24 **CHIEF JUSTICE CHANDRACHUD:** Speaker could not have acted on the...

25

26 **MR. KAMAT:** Your Lordship need not take that in note.... that is in my note.

27

28 **CHIEF JUSTICE CHANDRACHUD:** On the advice of the legislature party.

29

30 **MR. KAMAT:** That's right. I'll just show the documents and straightaway come to the note.
31 If Your Lordships have the decision of the Speaker which is of 3rd July at PDF 382 of the same
32 volume . I'm sorry of CC-2.

33

34 **JUSTICE NARASIMHA:** Which one?

35

1 **MR. KAMAT:** My Lord, CC2, Pages 382 of the Convenience volume. Running Page 369, PDF
2 Page 382. Your Lordships are aware this decision is taken after the election of the Speaker, on
3 3rd, on the late night of 3rd. Kindly see, what it says My Lord.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Just one second. I'm just trying to track it down.
6 Convenience compilation 2 right? Page?

7

8 **MR. KAMAT:** Page 382. I am sorry My Lord. 'With reference to your above mentioned letter
9 I have been ordered to inform you that you have been replaced from the post of legislature
10 party by nominating the name of Ajay Choudhary. In this regard you have raised the objection
11 by addressing a letter on 22nd June. In this regard, after deliberation on provision in the law,
12 Honourable Speaker Maharashtra Legislative Assembly has cancelled the approval granted to
13 Ajay Choudhary as the leader, Shiv Sena Legislature Party, and kindly see the next My Lords,
14 and approves the recognition, recognized the nomination of Eknath Shinde, the leader Shiv
15 Sena Legislature Party. Similarly the proposal to nominate Sunil Prabhu as a Chief of Shiv
16 Sena Legislature Party, is to be cancelled and to recognize the nomination of Bharat Gogawale
17 as Chief Whip of Shiv Sena Legislature Party has been approved and recorded in the registry.
18 So, my argument is limited to the second part of the decision. As far as, replacement of Sunil
19 Prabhu by Bharat Gogawale by the action of the Speaker on the 3rd. And the only material
20 which was there before the Speaker, was that letter of 22nd of June of Mr. Shinde, which Your
21 Lordships have seen. PDF page 67, Lordships have seen that, which encloses that resolution
22 of 21st, appointing Sunil Prabhu.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Can you give us a cross reference?

25

26 **MR. KAMAT:** Yes My Lords, that is page, the letter of Mr. Shinde to the Honourable Deputy
27 Speaker is at page 67. If Your Lordships just have a look at that.

28

29 **CHIEF JUSTICE CHANDRACHUD:** It's 67, of the same compilation?

30

31 **MR. KAMAT:** Yes My Lords, kindly see the heading. It is not by a political party, Shiv Sena
32 Vidhimandal Paksh Karyalay. Clear My Lord, that the letter was addressed by the Shiv Sena
33 Legislature Party at best. And this is based on the resolution which was passed in Guwahati.
34 Which is that resolution at page 49, at PDF page 62. Again Shiv Sena Vidhimandal Paksh
35 Karyalay. Sorry sir, PDF page 55, Shiv Sena Vidhimandal Paksh Karyalay. Now, the defence to
36 this in the reply, there are only two defences taken which Your Lordships have to consider.
37 One, they said this is an issue which is covered by 212. Court should not get into it. And second,

1 in any event, it is the Legislature Party which decides the Whip. Straightaway if I can place the
2 reply itself, the two issues which have been raised in the reply. Kindly turn to PDF page 475 of
3 Convenience Volume-one. If Your Lordships, have page 475?
4

5 **JUSTICE KOHLI:** Sorry. Which convenience compilation please?
6

7 **MR. KAMAT:** Convenience Volume-one. I have to call this in the notes, it may not trouble
8 My Lords.
9

10 **JUSTICE NARASIMHA:** Why don't you take us run through that note Mr. Kamat?
11

12 **MR. KAMAT:** Yes, yes My Lords. I will just point out the pages and straight away....
13

14 **JUSTICE NARASIMHA:** While you read it, you can advocate.
15

16 **MR. KAMAT:** Yes sir, I will sir. Now if Your Lordships have page 475 PDF? They are replying
17 to this writ petition. The second column from the top. This is the answer to 479. Writ petition
18 is not maintainable in view of 212 and in any event Speaker has no discretion in the matter
19 and has to notify the will of a majority of the legislature parties. Your Lordships would have
20 made a note. Similar averments are made at PDF 492, at paragraph 34, 35 and 36. These are
21 the documents which I wanted to show. Now straightaway if Your Lordships come to my note.
22

23 **JUSTICE SHAH:** Your notice?
24

25 **MR. KAMAT:** My Lord that is A2. It's called additional WS.
26

27 **CHIEF JUSTICE CHANDRACHUD:** Devdutt, your A1 is about the Seven judge issue, I
28 think.
29

30 **MR. KAMAT:** Yes My Lord.
31

32 **CHIEF JUSTICE CHANDRACHUD:** A2.
33

34 **MR. KAMAT:** At PDF Page 2 My Lords. The first point that as far as validity of this decision
35 is concerned it's only Your Lordships who can take a view on this and if Your Lordships kindly
36 see Paragraph 8 and 9, this issue on whether the Whip is to be issued by the political party or
37 legislature party... My senior colleagues have already made submissions, I will not repeat it.

1 Paragraph 8, I have extracted 2B and 9 My Lords I have given the reference to Mr. Sibal's
2 submission [UNCLEAR] etc. My Lord, It's clear that the Whip has to be issued by the political
3 party and not by the legislature party.

4 Now My Lords coming to the defences raised in the writ petition. If Your Lordships have
5 Paragraph 12. Paragraph 12, I have extracted 212. If Your Lordships, see 212.

6

7 **JUSTICE KOHLI:** Just a minute.

8

9 **Mr. KAMAT:** I'm sorry I'm sorry. Due to the paucity of time, I am trying to hurry up.

10

11 **JUSTICE KOHLI:** Yes please.

12

13 **Mr. KAMAT:** My Lords Paragraph 12, 212 I have extracted. The first criteria for 212 to kick
14 in is that the validity of any proceedings in the Legislature of a State shall not be called in
15 question. So my submission is My Lord, that the decision of the Speaker of 3rd July 2022, is
16 not a proceeding in the Legislature of the State. And I am 45 My Lord by Muhammad
17 Siddiqui's case, which I have extracted in the next paragraph, Paragraph 34. 'The above
18 proposition makes it clear that the finality of the decision of the Speaker and the proceedings
19 of the State Legislature being important privilege of the State Legislature, etc. The proceedings
20 of the Legislature include everything said or done in the House in the transaction of
21 Parliamentary business.' Now My Lords deciding a Whip or giving recognition to a Whip has
22 nothing to do with Parliamentary business. Therefore, the primary ingredient of 212 is not
23 satisfied. Second My Lord is a more fundamental argument that this is not a mere case of
24 procedural irregularity but a case of substantive illegality and unconstitutionality. Your
25 Lordships from time and again said that 212 will not help the Speakers decision to be immune
26 from judicial review if it suffers from substantive illegality or unconstitutionality even if it is
27 proceeding in the House. The latest judgment here extracts the Constitutional Bench judgment
28 in Raja Rampal and if I can just place My Lord, Paragraph 431 of Raja Rampal which is
29 extracted at Page 6, PDF 6, Conclusion S, bottom of that page. 'The proceeding, which may be
30 tainted on account of substantive or gross illegality or unconstitutionality are not protected
31 from judicial scrutiny.' And similarly My Lord You an ouster clause attaching finality to a
32 determination does not oust the power of judicial review but not on grounds of lack of
33 jurisdiction, or it being nullity for some such reason as gross illegality, irrationality, violation
34 of constitutional mandates.'

35

36 **CHIEF JUSTICE CHANDRACHUD:** Yes.

37

1 **MR. KAMAT:** Now My Lords, as far as the decision is concerned. That this is not a procedural
2 irregularity, but a substantive illegality or unconstitutionality is born by a plain reading of
3 paragraph two of the Tenth Schedule. And all the authorities and material which has already
4 been relied upon, that references I have given if Your Lordships have paragraph nine, I've
5 given the references page 70 to 96, paragraph 9, page 4 of this note. And I will not repeat it.
6 Now My Lords the second point, third heading in my note. What is the meaning of a political
7 party, Your Lordships asked during the course of our submission, what does it mean? Now,
8 My Lords, I have tried to explain, because ultimately decisions of a political party, which I will
9 demonstrate, are ultimately decisions of the political party expressed through it's leadership.
10 And when 2 (b), talks about directions of the political party, it means decisions of the political
11 party as are communicated, the Speaker.

12 Now, kindly have paragraph 19 of my note. The Tenth Schedule of the Constitution, prescribes
13 the court of prohibited conduct of our legislatures within and outside of House, any
14 Commission of the prohibited conduct by a legislature envisages penalty of disqualification.
15 Now My Lords, there are two categories of prohibited conduct, which Your Lordships have
16 seen. And the footnote will show, I'm not going to repeat it. What is prohibited conduct for the
17 purpose of para 2-1 (a)? I have given the references also. Resignation need not be explicit, it
18 can be inferred, giving a letter to the Governor, going to the Governor with the opposition
19 party, constitutes para 2-1 (a). All the references are there.

20 Now the substantive submission on the term "political party", if Your Lordships have
21 paragraph 21. The term Political Party, occurring in the Tenth Schedule is not a nebulous
22 concept for the term which has a definite connotation. The term Political Party referred to in
23 the Tenth Schedule is the association/body of persons which has a definite leadership
24 structure, which is recognized by the Election Commission of India under Section 29A of the
25 RP Act. A political party is not synonymous with it's legislators. A political party, includes in
26 it's ambit the entire organizational structure, which is spread at several levels, block levels,
27 taluka, district and state level, apart from the primary members holding those posts. Your
28 Lordships have seen, as far as Shiv Sena was concerned, organizational elections were held in
29 2018 and the leadership structure was communicated in January of 2018. The documents
30 Your Lordships have seen, I'm not going to point it out again, but those documents
31 unequivocally show who is the leadership of the political party. That is page-one, of the
32 convenience compilation-two. Now, how this concept of political party was included, what is
33 the history? I will not trouble Your Lordships with that. If Your Lordships straight away have
34 now have 29-A, which is extracted in para 28. Why this is important is that political party is
35 not something which is anomalous. It is very clear, who are the members, what is the
36 leadership structure? So when the Tenth Schedule says directions of the political party, it
37 means the directions of the political party as is expressed through the political leadership of

1 that party. Paragraph 28 My Lords, 29-A is extracted. If Your Lordships have PDF page 12,
2 sub-section four, of 29A, clearly states that the application shall contain the details of the
3 President, Secretary, Treasures and other office bearers. So the leadership structure has to be
4 intimated to the Election Commission. Now My Lords, detailed guidelines have been made in
5 the Article 324, under section 29A, and that also My Lords is a part of this very written
6 submission. If Your Lordships My Lord just have PDF Page 21. It requires the following
7 documents to be submitted, which includes office that My Lord may kindly make a note in at
8 Page 22 and also affidavits to be given by the President and Secretary, which is My Lord, Pdf
9 Page 34. So therefore My Lords coming back to my note, Paragraph 30. The fact that Shri
10 Uddhav Thackeray is the President of the party as per the Constitution of the Party, was
11 intimated to the Election Commission from time to time. 'Thus the terminus or scope for
12 deciding at disqualification petition under the Tenth Schedule in regards to the prohibited
13 conduct of a legislature has to be with reference to the state of affair of that political party as
14 it existed on the date of alleged action of disqualification. The term political party in the Tenth
15 Schedule is referable to the political party as registered and recognized with the ECI under
16 Section 29A.'

17 Now My Lords the next section that the Tenth Schedule is intended to maintain the integrity
18 of the political party Your Lordships have been taken through it. I will not trouble Your
19 Lordship with that.

20 If Your Lordships now have Serial Number V , My Lords. The submission here is....

21

22 **CHIEF JUSTICE CHANDRACHUD:** Hiatus.

23

24 **MR. KAMAT:** No My Lord. it's (V)at Page 15. 'The Correct Constitutional conduct for
25 legislators who claim that they represent the original political party is to first get that claim
26 resolved before indulging into prohibited conduct under Tenth Schedule.'

27 The core question My Lord which arises for consideration of the Lordships in this case is that
28 when there is an intra-party dispute, can certain MLAs take the defence that look here I am
29 the political party and I will indulge into prohibited conduct under the Tenth Schedule and
30 after indulging into prohibited conduct, toppling Government, forming the Government, file
31 proceedings on 19th of July before the Election Commission for My Lords validating that
32 claim. And the defence taken is look here I am the political party. So Your Lordships are called
33 upon to decide what is the correct course of conduct in this situation.

34 Para 36 - 'It is respectfully submitted that in the event of a dispute within the political party
35 the correct constitutional conduct for the legislators who claim that they represent the original
36 political party is to first get their claim resolved before indulging into prohibited conduct under
37 the Tenth Schedule. It is submitted if a legislator or a group of a legislators have a claim that

1 they represent original political party then it is imperative that such a claim has to be resolved
2 or adjudicated upon and decided in accordance with. Brahmananda Reddy' - My Lord, which
3 is already cited.- 'It is no defence in a disqualification petition to say that the defectors have a
4 claim of constituting the original political party. Till such claims of MLAs that they represent
5 original political party attain submission by a process known to law. Such MLAS are governed
6 by the code of conduct prescribed in Tenth Schedule. Any other interpretations would make
7 the working of the Tenth schedule untenable. In the fact of the present case, Shri Eknath
8 Shinde and his faction resorted to prohibited conduct of violating the Whip, indulging into
9 antiparty activities instead of getting that claim adjudicated or resolved at first instance and
10 then indulging into political activity.'

11 So what the question is whether you undertake political activity contrary to the Tenth
12 Schedule, indulge into prohibited conduct or first get your claim resolved. 'Any other
13 interpretation would lead to Tenth Schedule being rendered unworkable. This can be
14 demonstrated by a simple example. A Legislative Assembly has 40 Members. Political Party A
15 headed by Mr X has 5 MLAs. Party A forms a coalition Government, Mr. X is the Chief
16 Minister, subsequently three MLAs out of five, claim that they are the real political party. The
17 said three MLAs go to the Governor along with the opposition parties to form the Government.
18 If the disqualification petitions are filed against those three MLAs, writ petitions will have to
19 be decided with reference the state of affair as it existed on the date of prohibited conduct.
20 This is in line with Rana, of relating back. Thus the faction of three MLAs, should first get that
21 claim of being the real political party adjudicated and determined and then take a political
22 decision instead of putting the cart before the horse. This is the only interpretation which
23 harmonizes the provisions of Tenth Schedule and the Symbols Order. This interpretation will
24 harmonize various competing interests and objects and ensure that the integrity of the political
25 party is maintained, at the same time giving individual MLAs, or a group or a faction, the
26 opportunity to get the political leadership changed in a manner known to law.

27 My Lords, the next submission, that if this...if the contention of my learned friend's is accepted,
28 that moment there is a dispute within a political party, there can't be a disqualification
29 petition, will lead to a complete constitutional hiatus as far as Tenth Schedule is concerned.
30 That My Lord in paragraph 40, it is respectfully submitted that there cannot be any hiatus in
31 the working of the Constitution. It is the contention of the Respondent...if the contention of
32 the Respondent is accepted that the Tenth Schedule proceedings are hinged on a future
33 declaration of their status and/or their claim of being the political party, then it would result
34 in a situation where in every case of disqualification a defence would be taken where the
35 defectors represent the political party, and therefore no action of disqualification can be taken.
36 Taking the argument to its logical conclusion it would only mean that till such claim of the
37 defections...defecting faction that they represent the political party is decided by competent

1 forum, the Tenth Scheduled proceedings cannot be proceeded with. This would result in a
2 constitutional hiatus. My Lords, then I have cited Supreme Court of Canada that on
3 Constitutional interpretation and also Your Lordship's judgment in the Advocates on Record
4 Association.

5 Then My Lords, serial number seven. I respectfully submit that ultimately Your Lordships will
6 have to lay down the batting order as Justice Narasimha put it, My Lords that is paragraph...
7 serial number seven. It is imperative for this Honourable Court to lay down a constitutional
8 sequence in order to harmonize the Tenth Schedule 179-C, as well as para 15. As it's evident
9 from the facts to present case, the Respondent MLAs, instead of first resolving that claim in a
10 manner known to law, have resorted to prohibited conduct. The proceedings before the
11 Election Commission were initiated only on 19th July, that is much after the disqualification
12 petitions were filed on 23rd June 2022. Then paragraph 44 is the submission. Thus, it is
13 imperative that this Honourable Court lays down the constitutional sequence and the legal
14 permissibility of three distinct constitutional/statutory procedures, namely, one proceeding of
15 disqualification under the Tenth Schedule, that is one. Second is 179-C, My Lords, which has
16 already been argued. And then paragraph 15 of the Symbol's Order. It is respectful submission
17 of the petitioners that the Tenth Schedule proceedings necessarily have a constitutional
18 precedence over 2 and 3 above. Second My Lords, para 15 proceedings which are based on the
19 majority test cannot be undertaken or proceeded with, without final adjudication of the Tenth
20 Schedule. And third is the Nabam Rebia argument. Then last two submissions are on the
21 Symbol's Order and I have submitted that the reason is My Lords, that decision so defence....

22

23 **CHIEF JUSTICE CHANDRACHUD:** That is not an issue which falls here.

24

25 **MR. KAMAT:** Yes My Lords. One of the questions which you have referred to Your Lordships
26 in the reference order, relates to the power of the Election Commission. My Lords the only
27 defence which is taken My Lord...

28

29 **CHIEF JUSTICE CHANDRACHUD:** That is a separate.

30

31 **MR. KAMAT:** Yes My Lords. The reason is, the defence which is going to come, which Your
32 Lordships will probably hear, is that look here we are now being adjudicated as the party. So
33 therefore the disqualification petition are anyway not maintainable, because it is given by a
34 person who is not a political party. So, just two submissions on that. If Your Lordships have
35 paragraph 47. I have submitted that as far as para 15 is concerned, it cannot be undertaken
36 without determination of the Tenth Schedule which Your Lordships will examine in another
37 matter. And last Paragraph 49 and 50 is that the decision of the Election Commission is a

1 declaration of status that who is the political party pursuant to a split which has arisen. That
2 can only have a prospective My Lord effect. It can't relate that. Kindly have My Lords
3 Paragraph 49. It is submitted that under Paragraph 15 of the Symbols Order.... 'It is submitted
4 that a decision under Paragraph 15 of the Symbols Order is a decision which can only have a
5 prospective effect.' Then My Lords I have quoted Paragraph 15 of the Symbols Order.

6 It is a quasi-judicial adjudication under the Symbols Order. That My Lords, adjudication of
7 the dispute results in an order declaring XYZ as representing the political party. And this
8 submission is My Lord , that can only have a prospective effect. Now My Lords kindly see the
9 consequence. If it is held otherwise that it relates back, it would have My Lord in our respectful
10 submission, complete disastrous consequences as far as the Tenth Schedule is concerned.
11 Because when the decision comes, for instance, in this case it has come in February My Lords.
12 Petition moved on 19th of July and today to say that in view of this decision now in February,
13 2023 all the actions of prohibited conduct get defaced My Lord, would be to destroy the
14 complete intent, letter and spirit of the Tenth Schedule. My Lords all the other submissions
15 and judgments are there... I am grateful for a very patient hearing. Grateful My Lords.

16

17 **CHIEF JUSTICE CHANDRACHUD:** We will start after lunch, but just before we rise, Mr.
18 Kaul will first argue, thereafter Mr. Jethmalani. And then this Mr. Maninder Singh. Mr. Kaul,
19 how will you space out your submissions? How long would you take? Will you take the rest of
20 the day today?

21

22 **MR. KAUL:** My Lords, the Solicitor General, would of course also appear. My Lords, I would
23 definitely take today, whatever time and tomorrow.

24

25 **CHIEF JUSTICE CHANDRACHUD:** Today. And tomorrow is Wednesday.

26

27 **MR. KAUL:** Yes My Lord.

28

29 **JUSTICE NARASIMHA:** Entire?

30

31 **MR. KAUL:** Yes My Lords. I have three and a half days of arguments or four days of
32 arguments.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Right. So we want to wrap up the matter by the end
35 of this week.

36

37 **MR. KAUL:** Right. but I....

1
2 **CHIEF JUSTICE CHANDRACHUD:** So you know what we would suggest is that you
3 know, you can begin... of course you will take the whole of the day today. If you can sort of
4 complete, say 1 hour after lunch tomorrow, say by 3 o' clock, that would ensure that then, Mr.
5 Jethmalani and Mr. Maninder Singh can conclude, say by tomorrow evening. And then the
6 Solicitor can get a little time day after and then the rejoinder.

7
8 **MR. KAUL:** I'll try my best....

9
10 **CHIEF JUSTICE CHANDRACHUD:** Alright. Let's do it this way. Mr. Sibal, between you
11 and Dr. Singhvi, how long would you anticipate for a rejoinder? I mean....

12
13 **MR. SIBAL:** My Lords, if it's 02:00 in the afternoon on Thursday, we will finish by 4:00.

14
15 **CHIEF JUSTICE CHANDRACHUD:** So if we can...

16
17 **MR. JETHMALANI:** We can finish by 4:00....

18
19 **MR. MEHTA:** On Thursday I may not take more than 1 hour, one and half hour My Lord,
20 maximum.

21
22 **CHIEF JUSTICE CHANDRACHUD:** Alright.

23
24 **MR. JETHMALANI:** We will endeavour to finish by 2 o' clock on Thursday.

25
26 **MR. SIBAL:** That's right, that's fine.

27
28 **CHIEF JUSTICE CHANDRACHUD:** So then what we were suggesting was if you can
29 between the three of you, you can finish by tomorrow, ideally. Then you know, the solicitor
30 says he will take about one hour or one and a half hours on Thursday. So if he begins by 11:00
31 by 12:30 he'll be done. Then we still have a little bit of a half an hour margin. He said one, one
32 and a half hours. So you know, we'll just....

33
34 **MR. KAUL:** Try our best My Lords. That is all I can say.

35

1 **CHIEF JUSTICE CHANDRACHUD:** Between the three of you and the Solicitor, if you can
2 finish complete by Thursday, 02:00 PM you know, then they have the rejoinder after lunch on
3 Thursday.

4

5 **Mr. SIBAL:** That's enough for us.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Then maybe the three of you and just MR. Solicitor
8 can also have a word so that, you know, you space your arguments and you know what you're
9 going to argue. So that saves a lot of time.

10

11 **MR. JETHMALANI:** Your Lordships are sitting at 3:15 for a bail matter we are told so.....

12

13 **CHIEF JUSTICE CHANDRACHUD:** 3:50.

14

15 **MR. JETHMALANI:** We will only be sitting in the bench till...

16

17 **CHIEF JUSTICE CHANDRACHUD:** 3:50.

18

19 **MR. JETHMALANI:** 3:50.

20

21 **CHIEF JUSTICE CHANDRACHUD:** We thought because 3:15 then we'll really eat into
22 your time. It might continue beyond 4 o' clock, but we'll ...

23

24 <<LUNCH BREAK>>

25

26 **MR. KAUL:** I will address to Your Lordship's questions referred. Your Lordships because my
27 respectful submission is going to be, that a large number of arguments have gone far beyond
28 the questions referred.

29

30 My Lords, I am respectfully submitting, according to us large number of arguments are far
31 beyond the questions referred and really are not relevant to the issues at hand. Be that as it
32 may, what is the basic premise of the case of the petitioners over the last three and a half days?
33 That because there was a split in the legislature party, we the Respondents stand per se
34 disqualified, and because we stand per se disqualified, ex facie disqualified, under para 2-1 (a)
35 and 2-1 (b), of the Tenth Schedule, the Supreme Court of India should bypass all coordinate
36 constitutional authorities and decide itself whether we are disqualified or what in fact,
37 effectively saying we are disqualified on that.

1 Secondly, till that disqualification is decided, neither should the floor test have happened nor
2 should the Governor have taken a decision, nor could the ECI have taken a decision, because
3 if ultimately they are to be disqualified, it will have a bearing on the decision made by any of
4 these authorities.

5 And thirdly, and thirdly because it is Your Lordship's order of 27th of June 2022, which led to
6 the toppling of a Government, only Your Lordships can correct that wrong and restore status
7 quo at that. Now My Lords, this fundamental premise, on which the entire edifice of this case
8 is based suffers from some basic problems before I come to the issues in hand.

9 Your Lordships have time and again held, that we will not act as the court of first instance
10 especially where coordinating Constitutional authorities have been specifically vested under
11 the Constitution with the requisite powers to decide an issue. There is also a presumption that
12 you are per se disqualified so you are the jury you are the judge to decide it yourself without
13 any constitutional authority till date, having given any finding on our disqualification. You
14 decided, you presumed it so. But more importantly and I, before I get into the issues, I want
15 to touch the issues of the Governor. It is of some concern. There were emphatic assertions
16 made, that My Lords when the Chief Justice and Your Lordships put a question, that what
17 should the Governor do, in a case where not before the Government is formed, but after the
18 Government is formed, there is a problem should the floor test ordered or not. What is the
19 course of action that the Governor should adopt? And the answer given was that floor test
20 ought not to take place. Only a no confidence motion could be moved in such a situation. And
21 Dr. Singhvi said where disqualification petition is pending, my answer is zero as far as holding
22 off of floor test is concerned. My Lord with utmost respect, these submissions of the petitioner
23 are in the teeth of nine judges of this court in Bommai are in the teeth. We are told that the
24 concern in this matter is not about who wins and who loses but maintaining constitutional
25 propriety and institutions. And I think the arguments sought to be now forwarded before you
26 are constructive of the entire constitutional scheme as settled by Your Lordships in a patina
27 of decisions including the nine Judges in Bommai. Also reiterated in Shivraj Chauhan's case
28 where Your Lordship's relying on Bommai said that it is incorrect to say that a floor test can
29 only be directed to be ordered by the Governor before a Ministry formation and not after. In
30 fact, Your Lordship words in Bommai

31 and Shivraj were - 'It is the duty of the Governor to hold a floor test. The only constitutionally
32 ordained forum is the Assembly of Parliament and no Governor and individual in his own
33 opinion can form a view whether a majority has been won or lost and the only way forward is
34 a floor test. And the Court frowned upon the pendency because there used to be a huge misuse
35 of Article 356 to dismiss Governments and dissolve Houses. There was the Court frowned
36 upon it and said that the first instance the Governor must call for the floor test in such a case.
37 Now My Lords what happens in this case? In this case from the 27 and in my earlier submission

1 before Your Lordships of Nabam Rebia, I had even then said that I'm not for a minute
2 suggesting that when we filed our 32, Nabam was not one of our case. That is not our
3 contention at all. Nabam was [UNCLEAR] important arguments. The other was equally
4 important was violation of principles of natural justice and the third was imminent,
5 immediate danger to the lives of the MLAs whose houses were being burnt and relatives being
6 threatened. That is why we came in a 32 and that is hugely different and does not bought by
7 Kihoto at all. Because our contention was what that Your Lordship will decide on
8 disqualification petitions as they are claiming. That was not the prayer in our writ petition.
9 Our contention was that Nabam even as it stands today has held the judicial field. It is a
10 Constitution Bench decision, and the Speaker had no jurisdiction to proceed with the matter
11 at all apart from the principles of matter in justice being violated. The court keeping of this in
12 mind, only on the issue of natural justice on that day extended the time, did not injunct the
13 Speaker, extended the time. Now extension is interpreted to say because extension was
14 granted till 12th of July, it effectively meant an injunction, I don't see how If you violate a
15 provision of the rule which says adequate notice should be given, the Speaker doesn't give that
16 notice. The Honourable Court says give them more time.

17 Now after that My Lords what does the Governor do? The Governor in his letter writes to say
18 that seven independent MLAs who were supporting the Ministry have withdrawn support. The
19 leader of the opposition has written to me to say that they have no confidence, the ministry
20 Within the Ministry, a large section of the Legislative Party had moved a resolution saying that
21 they do not support the MVA Ministry and government. Given these facts, I think it prudent
22 and call upon the then Chief Minister Mr. Thackeray to come and prove his majority on the
23 floor of the House. My Lords, I put a question to myself what else is the Speaker.... the
24 Governor expected to do. Your Lordships words again in Bommai are by whatever process or
25 means the words used by Your Lordships in Bommai are by whatever process or means, the
26 Governor can gather the information that was required which raises a credible as to the
27 majority of a government in power.

28 The only course open is, the floor test. And that is what the Governor goes ahead with. You
29 refused to face that floor test and your only answer to that is, it was a *fait accompli*. So, My
30 Lords, if legislative, if democracy, it has to be tested on the floor of the House are going to be
31 decided on, if my *fait accompli* so I won't face a floor test. And yet want to continue in
32 government, is that acceptable? Is that constitutionally acceptable? The only mechanism
33 known is a floor test and you evade that. And then you cast aspersions on a constitutional
34 authority to say, which in any case today is the norm, you can cast any aspersion on anyone
35 you want to. And you say that the Governor in question, failed to discharge his duties, acted
36 with bias and in a mala fide manner. My Lords, what was he expected to do? Seven

1 independent MLAs say, we've lost confidence. The leader of the opposition writes, 34 of the 55
2 MLAs pass the resolution saying we have no faith in the ministry any longer.
3 Now, before I proceed further, before I proceed issue wise, I want to show these two
4 judgments. It was so much time has been spent on the powers of the Governor and that he
5 acted with mala fide intent and the solutions that Your Lordships asked for what could have
6 been done by the Governor? It was said, he definitely could not have asked for a floor test. And
7 the only way to get out of all this judgments is to say that those cases did not evolve a
8 disqualification petition pending.

9 Now My Lords, the moment Your Lordships in Shivraj Singh Chauhan, Kuldeep Bishnoi, and
10 any number of judgements have said that...And Shivraj Singh Chauhan especially, that
11 proceedings under the Tenth Schedule, which concern disqualification can a trust vote operate
12 an entirely different fields. In the meantime, the right of an MLA to participate in the
13 proceedings of the House continues and it continues to participate and vote. Now, if their
14 submission is taken to be correct, firstly it is wrong because in the teeth of what Bommai and
15 Shivraj Singh Chauhan says. Then when Your Lordships ask them what could be done? They
16 say zero definitely, if disqualification petitions are pending. Which is in the teeth again in
17 Shivraj Singh Chauhan, which says the irrespective of disqualification pending, irrespective of
18 resignation letters pending, they will participate in the House. And that comes back to the
19 same question, that if an MLA is permitted to participate in the floor of the House, the legality
20 as far as those proceedings are concerned, it can't be questioned. You can't say that all the
21 proceedings, budgets, decisions, bills passed will all be annulled. And we will restore status
22 quo ante. And when I come to Rana, I will point out My Lords, Rana is completely misread.
23 Rana was in the context, where the Speaker's power, the Supreme Court held that when the
24 Speaker decides the disqualification issue, he sees the events as on that date. Because there a
25 set of MLAs have gone and shown support to a rival faction and gone to Governor. The split
26 took place later. They sought to seek the defence of the Tenth Schedule, as then existed. The
27 Supreme Court, ultimately said no, as far as the Governor is concerned, the facts will be seen
28 on the day when they approach the Government. The Supreme Court never said that the MLAs
29 who participated in the trust votes, the MLAs who have taken decisions, proceedings which
30 have been legally conducted, will all stand annulled. Because ultimately it
31 comes around to the argument being that if ultimately Your Lordships were hold them to be
32 disqualified, the EC proceedings couldn't have gone on, the trust vote could not have happened
33 and thus restoration of *status quo ante*, which would mean annulled everything that has
34 happened. That is effectively the argument being laid before Your Lordships.

35 To state a EC proceedings, four arms of arguments were addressed. That EC should not go on
36 with the same argument. That if EC goes ahead with that and then later on it found that these
37 people are disqualified. They have no right to approach the EC. And a question was put by

1 Your Lordships even on that day, what about his right as a member of political party? In any
2 case who will decide this, whether there has been a split in the political party, and then you
3 presume as if I have argued that there is only a split in the legislature party and not in the
4 political party? We have consistently said so including in our resolution dated 21st of June
5 2022, that a Legislature Party is integral and organically connected and co-joined to a political
6 party. What is said in the Legislature Party is a reflection of what is happening amongst
7 millions and thousands of cadres of the Shiv Sena across the country because there was a huge
8 discontent of aligning in the MVA with people who you are ideologically opposed to the right
9 through your political careers in existence. That was where the discontent arose from that you
10 fought in an relation with another party after that suddenly went along with another party.
11 That was the political discontent. So we were conscious and it rightly talked about the political
12 party discontent. But who will determine this? Who is the Whip? There are two Whips we are
13 talking about they say your Whip is only appointed by the Legislature party. We say no. To say
14 that our Whip appointed by the Legislature party does not represent the authority of the
15 political party is wrong. Ultimately, right or wrong the EC today is taken a decision that's the
16 subject matter of another petition which Your Lordships will decide. But even on that day
17 when a stay was asked for, our respectful submission was how can the Supreme Court today
18 without the concerned constitutional authority at all deciding on the issue, at all deciding on
19 the issue take a call in these matters just because you say so and you presume we are per se
20 disqualified. Now please have My Lord's Bommai and Shivraj Singh Chauhan only on the
21 powers of the Governor before I proceed because that's one of the most glaring submissions
22 made in the teeth of the settled law of the land. Please for the..... judgment...

23

24 **JUSTICE NARASIMHA:** Mr. Kaul, so you are submission starts with the primary principle
25 that proceedings under the Tenth Schedule operate independent of the power of the Governor.
26 Irrespective of the pendency of the Tenth Schedule proceedings at any point of time, the
27 Governor can ask a floor test. Number one. And if he asks then are there any limitations with
28 respect to the fact that the Tenth Schedule proceedings are pending? Should he wait? Not wait?
29 Because the primary question will depend upon....

30

31 **MR. KAUL:** Yes. I bow down. My Lords I bow down, Your Lordships have summed it up very
32 well. May I just add to what Your Lordships are saying? In addition to what Your Lordships
33 summarized, is my second limb of the argument that Your Lordships have already held in any
34 number of judgments that an MLA during pendency of a disqualification petition is fully
35 entitled to participate and vote. If that were so, then what is the hindrance for floor test being
36 conducted? And in all those matters the issue arose the same. During pendency of
37 disqualification petition, should the floor test take place or not, I'll show those paras. And Your

1 Lordships answered by saying, why should the floor test not take place in the meantime. You
2 can't without the decision of the Speaker, say that a person is disqualified.

3

4 **JUSTICE NARASIMHA:** There is a little catch there. See, there is a catch there.

5

6 **CHIEF JUSTICE CHANDRACHUD:** So the problem really is this that the antecedent
7 circumstances which give rise to the necessity of a floor test are based on an alleged defection.
8 So why is the floor test necessary? The need for a floor test arises because of the fact that a
9 group of legislators maybe disqualified as a result of their having formed a split from the party.
10 This may or may not...

11

12 **MR. KAUL:** Not from. Within there is a rival....

13

14 **CHIEF JUSTICE CHANDRACHUD:** ...there is a legislature party. Now if the validity or
15 the legitimacy of the split is itself in question, then holding or directing the holding of a floor
16 test before the disqualification issue is resolved would result in this that are you not then
17 putting a premium on the very circumstances which gave rise to the disqualification?

18

19 **MR. KAUL:** So My Lords, a) Your Lordships have answered that, have answered that. And
20 I'll show those judgments where this very question arose that can those MLAs against whom
21 a disqualification petition is pending participate in a floor test?

22

23 **CHIEF JUSTICE CHANDRACHUD:** There you are right.

24

25 **MR. KAUL:** Look at the reverse.

26

27 **CHIEF JUSTICE CHANDRACHUD:** Because the law is very well settled that the mere
28 pendency of a disqualification petition does not preclude a Member of Parliament or the
29 Legislature in the State from exercising all rights and performing all functions of a legislature.
30 Undoubtedly. But equally, we have to be cognizant of a situation where the reason why he or
31 she can exercise all the functions as a legislature is because the Speaker has been not permitted
32 to decide the disqualification.

33

34 **Mr. KAUL:** May I with respect say My Lords, as far as that goes....

35

36 **CHIEF JUSTICE CHANDRACHUD:** Step one, the step one, the speaker is told to defer a
37 decision on the disqualification issue. So, the disqualification issue cannot be decided.

1 Therefore, why can the legislature not be restrained from exercising all rights from the floor
2 of the House? Because of the judicial edict, that you shall not hear the disqualification until
3 the 12th of July. Step one.

4

5 Step two, why is the trust vote required to be held? Up to, up to the 21st of June there was
6 never any requirement of a trust vote. What is the requirement of a trust vote? The
7 requirement of a trust vote arises because the seven independent MLAs, then you know, the
8 34, they all start clamouring and they say well, there is a disquiet within. We don't owe
9 allegiance and our Chief Minister has lost the, lost the confidence of the party. Now the point
10 of the matter is this that if that is the reason for the unsettling of the Government in the House,
11 then the antecedent basis of that itself is the allegation of disqualification. So if you allow a
12 Government to be toppled then in circumstance...

13

14 **MR. KAUL:** May I with respect say, firstly, if I may say that I've just begun.

15

16 **CHIEF JUSTICE CHANDRACHUD:** We are just flagging it.

17

18 **MR. KAUL:** No, no, I am very grateful. I am very grateful.

19

20 **CHIEF JUSTICE CHANDRACHUD:** These are the concerns.

21

22 **MR. KAUL:** Yes, yes.

23

24 **CHIEF JUSTICE CHANDRACHUD:** This is not a case where, say, there is a three party or
25 four party coalition in a state. Two parties say we are pulling the rug and entitled to that there's
26 no disqualification. You have four party which have come together in an Aghadi and those two
27 parties say we are pulling the rug and we want to get out of this Government. It doesn't have
28 the mandate of why we came together. Governor can tell you, say the two of your constituents
29 have pulled out, now please show me that you have established, you owe...You have the
30 allegiance of the House. Because there there is no...The problem arises in cases like this where
31 the reason for the trust vote is so intrinsically related to the alleged disqualification itself. You
32 are right. My judgment in Shivraj says that well, these are two independent issues. But there
33 is a...

34

35 **MR. KAUL:** No My Lords, let me....

36

1 **JUSTICE SHAH:** Mr. Kaul, one another thing. In addition to this, what is, what are their
2 submissions? There is no difficulty that both are independent. There is no difficulty that both
3 can go together simultaneously. But their submission is that if those persons who are to be
4 against whom the disqualification proceedings are pending, are permitted to cast their votes
5 in the, on the floor test, in the no confidence motion. If ultimately, after some time the Speaker
6 takes a decision and they are disqualified, they are disqualified from day one from the date of
7 their conduct. Correct? Then what will happen to that? So their case is that it is better, that the
8 disqualification proceedings are initiated first, that is what their submission. You have to
9 answer that also.

10

11 **MR. KAUL:** Yes My Lords, I will.

12

13 **JUSTICE SHAH:** That is the crux of their main submissions.

14

15 **MR. KAUL:** My Lords may I?

16

17 **JUSTICE SHAH:** You can argue on that, this was only warm up.

18

19 **CHIEF JUSTICE CHANDRACHUD:** Let's start with Bommai.

20

21 **MR. KAUL:** I thought, let me start with that and then I will come and I am conscious what
22 My Lords have said. I'm very grateful. I'll address those questions.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Anything more than five in that sense is gospel for
25 us, which was in a way we are bound by law, absolutely.

26

27 **MR. KAUL:** Not only that My Lords, of course you are right that way but even I want to show
28 two paras, even as far as Bommai is concerned, on how Shivraj deals with it? It's important for
29 Your Lordships to see that.

30

31 **CHIEF JUSTICE CHANDRACHUD:** Fair enough. So we'll see Bommai and then...

32

33 **MR. KAUL:** Yes, first, please see Bommai, and then see...Yes, yes. Kindly have para 119.

34

35 **CHIEF JUSTICE CHANDRACHUD:** Where is it? Your convenience compilation?

36

37 **MR. KAUL:** Volume 2 My Lords. Judgment Compilation Volume 2, PDF page 368.

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JUSTICE SHAH: PDF page?

MR. KAUL: 368.

CHIEF JUSTICE CHANDRACHUD: Which paragraph?

MR. KAUL: 119. My Lords May I?

CHIEF JUSTICE CHANDRACHUD: Yes.

MR. KAUL: 'Now in this connection it is necessary to stress that in all cases where the support of 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 counterclaims 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 House. Hence, when such demonstration is possible, it is not open to bypassing and instead depend on 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 fide. It is possible that on some rare occasions the floor test may be impossible, although it is difficult to envisage such a 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 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.'

Now, kindly have para 121 same page. 'We may on this subject refer to the unanimous report of the five member Committee of Governors, which recommended as follows -

The test of confidence in the Ministry should normally be left to a vote in the assembly. Where the Governor is satisfied by whatever process or means that the Ministry no longer enjoys majority support, he should ask the Chief Minister to face the assembly and prove his majority within the shortest possible time. If the Chief Minister shirks this primary responsibility and fails to comply the Governor would be in duty bound to initiate steps to form an alternative Ministry. A Chief Minister's refusal to test his strength on the floor of the assembly can well be interpreted as prima facie proof of is no longer enjoying the confidence of the legislature. If

1 then an alternative Ministry can be formed which in the Governor's view, is able to command
2 the majority of in the assembly, he must dismiss the Ministry in power and install the
3 alternative Ministry in office. On the other hand, if no such Ministry is possible, the Governor
4 will be left with no alternative but to make a report to the President under article 356.'

5 Now kindly have para 391 on PDF page 517. 391. My Lords have Page 391?

6

7 **CHIEF JUSTICE CHANDRACHUD:** Yes.

8

9 **MR. KAUL:** 'We must also say that the observations under point 7 is equally misplaced. It is
10 true that action under Article 356 is taken on the basis of satisfaction of the Union Council of
11 Ministers. But on that score it cannot be said that legal mala fides of the Governor is irrelevant.
12 When the article speaks of the satisfaction being formed on the basis of the Governor's report
13 the legal mala fides if any of the Governor cannot be said to be irrelevant. The Governor's
14 report may not be conclusive, but it's relevance is undeniable. Action under 356 can be based
15 only and exclusively upon such report. Governor is a very high constitutional functionary. He
16 is supposed to act fairly and honestly consistent with his oath. He is actually reporting against
17 his own Government. It is for this reason that the Article 356 places such implicit faith in his
18 report. If however in a given case his report is vitiated by legal mala fides, it is bound to vitiate
19 the President's action as well. Regarding the other points made in the judgement of the High
20 Court, we must say that the High Court went wrong in law in approving and upholding the
21 Governor's report in the action of the President under Article 356. The Governor's report is
22 vitiated by more than one assumption totally and sustainable in law. Constitution does not
23 create an obligation that the political party forming the Ministry should necessarily have a
24 majority in the legislature. Minority governments are not unknown. What is necessary is that
25 the government should enjoy the confidence of the house. This aspect does not appear to have
26 been kept in mind by the Governor. Secondly, and more importantly, whether the Council of
27 Ministers has lost the confidence of the House is not a matter to be determined by the
28 Governor, or for that matter anywhere else except the floor of the House.

29 The principle of democracy underlying the Constitution necessarily means that any such
30 question should be decided on the floor of the House. The House is the place where democracy
31 is in action. It is not for the Governor to determine the said question on his own or on his own
32 verification. This is not a matter within a subjective satisfaction. It is an objective fact capable
33 of being established on the floor of the House. it is gratifying to note that Shri, the former
34 President of India, has affirmed this view in his Rajaji Memorial lecture.

35 And now kindly have para 395 on page 518. 395. The High Court in our opinion erred in
36 holding that a floor test is not obligatory. If only one keeps in mind the democratic principle
37 underlying the constitution and the fact that it is legislative assembly that represents the will

1 of the people, and not the Governor, the position would be clear beyond any doubt. In this
2 case, it may be remembered that the Council of Ministers not only decided on April 20th, 1989
3 to convene the assembly on 27th of that very month that is within 7 days, but also offered to
4 prepone the assembly if the Governor so desired. It pains us to know that the Governor did
5 not choose to act upon the said offer. Indeed, it was his duty to summon the assembly and call
6 upon the Chief Minister to establish that he enjoyed the confidence of the House. Not only did
7 he not do it, but when the Council of Ministers offered to do the same, he demand and chose
8 instead to submit the report to the President. In the circumstances it cannot be said that the
9 Governor's report contained what was based upon relevant material. There could be no
10 question of the Governor making an assessment of his own. The loss of confidence of the
11 House was an objective fact which, could have been demonstrated one way or the other on the
12 floor of the house. In our opinion wherever a doubt arises whether the Council of Ministers
13 has lost the confidence of the House, the only way of testing it was on the floor of the House,
14 except in an extraordinary situation where because of all pervasive violence, the Governor
15 comes to the conclusion and records the same in his report, that for reasons mentioned by
16 name of free vote is not possible in that case.

17

18 Now kindly have My Lords, Shivraj Chauhan, which follows....

19

20 **CHIEF JUSTICE CHANDRACHUD:** Para 396 also.

21

22 **MR. KAUL:** Yes My Lords. I was just give me a minute. 396, We make it clear that what we
23 have said above is confined to a situation where the incumbent Chief Minister is alleged to
24 have lost the majority support or the confidence of the House. It is not relevant to a situation
25 arising after a general election where the governor has to invite leader of the party
26 commanding the majority of the single largest group to form the government. We need express
27 no opinion regarding such a situation.

28

29 **CHIEF JUSTICE CHANDRACHUD:** Now see para 397.

30

31 **MR. KAUL:** Yes. We are equally of the opinion that the High Court was in error in holding
32 that the enactment edition of Tenth Schedule of the Constitution does not make any difference.
33 The very object of the Tenth Schedule is to prevent and discourage floor crossing and
34 defections which at one time had assumed alarming proportions.... personal edifications.

35 A legislature elected on the ticket of a party is bound to support that party in case of a division
36 or vote of confidence in the House, unless he is prepared to forgo his membership of the House.

37 The Tenth Schedule was designed precisely to counteract horse trading. Except in the case of

1 a split a legislature has to support his party willy-nilly. This is the difference between the
2 position obtained prior to and after the Tenth Schedule. Prior to the said amendment, a
3 legislature could shift his loyalty from one party to the other, and any number of times without
4 imperilling his membership of the House. It was if he had a property in the office.

5
6 **CHIEF JUSTICE CHANDRACHUD:** So here they say actually, Bommai deals with a
7 completely different situation. Bommai was a case where the Council of Ministers had offered
8 to summon the House the session of the Legislative Assembly within a period of one week.
9 Governor says so sorry, I am convinced that you have lost the confidence of the House.
10 Therefore you send the report to the President under Article 356. There the court holds that
11 this course was not open to the governor. The only way to establish whether they had lost the
12 majority of the Assembly was to order a floor test. And therefore the Governor couldn't on his
13 own personal opinion that they had lost the majority say that well I'm going to send a report
14 to the sovereign under 356. Second, they also make it clear that with an introduction of the
15 Tenth Schedule, unless it's a case of a split which was a position prior to the deletion of the
16 split in 2004, the only case where you cannot vote for your party is a split. Otherwise you are
17 bound. You are bound by the forte of the party which is [UNCLEAR] power.

18
19 **MR. KAUL:** No difficulty. No difficulty.

20
21 **CHIEF JUSTICE CHANDRACHUD:** So now post 2004, the split having gone away as a
22 defence, the only other available exception is a case of a merger.

23
24 **MR. KAUL:** Right, right.

25
26 **CHIEF JUSTICE CHANDRACHUD:** Save and except the case of a merger, you are bound
27 to go to a party....

28
29 **MR. KAUL:** Right, right, no difficulty. But My Lords, two things. Firstly, no doubt as the facts
30 My Lord Chief Justice summed up on Bommai , but Bommai doesn't just restrict itself to those
31 type of....What Bommai says is the moment a support for Ministry is withdrawn, the
32 moment....The fact is that in that case the Chief Minister... face a floor test. The Governor
33 dissolved the House and sent the report to the President. But what Para 119 says is, the
34 moment the support to a Ministry is withdrawn, the only option left to the Governor is to
35 conduct a floor test.

36

1 **CHIEF JUSTICE CHANDRACHUD:** You know if we accept this extreme proposition very
2 radical results will result. On the one hand you have the Tenth Schedule, which is to prevent
3 you know, the sin, the constitutional sin of defections. On the one hand you say that well,
4 somebody who defects or causes a split is liable to a disqualification. At the same time, we say
5 that look, even if that person is liable to be disqualified, in the meantime you must hold a trust
6 vote on the floor of the House. That is why if the antecedent reason for a floor test is based on
7 a violation of the prescription in the Tenth Schedule, then holding a floor test at that stage will
8 defeat the whole basis and purpose of the Tenth Schedule there.

9

10 **MR. KAUL:** No My Lords may I with respect say, when Your Lordships first see...

11

12 **CHIEF JUSTICE CHANDRACHUD:** And you are legitimizing, then a defection which is
13 otherwise not permissible under the Tenth Schedule. That is what is happening actually.

14

15 **MR. KAUL:** Firstly, our case is not a case of a split at all. I am not relying on any defence at
16 all. I am neither relying on fee which in any case does not exist or on merger. That's not been
17 my case. I have right through argued that we are talking about a rival faction within the party,
18 which is decent and essence of democracy within a party. And we claim that we are the Shiv
19 Sena and that is what comes to be decided. I'm not for a minute either, relying on the defence
20 or merger or on the split of 1/3rd. That's their contention. My case has never been...

21

22 **CHIEF JUSTICE CHANDRACHUD:** But whether you are the Shiv Sena or not.... Whether
23 you are a Shiv Sena or not can't be decided...can't be decided on the floor of [UNCLEAR].

24

25 **MR. KAUL:** Will be...will be...of course not. Your Lordships are right who is the political party
26 will be decided by the Election Commission of India and that power is vested in the ECI and
27 Your Lordships in judgment after judgement from Sadiq Ali downwards had said that
28 exclusive jurisdiction and there's a presumption of validity as far as the decision of the ECI are
29 concerned. I will come to those decisions.

30

31 **CHIEF JUSTICE CHANDRACHUD:** On the 30th of June there was no decision of the ECI.

32

33 **MR. KAUL:** No My Lords on 30th there was no decision of the ECI for the simple reason that
34 if the decision will come when someone raises that issue, it will only be when a party approach
35 the ECI. That can't be a decision of the ECI de hors a party approaching the ECI.

36

1 **JUSTICE KOHLI:** Mr. Kaul where is the question of the party approaching the ECI? For our
2 understanding on 30th there was only one party. You are part of the party.

3

4 **MR. KAUL:** Yes.

5

6 **JUSTICE KOHLI:** There is a faction within or without. You contested the election on the
7 strength of a ticket given by the party which was the original party. Then?

8

9 **MR. KAUL:** And I still say I am the original party. They are the over whelming minority.

10

11 **JUSTICE KOHLI:** [UNCLEAR] say you are as we understand, you show it within the party....

12

13 **MR. KAUL:** And yes absolutely right. My lady is right.

14

15 **JUSTICE KOHLI:** ...do it in the House.

16

17 **MR. KAUL:** No, no, I'm not saying I will do it in the House that's why I say floor test and
18 majority in a political party are completely different issues.

19

20 **JUSTICE KOHLI:** When you go back to the party members, you say okay, here is a faction
21 that we claim are actually the Shiv Sena. So we are going to the party as if not the just the
22 organization, but each one counts in the party that makes the party to say now we are.

23

24 **Mr. KAUL:** So let me, let me answer that, let me answer that. One is which is the rival faction
25 within the party who should be recognized as the party under the Symbols Order. That is what
26 the Symbols Order provides for. That can only be decided by the Election Commission and no
27 one else, who represents the party and is the recognized, which faction is the recognized
28 political party? That is one part. In the meantime a Ministry which has lost the confidence of
29 the House cannot continue. It's a completely different issue for which the floor test is meant.
30 I'm not going for a floor test in this matter to show that I am the majority in the Shiv Sena
31 political party. That has never been my case. Has never been my case at all. I'm going to the
32 floor of the House show that you Mr. Thackeray and the NDA government, coalition
33 government you lead has lost the majority because 7 independent MLAs and 34 of the 55 MLAs
34 have no faith in you. Now they are presuming, they are presuming that this is only a rival
35 faction within the legislature party, and not a rival faction within the political party. Whereas
36 Your Lordships have time and again said you can't segregate the two. A Legislature Party is
37 also an extension of the political party. In fact, for the continued recognition of a political

1 party, the legislative presence of its MLAs, and the percentage of vote it polls, is a necessary
2 ingredient for continuing recognition under 6A and 6B of the Symbols Order. And Sadiq Ali
3 took note of it. They said, for a party's continued recognition as a political party, its performance
4 in the electoral hustings, its vote percentage, its MLA and MPs are equally important. These
5 are their arguments. And that is what I've been saying to yourself. You're the judge or the jury
6 you say per se disqualified. There was a split only in the legislature party and thus nothing else
7 needs to be done. My whole case is being it's a case of interned and dissent. We are the faction
8 which represents the Shiv Sena. That issue can only be decided by the Election Commission
9 where Your Lordships refuse to stay those proceedings. The same argument was made.

10

11 As far as the floor test is concerned, it is only restricted to the issue whether the Chief Minister
12 or the Ministry has the confidence of the House or not. And what does the Governor do? The
13 Governor says come and face of floor test and you resign. Now, that was a pertinent question
14 that day, which was put by Your Lordship and My Lord the Chief Justice saying that- Had this
15 Chief Minister not resigned, one could have possibly seen what is the effect of those 39 plus 4
16 votes or three votes. Now two answers to that. You remove those 39 plus 3 or 4, 42 votes. We
17 are still through by a 9. And I have prepared those charts and I'll show. You remove each of
18 those 39 plus 3 votes whose 42 and all, whose disqualification was pending, We are still
19 through. In that case that's one. Secondly, my first contention would still be why should those
20 42 be deleted at all because let's face it on that day, Nabam held the field. If Nabam held the
21 field, Nabam said that as far as the Speaker is concerned, he should not proceed with his
22 disqualification till its own case is decided. But let's take it, let's take it they should have been
23 excluded. A Chief Minister does not go through even with the deletion of 39 plus 3 or 39 plus
24 4, votes for the election of the Speaker and the election of the Chief Minister. He fails in both
25 cases. I have prepared those charts with 42, without 42, because as Your Lordships rightly said
26 that those 42 goes then the total strength also comes down. It can't be that you remove them
27 and you don't remove them from the strength of the House. So whichever way you look at it,
28 whichever way you look at it, presuming it for a minute, the trust vote was directly related,
29 according to me, no. My Lord, every disqualification is only a Tenth Schedule case. There can
30 either be a 191(1) or a 192(2). These are only two cases of disqualification. One can either be
31 for the grounds provided in 191(1) or 192(2), it's Tenth Schedule. In 191(1) there is a procedure
32 provided for the President, Speaker etc. in consultation with Election Commission, you get
33 disqualified. Under 191(2), when it comes to that, that's where the Tenth Schedule is kicked
34 in. Now, all those judgments that Your Lordship have dealt with are all cases that if a
35 disqualification is pending the trust vote will still go through. In each of those cases it could
36 have been argued that if this disqualification petition had been decided, the trust vote would
37 have been differently affected. It could have been the same argument in every case.

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JUSTICE NARASIMHA: Bommai lays down a normative principle that floor test is the actual test.

MR. KAUL: Yes.

JUSTICE NARASIMHA: It hasn't really taken into account the sequence in which the power of the Governor has to be exercised in the case of defections. Bommai therefore goes only that far. In its application, in the subsequent judgment of Shivraj Singh Chauhan, has the court given an exposition of how Bommai operates in the context of Shivraj Singh Chauhan?

MR. KAUL: So should I go to that matter?

JUSTICE NARASIMHA: I am asking you that question.

MR. KAUL: Yes, because I wanted to. I wanted to actually go to....

JUSTICE NARASIMHA: Because it just flags it here, Bommai in 396 and 397. And it says that the situation that would arise so far as the principle of Bommai is concerned in the context of Tenth Schedule, stands at a slightly different footing. It says that far and then doesn't say anything further. The thing which needs to be seen with the advent of the Tenth Schedule is that power of the Governor to ask for a floor test in the context of Tenth Schedule when it should be exercised? Because the fundamental difference is the floor test will be determined by this decision because the composition of the House will change. For which your answer is that it makes no difference on facts and we are more on the principle.

MR. KAUL: Yes. Your Lordships are absolutely right. Even on the principles My Lords, when Your Lordships said that a floor test must go on in other judgments, leave aside our case, must go on irrespective of the pendency of disqualification petition, that was not in vacuum, Your Lordships said it in the context that mere pendency of a disqualification petition cannot impact a trust vote being conducted. That's what Your Lordships said, because in every case where a MLA is disqualified, his vote one way or the other, whether in absentia or actual voting would have had an impact on the trust vote. So my question is, My Lord to myself, how and in what ways? The individual facts of every case will vary on what day the letter went, what happened? But the principle, as Your Lordships have rightly said is that you cannot merely because a disqualification petition is pending prevent an MLA from voting in a trust vote. Now to say that you had the trust vote done because in the meantime, your disqualification petition was

1 pending. These are all hypothetical questions. Now then, questioning the Governor to say,
2 Government should not have called the floor test. What else would the Governor have done
3 My Lords?

4

5 **JUSTICE NARASIMHA:** Okay, Shivraj Singh Chauhan.

6

7 **MR. KAUL:** Yes, Shivraj Singh Chauhan. Judgment compilation, Volume-1, PDF 1360.

8

9 **CHIEF JUSTICE CHANDRACHUD:** Which volume? Sorry. Page 13...?

10

11 **MR. KAUL:** On 1359, Para 16. Mr. Maninder Singh, Learned Senior Counsel

12

13 **CHIEF JUSTICE CHANDRACHUD:** Yes.

14

15 **MR. KAUL:** Yes, Mr. Maninder Singh, Learned Senior Counsel appearing, appeared in an
16 application for impeachment movement on behalf of 16 members who tendered their
17 resignation to the Speaker, but whose resignation have not been accepted. On their behalf Mr.
18 Singh submitted that an elected member of a Legislative Assembly has an absolute right to
19 resign by virtue of provisions of Article 190 of the Constitution, the Speaker of the Madhya
20 Pradesh Legislative Assembly accepted the resignations tendered by 6 members who are part
21 of the same group of 22 members within the span of one day, and in doing so has chosen not
22 to make any inquiry in regard to the remaining 16 letters of resignation. Resignations and
23 disqualifications are distinct concepts. The exercise of judicial review in regard to advice
24 tendered by the Governor to the Chief Minister to convene a trust vote is not warranted.

25

26 16.5. - in urging submission, Mr. Singh placed reliance <UNCLEAR> decision of 3 judge bench
27 in Shrimant Balasaheb versus Karnataka Legislative Assembly.

28

29 Then 17 - Dr. Abhishek Manu Singhvi Learned Senior Council, appearing on behalf of the
30 Speaker of the Madhya Pradesh Legislative Assembly, submitted that and kindly have 17.8 My
31 Lords, the precedence of this court in regard to convening of a trust vote have arisen in the
32 context of fresh elections held to the Legislature and not in the context of a running assembly.
33 This was the same contention raised there.

34

35 Now kindly have Para 65 and 66.

36

37 **JUSTICE NARASIMHA:** You're right. Same contention.

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MR. KAUL: 65 and 66 PDF Page 1380, para 65. My Lords Chief Justice has para 65?

CHIEF JUSTICE CHANDRACHUD: Yes.

MR. KAUL: 'In analysing the observations made by the nine judge bench in SR Bommai, it is pertinent to remember that the Governor in that case did not call for a floor test. Rather, the Governor of Karnataka sent a report to the President, based on which the proclamation was issued under Article 356. The observation in SR Bommai can be relied on in determining whether the Governor possesses the power to call for a floor test. Discerning the subsequent question of when the exercise of such power is appropriate is the distinct issue. On a perusal of the above observations in SR Bommai it is evident that whether or not the Council of Ministers has lost the confidence of the House must be determined only on the floor of the House and not by the Governor conducting an independent verification. Where the Governor has reasons to believe that the incumbent Government does not possess the support of the majority in the Legislative Assembly, the correct course of action would be for the Governor to call upon the Chief Minister to face the assembly and to establish the majority of the incumbent Government within the shortest possible time. An exception to the invariable rule of testing whether the Government has the assembly's confidence on the floor of the House is envisaged only in extra ordinary situations where, because of existence of all pervasive violence of free vote is not possible in the House.'

Then 66 - 'As a matter of constitutional law, it would not be correct to proceed on the basis that constitutional authority entrusted to the Governor to require the Council of Ministers to prove their majority on the floor of the house can only be exercised at the very first inception after general elections are held and not when the Governor has objective reasons to believe that the incumbent Government does not command the confidence of the House. The Governor is not denuded of the power to honour a floor test, where on the basis of the material available to the Governor, it becomes evident that the issue as to whether the Government commands the confidence of the House requires to be assessed on the basis of a floor test. Undoubtedly the purpose of entrusting such a function to the Governor is not to destabilize an existing Government. When the satisfaction on the basis of which Governor has ordered a floor test is called into question the decision of the Governor is not immune from judicial review. The Court would be justified in scrutinizing whether the Governor prima facie had relevant and germane material to order a floor test to be conducted. It must be noted that the Governor does not decide whether the incumbent Government commands the confidence of the House. The purpose of holding a floor test in the Legislative Assembly is precisely to enable their elected representatives to determine whether the Council of Ministers commands the

1 confidence of the House that verification is not conducted by the Governor. The decision in SR
2 Bommai, in fact held the recourse to the power under 356 was not warranted in a situation
3 where the issue of confidence would yet be decided on the floor of the House by calling for a
4 trust vote. Undoubtedly in that case, it was the Chief Minister who had suggested following a
5 meeting of the Cabinet that the House should be convened for the purpose of testing the
6 majority of the Council of Ministers. The significance of the decision lies in the fact that the
7 decision of the Governor to submit a report under 356, was faulted on the ground at the floor
8 test would have been an appropriate course of action.

9 My lords, so whether in Bommai the Chief Minister offered to face a floor test and the Governor
10 declined to do so, maybe the peculiar facts the larger principle in Bommai or in Shivaraj Singh
11 Chauhan that Your Lordships have laid down...that Your Lordships have...

12

13 **JUSTICE NARASIMHA:** The first half of 66 exposition is that it's untravelled, to that
14 extent.

15

16 **MR. KAUL:** Please My Lords?

17

18 **JUSTICE NARASIMHA:** The first half of 66, para 66 is Governor's power is untraveled not
19 confined to the inception.

20

21 **MR. KAUL:** Right. And that was the specific question posed.

22

23 **CHIEF JUSTICE CHANDRACHUD:** See para 71. Come further.

24

25 **MR. KAUL:** Very well. Yes.

26

27 **CHIEF JUSTICE CHANDRACHUD:** The powers of the Governor.

28

29 **MR. KAUL:** Yes, yes. The powers which are entrusted to constitutional functionaries are not
30 beyond the pane of Judicial Review. Where the exercise of the discretion by the Governor to
31 call a floor test is challenged before the court, it is not immune from judicial review. The court
32 is entitled to determine whether in calling for the floor test, the Governor did so on the basis
33 of objective material and reasons which were relevant and germane to the exercise of the
34 power. The exercise of such power is not intended to destabilize or displace a democratically
35 elected government accountable to the Legislative Assembly and collectively responsible to it.
36 The exercise of the power to call for a trust vote must be guided by the overarching

1 consideration that the formation of satisfaction by the Governor is not based on extraneous
2 considerations.

3 So My Lords, please read this with the observations in Bommai that no independent view of
4 any person, including the Governor. At the end of the day he must take recourse for a floor test
5 because these are not his individual opinions. His individual opinions are only meant that
6 prima facie it appears that the majority has been lost by the ministry in power. And after that,
7 how does he determine? The court says you can't determine it on your own and say you've lost
8 majority that's why I am dissolving the House. The best way to do it is ask the Chief Minister
9 concerned to face the floor test and that Chief Minister in this matter, refuses to face the floor
10 test and resigns before that. And the only argument being made is, because it could have been
11 an empty formality and disqualification petitions are pending. Firstly, My Lords there can be
12 no argument in law, but here I go a step further, you exclude those 42. What happens? You
13 still lose.

14

15 **JUSTICE NARASIMHA:** Para 72, also.

16

17 **MR. KAUL:** 72 and 73, My Lords?

18

19 **JUSTICE NARASIMHA:** Yes.

20

21 **MR. KAUL:** While the Constitution recognizes that the Governor does not possess a
22 power....I am so sorry. While the Constitution recognizes that the Governor does possess a
23 power in hearing-in the office to monitor that the elected Government continues to possess
24 the confidence of the Legislative Assembly. This entrustment ought not to override or displace
25 the basic responsibility of the executive to the legislature or the ability of the legislature to
26 demand accountability of the executive arm of the state. Dr. Singhvi's submission that the
27 Governor cannot demand a trust vote, except at the initial Constitution of the Legislative
28 Assembly following an election would be to unduly constrain the constitutional entrustment
29 authority to the Governor. Undoubtedly the largest number of precedence emanating from
30 this court have dealt with the situations where a trust vote was called at the time of the initial
31 formation of the Government following an election. One of the reasons for this may well be in
32 the prevalence of disputes at the time of the initial formation of the Government in the states.
33 But this line of precedence would not exhaust the power of the Governor, nor does it suggest
34 that the authority which is entrusted to the Governor cannot be exercised once a Government
35 has been formed. Mr. so-and-so, on the other hand, accepted that there may be situations
36 where the House is not in session having been pro, and there arrives circumstances leading

1 the Governor to a reasonable belief that the Government has ceased to command a majority
2 in the legislative assembly.

3

4 This in our view would certainly be one of the situations where the Governor would be justified
5 in calling for a special session in the course of which being incumbent Government may be
6 required to establish that it continues to hold the confidence of the House. In a situation where
7 the House has been summoned following the aid and advice of the Council of Ministers, the
8 position would be more nuanced in the sense that the remedy of a no confidence motion would
9 be available to any segment of the legislature seeking to espouse the view that the Government
10 has ceased to command the confidence of the House. In exercising the constitutional authority
11 to demand a trust vote, the Governor must do so with circumspection in a manner that ensures
12 the authority of the House to determine the existence or loss of confidence in the Government
13 is not undermined. Absent, exigent and compelling circumstances, there is no reason for the
14 Government.... for the Governor to prevent ordinary legislative process of a no-confidence
15 motion from running its due course. The Governor is an appointee of the President but does
16 not represent either a political ideology or a political view. The Governor is expected to
17 discharge the role of a constitutional statesman. The authority of the Governor is not one to
18 be exercised in aid of political dispensation, which considers an elected government of the day
19 to be political opponents. The precise reason underlying entrustment of the authority to the
20 Governor is the ability to stand above political conflicts and with the experience of
21 statesmanship to wield the authority in a manner which sub-serves and does not detract from
22 the strength and resilience of democratically elected Legislature and the Government in the
23 States who are accountable to them. To act contrary to this mandate would result in the
24 realization of the worst fears of the constitutional framers who are cognizant that the office of
25 the Governor, would potentially derailed democratically elected Governments but nonetheless
26 place trust in future generations to ensure that the Government of the people, by the people
27 and for the people would not be denuded by those who are designed to act as its sentinels.

28

29 **JUSTICE NARASIMHA:** Para 74 also. First 4 lines.

30

31 **MR. KAUL:** In discharging this crucial role It is necessary that the Governor bear in mind
32 that the purpose underlying the entrustment of the authority to require a trust vote is not to
33 display duly elected governments, but to intervene with caution when the circumstances which
34 are drawn to the attention of the governor indicate a loss of majority. And that is exactly what
35 the Governor did in this case. Seven independent MLAs write to him to say we are withdrawing
36 support. The leader of the opposition writes, 34 of the 55 MLAs now, of course, 40 say that
37 within the party that's another thing of split merger, that no one's that's never our case. That

1 is their case. To say that since there is no merger since para 3 is not available, you have per se
2 incurred the disqualification. And our case right through has been that whether we represent
3 the political party, the Shiv Sena is the recognized political party or you do, is a matter which
4 the Election Commission will decide. The speaker My Lords, if Your Lordships will recollect....

5

6 **CHIEF JUSTICE CHANDRACHUD:** In the present case, when the leader of the
7 opposition, writes to the governor, the Governor could have advice the leader of the opposition
8 about the motion of no-confidence.....

9

10 **MR. KAUL:** Right. But my lords, nothing stops the Governor. Today we are testing the bona
11 fides of a decision. My Lords to say that the Governor opted for one option instead of...

12

13 **CHIEF JUSTICE CHANDRACHUD:** The Election Commission cannot duck the
14 responsibility of summoning or placing a motion of no-confidence by getting the Governor to
15 direct the convening of a trust....

16

17 **MR. KAUL:** My Lords, may I with respect say that the leader of the opposition did not get
18 the Governor to do anything. The leader of the opposition brought it to the notice of the
19 Governor. 7 independent MLAs also brought it to the notice of the Governor. 34 MLAs within
20 the party wrote to the Governor to say that we will not support this Ministry and that Governor
21 in exercise of his discretion after amplifying his mind, satisfying himself that the conditions
22 accepted followed Bommai, followed Shivraj Singh Chauhan to say that the best course of
23 action available would be a floor test. Now My Lords, if Your Lordships in a nine judges and
24 Shivraj Singh Chauhan has said that that is the first course, you must follow that. And if the
25 Governor says I'm following it, the only line of attack is because a disqualification petition is
26 pending.

27

28 **CHIEF JUSTICE CHANDRACHUD:** But what is the objective material the Governor in
29 this case?

30

31 **MR. KAUL:** My Lord, the objective material was the moment, firstly 7 independent MLAs,
32 the Leader of the opposition, and 34 out of the 55 MLAs say you do not enjoy...

33

34 **CHIEF JUSTICE CHANDRACHUD:** Independent MLAs have nothing to do with the
35 strength of the government in the House.

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37 **MR. KAUL:** They were part of the Government.

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CHIEF JUSTICE CHANDRACHUD: There was absolutely no word because that applies when the government was formed.

MR. KAUL: No, no My Lords. They continued to support the government. Those seven are part of the..... They withdrew support to the Government My Lords. Those 7 withdrew support to the government.

JUSTICE NARASIMHA: Were they holding Ministerial posts?

MR. JETHMALANI: Two of them.

MR. KAUL: Two of them were. My Lords they were part of the Government. They were part of... let's test it. When Your Lordships in para 121, of Bommai says...

JUSTICE NARASIMHA: Did the remaining gave letters of support to the Government during its formation?

MR. KAUL: Please My Lords?

JUSTICE NARASIMHA: The remaining apart from the two who became ministers, did they... just check it up later. Check it out.

MR. KAUL: We'll check it up. My Lords, please see, MLAs who are part of the Government say we are withdrawing support. The leader of the opposition says he has lost support. 34 of the 55 ruling party MLAs say that we represent the real Shiv Sena, we have no faith in this coalition continuing. What is wrong.... [NO AUDIO] called for a floor test. My Lords, if he had dissolved the House, if he had called someone else to form the Government, dismissed the Government. He has not done any of it. He just said you come and prove the majority on the floor of the House. Their entire argument is that because of disqualification is pending, test that proposition My Lords. According to us because we passed a resolution, they gave a disqualification notice to us. That's our case. Reverse the proposition, suppose you want to defeat any bill, any decision on the floor of the House, the easiest thing is give disqualification notices to parties.

CHIEF JUSTICE CHANDRACHUD: Now in this context, if you see para 75 of Shivraj Singh, the court there held that there was objective material before the Governor.

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Mr. KAUL: Yes.

CHIEF JUSTICE CHANDRACHUD: That's the kind of, just see that para 75 and 76 in the first case. We then get some flavour of what are the circumstances in which a Governor can call for a....?

MR. KAUL: Yes, in the present case the facts which have come on record indicate that the budget session of the Legislative Assembly had been convened on the aid and advice of the Council of Ministers to commence from 16-03-2020. The Governor was intimated that 22 members, owing allegiance to the INC has tendered their resignation to the Speaker of the assembly. Copies of the resignation letters were forwarded to the Governor. At this stage the validity of these resignations had not been discerned, and no decision had been made by the Speaker as to whether the resignations were voluntary or genuine. The Chief Minister subsequently tendered the advice to the Governor for the removal of the six ministers who were ministers in the State government. On 13-03-2020, the Speaker of the Legislative Assembly issued notices of disqualification. However, on 14-03-2020 resignations of six members who are ministers of incumbent government were accepted by the Speaker, acting in exercise of the constitutional authority under the proviso to Article 193B. The Chief Minister adverting to the turmoil in the State addressed a communication to the Governor, 13-03-2020, stating that the convening of the floor test would be a sure basis for resolving the conundrum. This is a strong indication that the Chief Minister himself was of the opinion that the situation in the State had cast his government's majority in doubt. However, upon the convening of the Legislative Assembly, no floor test was conducted and the House was adjourned till 26-08-2020. These facts form the bases on which the Governor advised that a floor test be conducted. Based on the resignation of the six ministers of the incumbent government accepted by the Speaker, the purported designation of 16 more members belonging to the INC, and the refusal of the Chief Minister to conduct a floor test despite the House having been convened on 16-03-2020, the exercise of power by the Governor to convene the floor test cannot be regarded as Constitutionally improper.

Now My Lords, applies to the facts of our case. The Governor notes, there is violence. They're being attacked. 34 of 55 do not support the Ministry. Seven supporting independents have also withdrawn. The leader of the opposition is also written to the same extent. He doesn't dissolve. He doesn't swear in another government in power. He says, you come and prove your majority. And Your Lordships, they have right through said it is your duty to summon the House and said that no Governor or any other individual should form an independent opinion.

1 In Bommai Your Lordships has said at the moment the Governor starts coming in these
2 matters and substituting his opinion to dissolve the House instead of a floor test being ordered,
3 it would be dangerous for democracy. I'm just testing the proposition of the other side My
4 Lords, because it is being said or not. This material in my respectful submission is more than
5 sufficient to meet the test of judicial review because Your Lordships are not substituting your
6 view for that of the Governor. All that Your Lordships are seeing is whether the decision
7 making process was apt. It was not accentuated by mala fides or bias in the matter or any
8 extraneous consideration was not taken into account. And in the given circumstances, My
9 Lords, the Governor, taking the requisite facts into account, the surrounding circumstances
10 into account, comes to an informed decision, that floor test should be conducted. And he
11 orders a floor test. Now because you feel the floor test would have led to a situation where you
12 are unable to face the majority then that should be the end of your Government. Which
13 Government should be allowed to continue, which cannot face a floor test My Lords?
14 Irrespective of disqualification pending or not pending, can any elected representative ever
15 say that I want to continue in the Ministry as an elected Government without facing a floor
16 test?

17

18 **CHIEF JUSTICE CHANDRACHUD:** Just look at the Governor.... [UNCLEAR] Look at
19 Para 1 and Para 2. What does he say? Is that convenience compilation number 2. Page 326.
20 Just read that..

21

22 **Mr. KAUL:** Yes. My Lords. I will read the whole thing. I'll read the whole letter.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Dear Shri Uddhavji.

25

26 **Mr. KAUL:** Yes. I'm in receipt of two letters dated 28-6-2022, which have been received at
27 the Raj Bhavan, Mumbai. The first letter has been given by 7 independent MLAs stating that
28 you have lost the majority of the floor of the Vidhan Sabha and requesting me to call for a
29 special session of the Maharashtra Legislative Assembly and to direct you to prove your
30 majority on the floor of the House. A similar letter dated so and so has been received from the
31 Leader of the Opposition stating that you have lost the majority in the Maharashtra Legislative
32 Assembly and a floor test for proving your majority in the with Vidhan Sabha is urgently
33 required. I'm in receipt of a resolution dated 21-6-2022 signed by 34 members of Shiv Sena
34 legislature party stating that there is a enormous discontent within the Shiv Sena cadre and
35 electorate on account of the alliance of the NCP and INC. The resolution clearly indicates that
36 the majority members of Shiv Sena Legislature Party want to exit the alliance with NCP and
37 INC and to that end they have reaffirmed the appointment of the leader of the Shiv Sena

1 legislature party. I'm also in receipt of a later dated 21-6-2022 addressed by Eknathrao Shinde
2 to the Deputy Speaker stating that the purported appointment of one Mr. Ajay Chaudhary is
3 illegal, having been made by 16 MLAs without notice and without quorum, and therefore the
4 same is inoperative. A letter dated 25-6-2022 was also received by me, whereby 38 members
5 of the Shiv Sena legislature party have alleged that the security provided by the State
6 Government to them and their family members have been illegally withdrawn. It is stated in
7 the letter that various leaders of the State Government are instigating the cadre to initiate
8 violence against 38 MLAs as a result of which the offices of some of these MLAs were
9 vandalized. I have also been made aware that there have been grave threat to life of these 38
10 members and also their families. I've seen the developments through electronic and
11 print media very clear closely which substantiates the above facts. The apprehension of the
12 MLAs is also fortified by the letter of the leader of the opposition who has in fact provided links
13 to videos where Mr. Sanjay Raut has openly stated that dead bodies of the MLAs will come to
14 Mumbai and will be sent for post mortem. Mr. Sanjay Raut in an interview given to the
15 National TV has also said that ongoing violence is not even a trailer, but it's just the warming
16 up. Certain news articles reporting open and rather disturbing threats to 39 MLAs of Shiv Sena
17 have also been enclosed with the letter issued by the leader of the opposition. In response to
18 the aforesaid letter dated 25-06-2022 received by me on behalf of MLAs of the Shiv Sena, I
19 had vide communication dated 25-06-22 directed, 1). The Home Secretary, Ministry of Home
20 Affairs Government of India. 2). The Chief Secretary to the Government of Maharashtra and
21 3). The Additional Chief Secretary Home Department Government of Maharashtra, Director
22 General of Police Maharashtra State and the Commissioner of Police, Mumbai, to provide
23 adequate police protection to the MLAs and their families on the immediate basis. It is thus
24 clear that a majority of Shiv Sena MLAs have given a clear indication on behalf of the Shiv
25 Sena legislature party that they intend to exit from the Maharashtra Vikas Aghadi Government
26 and that you have been made aware of the same and that you are trying to win over your MLAs
27 and cadre by means which are not democratic. I am therefore confident that you and your
28 Government had lost the trust of the House and the Government is in minority. The
29 Honourable Supreme Court of India in a range of decisions has time and again held that the
30 Governor possesses a power to monitor that the elected Government continues to enjoy the
31 confidence of the Legislative Assembly. It is therefore within my power and discretion to call
32 for special session of the Maharashtra Legislative Assembly and direct a floor tes
33 t to ascertain as to whether you enjoy the confidence of the majority in the House. My
34 discussion is guided by the aforesaid facts. Please refer to Shivraj Singh Chauhan vs. Speaker
35 Madhya Pradesh Legislative Assembly. Further with the view to obviate any undemocratic
36 method being employed, such as violence, illegitimate and unseemly political bargaining and
37 horse trading in a quest for political power, the Honourable Supreme Court of India has

1 consistently insisted upon convening a trust vote at the earliest date. In the aforesaid of Shivraj
2 Singh Chauhan the Honourable Supreme Court has held that a trust vote in the ultimate
3 analysis is to uphold the political accountability of the elected Governments. Some of the other
4 judgments of the Honourable Supreme Court of India, which require the immediate holding
5 of the aforesaid so and so.

6 As per the judgement of Shivraj Singh Chauhan, where the circumstances of violence and
7 coercion exists that would undermine a free and fair vote in the assembly, the Governor must
8 take measures to ensure that the sanctity of the trust vote is maintained. In the present case,
9 use a one democratic means such as violence and coercion to influence the vote cannot be
10 ruled out. The Maharashtra Legislative Assembly rules contemplate voting by a division, by
11 asking members to rise in their seats for the purpose of countering the vote. Such procedure
12 for voting would according to me, ensures that the members are allowed a free and fair vote
13 in the present case. This is in line with a series of judgments delivered by the Honourable
14 Supreme Court. Therefore, in keeping with the constitutional and democratic values and
15 principles, as also the law laid down by Honourable Supreme Court of Indian and in pursuance
16 of the powers conferred by Article 174 read with 175(2) the Constitution. I hear by issue the
17 following direction. A special session of the Maharashtra Vidhan Sabha be summoned on 30-
18 06-2022 at 11:00 A.M. with the only agenda of a trust vote against the Government. The
19 business over the House shall be conducted in such a way that the speeches, if any are
20 concluded in a short period of time and the trust vote is concluded on 30-06 by 5:00 P. M. The
21 voting will be conducted by members to rise in their seats for the purpose of...

22

23 **CHIEF JUSTICE CHANDRACHUD:** So the only reason really, a lot of this is completely
24 constitutionally extraneous. The fact that some MLAs have said that, well, you know, their
25 safety is in peril, that I directed as a Governor that their safety should be provided. This has
26 nothing to do on whether the Government should be asked to face a trust vote. The only point
27 which he says, really is this two points. One, 7 MLAs have said that they don't owe allegiance
28 to the Government and more importantly, the 34 say, 34 MLAs have indicated that they want
29 Shiv Sena to exit from the alliance of the INC and the Maharashtra Vikas Aghadi.

30

31 **MR. KAUL:** Yes. Not from the party but from the coalition Government. My Lords, the
32 resolution of 21-06-2022, as also this letter categorically says that there is a huge discontent
33 within the party.

34

35 **CHIEF JUSTICE CHANDRACHUD:** Mr. Kaul what happens is, that you know, once
36 Governor starts this process of intervening in a sitting House, that only sort of gives a....

37

1 **Mr. KAUL:** My Lords may I with respect say, when...

2

3 **CHIEF JUSTICE CHANDRACHUD:** Why not ask, whoever wants to move a no confidence
4 motion. [UNCLEAR] motion of no-confidence.

5

6 **MR. KAUL:** With respect, My Lord, Your Lordships have said...

7

8 **CHIEF JUSTICE CHANDRACHUD:** Why should a Government which has been formed
9 and in respect of which there was absolutely no disquiet, just a month earlier, he asked to
10 suddenly face the trust vote, on the basis of these....

11

12 **MR. KAUL:** My Lords may I with respect say, for a Government to lose a majority there
13 cannot be a cutoff date? That event in politics can occur at any time. Whether it enjoyed
14 majority a month earlier or it loses majority a month later with utmost humility I submit, is
15 inconsequential. What is important is on the date when the Governor applies his mind, was
16 there a representation by the requisite number of members of the legislative assembly to say
17 that we no longer have any faith in this Government. Consciously on 21st of June 2022, 34 or
18 35 MLAs wrote to so, that there is a huge discontent and discord within the party of an MVA
19 alliance continuing. They don't say we are merging with someone else or we are splitting. They
20 say within the party and we do not want this Government to continue. Seven independent
21 MLAs who are part of the Government write. Now My Lords, I put a question to myself when
22 from nine judges to Shivraj Chauhan, Your Lordships have said the first duty is to summon
23 the House. Why should that Governor ask anyone to move a vote of no-confidence? When
24 Your Lordships have guided the Governor, time in again and in various situations to say that
25 the first right you must exercise as a constitutional authority is to summon the House and call
26 for a floor test and ask the Chief Minister to prove his majority. Why should that Governor
27 exercise and discretion and say that no, no because one month earlier there was no disquiet,
28 today a vote of no confidence should be moved and not a floor test? My Lords, ultimately, as I
29 respectfully submitted, Your Lordships are not sitting as a court of appeal. Even if Your
30 Lordships feel that another course of action may have been a more appropriate course of
31 action, the fact is, as long as what the Governor does is within the constitutional principles as
32 laid down in Bommai and Shivraj Singh Chauhan, that is good enough.

33 Now for a minute, leave this aside. What fell from My Lord, the violence, what was happening
34 to MLAs, exclude that. What is required is the essential ingredient for a floor test. The need
35 for a floor test arises when there is a representation that the concerned Chief Minister of
36 Government has lost the confidence of the House. Now, as far as the confidence of the House
37 is concerned, what material will the government look at... the Governor look at? The Governor

1 will naturally look at the representations of various MLAs in the assembly to say that they are
2 no longer supporting. What other material can you look at? And that is why Your Lordships.....

3

4 **CHIEF JUSTICE CHANDRACHUD:** The head of the political party had not informed the
5 Governor that we have withdrawing from the alliance. The alliance still continued between the
6 three parties. There was no intimation by the head of the political party,

7

8 **Mr. KAUL:** Who was also the Chief Minister

9

10 **CHIEF JUSTICE CHANDRACHUD:** He had not intimated the Governor.

11

12 **MR. KAUL:** He had not intimated.

13

14 **CHIEF JUSTICE CHANDRACHUD:** That he is withdrawing from this alliance.

15

16 **MR. KAUL:** My Lords he need not. But if 34 out of 55 write to him to say... My Lords again
17 as I'm saying he is not dealing with Tenth Schedule. That's a separate argument I will come to.
18 He is dealing with 34 out of the 55 MLAs writing into him to say we have no faith in this
19 Government, in this Chief Minister. Seven independent MLAs were part of the Government
20 said we have no faith in this Government. Leave aside the leader of opposition for a minute.
21 Now, My Lords when a Governor takes the decision to conduct a floor test, what is the most
22 important consideration in his mind? The most important consideration in his mind...

23

24 **JUSTICE SHAH:** Mr. Kaul, read Para 78 of the judgment.

25

26 **MR. KAUL:** My Lords, of?

27

28 **JUSTICE NARASIMHA:** Shivraj Singh Chauhan. The focus what you are saying.

29

30 **MR. KAUL:** 78 - 'The idea underlying that trust' My Lord, the Chief Justice has it? 'The idea
31 underlying the trust vote in the ultimate analysis is to uphold the political accountability of the
32 elected Government to the State Legislature. Assertion of accountability is a mirror image of
33 the collective responsibility of the Government to the Legislature. The requirement of the trust
34 vote fulfils that purpose in the present case. The present controversy has on allied on the often
35 fluid allegiances of democratically elected representatives. This is a matter of there for their
36 conscience and the Court expresses no opinion on the matter. However, it is important to note
37 that in directing a trust vote, the Governor does not favour a particular political party. It is

1 inevitable that the specific timing of a trust vote, may tilt the balance towards the party
2 possessing a majority at the time of the trust vote is directed. All political parties are equally
3 at risk of losing the support of their elected legislators, just as the legislators are at the risk of
4 losing the vote of the electorate. This is how the system of parliamentary governance operates
5 and the Learned Senior Council on both the sides of the disputes congenially admitted that the
6 outcome of the trust vote is the ultimate litmus test for the legitimate to govern. However, we
7 know that where the evidence indicates that the circumstances of violence and coercion exists
8 that would undermine a free and fair vote in the assembly. The Governor and the Court must
9 take measures to ensure that the sanctity of the trust vote is maintained in the circumstances
10 as they have emerged in the case, the exercise of authority by the Governor, who was based on
11 circumstances which were legitimate for the purpose of ensuring that the norm of collective
12 responsibilities duly preserved, there existed no extraordinary circumstance with the
13 Governor to determine that a trust vote was not appropriate course of action on 16-3-2020.
14 Now My Lords all that I am respectfully submitting today is that merely because it will turn
15 the in favour of one or the other, Your Lordships deal with those issues. Let's, let's... I put
16 myself in the Governor's position. Now suppose he had not held a trust vote. One of the first
17 challenges would have been despite a nine judges bench, despite Shivaraj Singh Chauhan,
18 despite MLA's writing to him, why did he not hold a floor test? Where is the requirement in
19 law My Lords that if a Governor, after due application of mind comes to a conclusion that a
20 trust vote ought to be held, he should nonetheless, have a vote of confidence moved on the
21 floor of the House and not go in for a floor test? Where is that requirement in law? And
22 presuming for a minute both options are available, can he opt for one instead of the other?
23 Would that be enough for Your Lordships in exercise of Your Lordships' extraordinary
24 jurisdiction to strike down the decision of the governor in a matter like this? That this is a
25 decision so influenced by extraneous consideration or so biased or unfair accentuated by mala
26 fides that you will strike it down as a decision? It's a decision based on due representation
27 made by MLAs.

28

29 **CHIEF JUSTICE CHANDRACHUD:** Yes.

30

31 **MR. KAUL:** And naturally, My Lords, when these MLA's make representations, these are on
32 political considerations.

33

34 **JUSTICE NARASIMHA:** Mr. Kaul, as your claim is not either a split or a merger, your claim
35 is on the ground that you are the political party.

36

37 **MR. KAUL:** Right, right.

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JUSTICE NARASIMHA: Now in the information given to the Governor, to what extent the information available as to you have garnered the political...

MR. KAUL: Yes My Lords....

JUSTICE NARASIMHA: Garnered political, not the legislative majority. Where is that kind of material?

Mr. KAUL: I'll just come to it My Lords, I'll just come to it.

JUSTICE NARASIMHA: No. Take your own time.

MR. KAUL: Tomorrow if Your Lordships permit. No, I'm very grateful. I'm very grateful that Your Lordships indicated.

JUSTICE NARASIMHA: In so far as the Governor's decision is concerned, go by Bommai. The principle of the judicial review is confined to the question as indicated therein material is available to him. Relevant material. Then judicial review is available. The relevant material available for him to direct the floor test must be in relation to that kind of a decision that you have now garnered the political, not the legislative but political power with respect to the parties. That material is available or not?

MR. KAUL: I'll address Your Lordships tomorrow on that.

JUSTICE NARASHIMHA: No, in your own time.

MR. KAUL: Tenth Schedule is where this whole argument of legislature, political party, is political party co-joined with legislature party. Was it only within the political party or within the legislature party is one part. As far as the Governor in exercising his powers for a floor test is concerned, his only consideration is whether on the floor of the House the members enjoy the requisite majority or not? And my respectful submission there to Your Lordships would be, that there all that he has to see is that the elected representatives who constitute the composition, total composition of the House, is there a substantial challenge to say that a large number of them are withdrawing their support to the Ministry, which raises a genuine doubt in his mind to say that the majority of the Ministry must be proved on the floor of the House. And which material was here? He doesn't have to embark on that exercise which is a part of

1 Tenth Schedule. Political party, legislature party. All that he has to see is elected
2 representatives 34 of 55, seven independent who were supporting and as I said exclude the
3 leader of the opposition completely.

4
5 **CHIEF JUSTICE CHANDRACHUD:** But Mr. Kaul, once a Government is formed, it is not
6 open to any group of Members of Parliament or of the Legislative Assembly to say that look,
7 we don't want to go with this alliance. You have an alliance of five parties, it is not open to say
8 a group of persons who owe allegiance to the dominant political party in the alliance, as in this
9 case the Shiv Sena was, right? Shiv Sena had 55 as opposed to 44 of the Congress and 53 of the
10 NCP. It's not open to any one segment of any political party, whether it was a Shiv Sena, or the
11 NCP or the Congress to say we don't want to go along with this. That would ipso facto attract
12 the disqualification provisions. You are bound by the Whip and you are bound to vote with
13 your party so long as you are a legislature or say that's a merger.

14
15 **MR. KAUL:** That's why My Lords, as I say...

16
17 **CHIEF JUSTICE CHANDRACHUD:** On one hand none of them, either 15 or 20 or 25 or
18 30, and say the Governor, that look, we don't want to go along with the alliance. Answer is very
19 simple. You don't want to go along with the alliance, vote your leader out in the political party,
20 or you take a decision on the political party outside. So long as you are a member of the House,
21 you are bound by the discipline of the Act. You have to go with your political party.

22
23 **MR. KAUL:** So just to answer what My Lord....

24
25 **CHIEF JUSTICE CHANDRACHUD:** So what they were essentially telling the Governor
26 was this. We don't want our political party to continue with this three party alliance of the
27 MVA. Right? We want to exit from that. Governor takes cognizance of it. Now what he is
28 essentially taking cognizance of is that there is a breakaway segment of this particular party.
29 In that letter of the Governor, one thing which is completely absent is your argument that we
30 are the Shiv Sena. The entire letter is postulated on the fact that there was out of 55 there are
31 30 more people who want to break away from this alliance. And what is this but not a split?

32
33 **MR. KAUL:** My Lords, may I....

34
35 **CHIEF JUSTICE CHANDRACHUD:** The governor, at least was not allied to this argument
36 at all that you know you represented the Shiv Sena.

37

1 **MR. KAUL:** My Lords, may I with respect say that is not....

2

3 **CHIEF JUSTICE CHANDRACHUD:** The material before.

4

5 **MR. KAUL:** That, of course, the governor's counsel....

6

7 **CHIEF JUSTICE CHANDRACHUD:** Therefore very careful in those two paragraphs to say
8 22 members had resigned. They didn't defect. They said we quit the Assembly. Out of them six
9 resignations were accepted by the Speaker. 22 were in the same batch. The Speaker went and
10 accepted the 6, he kept quiet over the 16. And Dr. Singhvi's argument was that you are trying
11 to prevent the Speaker. The plot essentially is to buff the Speaker's decision. So to which we
12 said that look, they were all 22 sailing together. Why did the Speaker accept only six and leave
13 the 16 intact? That is not the case that they split. They said we will leave the House.

14

15 **MR. KAUL:** My Lords, as I said, I haven't....

16

17 **CHIEF JUSTICE CHANDRACHUD:**consequence to vacate the House.

18

19 **MR. KAUL:** I haven't even come to the legislature party versus political party argument
20 because where my contention will be:

21 (a), there are two political Whips appointed on the same day. As per us we are following the
22 mandate of the party. My Lords, the Chief Justice put a question to say that suddenly you
23 decide to do what you want. That's not our case. On 21st of June 2022, a political Whip was
24 appointed. The question is whether my political Whip or their political Whip, is the actual
25 political Whip. Because if my political Whip is the Whip, then I have not disobeyed any order
26 at all. So when My Lord, the Chief Justice said that by just saying that you don't agree with the
27 Government you ex facie, we've not done that. Our Whip, and that is the question when this
28 argument was raised Your Lordships said is this the rival faction whose Whip was appointed.
29 That first for the EC to say which was the party, which was the faction, which was the
30 recognized political party with it. Because according to us the faction within the party which
31 is the recognized faction today, was the faction which represents the political party and had
32 appointed duly the Whip. And the Whip argument when I'll come to, I'll show to Your Lordship
33 right through the convention of the Shiv Sena, has been that the legislative party, with the
34 requisite authority of the political party appoints the Whip, communicates it to the Speaker.
35 And even when the Tenth Schedule existed, when Para 3 existed, Your Lordship said that the
36 limited jurisdiction under Tenth Schedule of the Speaker is to only see a prima facie split in
37 the party, not embark on an independent inquiry. As far as the political party is concerned,

1 that's the domain of the Election Commission. Today it has been presumed as if I did not have
2 the requisite political Whip in my favour, that I did not represent the requisite majority within
3 the party, and thus I ex facie incurred. I incurred the disqualification under the Act, under the
4 Constitution. And my respectful submission right through as being says, who just because you
5 say doesn't mean I'm disqualified. That has to be decided by an appropriate Constitutional
6 Authority, which in this case My Lord has decided in my favour in this matter. But be that as
7 it may, you can't presume and say that you have incurred ex facie the disqualification, and thus
8 you are not entitled to write. After all, the concerned body has to decide that. According to me
9 I represent within it the view of the political party. Our resolution also when My Lord just put
10 a question to me to say that this part that we are the Shiv Sena was not something which gets
11 reflected in the Speaker's letter.

12

13 **CHIEF JUSTICE CHANDRACHUD:** Governor's letter.

14

15 **MR. KAUL:** I am so sorry, I am so sorry. The Governor's letter. That very letter of the
16 Governor refers to the resolution of 21st June 2022, which I'll read out tomorrow to Your
17 Lordships which says there's an overwhelming discontent in the cadres of the party. The party
18 does not want to continue. So it's not as if the Governor just dealt with. And this is my
19 argument which I just presented before Your Lordships. The Governor was cognizant of the
20 fact that the resolution on the basis of which 34 MLAs wrote to him, in turn referred to the
21 large discord and discontent within the political party which was because of continuing with
22 MVA. The cause is not important. The reason is not important. The reason could be anything.
23 There it was corruption and it was MVA. Could be anything. The fact remains is they were
24 discontent. The fact remains is that an overwhelming part of the political party did not want
25 to go along. Now whether your Whip represents the right wing then my learned friend started
26 going into when was the committee meeting held? Those are not the....that is not within the
27 purview of the Constitution Bench today. That will be decided and is being decided by the EC
28 that who represents within the party, the actual recognized political party. I will even touch on
29 those 18 (7), and 27 (7), which are not the subject matter of this reference to Your Lordships.

30

31 **CHIEF JUSTICE CHANDRACHUD:** We will continue. We will see the other resolution
32 which you said you want.

33

34 **MR. KAUL:** Yes, I will read My Lords. I'm very, very grateful My Lords. I will continue
35 tomorrow.

36

37 **CHIEF JUSTICE CHANDRACHUD:** We will continue tomorrow morning.

CHIEF JUSTICE'S COURT

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE M.R. SHAH
HON'BLE MR. JUSTICE KRISHNA MURARI
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE PAMIDIGHANTAM SRI NARASIMHA

Subhash Desai

v.

Principal Secretary, Governor of Maharashtra and Ors.

W.P.(C) No. 493/2022
Item No. 501

TRANSCRIPT OF HEARING

01-Mar-2023

Transcript to be read with video recording of hearing.

11:00 AM IST

1

2 **MR. KAUL:** My Lords let me just complete the reading of Shivraj because there were four or
3 five paras left. And then I'll go on to the timelines and the issues referred to Your
4 Lordships. Para 78 . I know I read it yesterday, but just for the sake of...

5

6 **CHIEF JUSTICE CHANDRACHUD:** Para... judgment compilation 2.

7

8 **MR. KAUL:** Yes, yes. PDF 1388, Volume-one.

9

10 **CHIEF JUSTICE CHANDRACHUD:** Volume one?

11

12 **MR. KAUL:** Yes.

13

14 **CHIEF JUSTICE CHANDRACHUD:** Judgement compilations 1. PDF page?

15

16 **MR. KAUL:** 1388. The idea underlying the trust vote in the ultimate analysis is to uphold the
17 political... I did My Lords. I just want to read it again because it gives a continuity to the next
18 three paragraphs. The idea underlying the trust vote in the ultimate analysis is to uphold
19 the political accountability of the elected Government to the state legislature. Assertion of
20 accountability is a mirror image of the collective responsibility of the Government to the
21 legislature. The requirement of the trust vote fulfils that purpose in the present case. The
22 present controversy has shown a light on the often fluid allegiances of democratically elected
23 representatives. This is a matter for their conscience, and the Court expresses no opinion on
24 the matter. However, it is important to note that in directing a trust vote, the Governor does
25 not favour a political, a particular political party. It is inevitable that the specific timing of a
26 trust vote may tilt the balance towards the party possessing a majority at the time the trust
27 vote is directed, all the political parties are equally at risk of losing the support of their elected
28 legislatures just as the legislators are at the risk of losing the vote of the electorate. This is how
29 the system of parliamentary governance operates, and the learned Senior Council on both
30 sides of the dispute congenially admitted that the outcome of the trust vote is the ultimate
31 litmus test for the legitimacy to govern. However, we note that where the evidence indicates
32 that circumstances of violence and coercion exists, that would undermine a free and fair vote
33 in the assembly, the Governor and the Court must take measures to ensure that the sanctity of
34 the trust vote is maintained. In the circumstances as they have emerged in this case the excise
35 of the authority by the Governor was based on circumstances which were legitimate to the
36 purpose of ensuring that the norm of collective responsibility is duly preserved. There existed

1 no extra ordinary circumstances for the Governor to determine the trust vote was not the
2 appropriate course of action on 16-03-2020. A significant ground of attack by Dr. Singhvi,
3 learned Senior Counsel appearing on behalf of the Speaker, on the decision by the Governor
4 to call for the trust vote is that convening a trust vote at this stage will impinge on the discretion
5 of the Speaker to determine whether the resignation should be accepted under proviso to
6 section 190, sub-clause C, sub clause B, and at the second level, to decide upon the
7 consequences of the resignation in terms of anti defection provisions of the Tenth Schedule.
8 Short circuiting is the phrase which was used by Dr. Singhvi, implicit in the submission is the
9 charge that holding the trust vote impinges upon the discretion of the Speaker on whether to
10 accept the resignations and to decide whether these members have incurred the wrath of
11 disqualification. While analyzing the submissions articulated by Dr. Singhvi, the cobwebs need
12 to be cleared. Governor doesn't decide whether the resignations that were submitted by the
13 members were genuine and voluntary. That is squarely a matter which lies within the domain
14 of the Speaker. Similarly, whether a member of the House has incurred disqualification under
15 the Tenth Schedule is a matter where the Speaker is the designated authority. Conscious as
16 the Court has been of the fact that these are matters which lie within the domain of the
17 Speaker, in the recent past a direction to the members to appear before the Speaker and for
18 the Speaker to take a decision immediately was recalled by a three judge bench. Dr. Singhvi
19 alluded to these orders. It is strike law that neither the Governor nor the, nor for that matter,
20 this Court has the power to impinge upon the authority of the Speaker to take a decision on
21 the above issues. The issue, however, is whether the convening of a trust vote has to be deferred
22 until such time as the Speaker has taken a decision on whether or not to accept the resignations
23 and if so, the consequence of the members departing from the fold of the party on whose ticket
24 they were elected under the Tenth Schedule. Holding of a trust vote operates in a distinct field
25 from the issue as to whether one or more individual member of the legislative assembly
26 have embarked upon a voluntary act of resignation, or have incurred the wrath of the Tenth
27 Schedule. Holding a trust vote is necessary to ascertain, whether the Council of
28 Ministers headed by the Chief Minister has the confidence of the House.
29 The continuous existence of the confidence is crucial to the legitimacy and hence survival of
30 the government. It is a matter which can brook no delay, since the authority of the Government
31 presided over by the Chief Minister depends on the Council of Ministers continuing to have
32 faith of the legislative body as a collective entity. Particularly where the members resigned in
33 an expression of the lack of faith in the existing government, the convening of a floor test is
34 the surest method of assessing the impact of designation on the collective bill of the House.
35 The consequence of acceptance of resignation is to reduce the numerical strength of the House
36 until the resignation are accepted. The members who have resigned continue to be affected in
37 the strength...reflected in the strength of the house having regard to the language which has

1 been employed in Article 190s across sub clause 3 sub clause B, shall there upon fall vacant.
2 Whether in a situation such a present... as the present, an elected government is entitled to
3 continue despite the resignation of the 22 of its members has a significant bearing on the issue
4 of confidence. Neither the Governor, not for the matter, neither the Governor nor for that
5 matter the Court can entrench upon the power of the Speaker, but the pendency of the
6 proceeding before the Speaker cannot be a valid basis to not have the confidence of the House
7 in the Government determined by the convening of a floor test.

8 Added to this is the factual circumstance in the present case that the Speaker accepted the
9 resignation tendered by six of the 22 members on 14-03-2020. All of the members sailed
10 together. No explanation was, forthcoming in the submission of Dr. Singhvi. of what, if
11 any, was the distinction between six members whose resignation was accept it with alacrity,
12 and the remaining 16 on whose resignation no decision has been taken. None of the members
13 who resign neither the six nor the 16 appeared before the Speaker. Therefore, not appearance
14 before the Speaker is evidently not a ground of distinction. We have highlighted the above
15 factual scenario only to emphasize that the convening of a trust vote of crucial importance to
16 affirm the fundamental values of the Constitution, namely, abiding by the rules which govern
17 a parliamentary democracy. The fundamental precept to parliamentary democracy is that the
18 government owes collective responsibility to the Legislative Assembly and as a collective body,
19 the Legislative Assembly is entitled to hold the government to account. The ultimate
20 expression of accountability is the existence of or lack of confidence in the Council of Ministers.
21 We are therefore unable to accept the submission of Dr. Singhvi, that the holding of a trust
22 vote would short circuit the jurisdiction of the speaker on a matter of resignation and
23 disqualification.

24 So My Lord, I just halt here for a minute Your Lordship.

25

26 **JUSTICE SHAH:** Before that, in para 82.

27

28 **MR. KAUL:** 82, yes. During the course of his summation, Dr. Singhvi fairly accepted that the
29 holding of a trust-vote at this stage would ultimately only affect the ability of the resigning
30 members to accept ministerial office in a new government, and that may be formed if the issue
31 of disqualification is not been addressed in the meantime. Dr. Singhvi submitted that the
32 effort in such cases is for resigning members to bring down a government on the allure of
33 ministerial positions in a succeeding government as their disqualification may not be
34 accepted in future if the government were to change. This is Dr. Singhvi submitted before the
35 Court is how democratic politics operates in reality, The point of the matter, however, is that
36 nothing prevents the Speaker from taking a decision either on matters of resignation or
37 disqualification, despite convening of a trust vote. That Speaker has not yet done so is not a

1 ground to defer the convening of a trust vote. My Lords my respectful submission is that these
2 two submissions are not being made for the first time before Your Lordships, that immediately
3 when the Government is formed, a trust vote should only be held then and not later and that
4 if there is a disqualification pending, there should be no trust vote. These two submissions and
5 arguments were categorically taken in Shivraj Singh Chauhan and categorically rejected in
6 there because, My Lords, ultimately, please see, who are we dealing with in this matter. We
7 are dealing with three distinct constitutional authorities. We are dealing with the Speaker, who
8 exercises and has the sole authority to exercise jurisdiction under the Tenth Schedule. We are
9 dealing with the Governor, who's the sole authority to decide whether there should be a
10 floor test or not. And we are dealing with the Election Commission, which under
11 the Symbols Order read with Article 324 is the sole authority to decide whether within a
12 political party a rival faction or a splinter group, as they say, has emerged or not. Now,
13 repeatedly saying that there has been a split and you have not merged is of no consequence,
14 because that is no one's case. I have never argued that I have split from the political party. We
15 have never argued that we needed to merge with another parties. Those were defenses under
16 the Tenth Schedule. Our consistent and continuous argument has been, that we within
17 the Shiv Sena represent the rival faction which ought to be recognized as the political party
18 and has now been recognized as the political party in question in this matter. Now, My Lords,
19 if Your lordship will recollect then My Lord the Chief Justice also put a very pertinent question
20 to me yesterday that could it be argued by someone to say that, because you expressed your
21 dissatisfaction with the Government in question, or the Chief Minister in question, you would
22 incur the wrath of the Tenth Schedule ex facie, automatically? My Lords Your Lordship in
23 Yediyurappa, and those lines of judgement have categorically held that merely because a
24 dissent is expressed within the party, that we have no faith in the Government in power does
25 not mean that you're acting against the political party, and you do not incur the
26 wrath of Article 2(1) subclause A. Because till 2nd July, My Lord 2(1)(b) does not get
27 triggered. Both the disqualification petitions still 2nd of July 2022 are based on Clause....
28 Para 2, Sub Clause 1, Sub Clause A - whether you have voluntarily given up the membership of
29 the party or not. And there we have respectfully submitted that time and again, Your
30 Lordships have interpreted it to say that there must be overt specific acts moving with MPs to
31 say that we are joining someone else, merging with another party. Those are overt acts which
32 are considered. My learned friend cited one judgment where they said, in the context to say
33 that withdrawing support would also amount to the same. But please see the series of
34 judgments what they say. Yediyurappa categorically says that merely because you go and say
35 - I have no faith in the Chief Minister. In fact, there it was the Chief Minister. In our case, we
36 don't even say that. Our case was not that we did not have the faith in the then Chief
37 Minister to continue with the Government. Our argument was that you cannot continue in

1 the Government in an MVA coalition with the NCP and the INC because My
2 Lords our resolution of 21st June 2022 categorically said that your pre poll alliance was with
3 the BJP, your post poll alliance in this era of competing ideologies is with a person and a party
4 with whom we have had serious differences for decades. And there is a vast
5 discord and discontent amongst the cadres of the political party and the workers of the Shiv
6 Sena and thus, and thus we said that this is a case where there is internal dissent within the
7 party. So right till 2nd July 2022, it was only a case of 2(1)(a) which
8 the Yediyurappa squarely covers and says that merely because you express internal dissent,
9 which is the essence of democracy. It cannot be treated to mean that you have voluntarily given
10 up the membership of the party under 2(1)(a). As far as the Whip issue is concerned, My Lord,
11 which is a 2(1)(b) issue on 21st there was a Whip appointed by us. They reiterate their faith
12 in another way. Both give their own categorical direction, which only comes into action..

13

14 **CHIEF JUSTICE CHANDRACHUD:** You appointed your Whip on...

15

16 **MR. KAUL:** On the 21st.

17

18 **CHIEF JUSTICE CHANDRACHUD:** There was already an existing Whip, right?

19

20 **MR. KAUL:** No My Lords, There was an existing Whip but then overwhelming
21 legislature and I'll come to that. I will just develop that argument.

22

23 **JUSTICE NARASIMHA:** So that we are flagging for you to answer that Whip arising out of
24 a legislative party, non the political party. That you answer.

25

26 **MR. KAUL:** Absolutely My Lords. I have because that's one of the issues also framed
27 by Your Lordships. And when I'll deal with the issues, I'll deal with that as well. But it's
28 important, My Lord, let me just revisit some of the timelines because a lot has been said on
29 these timelines. And it's important for Your Lordships to keep in mind these timelines. My
30 Lords, it is our contention and now I'll just go through some of the important dates, just seven
31 or eight of them My Lords, to say, that the very act of filing a disqualification petition was in
32 fact an attempt to stifle dissent in the party after a resolution is passed. and we express no
33 confidence in this Deputy Speaker. Suddenly a disqualification petition is filed. So, our
34 respectful submission is that Tenth Schedule cannot be used to stifle dissent within the party
35 and definitely internal descent does not amount to voluntarily giving up the membership of
36 the party under Article-218. So, leading up to the 2019 elections My Lords, there was a pre-
37 poll alliance between the Shiv Sena and the BJP.

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JUSTICE NARASIMHA: Those timelines, you are reading from somewhere or...?

MR. KAUL: These are just five, six dates, I jotted down. I'm so sorry. I just jotted the relevant dates.

CHIEF JUSTICE CHANDRACHUD: No problem. Why did you give us those dates, first take down those dates, and then you can make your submission on that.

MR. KAUL: Yes.

CHIEF JUSTICE CHANDRACHUD: If you can just give us those dates straight away, and then you can make your submission.

MR. KAUL: Yes, what I'll also do by the end of the day, I'll have a page typed out, which I should have done.

CHIEF JUSTICE CHANDRACHUD: No problem, you can just straight away, it's five dates, so we can take it down.

MR. KAUL: Five or six dates My Lords. 21-06-2022, 22-06-2022.

CHIEF JUSTICE CHANDRACHUD: What happened on 21-06-2022?

MR. KAUL: My Lords, I just, should I?

CHIEF JUSTICE CHANDRACHUD: Oh, you are giving a...

MR. KAUL: Whichever way Your Lordships want that.

CHIEF JUSTICE CHANDRACHUD: I'm saying it is easier to type it out...

MR. KAUL: I must confess, I thought Your Lordship said first give the dates that explained what happened...I'll just give with the event that happened. Very grateful. So, My Lords, on 21st of June 2022, the first meeting of the majority of the Shinde faction of 34 MLAs takes place. 34 MLAs were present in this. Mr. Gogawale was appointed as the Chief Whip and Mr. Prabhu's appointment as the Whip was cancelled with immediate effect.

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JUSTICE SHAH: This Chief Whip was appointed by the legislative party?

MR. KAUL: That just, yes. Park it, I'll show to Your Lordships that this is not only the convention, this has the authority of the political party. So this whole argument that this is only the legislature party and not the political party, I'll demonstrate that. That is how it's been right through, this whole artificial distinction which has been drawn that it is the legislature party who did it and the political party had nothing to do with it. I'll come to it, that's a specific issue.

CHIEF JUSTICE CHANDRACHUD: Let's go through the dates first then we can then focus on that. Dates and events, I mean whatever.

MR. KAUL: Dates and events My Lords. So, on 21st Mr. Gogawale is appointed as the Chief Whip, Mr. Prabhu's appointment as the Whip is cancelled with immediate effect and a resolution is passed which categorically provided that there is enormous discontent amongst the carders of the party for forming a Government with NCP and INC, who are ideologically opposed to the Shiv Sena. The resolution also said that the act of entering into a coalition had a tremendous negative impact on the voters and the party cadres at large and that there was hue and cry towards the party leaderships for the act of aligning with the opposing parties. And then it categorically says that the MLAs, as well as the leaders and workers throughout the country are facing a lot of humiliating questions on this count. So this is what we did. On the same day the minority faction within the party, which at that stage was 24, now is of course less than 14, 24 of them on that day.

CHIEF JUSTICE CHANDRACHUD: On 21st June, itself?

MR. KAUL: 21st June itself, met and passed the following resolutions. One, removing Mr. Shinde as the leader of the party because Mr. Shinde also had been a leader since 2019 of the Legislature party. So they removed Mr. Shinde as the leader of the party and they appointed Mr. Ajay Chaudhary as the leader of the Legislature party. The resolution also recognizes Mr. Prabhu as having been appointed as a Whip previously. On 21st itself My Lords a notice was also sent by the majority faction, that is the Shinde faction, for removal of the Deputy Speaker. This notice was issued on behalf of and signed by 34 MLAs of the Shiv Sena Legislative party.

1 **CHIEF JUSTICE CHANDRACHUD:** So is it not therefore clear that on the 21st, there are
2 really two clear...there are two clear factions. One you claim that well, there were 34 with you
3 and the others say that well, they're 24. The 24 say that we're reiterating here Prabhu.

4

5 **MR. JETHMALANI:** 21 actually.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Right 21. Not 24.

8

9 **MR. KAUL:** Now on 21st itself the Deputy Speaker communicates to the minority faction that
10 they have accepted Mr. Ajay Chaudhary as the leader and does not respond to our...

11

12 **CHIEF JUSTICE CHANDRACHUD:** Come again.

13

14 **MR. KAUL:** On 21st itself, the Deputy Speaker or the sorry the Under Secretary of the
15 Maharashtra Secretariat communicates to the party that they have appointed Mr. Ajay
16 Chaudhary as requested by the minority faction, and does not respond to our communication
17 at all. On 22nd of June 2022, a notice is given by the minority faction to attend an emergency
18 meeting on the same day at 05:00 PM. And the notice said if you fail to attend, it will be
19 deemed to indicate your clear intention to voluntarily give up the membership of the party.
20 That's been their only case of voluntarily giving up the membership.

21

22 **CHIEF JUSTICE CHANDRACHUD:** Attend the meeting on?

23

24 **MR. KAUL:** 22nd of June, 2022.

25

26 **CHIEF JUSTICE CHANDRACHUD:** Same day meeting. Meeting is to be held on?

27

28 **JUSTICE KOHLI:** Same day meeting.

29

30 **MR. KAUL:** My Lord, yes on the same day at 05:00 PM. On the very same day My Lords...On
31 the very same day, the majority faction writes to say that Mr. Prabhu's, letter stating.. calling
32 for a meeting. He had no authority to call for a meeting, and therefore the notice is invalid as
33 he had been removed from his position as the Chief Whip.

34

35 **JUSTICE KOHLI:** No, writes to?

36

1 **MR. KAUL:** The majority faction replies to Mr. Prabhu's notice because he had called a
2 meeting the same evening of the minority faction.. he was part of the minority faction, issued
3 a letter calling for an emergency meeting at 05:00 P.M on the same day.

4

5 **JUSTICE KOHLI:** It is stated that he has no right.

6

7 **MR. KAUL:** Because he had been removed on 21st as the whip by the majority faction. On
8 23rd June, the first disqualification petition, on 23rd June the first disqualification petition is
9 filed before the Speaker...before the Deputy Speaker against 16 MLAs by Mr. Prabhu on the
10 grounds that they had voluntarily given up the membership of the party to attend the meeting
11 as they did not attend the meeting on the 22nd.

12

13 **CHIEF JUSTICE CHANDRACHUD:** First disqualification petition is filed before the
14 Deputy Speaker...

15

16 **MR. KAUL:** On the grounds...

17

18 **CHIEF JUSTICE CHANDRACHUD:** By Mr. Prabhu?

19

20 **MR. KAUL:** That's right.

21

22 **CHIEF JUSTICE CHANDRACHUD:** That they had voluntarily given up membership.

23

24 **JUSTICE NARASIMHA:** When was your notice to the Speaker for removal of Speaker
25 given?

26

27 **MR. KAUL:** On 21st June 2022.

28

29 **JUSTICE NARASIMHA:** So therefore that's the one first day of your...

30

31 **MR. KAUL:** Prior in time.

32

33 **JUSTICE NARASIMHA:** So that date hasn't come. So 21st is the notice given by your group
34 for removal of the Speaker.

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36 **MR. KAUL:** Of the Deputy Speaker. Because there was no Speaker. For the removal of
37 the Deputy Speaker.

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CHIEF JUSTICE CHANDRACHUD: So that 21st is a cancellation of Prabhu's appointment as a Whip and for also the removal of the Deputy Speaker.

MR. KAUL: It My Lord has first, Mr. Gogawale appointed as the Whip.

CHIEF JUSTICE CHANDRACHUD: Right.

MR. KAUL: Mr. Prabhu cancelled with immediate effect.

CHIEF JUSTICE CHANDRACHUD: Right.

MR. KAUL: The resolution that there is widespread discontent passed on the same day.

CHIEF JUSTICE CHANDRACHUD: That we took

MR. KAUL: And also the note... separate notice issued to the Deputy Speaker.

CHIEF JUSTICE CHANDRACHUD: Yaa.. That.. you are right. Separate notice for removal of the Deputy Speaker.

Mr. KAUL: Under Article 179C. My Lords may I? Now on 25th of June 2022, disqualification notices are issued to 16 MLAs by the Deputy Speaker asking the MLAs to file their replies by 05:30 p.m. On 27th June 2022.

CHIEF JUSTICE CHANDRACHUD: Before that 23rd June, the first disqualification petition is for how many people?

MR. KAUL: For 16.

JUSTICE KOHLI: For 16 MLAs.

CHIEF JUSTICE CHANDRACHUD: Okay. Then the next one was 25th, you said?

MR. KAUL: Yes, 25th. Disqualification notices issued to the 16 MLAs by the Deputy Speaker asking them to file their replies by 05:30 p.m. on 27-06-2022 and 26th and 27th were the weekend. So these two non-working days are given to file a reply.

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JUSTICE KOHLI: 26th or 27th. Which one Mr. Kaul?

Mr. KAUL: 25th is when they are given a notice to file their replies by 27th. So intervening are two non-working days which are 26th and 27th, are both nonworking days. It's the weekend. Now on 25th, it's an important event My Lords, even the Thackeray faction writes to the Election Commission. The minority faction writes to the Election Commission. So they go to the Election Commission to say that there is a rival faction, which may set up a political party and we are the Shiv Sena, they write to the Election Commission invoke the jurisdiction of the Election Commission. And that order is not the subject matter before Your Lordships, the EC order which Your Lordships are dealing in are other matter, where I've been recognized as the political party categorically says that this rival factions had emerged on 21st and maybe was the culmination of dissent for a long time, culminated in the resolution of 21st June 2022. It is in this background that on 27th of June 2022, we come to the...to this Honourable Court to say that (a), there has been a serious violation of principles of natural Justice because instead of the scheduled period of seven days, a two day period over the weekend is provided to us and we need more time to file a reply. We also argued Nabam and I repeatedly said, so I'm not for a minute ever suggested that we did not ask argue Nabam. We also argued Nabam to say that quite unlike the cases of Kihoto, and this was heard at length where it says that you will not interfere at an interim stage. Nabam, which is much later in time, takes note of it and says but where there is a petition pending for the very removal of the Speaker, it would be constitutionally and ethically not proper for him to continue, he can always in the meantime prove his majority on the floor of the House and then continue with the disqualification petition. Because as Justice Mishra in detail said that no harm is caused. That the earliest prove your majority, you can lay down the timeline, show that you have the confidence and proceed with that disqualification. But the reversal would be disastrous because you would then set the pool and composition of the House to suit yourself so that no one can remove you in the meantime. And those entire arguments that Your Lordships have heard on the 14 days, 7 days etc., would be utilized and that has to be seen, the then members, have to be seen in the context of the Notice on the date which was given to you. Your conflict of interest starts on that date when the Notice is given to you. And you would utilize that time. This is what Justice Mishra dealt with in that judgment in Nabam to say that, look at the reverse. Nothing happens in the meantime. If you are...tomorrow you win the confidence, you come back and you win the confidence. But as far as the other party is concerned, it's lost an opportunity to vote against you. Now My Lords, after this, it was keeping this in mind after hearing arguments of this, the Court consciously still only extended, did not

1 injunct the Speaker, gave time till the 12th. And of course, My Lords, we had also in this
2 raised as a justification for coming in an Article 32 to the Supreme Court was that there was a
3 threat to our lives. Homes were being burned and we read out the press statement of Mr. Rout
4 and others and saying that you will see a series of dead bodies coming etc. And we said it's
5 not safe for us to go and that is why we are out of the state. So these are the principle three
6 grounds, that we came on. The Court consciously on that day said only time is extended
7 because the period provided as for us was seven days, which was not complied with. On 27th
8 of June 2022, the second disqualification petition is moved. This time against
9 22 MLAs, is filed by Mr. Prabhu.

10

11 **JUSTICE NARASIMHA:** That's also 27th, is it?

12

13 **MR. KAUL:** 27-06-2022.

14

15 **CHIEF JUSTICE CHANDRACHUD:** Yes, how many MLAs?

16

17 **JUSTICE KOHLI:** 22.

18

19 **MR. KAUL:** Till date My Lords, subject to correction, I am instructed to say that no Notice
20 has been received or was received unlike in the case of the first 16, by any of the people against
21 whom disqualification was alleged.

22

23 **JUSTICE KOHLI:** Out of these 22?

24

25 **MR. KAUL:** Against these 22. On 28th of June 2022, leader of the opposition
26 Mr. Fadnavis went to meet the Governor and requested him to hold a floor test, as the
27 Coalition Ministry had lost the confidence of the House.

28

29 **MR. JETHMALANI:** My Lords, may I just say one thing. On the second it's very
30 important, reasons I'll point out later that as far as the second disqualification is concerned,
31 allegedly on 27th, First, as my learned friend pointed out, there was no notice but for the first
32 time the disqualification petition of the remaining 22 MLA's is concerned, it's only on this 8th
33 of July petition. Up to 8th of July, it is never alleged that there was
34 any disqualification petition pending. In fact, in all the averments, as I point out when I come
35 to it. In all the averments in every period it has always been said that there are only 16 MLAs
36 disqualified. On the 8th of July, when they filed their petition in this court, for the first time
37 they alleged that there was a 27th July notice or petition for disqualification of 22 MLAs.

1 Actually the factual matter is, there has never been any disqualification petition to my
2 knowledge, filed till 8th July.

3

4 **MR. KAUL:** Now on 28th of June 2022.

5

6 **CHIEF JUSTICE CHANDRACHUD:** That's when the leader of the opposition meets the
7 Governor and seeks a floor test.

8

9 **Mr. KAUL:** The leader of the opposition yes, meets the governor My Lord, that Chief
10 Justice is absolutely right. And the Governor then issues a communication on 28th June 2022
11 to Mr. Thackeray directing him to face a floor test on the 30th of June 2022.

12

13 **JUSTICE KOHLI:** So both events of the same day?

14

15 **MR. KAUL:** Yes, Yes and as I had read out the letter to Your lordships yesterday, it
16 specifically refers in detail to three things. One is 7 MLAs, who are part of the government,
17 including two ministers withdrawing their support. The letter of the leader of the opposition
18 saying that it has lost its majority and the resolution of 21-06-2022 passed by 34 of the 55
19 MLAs saying that there is a huge discontent within the party. And he calls upon, he calls upon
20 Mr. Thackeray to face the floor test on 13th. Now immediately after that on 29th of June
21 2022, Mr. Prabhu filed a writ petition before the Supreme Court, seeking a stay on the
22 direction calling for the floor test. On the ground, the disqualification petitions of 42 MLAs
23 was pending consideration.

24

25 **CHIEF JUSTICE:** That stay was refused by our courtrooms.

26

27 **MR. KAUL:** And My Lord argument were heard till late evening and our contention right
28 through was that how can any Chief Minister ever say that I will not face a floor test? Because
29 your lordships have said time and again that Floor test should brook no delay. It's the litmus
30 tests of democracy, a floor test should be held the moment and the words used in Bommai by
31 your lordships are, the Governor, as the constitutional authority is entitled by any means or
32 process the words used are .. by any means of process in para. 121 to say to come to a
33 conclusion that this necessitates a floor test. So when you Lordship put that question to me
34 yesterday, my respectful submission was that what else is a Governor expected to do? He is
35 not concerned with the Tenth Schedule legislator party versus political parties. His only
36 concern is does the government enjoy the majority on the floor of the House or not? Now...

37

1 **CHIEF JUSTICE CHANDRACHUD:** Did you complete the dates?

2

3 **MR. KAUL:** Sorry I digressed. Let me complete the dates.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Complete the dates.

6

7 **MR. KAUL:** Yes. Yes. So the court then says the floor test of the 30th and categorically only
8 says the floor test of 30th is subject to the outcome of the proceedings but that floor test on
9 30th never happens because on 29th Mr. Thackeray within ten minutes of this stay being
10 refused, resigns as the Chief Minister. On 30th June 2022 My Lords, Mr. Shinde and
11 Mr. Fadnavis approached the Governor as a coalition staking claim to form the government
12 and on 30th, the Governor swore in Mr. Shinde as Chief Minister, and Mr. Fadnavis
13 as Deputy Chief Minister, and directed the new coalition to prove its majority on 4-07-2022.

14

15 **CHIEF JUSTICE CHANDRACHUD:** They are sworn in on the 30th itself?

16

17 **MR. KAUL:** Yes, My Lords.

18

19 **CHIEF JUSTICE CHANDRACHUD:** Through the majority on the 4th.

20

21 **MR. KAUL:** Yes, on the 4th. Now on 30th, even the minority faction claims that they sent a
22 letter which is as per the Election Commission received on 1st in their office, again bringing to
23 the notice of the Election Commission, as they did on 25th, a change in organizational setup
24 of the party, including Mr. Shinde's removal as the leader of the Legislature party.

25

26 **JUSTICE KOHLI:** Mr. Kaul, will you repeat yourself?

27

28 **MR. KAUL:** Yes so lady, on 30th even the minority faction claims which of course, as for the
29 Election Commission, is a letter received on 1st of July, they write to the Election
30 Commission intimating change in the organizational setup of the party including Mr. Shinde's
31 removal as a leader of the Legislative party. He is not removed as a member of the party, but
32 as the leader of the Legislature party, is their letter. The purpose that I'm emphasizing is that
33 both on 25th and 30th they themselves invoke and go to the EC, knowing very well that for
34 any dispute intra-party is a dispute exclusively within the jurisdiction of the Election
35 Commission. Now on 2nd of July 2022 Mr. Prabhu purportedly acting as a Shiv Sena
36 Chief Whip issues a whip to the members of Shiv Sena Legislative Party regarding the election
37 of the Speaker and the confidence motion. As for us on 21st, he stood removed. He had no

1 authority to issue any such Whip. On 2nd he issues this Whip and this is the first date when
2 their argument of 2(1)(b) of the Tenth Schedule emerges because till now it is only 2(1)(a)
3 voluntarily giving up the membership of the party while not attending the meeting on 3rd
4 of July 2022 at 12:01 p.m. Mr. Rahul Narvekar is elected as the Speaker with a total of 164
5 votes. The same day My Lords at 12:02, and the rival candidate only gets, I'm grateful to my
6 learned friend, gets only 107. At 12:01 Rahul Narvekar is elected as the Speaker with a total of
7 164 votes. On the same day on 3rd, 2022 at 12:02 p.m. certain MLAs from the former MVA
8 coalition issued a notice for the removal of Mr. Narvekar is Speaker after him having won his
9 election. And after this on the 3rd itself they file a fresh disqualification proceeding against all
10 the 39 MLAs purportedly for voting against the party Whip regarding the election of the
11 Speaker. And this they now alleged 2 (1)(b). On 3rd itself My Lords Mr. Narveker recognizes
12 Mr. Gogawale as the Chief Whip, and Mr. Shinde as the Leader of the Shiv Sena party, which
13 in any case, as for us, on 21st, Mr. Gogawale was appointed and Mr. Shinde, who had been the
14 Leader since 2019. We had reiterated our faith in his content.

15

16 **CHIEF JUSTICE CHANDRACHUD:** Yes.

17

18 **Mr. KAUL:** Now they thereafter also challenged Mr. Narvekar's recognition of Mr.
19 Gogawale and Mr. Shinde before the Supreme Court, which is one of the petitions pending
20 before Your Lordships. And this time on the ground on Nabam Rebia, saying that he cannot
21 proceed with the disqualification as there is a petition against him for removal pending. On
22 4th of July 2022, the House reaffirmed its confidence in the newly elected
23 Speaker Mr. Narvekar. So My Lords, on 3rd he wins. You again move after his winning. Two
24 minutes later he again.. the House reposes its confidence on the 4th. And on 4th then the
25 confidence motion called for on the floor of the House, wherein Mr. Shinde's Government
26 proves its majority in the House. 164 for, 99 against. Now for a minute, My Lord, because
27 there's been so much confusion as I'm reading this timeline, please have this chart as well. It's
28 important. My Lords I've had copies made. Sorry because this otherwise will be an endless
29 exercise on the numbers which...

30

31 **CHIEF JUSTICE CHANDRACHUD:** Where is the second page?

32

33 **MR KAUL:** My Lords, I'm so sorry we have printed the...

34

35 **JUSTICE SHAH:** On 2nd when Mr. Prabhu, issued the Whip...fresh Whip.

36

37 **Mr. KAUL:** Yes, My Lord yes,

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JUSTICE SHAH: On 2nd July. He issued the fresh Whip.

Mr. KAUL: Yes.

JUSTICE SHAH: Though according to you he could not do because he was his Whip was already removed on 21st June.

Mr. KAUL: Right.

JUSTICE SHAH: That was with respect to the election of the Speaker as well as the trust vote on 4-7.

Mr. KAUL: Yes.

JUSTICE SHAH: Can it not be said that by issuing the fresh Whip they have accepted the calling of the trust vote on 4 -7.

Mr. KAUL: Yes.

JUSTICE SHAH: So you can very well and your submission can.

MR. KAUL: I'm grateful. I'm grateful.

JUSTICE SHAH: Your submission can...they cannot challenge.

MR. KAUL: I'm grateful. I'm grateful.

JUSTICE SHAH: Subsequent calling the trust vote on 04-07. Otherwise they could not issue the Whip on 04-07.

MR. KAUL: I'm grateful. I'm grateful. Your Lordships are right.

JUSTICE SHAH: But we wanted to, at least I wanted to know that it was with respect to both. Speaker's election as well as...[UNCLEAR]

MR. KAUL: Yes, yes. Now, My Lord.

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JUSTICE SHAH: Trust vote.

MR. KAUL: Yes. Now My Lords, kindly have this chart. Now, first, is the election of the Speaker, Mr. Rahul Narvekar on 3rd of July 2022. My Lords has that?

CHIEF JUSTICE CHANDRACHUD: Yes.

MR. KAUL: Now, please see, this is, I've done the exercise both with 42 and without 42. I've done both the exercises on both the Speakers and the confidence. So first it says, voting in the election of the Speakers so and so, including the 42 members against whom disqualification petition was pending. Now please see My Lords, Shiv Sena 39, BJP 105, others 20 total votes received by Mr. Rahul Narvekar 164, total votes against Rahul Narvekar 107, abstain absent members 16, total strength of the House 287, strength minus the abstain is 271, majority mark 136, votes secured by Speaker 164. Now please have the one where we remove the 42. Shiv Sena zero, BJP 105, others 17, total votes received by Rahul Narvekar 122. That is 164-42. Total votes against Rahul Narvekar 107, abstained Absent 16, total strength 245, strength minus abstain 229, majority mark 115, votes obtained 122.

Now please have My Lords, on the back of the page. Voting in the floor test of the Government on 4-07-2022, including 42 members against whom disqualification petitions were pending. Shiv Sena 39, BJP 105, others 20, votes in favour of Eknath Shinde 164, votes against Mr. Eknath Shinde 99, abstain 24, total strength 287, strength minus abstained votes 263, majority mark 132, majority votes obtained by Eknath Shinde 164, against 107. Now kindly have where 42 are removed. Shiv Sena, so BJP 150, others 20, votes in favour of Eknath Shinde 122, votes against Eknath Shinde 99, abstain 24, total strength 245, strength minus abstained votes 221, majority mark 111, vote secured by Mr. Shinde discounting 42 MLAs is 122.

Now, I'll come to the issues, and I will proceed issue wise, because I have to deal with as My Lords have said, not only each of those issues plus also the issue of legislature party versus political party. But just before that there is one submission that I wanted to make which is, we are dealing with three constitutional authorities. An attempt is to confuse issues as far as the exclusive jurisdiction of each of the three is concerned. The Governor, all that he is concerned with is, do you in a democracy, have the confidence of the House or not? Now what better way to test that confidence than a floor test, having said that I am not for a minute suggesting that it's not subject to judicial review or you can just ask for a floor test for the asking and there can be...there has to be material, there has to be due application of mind. But when an overwhelming number of MLAs write to you for various reasons and say that the

1 concerned Government or the Ministry does not enjoy confidence, what is wrong with
2 the Governor having taken the decision of just given the opportunity to the then Chief Minister
3 to face a floor test. In fact, rather than dissolving or sending a report to the Governor and at
4 which Supreme Court repeatedly frowned upon by saying that there used to be a huge misuse
5 of Article 356, where reports to the President was said dissolving the House. They said the first
6 thing is let them face the floor test. What is wrong with it? That is one. Secondly, My Lord,
7 comes the issue of the Election Commission. The Election Commission, under the Symbols
8 Order decides on...what the words use are splinter group/rival faction. Those are the words
9 used in para 15 of the Symbols Order. This whole argument that I have split, I have not merged
10 is not my argument at all. I have never claimed a split. I am claiming a rival faction within the
11 party which according to us represents the Shiv Sena and has now been recognized as the Shiv
12 Sena. Because Your lordships have held that ultimately went two rival factions emerged within
13 a party you can't recognize both is what Your Lordships judgements have held. Because a
14 symbol can't be split into two, a name can't be split into two. It ultimately has to go to one or
15 the other rival factions. In this case, that is a separate petition. But the competent body has
16 decided to say that I represent the rival faction, which would be recognized as the political
17 party and that's a decision exclusively vested in the Election Commission. Sadiq Ali
18 downwards, including on interim orders, including on deciding whether political majority,
19 legislative majority, two to be taken together. What's the cut-off date when disputes have
20 arisen. What numbers will be seen? They say that the only party...only body entitled to an
21 equipped to deal with it.

22

23 **CHIEF JUSTICE CHANDRACHUD:** Mr. Kaul for the purposes of the Tenth Schedule it
24 makes no difference as to whether the rival faction which has emerged, claims to still be within
25 the fold of the strived political party or forms a new political party in the Legislature. It makes
26 no difference at all. Once the Tenth Schedule attaches a disqualification the moment you have
27 a rival faction unless you make out one of the defences, and it makes absolutely no difference
28 whether you are saying that well we are in the same party. We are only saying that we represent
29 the same party. Here all the dates you have given us make it very clear that there is a rival
30 faction. From the 21st, 34 MLAs represent a rival faction. They say, well we are the Shiv Sena.
31 There was a great deal of discontent because you teamed up with the Indian National Congress
32 and the NCP when you were ideologically opposed to them, that we had a pre poll alliance with
33 the BJP. They're fair enough that's their contention. But does that oblivate the fact that this
34 is a rival faction within the meaning of the Tenth Schedule and a split within the meaning of
35 the Tenth Schedule.

36

1 **MR. KAUL:** And I was just coming to that matter. That's why I said three different
2 authorities, three different provisions. I am not for a minute suggesting that Tenth Schedule
3 has a bearing there at all as far as Election Commission is concerned, the third issue I
4 just touch on My Lords.

5

6 **CHIEF JUSTICE CHANDRACHUD:** And you know, a split does not postulate that people
7 who are party to a split leave the party. It maybe that the people who split sometimes leave the
8 party, but otherwise the Tenth Schedule will also operate where, a group of persons, whether
9 minority or majority say that we belong to the same party. And though you've constantly said
10 that you know the Eknath Shinde faction was the majority, and the Uddhav Thackeray faction
11 represented a minority after the 21st. It makes no difference to the application of the
12 Tenth schedule as to whether what who remains is in the minority.

13

14 **Mr. KAUL:** I will answer that. So one My Lords the Governor as far as the floor test, the
15 Election Commission which looks at everything including the Legislature party, the political
16 party which according to us are integral. You can't segregate them and come to a conclusion
17 which rival factions or splinter group should be recognized as the party. Then comes the issue
18 of the scope of the Tenth Schedule. As far as the Tenth Schedule is concerned an attempt is
19 being made to place before Your Lordships to say that this was only the legislature party. This
20 was not the political party, and in 2(1)(b) what is mentioned is the political party and not the
21 legislature Party. And in Mayawati Your Lordships say that it is not the legislature Party, it's
22 the political party which is mentioned in 2(1)(b) and it can only be read as the political party.
23 This is what is your what your Lordships are told. Now My Lords, I have never ever said that
24 the two are different. Our argument right through has been that this decision of the
25 Legislature Party has the authority of the political party and the only interaction that a Speaker
26 has while deciding on whether 2(1)(b) has been violated or not is his interaction with the
27 leader of the legislature party and the Whip appointed. Because conventions have also shown
28 and I will come to those specific Maharashtra Assembly rules that have not been shown to
29 Your Lordship. The members of the legislature party appoint the leader of the legislature party.
30 The leader, in turn informs the Speaker about all posts, all designations, which necessarily
31 implies also about the Whip who is appointed in any change in that. Even when the defence of
32 Para 3 existed, when the defence of Para 3 existed, there were only two defences, Para 3 and
33 merger in 4. Even when the defense of Para 3 and split in the state. The Supreme Court in
34 Rana said that the Speaker cannot embark on any independent inquiry as to what has
35 happened within the power Political Party in a split within. He will only for purposes of
36 disqualification take up prima facie view. In any case that is today academic because Para 3
37 has gone. Now what will the Speaker today look at? The Speaker under 2(1)(b) will look at who

1 has issued the Whip? what is the direction? Now as per us, the Whip as on 21st is not Mr.
2 Prabhu and we are not obliged to follow any direction of his. We are not for a minute
3 suggesting, in fact, our contention has been that the Speaker cannot determine, Your Lordship
4 are absolutely right. The Speaker under Tenth Schedule is not required to go and determine
5 whether a political party is split or not. That is the EC's jurisdiction. All that they look at is
6 which are the set mode. The set mode is a Speaker doesn't embark on finding out in the lack
7 of membership, who is the political party, who was expelled, who was not expelled. His
8 interaction is with the essentially the legislature party. Now the problem which comes in the
9 argument of the other side, is to say - No. The word mentioned is political party and since the
10 two are separate, you are only relying on the legislature party. That is not our argument. The
11 Symbols Order Para 6 and 6A, categorically provides that even for the continued recognition
12 of a political party, it's vote percentage, it's elected representative, it's elected members of
13 Parliament are all important to determine the existence and continuance of a political party.
14 So when you say this is legislature, this is political, that's an artificial distinction you are
15 drawing. According to us, according to us, that legislature party has the political authority of
16 the political party and that has been the convention right through. And I will show two letters.
17 One is on record, one is not. Every time that a Whip is communicated to the Speaker
18 it's the legislature party which communicates the Whip...to the Speaker. So this argument,
19 which is sought to be made, is that Mayawati said it's only the political party. You are the
20 legislature party. Thus you incur the wrath of 2(1)(b).

21

22 **CHIEF JUSTICE CHANDRACHUD:** Can we see the rules of the Maharashtra Legislature?

23

24 **Mr. KAUL:** Yes. I'm very grateful for that. I'm very grateful.

25

26 **CHIEF JUSTICE CHANDRACHUD:** Those rules are very, very important.

27

28 **MR. KAUL:** Yes. Yes. Statute compilation My Lord on PDF Page 4 starting at 6. Rule 2F.

29

30 **JUSTICE NARASIMHA:** First compilation? Statutes?

31

32 **CHIEF JUSTICE CHANDRACHUD:** Page? What page?

33

34 **MR. KAUL:** PDF Page 6.

35

36 **JUSTICE NARASIMHA:** This contains the entire rules or only part of them?

37

1 **Mr. KAUL:** My Lord, these are the entire rules I am told. Yes., the disqualification rules My
2 Lords. My Lord they were framed under Para 8 of the Tenth Schedule. First My
3 Lords 2 (G) page 7. Then I'll go to the earlier section, but first have 2, sub-clause G. Member
4 means, My Lord has that? Member means a member of the Maharashtra Legislative
5 Assembly. It says nothing else. Now please have 2, sub-clause F. Leader in relation to
6 a legislature party means a member of the party chosen by it as its leader and includes any
7 other member of the party authorized by the party to act in the absence of the leader as or
8 discharge the functions of the leader of the party for purposes of these rules. And now kindly
9 have rule 3, sub-clause 1. My Lords have rule 3(1)? May I My Lords? My Lords the Chief
10 Justice, may I? Rule 3, information to be furnished by leader of a legislature party. The leader
11 of each legislature party other than the legislature party consisting of only one member shall
12 within 30 days, after the first sitting of the House or where such legislature party is formed
13 after the first sitting, within 30 days after its formation or in either case within such further
14 period as the Speaker may for sufficient cause allow furnish the following to the Speaker,
15 namely:

16 a) A statement in writing containing the names of the members of such legislature party
17 together with other particulars regarding such members as informed one and names of
18 designations of the members of such party who have been authorized by, for communicating
19 with Speaker for purposes of the rules.

20 And now kindly have rule 3, sub-clause 4, page 8. Whenever any change takes place in the
21 information furnished by the leader of the legislature party under sub-rule one or by a member
22 under sub-rule two, he shall as soon as may thereafter, and in any case within 30 days from
23 the date on which such change takes place or within such further period as the Speaker may,
24 for sufficient cause allow, furnish writing information to the Speaker with respect to such
25 change. So it's the leader of the legislature party who communicates, points out the
26 designations, the posts and the people who are appointed. And today clearly within two rival
27 factions are claiming that their leader is the leader of the legislature party and the Whip. Now
28 the Speaker at this stage only goes by what the leader communicates. The Speaker,
29 as Your Lordships have held, has no independent tools at his disposal to go and find out
30 within a political party where lakhs of taluka, district level party organizations members
31 constitutions are involved. That is how we interacts. Now they attempt to get out of it by saying
32 that you only had a meeting of 34 legislatures so thus you're only the legislature party. So our
33 contention, it says, is who? You decide on your own that I have disqualified under 2(1)(a), you
34 decide I'm disqualified under 2(1)(b). And without a speaker deciding on either of the two.
35 And you want and you tell the court that this is x-ray shy evident that you have lost your
36 membership, your hit by the Tenth Schedule and so you should be declared disqualified.

37

1 **JUSTICE NARASIMHA:** So this form one should include Whip also?

2

3 **MR. KAUL:** I not to sure whether it does. It does.

4

5 **JUSTICE NARASIMHA:** It normally does, but...

6

7 **MR. KAUL:** It does. It does. Such members as inform one and names and designations of
8 members who have been authorized.

9

10 **JUSTICE NARASIMHA:** Who have been authorized by...

11

12 **MR. KAUL:** Who have been authorized by it for communicating with the speaker. So which
13 includes My Lords communicating in any form, including the views. Now please see.

14

15 **JUSTICE NARASIMHA:** Yes, the communication.. it talks about the Speaker for the
16 purpose of these rules. These rules also relate to....

17

18 **Mr. KAUL:** Now kindly have 3(5) where a member where a member belonging to any
19 political party votes or abstains from voting in the assembly contrary to any direction issued
20 by such political party, or by any person or authority authorized by it in this behalf, without
21 obtaining in either case the prior permission of such political party. A person or authority, the
22 leader of the legislature party concern or where such member is the leader or is the case, may
23 be the sole member of that legislator party. Such members shall as soon as maybe thereafter,
24 and in any case within 30 days from the date of such voting, or abstention inform the Speaker
25 as informed to whether such voting or abstention has or has not been condoned by such
26 political party, person or authority. But today the limited issue before Your Lordships as far as
27 the Tenth Schedule is, how does the speaker determine it? They want today the speaker to
28 embark upon and decide what the EC is meant to decide. The Legislature party, the political
29 party, according to us, are not distinct. They are conjoined, integral and organically connected
30 with each other. That is...

31

32 **CHIEF JUSTICE CHANDRACHUD:** The bar, Who have who's not gone paperless.

33

34 **MR. KAUL:** May I, may I would respect say from the day this hearing has started, I've been
35 praying that you lordships doesn't ask me this question, but finally it was inevitable and it has
36 fallen on me today. But your Lordships can be reassured. I'm trying very hard and I have this

1 with me and I'm taking some classes and lessons in it. Give me some time. Hopefully I'll be
2 there.

3

4 **CHIEF JUSTICE CHANDRACHUD:** Before the next CB.

5

6 **MR. KAUL:** For sure My Lords.

7

8 **JUSTICE NARASIMHA:** Your other two colleagues have coped up.

9

10 **MR. KAUL:** Yes they are far more able, My Lord in all fairness, I've read out a few judgments
11 from this. In fairness and in my defence I've read out at least a few judgements from this.

12

13 **CHIEF JUSTICE CHANDRACHUD:** Your navigation is being done by your junior you
14 have to also do the navigation yourself. That's also the essence of being paperless, you see.

15

16 **Mr. KAUL:** Well Your Lordships time is precious if I start doing the navigation at the
17 moment.

18

19 **CHIEF JUSTICE CHANDRACHUD:** Alright.

20

21 **MR. KAUL:** So if that is the layout, please see how have parties understood these rules in
22 terms of communicating to the speaker.

23

24 **JUSTICE NARASIMHA:** Now we also...if you can show us some kind of a practice which is
25 being followed.

26

27 **MR. KAUL:** Yes. That's what I'm coming to. That's exactly what I'm coming to. So, please,
28 immediately. Now have...

29

30 **JUSTICE NARASIMHA:** Mr. Kaul this only answers half of the contentions raised by the
31 other side only to show that these names will be forwarded by the Leader of the House to the
32 Speaker.

33

34 **MR. KAUL:** Yes. No, no My Lords I.... absolutely. When I deal with the issue, My Lords, I'll
35 deal with it squarely. Since the question fell from My Lords, I just attempted to....My Lords
36 one letter is on record. This other letter I don't think is on record My Lords. We've just got
37 copies made. And give one to the other side as well. Court Master, if there's an extra copy could

1 you return it? Because I need to give it to the other side. Very grateful. Now My Lords as late
2 or recent as 6th July, 2022 Mr. Sanjay Raut, as Leader of the Shiv Sena Parliamentary
3 party writes to the Speaker to say - this is to inform you that Shiv Sena Parliamentary Party
4 has nominated so and so as the Chief Whip in Lok Sabha in place
5 of Shrimati Bhavana Gawali MP with immediate effect and also My Lords, the earlier letter
6 which is convenience compilation Volume 2, PDF 728.

7

8 **JUSTICE KOHLI:** That letter of 25th of November 2019 is the one?

9

10 **MR. KAUL:** Yes, Ma'am, Yes My Lady.

11

12 **JUSTICE KOHLI:** Which you have already highlighted.

13

14 **MR. KAUL:** It was read out, but I now want to read it in the context of the rules. May I with
15 Your Lordship's permission?

16

17 **CHIEF JUSTICE CHANDRACHUD:** Yes.

18

19 **MR. KAUL:** To the Honorable Speaker, Shiv Sena's newly elected MLAs meeting was
20 convened at Shiv Sena Bhavan, Dadar, Mumbai on Wednesday 31-10-2019. The meeting was
21 chaired by Shri Uddhav Thackeray, Shiv Sena Paksh Pramukh. All the newly elected MLAs of
22 the Shiv Sena Party unanimously resolved that all the decisions of today's meeting be decided
23 by Shri Uddhav Thackeray and authorized Shri Uddhav Thackeray to take all the decisions in
24 the meeting. In the meeting, thus Shri Eknath Shinde and Shri Sunil Prabhu are appointed as
25 Group Leader and the Chief Whip of the Shiv Sena legislature party in
26 the Maharashtra Legislature Assembly. The resolution passed in this regards as follows.

27 Resolution One, it is resolved in the newly elected MLA's meeting of Shiv Sena party that Shri
28 Eknath Shinde is appointed as the group Leader of the Shiv Sena legislature party in the
29 Legislature. It is resolved in the newly elected MLA's meeting of the Shiv Sena party
30 that Shri Sunil Prabhu is appointed as the Chief Whip of the Shiv Sena legislature party, and
31 then all the MLAs.

32

33 **JUSTICE NARASIMHA:** Who writes this?

34

35 **MR. KAUL:** This doesn't have a....

36

37 **JUSTICE KOHLI:** This is signed by all the MLAs.

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MR. KAUL: But it has the signature of all the MLAs,

JUSTICE KOHLI: So it's collectively written.

MR. KAUL: Collectively written. I'm grateful. By all the MLA's. And that is why I said My Lords to that question when we come under the Tenth Schedule, what you are seeking to do is today creating distinction which does not exist. We have never argued the legislature party is separate or the party under the Tenth Schedule under 2(1) means only the legislature party and does not mean the political party. That's not our argument. It is always done through the legislature party, at least in majority of cases, My Lords. It's never the Party President, who writes to the Speaker.

JUSTICE SHAH: Mr. Kaul, please read para one of that, this communication, wherever.

MR. KAUL: Shiv Sena's newly elected ?

JUSTICE SHAH: Yes.

MR. KAUL: Newly elected MLAs meeting was convened at the Shiv Sena Bhawan, Mumbai. The meeting was chaired by so and so, Shiv Sena Paksh Pramukh.

JUSTICE SHAH: Now these four lines are very important because what was the resolution passed? It is only a communication, of the resolution passed. Correct? It is the communication.

MR. KAUL: Yes.

JUSTICE SHAH: It is not that, that the leader is decided by the legislative party. Please read the next resolution. The meeting was chaired by so and so, so and so. All the newly elected members of this so and so, so and so, unanimously resolved that all the decisions of today's meeting be decided by this so and so, so and so.

MR. KAUL: My Lords, I have right through said, the legislature party has the authority of the political party to do so. I am not for a minute suggesting that, that is not so. They have the authority to do so. That communication is through the legislature party and the Speaker's interaction is through them, doesn't mean the political party is not involved.

1 **JUSTICE SHAH:** Naturally the decision is always communicated whatever is only by
2 the legislature party or the leader of the legislative party.

3

4 **MR. KAUL:** Yes, that is all that I am saying. Now, My Lords, let me straight away now...,

5

6 **JUSTICE SHAH:** Otherwise you will communicate? As far as the Speaker is concerned, only
7 the leader of the legislative party will communicate.

8

9 **Mr. KAUL:** Absolutely. Now, when I come to the case law and distinguishing case laws. Once
10 I am through the rules, I'll distinguish Mayawati. Mayawati is in a completely different
11 context. And I'll deal with that Rana, Mayawati all those line of judgment cited, I'll distinguish
12 each one of them. But let me now My Lords, at least let me start with the issues at hand which
13 have been referred to Your Lordships.

14 My Lords, kindly come first to the second issue because Nabam, Your Lordships heard
15 arguments at length. On Nabam, Your Lordships have heard arguments at length and I
16 need not trouble Your Lordships again until unless called upon. Please have issue B, and I'll
17 go issue wise and deal with.

18

19 **JUSTICE SHAH:** B?

20

21 **MR. KAUL:** Yes.

22

23 **JUSTICE NARASIMHA:** Where are you reading B from?

24

25 **MR. KAUL:** From that order as well.

26

27 **JUSTICE NARASIMHA:** The earliest order?

28

29 **MR. KAUL:** I'll just give, I should have actually pointed the...The referral order
30 is 23rd of August 2022.

31

32 **JUSTICE NARASIMHA:** It is there in the orders compilation?

33

34 **MR. KAUL:** My Lords, Orders Compilation, PDF page 34.

35

36 **CHIEF JUSTICE CHANDRACHUD:** Yes. What's the meaning of, should be inviting a
37 decision?

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MR. KAUL: That is the question, may I read out?

CHIEF JUSTICE CHANDRACHUD: Yes.

MR. KAUL: Whether a petition under Article 226 or Article 32 lies inviting a decision on a disqualification petition by the High Courts or the Supreme Courts, as the case may be. Now, My Lords our respectful submission is...

CHIEF JUSTICE CHANDRACHUD: Lies inviting a decision? Possibly a direct.

MR. KAUL: My Lords, I think the inference was that could Your Lordships directly decide it. That is my...

JUSTICE NARASIMHA: We can directly decide what the Speaker should have decided.

MR. KAUL: Yes, yes. So, My Lords, on that our respectful submission is that this is in the teeth of Kihoto. The argument of the petitioner is in the teeth of Kihoto because ultimately, My Lords, under the Constitution Para six of the Tenth Schedule, the Speaker is the sole constitutional authority to decide the issue of disqualification. It is the constitutionally designated authority to decide the issue and even the proceedings before the Speaker have been stated by your Lordships to be proceeding under 122 and 212 as score as proceedings of the House. And even the interference with such decisions except for violations of fundamental rights or substantive or gross illegality of unconstitutionality etc. Ordinarily is not interfered, but not to say that it cannot be challenged. I am not for minute saying that it cannot be challenged. Now, what your Lordships have been today asked to do is to bypass the entire constitutional machinery, not only for the Speaker, even earlier an attempt was made as far as the Election Commission was concerned which Your Lordship's refuse to grant stay and said, let the Election Commission, take a stand on it and then let the petition come here. And that is why at that stage I had submitted that Your Lordships can't act as the court of first instance. These are coordinate constitutional authorities vested with exclusive and sole jurisdictions. Their decision attains a finality. Their decision attains a finality. These are restricted grounds of challenge. You can't today come to the Supreme Court and say the Supreme Court should decide this issue because according to you, these are extraordinary circumstances and the entire machinery should be bypassed. So you decide I'm ex facie. I've incurred the wrath of 2(1)(a) and 2(1)(b). The speaker is biased. Nothing else remains to be decided. And thus, under Article 32, the Supreme Court of India must act as the court of first instance. That is effectively

1 what Your Lordships are being told in this matter to do. And which my respectful
2 submission is, My Lords, that quite apart from the Shrimant Balasaheb Patil case where Your
3 Lordships also held at ordinarily go in a 226 and then come to this court. That is another that's
4 another facet. But in any case definitely not straight to any court whether 226 or 32. And say
5 that you decided as the court of first instance. Now the same party also relies on Nabam when
6 it suits them but the reason we came in a 32 that's important today My Lordships is we came
7 in a 32 because Kihoto does not deal with the issue we canvassed. Which is a Nabam, which is
8 post Kihoto. Where a five judge bench of this court and is today still holds the field says, that
9 it would be improper and inadvisable for a speaker to proceed, continue or conclude a
10 disqualification petition while his own disqualification is pending. It is for this reason that he
11 came in a 32 to say that a). Our lives were in danger. We couldn't go to Maharashtra. b). The
12 Speaker cannot assume jurisdiction. So to say that we are hit by Kihoto. We were not hit by
13 Kihoto, and that is a distinction we drew. Whereas your contention is clearly hit by Kihoto.
14 Because in your case, you are wanting the Court to do something without the Speaker even
15 exercising its jurisdiction on the matter. Secondly, My Lords, the Speaker has won the
16 confidence once. The House has again reaffirmed its faith. And we keep going back to the same
17 argument to say that if that disqualification had been decided then it would go back to the date
18 what Justice Shah put to me yesterday. And I'll come to that argument because even if a
19 disqualification relates back to the date of the event, doesn't mean any action taken in the
20 meantime gets annulled. In Rana what Your Lordships said that when the speaker decides he
21 only look that the event on the day that this qualification prediction was moved and at no event
22 post that, that's what Rana said. But those series of judgments that you not choose are given
23 on the point that there is no bar to an MLA or an MP is disqualification petition is decided
24 from participating in the proceedings of the House, because a constituency can't go
25 unrepresented. He has to be there, can't mean that all those decisions will be annulled because
26 the argument thought to be raised at in the process, the trust vote, everything else will get
27 annulled and that's Your Lordships should restore status quo ante because your
28 Lordships created... and order created and toppled the government. That's the argument
29 being made to Your Lordship. My respectful submission is, My Lord, is legally and
30 constitutionally and an unsustainable proposition. It's an unstable proposition in law.

31

32 **JUSTICE NARASIMHA:** Disqualification under the Constitution is vested in the Governor
33 who takes issues of disqualification are vested in the Governor and he if he chooses state
34 advice of the Election Commission,

35

36 **MR. KAUL:** Yes, Yes that's 191 (1) and 191 (2) as Your Lordships rightly said, is the Speaker.

37

1 **JUSTICE NARASIMHA:** No 192 talks about [UNCLEAR]

2

3 **MR. KAUL:** Your Lordships are absolutely right.

4

5 **JUSTICE NARASIMHA:** Whether a member of the House 191(1) It will be referred to the
6 Governor.

7

8 **Mr. KAUL:** Yes, Yes.

9

10 **JUSTICE NARASIMHA:** In any event decision of the Speaker, the judicial review is only
11 decision making process but asking the Court to decide what the Speaker is to decide is a leap.

12

13 **MR. KAUL:** Yes. yes absolutely. I'm grateful. I'm very grateful. Now
14 would Your Lordships be kind enough to now move to the next question?

15 Can a Court hold that a member is deemed to be disqualified by virtue of his or her actions,
16 absent a decision by the Speaker? My Lords, my respectful submission is how can
17 the court ever deem MLA to be disqualified pending a decision. Would that not necessarily
18 circumvent the entire Constitutional authority My Lords? And would the functioning of the
19 Legislature not be put in jeopardy by imposing temporary disqualifications? And would it
20 not hamper electoral democracy, that a whole constituency goes unrepresented? Especially
21 when Your Lordships have time and again held, time and again held that he is entitled to
22 participate, pending his disqualification and it is sought to be argued that you should be
23 deemed to be disqualified. Without the Speaker exercising his jurisdiction or the Governor in
24 consultation with the Election Commission under 191(1) or 191(2), how can the Court say
25 that to MLA or an elected representative of the people is deemed to be disqualified till the
26 decision is taken. It is like annulling the mandate of the people, My Lords and by the Supreme
27 Court, as the Court of first instance in an interim order. Would Your Lordships be kind
28 enough to have the next question? May I, My Lords with Your Lordships permission?

29

30 **CHIEF JUSTICE CHANDRACHUD:** Yes.

31

32 **MR. KAUL:** What is the status of the proceedings in the House during the pendency of
33 disqualification petitions against the members?

34 Now, My Lord, right from Kuldeep Bishnoi, Pratap Gouda Patil, Shivraj Chauhan, and
35 Nabam Rebia. Your Lordships have time and again said that pending
36 disqualification he participates with all the vigour and robustness and legality as his command
37 in the proceedings of the House. There is nothing which disentitles him from participating in

1 the proceedings of the House and can it be said that tomorrow, if he is disqualified, all those
2 proceedings that he participated in..

3

4 **JUSTICE NARASIMHA:** Article 100.

5

6 **MR. KAUL:** Are null and void? Suppose they have a decision by his vote a decision turned, so
7 that will be annulled. Now, My Lords, will be kind enough in this context to have Article 189
8 for a minute.

9

10 **JUSTICE NARASIMHA:** 189 and 100, go together.

11

12 **MR. KAUL:** Yes, My Lords, 189 is the mirror assembly. Great, great.

13

14 **JUSTICE NARASIMHA:** Sub-article 2?

15

16 **MR. KAUL:** Yes My Lords. My Lords, the Chief Justice has?

17

18 **CHIEF JUSTICE CHANDRACHUD:** Yes.

19

20 **MR. KAUL:** Justice Shah, has? A House of the legislature of a State shall have power to act,
21 notwithstanding any vacancy in the membership thereof, and any proceeding in the legislature
22 of a State shall be valid, notwithstanding that it is discovered subsequently, that some person
23 who was not entitled so to do sat or voted or otherwise took part in the proceedings. Quite
24 apart from the provision, the law is laid down by our Lordships. The moment Your
25 Lordships permit and say that a MLA is entitled to participate. The necessary corollary is that
26 whatever he has exercise in terms of his vote, the proceeding, tomorrow, he votes in a
27 budget, there are appropriation bills. There could be any other decision taken. So will we say
28 that every just because he has participated in a trust vote, Your Lordships are told
29 annul everything. Because had he been disqualified, he could not have voted. And we have
30 presumed he will be disqualified, or he is already incurred the wrath of Tenth Schedule. And
31 thus the entire process is initiated. That's the argument being made to Your Lordships and
32 that Your Lordships today should annul everything from the resignation, swearing in of a
33 new Government, Speaker, winning the vote of confidence, the Government winning the trust
34 vote. Everything should be annulled because everything was caused by Your Lordship's order
35 and Your Lordships are responsible for the toppling, that's only Your Lordships can correct it.
36 That is the argument being made.

37

1 **JUSTICE NARASIMHA:** Which are the judgments?

2

3 **MR. KAUL:** My Lords the judgments are Speaker Haryana Vidhan Sabha versus
4 Kuldeep Bishnoi, 2015. 12-SCC, 381, para 46 and 47. And I will also later give the compilation
5 numbers of, it's part of the compilation. Then Pratap Gouda Patil versus the State of
6 Karnataka, 2019, Volume-seven, SCC 463, para 4 and 7.

7

8 **CHIEF JUSTICE CHANDRACHUD:** 2019, Volume?

9

10 **MR. KAUL:** Seven, SCC 463, para 4 and para 7. Then Shivraj Singh Chauhan versus MP
11 Legislative Assembly, 2020, Volume 17, SCC, Page 1, para 79 and para 80. Then Nabam Rebia
12 versus Arunachal Pradesh Legislative Assembly, 2016, Volume 8, SCC Page 1, para 188, 189
13 and para 191 to para 194.

14

15 **CHIEF JUSTICE CHANDRACHUD:** Yes.

16

17 **MR. KAUL:** My Lords, quite apart that it is absolutely obvious from these judgments
18 that it retains the right to participate, also see the danger My Lords. If such MLAs against
19 whom the disqualification is pending and they are suspending during pendency of
20 their disqualification petitions, it would open up serious possibilities of misuse of the Tenth
21 Schedule. And I'll give some instances. The participation of course gets affected. So you in a
22 way fix the eligible voters who will fix... Who will vote in the House. And major decisions to
23 which some of the MLAs could have been inconvenient, do not participate now in. And
24 also My Lords a quick...

25

26 **CHIEF JUSTICE CHANDRACHUD:** That's very clear actually. It is a matter of first
27 principle because of mere pendency of the disqualification petition doesn't affect the....

28

29 **MR. KAUL:** Absolutely. And My Lords, the moment Your Lordships have said they
30 have every right to participate quite apart from Article-one is, that's the end of it.

31

32 **JUSTICE SHAH:** Article 181 also. Article 181. When the Speaker against took
33 the decision, only in the particular meeting, he can order. Otherwise he can speak even that
34 meeting also he can speak.

35

36 **MR. KAUL:** Yes, absolutely right. But, My Lords, this point, Your Lordships are absolutely
37 right, is very clear, but it acquires some significance because the argument being raised is that

1 if his disqualification, he is held to be disqualified, Rana says it will relate back to that day and
2 thus any action taken with his vote with the crutches aid of his vote stands vitiated and suffers
3 from a constitutional sin. That's why I said it's important. Because your argument is that it
4 relates back and because it relates back every vote given by him, including the trust vote
5 goes and thus Your Lordships in exercise of Your Lordships' extraordinary jurisdiction must
6 overturn everything that has happened and act as a court of first instance. Then My Lords....

7

8 **JUSTICE SHAH:** It could be very serious consequences according to you. Suppose the
9 budget is passed, and he has participated and cast his votes. If it is to be restored back
10 correct, to its original one, then all these budgetary provisions, all these.....

11

12 **MR. KAUL:** My Lords, I can't put it better. Absolutely. And that is what is being sought to be
13 argued. And this is Rana, never said this. Rana, when I come in, I'll distinguish the judgments.
14 Rana is in a different context. Mayawati is in a different context, and you pick them up and
15 apply them to a situation where they have no application at all. A line here, a line there, and
16 you say that's the settled law on the point. Now My Lords ground E with Your
17 Lordships permission.

18

19 **JUSTICE NARASIMHA:** The number of legislators' emolument [UNCLEAR] there is a
20 provision, let me just check-up. What is the consequence of an MLA or an MP disqualified
21 upon his emolument? There is a separate paragraph on that, it's also an indication....

22

23 **MR. KAUL:** Your Lordships said that the MLA emolument.

24

25 **JUSTICE NARASIMHA:** Haan, emolument. Just check that up. There is a provision....

26

27 **Mr. KAUL:** I will. I'll look it up, I'll look it up today. Now My Lords has ground E.
28 Sorry, question E. My Lord the Chief Justice.

29

30 **CHIEF JUSTICE CHANDRACHUD:** Yes.

31

32 **MR. KAUL:** If the decision of a Speaker that a member has incurred disqualification under
33 the Tenth Schedule relates back to the date of the action complained of, then what is the status
34 of proceedings that took place during the pendency of a disqualification petition? That's
35 why My Lords I have put this because that's been what they've been arguing right through .

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37 **JUSTICE KOHLI:** Mr. Kaul, D & E can be collectively[UNCLEAR]

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MR. KAUL: Yes, yes. But the reason I'm laying so much emphasis on is because a large part of this argument where Your Lordships order of 27th and 29 becomes according to them the cause of all that has happened. Only Your Lordships can rectify and the solution lies in this because it relates back to that day, and because it relates back to that day and trust vote also falls in between everything should be annulled.

JUSTICE NARASIMHA: So will you explain on the base of Rana and other judgments that they have cited?

MR. KAUL: My Lords, what I'll do is....

JUSTICE NARASIMHA: No. Whenever.

MR. KAUL: I'll in one go explain each of those judgments. Because I'll explain Ramareddy, Rana... Each one of them I will distinguish.

CHIEF JUSTICE CHANDRACHUD: So you will take up the judgments in one lot at the end?

MR. KAUL: In one lot. Because My Lord I have to cite my own judgments and I have to distinguish the judgments cited by them.

CHIEF JUSTICE CHANDRACHUD: Alright. Fair enough. That should be more coherent.

JUSTICE NARASIMHA: Right all this relating to relating back

MR. KAUL: Yes. So one of all those issues of Mayawati on political party versus Legislature party in the Tenth Schedule. Rana status quo. Ex post facto and the others I will...as I go along I will deal with them. So My Lords, again, as far as this question is concerned, my argument remains the same as I just addressed Your Lordships on the provisions of the law, the provisions of the Constitution. It cannot be any other way. This is the only way it can be, because the consequences for an electoral democracy are disastrous. Constituencies go unrepresented. No one is there just because a disqualification petition is pending and he will not participate, especially when Your Lordship this is no longer *res integra*. Then Your Lordships have ruled on it on judgment after judgment. Now, My Lords would Your Lordships be kind enough to have....

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CHIEF JUSTICE CHANDRACHUD: That's why, in the context of the judicial function you've developed, we have developed the concept of the de facto doctrine. So even if the appointment of a judge is found to have suffered from an invalidity, that will not render all the judicial acts as invalid.

MR. KAUL: Absolutely, I bow down to it. I bow down to it. Now the next question is Question F. What is the impact of removal of Paragraph 3 of the Tenth Schedule?

JUSTICE NARASIMHA: Mr. Kaul, I have one small doubt. How are we going to deal with the situations which is emerging from time to time? Disqualification application is filed, Speaker doesn't decide, and then the matter goes on. He participates in the Assembly and disqualified member continues. At what time and what is the time limit within which he needs to decide? Because till a decision is taken, disqualification issue is not decided. So therefore it's pending. This problem has been arising in a number of cases. Meghachandra is one judgment where Nariman had to say that within a time limit, he has to decide. But that's referred to a larger bench saying that you can't direct the Speaker to decide. But where are we going to deal with the situation like this where Speakers doesn't... don't decide and events overtake that and either matters become infructuous or the House is dissolved by flux of time.

MR. KAUL: Your Lordships are right. This will have to be considered. Should there be a timeline? Should there be a time bound process? Should it be decided within a time bound process or not? As Your Lordship said that issue whether such a direction could be given to Speaker...

JUSTICE NARASIMHA: Can you just pick up that order where it's referred to larger bench?

CHIEF JUSTICE CHANDRACHUD: Meghachandra.

JUSTICE NARASIMHA: Meghachandra is referred to a larger bench. Can you just pick that up?

MR. KAUL: I'll get hold of it My Lords. Let me just also apply my mind to this. It's fallen from My Lord. But quite apart from the fact, My Lords, when we were arguing Nabam where we said that as far as the Speaker's own removal is concerned, the Assembly and the Constitution itself provided a reasonably strict timeline on how it could be followed. In terms

1 of when the notice to be given, when is it to be decided. Possibly some kind of a
2 timeline as Your Lordship said I'll have a look at the issue.

3 Now My Lords as far as the removal of the Tenth Schedule is concerned, My Lords, firstly, this
4 was only a defence against incurring a wrath under the
5 Tenth Schedule. 3 and 4, Para 3 and 4 are only defences under the Tenth Schedule. That
6 defence of one-third having split from the party is no longer available. But to me it
7 is wholly inconsequential, because my case has never been that I have split or gone anywhere
8 else. My whole argument has been that I represent the majority rival faction within the party.
9 Neither have I given a support to any other political party, nor have I said I will not support
10 a Government as far as my own political party is concerned. As long as the coalition is
11 something that we have expressed are concerned with. I have not gone anywhere. So this
12 whole line of merger, split. It is not a case of a split My Lords. It is a case of a rival faction
13 or what the rule...Para 15 of the Symbols Order says of a splinter group within the party.
14

15 **JUSTICE NARASIMHA:** What is the difference between a split and a...

16

17 **MR. KAUL:** My Lords split is...

18

19 **JUSTICE NARASIMHA:** Split on the one hand and what you are suggesting?

20

21 **MR. KAUL:** My Lords the difference between the two is that split is an issue where you as a
22 defence say that I will not incur the wrath of the Tenth Schedule. I have not even voluntarily
23 left the party. In the case of a rival faction, I claim that I am the political party and recognize
24 me as the political party under the Symbols Order. Please have that Symbols Order for a
25 minute. It's a question that Your Lordship has to me a pertinent question and this will answer.
26 Please have statute compilation PDF page 155.

27

28 << BREAK >>

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30 **MR. KAUL:** Would Your Lordships be kind enough to have para 15 of
31 the Symbols Order? Statute compilation PDF...

32

33 **JUSTICE SHAH:** Para 15 of?

34

35 **MR. KAUL:** Symbol's Order.

36

37 **CHIEF JUSTICE CHANDRACHUD:** This is in the context of the same issue, right?

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2 **MR. KAUL:** Yes, we were at F, and also in the light of the question that My Lords, posed to
3 me before lunch, of split under Tenth Schedule vis-à-vis rival faction. I just needed to answer
4 that. So I just need to show two provisions to Your Lordships. Para 15, PDF 103,
5 Statute Compilations. With Your Lordship's permission. Power of the Commission in relation
6 to splinter groups or rival sections of a recognized political party. When the Commission is
7 satisfied on information in its possession that there are rivals sections of groups of a
8 recognized political party each of whom claims to be that party, the Commission may, after
9 taking into account all the available facts and circumstances of the case and hearing such
10 representatives of the sections or groups and other persons as desired to be heard, decide that
11 one of the such rival section or group, or none of such a rival section or group is that recognized
12 political party. And the decision of the Commission shall be binding on all such rival sections
13 or groups. Now kindly compare this My Lords with para 3 of the Tenth Schedule, as it existed.
14 PDF page 50 of the same compilation.

15

16 **CHIEF JUSTICE CHANDRACHUD:** PDF Page 50?

17

18 **MR. KAUL:** PDF Page 50 My Lords.

19

20 **CHIEF JUSTICE CHANDRACHUD:** Yes.

21

22 **MR. KAUL:** Justice Narasimha has that? 'Disqualification on ground of defection not to
23 apply in case of split where a member of a House makes claim that he and any other, and any
24 other members of his legislature party constitute the group representing a faction which has
25 arisen as a result of a split in his original political party, and such group consists of not less
26 than one-third of the members of such legislature party.' - And now please have b). From the
27 time of such split, such faction shall be deemed to be the political party to which he belongs,
28 for the purposes.... for purposes of sub-paragraph 1 of paragraph 2 and to be his original
29 political party for the purposes of this paragraph.' So when you split and form a group that
30 becomes your original political party within 2(1)(b), and saves you from disqualification
31 under 2(1)(b). Whereas, under para 15 of the Symbols Order within the party itself a rival
32 faction emerges, goes to the Election Commission and says, I am the recognized political party.
33 And as Your Lordships have held, there can't be two recognized political parties within the
34 setup, the symbol can't be split. The name can't be split. So either none of them get it, or one
35 of them emerges as the recognized political party within para 15 of the Symbols Order.
36 Whereas here after a one-third split, it calls itself. It's like saying if Eknath Shinde or Uddhav
37 Thackeray, one of them had split and called themselves the Shiv Sena Thackeray, the other

1 would have called themselves the Shiv Sena Shinde. The one-third split would have become
2 the new original party. That's not our case. We've never claimed that we have a new original
3 political party. Our political party remains the same.

4

5 **JUSTICE NARASIMHA:** As the first part of the section, member of the House makes a
6 claim that he or any other member of his legislative party constitute the group representing a
7 faction which has arisen as a result of a split, which is prior in point.

8

9 **MR. KAUL:** Right. Right.

10

11 **JUSTICE NARASIMHA:** So what is the.... as a result of this split, as a result of the split in
12 his original party,

13

14 **MR. KAUL:** Right.

15

16 **JUSTICE NARASIMHA:** That must occur prior in point. In the political party, there must
17 be a split, a consequence of which will be recognized in the legislation.

18

19 **MR. KAUL:** Right. Right. And you will call yourself the original, new original political party
20 for purposes of 2(1)(b). Now My Lords, in terms of the question that I was addressing Your
21 Lordships on which was F, what is the impact of the removal of paragraph 3 of the
22 Tenth Schedule?

23 My respectful submission, My Lords, is that a). A defence which was available is gone. Is no
24 longer available to disqualification under the Tenth Schedule. Only merger as a defense now
25 remains. b). It doesn't concern me at all because my case has never been or never have I
26 sought the... nor can I seek the protection. But it's not in the Constitution as a as a
27 protective Clause. Nor is this ever been my case. My case is that I, as a faction within the party
28 represent the recognized political party. And My Lords, when I come to the judgment, I'll show
29 to Your Lordships that this issue when it arose, and this in itself can never be a 2(1)(a) case
30 either.

31 Merely because a faction says that I am the recognized political party and goes to the EC, for a
32 relief under para 15 of the Symbol's Order doesn't mean he incurs disqualification
33 under 2(1)(a), by saying that I have lost the majority. Because in Yediyurappa, this was the
34 exact case which arose. MLAs there went and said, we do not have faith in Mr. Yediyurappa
35 and ultimately the Speaker disqualified them. The Supreme Court said that they have only said
36 we do not have faith in Mr. Yediyurappa. They have not said that they don't have faith in the
37 political party or they formed another political party. And such the drastic step taken by

1 the Speaker to disqualify them under 2(1)(a), was far beyond what the facts necessitated in the
2 fact of that case. So to say that merely because I go to the Governor and I say that here today,
3 given the ideology of the party, the overwhelming cadres don't want to go along with the MVA.
4 Our entire contention has not been that the Shiv Sena should not form the Government. At
5 that stage, our contention wasn't even that the Chief Minister could not have formed
6 the Government with any other political party. Our lack of faith in the Ministry was because
7 you were carrying on with a party whose ideology did not match our ideology. We had been in
8 loggerheads for very long. And going along with them was creating a huge discord and
9 discontent amongst the cadres and party workers. Now, can this be treated by this logic
10 My Lords, any form of internal dissent? Anyone raises any voice of dissent, which is
11 the essence of democracy within a political party, would be said that he's incurred
12 the wrath under 2(1)(a). And I will show cases of 2(1)(a), what overt acts have been done in
13 those cases. You go with another rival faction. You go there and say, I'm helping them form
14 the Government. I don't have any longer any faith in the political party that I belong to which
15 is ruling. Those are the kind of overt acts which are 2(1)(a) cases. Here the only allegation
16 against me at that stage was, you have not attended two meetings. In fact, at that stage the
17 allegation was only that you have not attended the two meetings which have been called on
18 21st and 22nd, and thus you have voluntarily given up the membership of the party, the first
19 disqualification petition and the second disqualification petition, as on 2nd of July 2022. And
20 then came the issue of Whip by when both factions that appointed their Whips, leaders, all
21 that dispute arose. That's a separate 2(1)(b) issue. So, according to us, My Lords, as far as
22 paragraph 3 of the Tenth Schedule is concerned,

23 (a) Had it been on the statute book still, it's not something that I would have relied on, because
24 according to me I am the majority, I constitute the recognized political party and today I have
25 an order also. Which is the subject matter of another petition. In my whole case was that under
26 the 15 of the Symbols Order, I am the faction which represents and ought to be recognized as
27 the original political party. That was my case.

28

29 **JUSTICE NARASIMHA:** So, what does the Speaker do in such situations where you raise a
30 claim that you are the political party?

31

32 **MR. KAUL:** My Lords, the Speaker is only concerned as far as involuntary membership is
33 concerned. According to My Lords, this does not constitute an act on 2(1)(b)...

34

35 **JUSTICE NARASIMHA:** Where on the Tenth Schedule violation, they say that there is
36 violation of Tenth Schedule and you take the plea that it is not a case of a split, but it's a case
37 of reorganization or realignment of the party and I have the majority of the party. What is

1 the Speaker supposed to do there? What is the inference that he is supposed to
2 draw? Will he say that it is not a Tenth Schedule case?

3

4 **MR. KAUL:** My Lords, what he will say in such a case is, and that has been our case, that his
5 link is with the Whip and the leader of the legislature party. That is why I read out those rules
6 of the Maharashtra Legislative Assembly to Your Lordships that the members elect the leader.
7 The leader intend informs the Speaker of all the designated posts, the people who will hold
8 various posts. And even when the Tenth Schedule existed, in Rana's judgment, the Supreme
9 Court said the Speaker cannot embark on an independent inquiry to find out whether there
10 has been a split within the political party at all. Even the prima facie view that he forms, even
11 when there was there, was only on the question of prima facie, there has been a split. Today
12 the split is an inconsequential issue, because para three, is not there. Today the question is of
13 a rival faction, and under 2(1)(b), not obeying the orders as communicated through the Whip.
14 Now not communicated by the Whip, is the issue of which Whip do you follow. Now, if the
15 majority of the members of the legislature party, with the political authority of the political
16 party, appoint a leader and appoint a Whip, naturally, the speaker will be in touch with
17 that Whip.

18

19 **JUSTICE NARASIMHA:** Your answer is that the Speaker has no option except to go by the
20 majority of the legislature.

21

22 **MR. KAUL:** Rule of majority as far as the Legislature party for....

23

24 **JUSTICE NARASIMHA:** The context of it and schedule.

25

26 **MR. KAUL:** In the context of Tenth Schedule.

27

28 **JUSTICE NARASIMHA:** Only majority.

29

30 **MR. KAUL:** Majority. And but the mistake which is being sought to be made is to segregate
31 a legislature party and a political party. That Legislature party necessarily carries with it the
32 political authority of a political party. And that is where My Lords, para 6A and 6B of
33 the Symbols Order becomes important because 6A and 6B of the Symbols Order, both say that
34 for the continued recognition of a political party the vote percentage, the MLAs, the MPs are
35 all essential for even a political party to survive and continue. So this distinction which is being
36 drawn to say that you've only brought about something in the legislature party and you don't
37 have the support in the political party is wrong, and the Speaker's inquiry is limited in such a

1 case. If the Speaker could do the same thing which the Election Commission could do, then all
2 those lines, My Lords where Your Lordships said even when para 3 existed, will not embark
3 on an independent inquiry will only take a primer facie view whether one-third is split or not
4 because the Speaker does not have the wherewithal, My Lord. It's the Election Commission.

5

6 **JUSTICE NARASIMHA:** In other words, to simplify, sorry for asking you repeatedly the
7 question. Leave aside their argument of drawing a distinction between political party
8 and a legislative party. Leave that aside.

9 As you are arguing the only method that the Speaker can adopt in a case where somebody sets
10 up a case of he garnering the entirety of the party is to just go by the number of legislators that
11 he has, that group, that's all.

12

13 **MR. KAUL:** And be in touch with the Whip and the leader of the Legislature Party as to what
14 are the instructions.

15

16 **JUSTICE NARASIMHA:** There is a problem because there are two Whips.

17

18 **MR. KAUL:** Sorry, My Lords?

19

20 **JUSTICE NARASIMHA:** There will be two Whips.

21

22 **MR. KAUL:** Right.

23

24 **JUSTICE NARASIMHA:** So in the teeth of two whips, the decisions that he has to take is a
25 majority decision.

26

27 **MR. KAUL:** Because My Lord, Your Lordships are absolutely right because the rules say the
28 members of the Legislative Assembly will appoint the leader. If the majority of the members
29 of the Legislative Assembly appoint the leader and that leader in turn is in touch with
30 the Speaker and communicates all the decisions to him, they are presuming that what is done
31 there does not have the support of the political party. But there is no basis to say so because
32 they make the mistake of saying that the two are separate. And because the two are separate
33 you have done all that you had to do within the legislature party, but you did not have the
34 support in the political party. What is actually proved is quite to the contrary because today it
35 is shown even by the competent constitutional body which is the Election Commission of
36 India, that I am the political party. The Speaker's interaction My Lords, is with the Whip, with
37 the leader what are the directions given. He will not embark in to find out what has been the

1 political division in the political party. For that under 15..... Otherwise My Lords that all could
2 be done under 15A.... sorry under 15, the power for determining this very question has been
3 given to the Election Commission and Your Lordships have said it is the exclusive jurisdiction.
4 And the reason is because when that is done, Talukas, Districts, MLAs, MPs, percentage of
5 votes, Constitution on the date when disputes arose between parties, what was the stated
6 position of various factions? Everything is taken into account. Then My Lords...

7

8 **CHIEF JUSTICE CHANDRACHUD:** Did para 15 of.... Does para 15 of the Symbols Order
9 also necessarily implicate a split within the meaning of Para 3 of the erstwhile provision of the
10 Tenth Schedule or no?

11

12 **MR. KAUL:** No My Lords, no.

13

14 **JUSTICE KOHLI:** What is a splitter group mean, in the Symbols Order vis-à-vis the split in
15 three, which is now....

16

17 **MR. KAUL:** Because there are two rival factions within a party, who emerge and both claim
18 that we are the... or we are entitled to be the recognized political party. So one of the two who
19 it is accepted, carries on with the party and the symbol. Then...

20

21 **JUSTICE KOHLI:** So Mr. Kaul since that order just to understand 15 once it applies and you
22 say the EC's decided that's also perspective right. It obviously can't.... The clock can't be put
23 back to what the situation was on 21st.

24

25 **MR. KAUL:** The EC says that the split, as I said, that order is not just, says that the split
26 occurred on 21st. The rival faction emerged on 21st.

27

28 **JUSTICE KOHLI:** It relates back to....

29

30 **MR. KAUL:** Right. And My Lady, that's why I pointed out, even on the 25th and 30th their
31 side for whatever reasons, on issues which were emerging or simmering within the political
32 party were already writing to the Election Commission, recognizing the authority of the
33 Election Commission on 25th and 30th. I'll revisit some of those.

34

35 **JUSTICE KOHLI:** What you are saying is that the pot was boiling. It's just that it
36 was rectified by the Election Commission.

37

1 **MR. KAUL:** Yes. That's another issue. I'll touch when I come to that particular issue.
2 According to us, it's for simmering for a while. It culminated in the rival factions, ultimately
3 by way of a resolution expressing themselves on the 21st June. Led to the events which
4 happened and ultimately, a petition was filed before the Election Commission around the 18th
5 of July. And even that order recognizes all this had started earlier. I don't have to...

6

7 **CHIEF JUSTICE CHANDRACHUD:** Mr. Kaul, para. 15 does not expressly reuse the
8 expression split at all.

9

10 **Mr. KAUL:** Right My Lord. I'm very grateful.

11

12 **CHIEF JUSTICE CHANDRACHUD:** Just says which of the factions of the original
13 political.. of the political party represent the political party? That's the function of the Election
14 Commission. Let's go back to para 15 because one needs to look at what is the relationship
15 between para 15 to the erstwhile para 3.

16

17 **MR. KAUL:** Yes.

18

19 **JUSTICE KOHLI:** Rival section.

20

21 **CHIEF JUSTICE CHANDRACHUD:** The marginal note refers to splinter group. The
22 expressions 'splinter groups' is not used in the text of the provision at all.

23

24 **MR. KAUL:** Yes, yes.

25

26 **CHIEF JUSTICE CHANDRACHUD:** It says that... the text says - the rival sections or
27 groups of recognized political party each of whom claimed to be that party. Para 15 applies in
28 a situation where you have different groups within a party. Each says, I represent the Party. I
29 am the Congress. I am the Shiv Sena, I am the BJP, so on and so forth. None of them
30 have, none of them have professed to leave the fold of the party.

31

32 **MR. KAUL:** Right.

33

34 **CHIEF JUSTICE CHANDRACHUD:** So the Election Commission then has the power to
35 determine which of those rival factions represents that party.

36

37 **Mr. KAUL:** Right.

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CHIEF JUSTICE CHANDRACHUD: Now para 3 operated in a very different realm. Para 3 applied in a situation where there is a split within a political party, in which case, provided you had not less than one-third of the total membership of the party that would be deemed to be the original political party for the purpose of the House.

MR. KAUL: My Lords, may I just add to what Your Lordship is saying? The one-third leaves... one - third leaves under the Tenth Schedule and says, now, treat us as the original political party for purposes of 215.

CHIEF JUSTICE CHANDRACHUD: Right.

MR. KAUL: That other political party continues and the other political party continues from which they split.

CHIEF JUSTICE CHANDRACHUD: So therefore, they're deeming faction that therefore the one-third, then, is the original is deemed to be the original political party to which the group belongs for the purpose of para 2(1).

MR. KAUL: And for their purpose.

CHIEF JUSTICE CHANDRACHUD: Right.

MR. KAUL: Or taking any direction as far as they are concerned.

CHIEF JUSTICE CHANDRACHUD: Para 3 has gone.

MR. KAUL: Right. Right.

CHIEF JUSTICE CHANDRACHUD: Now in a situation where the Election Commission recognizes, under Para 15 of the Symbols Order that one particular faction represents the political party, can this at all be within the purview of the Tenth Schedule, then?

MR. KAUL: According to us, not at all, My Lords. According to us not at all. In all humility I say so. And My Lords....

1 **JUSTICE KOHLI:** ...of the person as a representative of a constituency vis-a vis that of
2 a person....

3

4 **MR. KAUL:** My Lady, what happens is when you participate as an elected representative and
5 vote on the floor of the House....

6

7 **JUSTICE KOHLI:** Can you draw a line?

8

9 **MR. KAUL:** You can't. Any, anything which comes up on the floor of the House, where you
10 exercise your right as an elected representative is saved. The Constitution says so, 189.
11 And Your Lordship's judgment say so.

12

13 **JUSTICE KOHLI:** It is saved, but the act per se, of doing something which is not
14 contemplating....

15

16 **MR. KAUL:** So you will lose, you will become, you will be disqualified. There is a difference.
17 If ultimately these, some disqualification petition is allowed, that person will stand
18 disqualified.

19

20 **JUSTICE KOHLI:** So disqualified for acts which were supposed to be done by a person as a
21 member of the party...

22

23 **MR. KAUL:** So, you are disqualified in your status as a member of the House. But your acts
24 done during the pendency of the disqualification petition remain untouched.

25

26 **JUSTICE KOHLI:** No. No issues on that. But can you go beyond it and say
27 that disqualification qua, his say not abiding by the Whip relating to the internal affairs of
28 the party would still, the clock would be put back to where it was. The status quo ante...

29

30 **MR. KAUL:** If the clock is put back and he has ultimately held to be, suppose Your
31 Lordships not choose to hold against and say that you did not follow the Whip, you did not
32 represent the majority of the party, and you have incurred the wrath of Schedule Ten.
33 The person concerned will stand disqualified. But to say that the consequence of that is that
34 even before he was disqualified and an order was passed by the Speaker, all actions that he
35 participated in which are as per the settled law by Your Lordships to say that he is fully entitled
36 to participate in will stand annulled, is wrong.

37

1 **JUSTICE KOHLI:** So, you are saying it can't be sifted, the act what is done by a...

2

3 **MR. KAUL:** Your Lordships, have time and the Constitution says so and Your
4 Lordships have said that pendency of a disqualification petition is no ground to say that an
5 MLA will not participate and under various circumstances. It arose in the case of a
6 disqualification petition pending. It happened in the case of resignation letters. It happened
7 in the case of Nabam Rebia to say where a removal was pending of the Speaker. They said you
8 can't stop them from participating in the removal of the Speaker, merely because there is
9 a disqualification petition pending against them. And especially in Shivraj Singh Chauhan,
10 para 78, deals with these situations. You can't say because it was pending, thus it tilted in
11 favour of one party? The court says these are matters which happen at any given timing of any
12 vote for anything trust or otherwise, someone will benefit or the other. But you can't trace it
13 back to say had we treated on that day as disqualified, you would have not been
14 entitled. Thus, any vote that you've given in the trust vote or anywhere else, all stands
15 annulled.

16

17 **JUSTICE KOHLI:** So, the consequences will flow prospectively.

18

19 **MR. KAUL:** Yes.

20

21 **CHIEF JUSTICE CHANDRACHUD:** Para 2(1)(a), of the Tenth Schedule can have no
22 application? Right? Because para 15, postulates that the claim is that I represent a political
23 party and the Election Commission will then decide which of the factions is representing the
24 political party. So in a situation which is governed by para 15, there is no question of having
25 voluntarily given up membership of the party. Right?

26

27 **JUSTICE NARASIMHA:** That's what it comes to. In other words, a majority..... Then again,
28 it goes into the question of but then in the facts of this case, the majority based on the para
29 15, as it turns out in the Assembly is based only on the legislators. So you have the majority of
30 the legislators to support you in the Legislative Assembly and therefore you can attempt, you
31 can appoint the leader of the House who can only give the Whip. So therefore, the question of
32 anti-defection would not apply at all.

33

34 **MR. KAUL:** One, our case.... absolutely right. In our case, an addition is also that the decision
35 which the legislature party took had the political authority also to take that decision. I'm going
36 a step further, it is wrong to say. The legislature party elects the leader, the legislature party as
37 the rule brings and appoints the Whip, conveys it to the Speaker, but doesn't mean the

1 political authority is not there. The problem is they tend to segregate the two and say, you only
2 had the majority of the legislative party. The EC says, when we go through the whole
3 thing, percentage of votes polled and the number of members who have is also a ground to
4 recognize a political party apart from the membership of the political party.

5

6 **CHIEF JUSTICE CHANDRACHUD:** Mr. Kaul, para 2(1)(b), still poses a little bit of a
7 problem. Forget this case, we are now analysing it as pure doctrine. As I said, once a para 15
8 of the Symbols Order situation arises, para 2(1)(a), on the Tenth Schedule can never
9 operate here, right? Because once you are deemed to be the political party, there is no question
10 of you having given REM. Even that faction, which is not recognized as the political party, they
11 have not voluntarily given up membership. That's a little complicated. We'll keep that aside.
12 But para 2(1)(b) still poses a problem, because the order of the Election Commission is
13 prospective because it determines which of the two factions is the political party. Right? If the
14 order of the Election Commission is prospective then we will necessarily have to hold that
15 though it does not date back to the defiance, the defiance of the Whip, once this is recognized
16 as the political party then para 2(1)(b) will also not operate because if once your faction is
17 recognized as the political party then where is the question of a defiance of the whip? The
18 defiance of the Whip of that political party, right? So willy-nilly, it will impact.... it may not be
19 retrospective, the declaration by the Election Commission but it will certainly have a
20 retroactive effect in the sense, in the sense that then there can't be a defiance of a whip, isn't
21 it? Otherwise it will be anomalous.

22

23 **MR. KAUL:** And then the question will arise, then the question.... then the question will
24 arise the speaker will look at which Whip and which leader. I am sure my learned friend will
25 have his chance to argue and I'm sure you have but all that I am saying we very patiently heard
26 you for three and a half days. All that I am respectfully submitting is, all that I am respectfully
27 submitting, is that what is to be seen and that is why what is to be seen is those three rules.
28 The members of the Legislative Assembly appoint the leader, the leader conveys....

29

30 **CHIEF JUSTICE CHANDRACHUD:** That you have made a note.

31

32 **MR. KAUL:**and because, and that is why, even with para 3 exists My Lords, then at the
33 cost of repetition, I'm just troubling Your Lordships with it. Rana said, and I'll read those
34 paras, you can't, the Speaker can't embark into an independent inquiry in the affairs of of the
35 political party.

36

1 **CHIEF JUSTICE CHANDRACHUD:** Mr. Kaul, let's do this, now you've come up to issue
2 number F. You can quickly go through I..G.. GHIJ. So you can finish the four, and then go
3 straight to the judgments which we are..... Now we need to observe the clock. There's no
4 clock here.

5

6 **JUSTICE KOHLI:** Right there actually.

7

8 **MR. KAUL:** My Lords we removed it. All that I am saying is I need some time
9 tomorrow. I don't think I can cover so much... an hour tomorrow. I need an hour.

10

11 **CHIEF JUSTICE CHANDRACHUD:** We have to wrap up by tomorrow because we don't
12 want to keep this part heard beyond Holi. I mean, we have to finish this.

13

14 **MR. KAUL:** Let me. I'll go as fast as.....

15

16 **JUSTICE KOHLI:** They take 2 hours.

17

18 **MR. KAUL:** Three and a half days plus 2 hours.

19

20 **JUSTICE SHAH:** We have to wrap up today, and Mr. Jethmalani and Mr. Maninder
21 Singh all....

22

23 **MR. KAUL:** My Lords, I'm trying my best to cover as fast as I can.

24

25 **CHIEF JUSTICE CHANDRACHUD:** Alright, so long as your side completes by 02:00
26 tomorrow we are on schedule. 01:00. In Bombay, we used to rise... anyway so we started
27 at 11:00.

28

29 **MR. KAUL:** Yes. So my lords. Now next, kindly have what is the scope and power of
30 the Speaker to determine the Whip and the leader of the House Legislature Party? What is the
31 interplay of the same with respect to the provisions of the Tenth Schedule?

32

33 **CHIEF JUSTICE CHANDRACHUD:** Yes.

34

35 **MR. KAUL:** Again My Lords, the submissions, which I have already made, this whole
36 presumption that a Whip appointed by a legislature wing does not represent the authority of
37 the political party is entirely misconceived and it is misconceived, as I said, My Lords, that you

1 cannot segregate at the cost of repetition. 6A and 6B of the Symbols Order categorically
2 provides that percentage, number of votes, Poll, MLAs, MLCs, Members of Parliament, all
3 are part and integral and organically committed, connected to a political party.

4

5 **CHIEF JUSTICE CHANDRACHUD:** So how do you answer G, then?

6

7 **MR. KAUL:** Then, so my answer to G is that we will go back to the rules again, the
8 Maharashtra Assembly rules. And the question is what is the scope of the power of the Speaker
9 to determine the Whip and the leader of the House Legislature Party? What is the interplay of
10 the same with respect to provisions of the Tenth Schedule. If under the rules members are
11 members of the Legislature party, they appoint the leader, naturally, the majority will appoint
12 the person, whoever they do will prevail over a minority, appointing the leaders. Naturally,
13 that would prevail by the simple rule of majority. And that leader, in turn, will convey
14 the Whip. Now there to say that the Speaker will be directly in touch, will determine on his
15 own, that's where Rana comes in that you're not embarking on some independent inquiry.
16 Your prima facie view is limited to the issue of disqualification. It says you will take a prima
17 facie view under the Tenth Schedule. A prima facie view qua disqualification. But you are not
18 embarking like the Election Commission on an independent inquiry into who
19 represents, who's the Whip of the party, who's there. The assembly rules provide and the
20 interface and the interaction of the Speaker is with the Leader and the Whip and the Whip
21 is communicated by the Leader. The Leader can only be appointed by the members of
22 the House. In fact, My Lords Rule 5, which I had ...Rule 3, Sub-Clause 5 of the rules I had
23 shown specifically says that it's the Leader of the legislature party who also informs about the
24 disobedience of the....

25

26 **CHIEF JUSTICE CHANDRACHUD:** Rule 3 we saw.

27

28 **MR. KAUL:** Yes, Rule 3, sub-clause 5. My Lords, I am also now trying to rush through as
29 much as I can. As far as the Tenth Schedule is concerned My Lords, this may not be directly
30 arising out of this question but My Lords, it is a serious question that you can effectively stifle
31 in a party democracy has happened here. Because the resolution is passed on the 21st, on the
32 23rd, disqualification notices are given. You know, in the resolution of 21st, where people have
33 said that we are not with this coalition continuing. Naturally, there is a good chance of a trust
34 vote coming. Look at it, the way it is always been said that this is how you will hamper, harm
35 democracy. The moment you know there is internal dissent. The moment you know you will
36 not within the party be able to survive or overwhelming majorities not with you. The easiest
37 thing is suppose there are 105 elected members. They know 100 here and the overwhelming

1 cadre of the party are not with them. 5 of them go and file a disqualification petition and that
2 disqualification petition is not decided by the Speaker because there's no timeline, unlike the
3 removal of a Speaker where there are timelines under the rules provided for and he keeps
4 sitting on that. So a trust vote which ought to happen immediately and a Government which
5 has gone into minority or a Ministry which does not any longer enjoy the confidence of the
6 House continues, because there can be no trust vote, because what was sought to be argued
7 was that a trust vote can only be when the Government is formed and not later. So the abuse
8 of that is enormous. And that is why this was a reason in Nabam Rebia My Lords when the
9 Justice Mishra dealt with that issue. And I keep coming back to say that let's balance the two
10 and see. A Speaker can definitely in such a situation wait with the disqualification. He should
11 be keen to immediately establish his majority and then take up disqualifications. Because if an
12 MLA misses out on the vote or an MP misses out on the vote to remove the Speaker, there is
13 no second chance on that. There's no judicial review of that. But there's a judicial review of
14 disqualification which can happen. And he specifically dealt with it in Para 248, this very issue.
15 Then My Lords, and again the... as far as the party is concerned, the Election Commission
16 order is there. There they've already said that there were no even internal roots available for
17 dissent. That we are arguing in the other petition, which the petitioners have filed. The
18 Election Commission has said we've gone through the Constitution. How does someone
19 dissent here? How does someone express it, dissent in a matter like this? You've left nothing.
20 The same Party President is elected by a body which is the electoral college and he appoints
21 the electoral College, which is there the subject matter. So ultimately there was no other option
22 left and that is the totality which the Election Commission took into account and took into
23 account percentage MLA's, MPs, votes polled and then said, we recognized you as the party.
24 Then My Lords as far as the conduct is concerned, for instance, in Rajendra Singh Rana, I'm
25 not distinguishing, but I'm giving instances of 2(1)(a). I'm giving instances of 2(1)(a). There on
26 27th August 2003, 13 MLAs from the BSP met the Governor, asking the Governor to invite
27 the Leader of the Samajwadi Opposition Party to form the Government. It was actions like
28 these, which are regarded as *ex facie* voluntarily giving up the membership of the party
29 under 2(1)(a).

30

31 Here the only allegation against me is that under 21, on 21st we held a meeting of which I say
32 I never received any notice. They say we sent you a Notice. We haven't received any notice.
33 And the other notice at 05:00 P.M., the same day. And they say you voluntarily given up the
34 membership of your party because you did not attend a meeting. That's the overt act they're
35 talking about which goes on and is the basis of the first two disqualification petitions. In Ravi
36 Nayak's case My Lords, there were photographs showing the MLAs of the political party with
37 the opposition party and they approached the Government saying that they no longer support

1 the original political party. These are overt cases of 2(1)(a), where when the Chief
2 Justice yesterday put the question, nothing more requires to be done, but your whole basis of
3 the case is that you've not attended the meetings. Out of which I don't receive a notice or not
4 the other. You hold it an emergency meeting the same evening. And it was in that context on
5 27th, when Your Lordships said, give them more time to reply to this. To which Your
6 Lordships have come and told, that Your Lordships have toppled the Government. It's the
7 judicial order which led to toppling of the Government. In G. Vishwanathan's case, two
8 members of the AIDMK were expelled. After that they joined MDMK. When they
9 joined MDMK, a motion for disqualification was moved. So these are acts of leaving a political
10 party, joining another political party, supporting an opposition party to form
11 the Government. Here the same political party continues. The Cabinet
12 Ministers were the Cabinet Ministers, in the old regime as well. The Election Commission has
13 recognized them as the recognized political party. So this whole split, no merger, Tenth
14 Schedule, where does it come in? Then My Lords, please come to question H. My Lord, have
15 H?

16

17 **CHIEF JUSTICE CHANDRACHUD:** Yes.

18

19 **MR. KAUL:** Are intra-party decisions amenable to judicial review? What is the scope of
20 the same? Now, My Lords, from Sadiq Ali downwards, Your Lordships have said that it is the
21 Election Commission. Of course, the Election Commission's order is subject to judicial review
22 within the known parameters. And Your Lordships have held that under Article 324, and
23 the Symbols Order, the power to recognize a political party, the power to recognize the rival
24 faction within a political party is the exclusive jurisdiction of the Election Commission,
25 including interim orders, including awarding interim symbols and interim names which it did
26 in this matter till the dispute was being heard. And it is the only body which has the necessary
27 requisite expertise and wherewithal to go and look at the larger picture of majority. Not
28 the Speaker. Not the Governor.

29

30 **JUSTICE NARASIMHA:** 16A.

31

32 **MR. KAUL:** Please, My Lords?

33

34 **JUSTICE NARASIMHA:** Section 16A?

35

36 **MR. KAUL:** Yes, yes, yes My Lords. Next, My Lord, is the question (I). What is the extent of
37 the discretion and power of the Governor to invite a person to form the Government and

1 whether the same is amenable to judicial review? Apart from Bommai, Shivraj etc. which we've
2 already argued, Your Lordships in Rameshwar Prasad went to the extent of saying that when
3 a majority is claimed, merely because the Governor is of the view that the majority has been
4 cobbled by illegal and unethical means.

5

6 **JUSTICE NARASIMHA:** That is the converse case? That's a converse case.

7

8 **MR. KAUL:** Yes. So I am saying...

9

10 **JUSTICE NARASIMHA:** Here that's a dissolution of the dissolution House by the
11 Governor because I think I'm not really sure, I think before a coalition could be formed, the
12 Governor dissolves the House and the plea taken is that if we give more time there could
13 be horse trading and buying up more legislators to form the Government.

14

15 **MR. KAUL:** Absolutely. My Lords, but look at the extent to which the Supreme Court goes.
16 It says that look, a governor is not some autocratic political Ombudsman. Those are the words
17 used in Rameshwar Prasad.

18

19 **JUSTICE NARASIMHA:** Rameshwar Prasad it was Buta Singh.

20

21 **MR. JETHMALANI:** Your Lordships knows that only too well.

22

23 **MR. KAUL:** Firstly, according to us, it's a legitimate resolution pass representation made to
24 the governor. I am saying even to the extent where the Supreme Court has said that even if you
25 think in your personal view that something was by unethical means, even then, you can't refuse
26 a majority government to be sworn in. That's not for you to decide. But here there is a
27 resolution which is conveyed. Seven members supporting the Government have said so. And
28 to that, My Lord, their argument was that your resolution that you talked about. And I want to
29 read that resolution to My Lords -- Talks about the leader being changed and the Whip being
30 changed. It doesn't specifically say it's withdrawing support. And even the letter to the
31 Governor did not specifically say you are withdrawing support. Now My Lords with utmost
32 respect the Governor takes note of the resolution. The resolution says the leader,
33 the Whip are being changed. There is huge discontent amongst the party
34 with MVA continuing and we are not happy with this coalition with the MVA continuing.
35 Given this fact, given that seven other MLAs say that we are withdrawing support, if the
36 words in 121 of Bommai para 121, saying that the Governor will use all processes and means
37 to come to a conclusion, if the Governor on the totality of it comes to a conclusion that it's a fit

1 case and I'm not talking about violence etc. As Your Lordships said right, let's keep that aside.
2 But surely if the leader of the opposition 7 MLAs supporting the party and a resolution of the
3 majority of the MLAs within the party says we are not happy, even if that one word as they said
4 was not present saying that we are withdrawing support. Is the Governor not within his rights
5 to come to a decision that this is a fit case where a floor test should be proved by the Chief
6 Minister? It's not a case, my Lord. Does someone misusing this process? Someone, just one
7 person walks in and says, I don't have any faith. I could understand that it can't be d
8 one lightly. But you have seven members who are part of the government. You have 34 of 55
9 MLAs giving a resolution that you are not happy with this coalition. Is the decision of
10 the Speaker such that Your Lordships in exercise of Your Lordships jurisdiction under 32 will
11 interfere with it? Is it so bereft of any application of mine or smacks of non-application of
12 mine?

13

14 Please have that My Lords that resolution which My Lords the Chief Justice also yesterday
15 asked me to read because the letter I had read out. Convenience Compilation, Volume 2, pdf,
16 page 55. Resolution or meeting of Shiv Sena in a Maharashtra Legislative Assembly, 2019 to
17 2024: 'We the following members of the 14 Maharashtra Legislative Assembly belonging to
18 the Shiv Sena. We are notified as the members of the Maharashtra Legislative Assembly as
19 members of the Shiv Sena Legislature Party. We had unanimously elected Mr. Eknathrao
20 Sambhaji Shinde on 31st October 2019 as Group Leader of Shiv Sena Legislature Party. There
21 was pre poll alliance between the Bhartiya Janta Party & Shiv Sena party for the 14
22 Maharashtra Legislative Assembly 2019. There has been great dissatisfaction prevalent
23 amongst the members of our party that is Shiv Sena and our party carder at large on account
24 of corruption in the Government administration regarding police posting, corruption by the
25 then Home Minister Anil Deshmukh, who is in jail and setting Minority Minister Mr.
26 Nawab Malik, who is also in jail for involvement in underworld don Dawood Ibrahim. Apart
27 from the above regions, our party cadre faced tremendous harassmt and distress on political
28 as well as personal grounds from the opposition. Ideological parties who are now a part of the
29 government were using their office and power to undermine the basis and foundation of our
30 Shiv Sena cadre. There is enormous discontent amongst the cadre of our Party, Shiv Sena
31 from forming government with NCP in Indian National Congress who are ideologically
32 opposed to our party the Shiv Sena. There has been a compromise on the principles
33 of our party Shiv Sena which has been a party with fierce ideological base and was formed for
34 fighting for the rights of local Marathi people. For the last two and a half years, our party and
35 its leadership have compromised party principles by aligning with contrasting ideologies for
36 the sake of achieving power in the State of Maharashtra. The ideology of our Party Leader
37 Late Balasaheb Thackeray was to give a clean and honest Government to the people

1 of Maharashtra and also without compromising on the principles of Hinduvaad, which was
2 defeated by the first day itself by aligning with the opposition ideologies. Shiv Sena had forged
3 the pre poll alliance for 2019 Assembly elections. They fought the... they sought the
4 blessings of the voters for this Sena BJP alliance which the voters accepted and voted in favour
5 of this alliance. After that results were out and Shiv Sena severed its ties with the
6 BJP and formed an alliance with the opposing parties which they had fought against the 2019
7 assembly elections. This Act of our party leader had a tremendous negative impact upon the
8 voters and party cadre at large. There was a continuous hue and cry towards the party
9 leadership for the act of aligning with the opposite opposing parties. Ignoring this, the party
10 leadership went ahead and formed a Mahavikas Aghadi Government for the last two and a half
11 years, we, the Shiv Sena legislative party members were facing tremendous pressure from
12 their electorates voters. We, the members of the legislative party as well as all the leaders and
13 workers throughout the country were facing a lot of humiliating questions from our voters on
14 account of our support to leader of the opposition. Our leader Shri Balasaheb Thackeray was
15 always a strong nationalist. We have also been subjected to a lot of criticism for being a part of
16 this corrupt Maharashtra Government. In view of the above, the members of the Maharashtra
17 Shiv Sena legislature party met today and resolved. It is hereby resolved and reaffirmed that
18 Eknathrao Sambhaji Shinde who was appointed as the leader of Shiv Sena legislature party is
19 in continues to be the leader of the Maharashtra Shiv Sena legislature party.

20 2). It is here by further resolved that Mr. Bharat Gogawale be elected and appointed as of the
21 Chief Whip of the 14th Maharashtra Shiv Sena legislative party. Appointment of Mr. Sunil
22 Prabhu is cancelled with immediate effect.

23

24 Now My Lords, two things emerge from this. One, it is not a reference to the legislature party.
25 It is a reference to the political party and the disquiet amongst the political party. The only
26 ground taken is that your specific letter to the Governor did not specifically, or the resolution
27 specifically mentioned that you have withdrawn or you will be withdrawing support to this
28 Government. Now, if the essence of this resolution and the letter written is we have no faith in
29 this coalition Government and independently independent MLAs are writing to say that we
30 have no faith. They have lost the confidence. Is the decision of the Governor who is seized of
31 this resolution, who has told that the MLAs have no faith in the, have no faith in the in the
32 coalition Government. 7 independent MLAs, who are part of the Government where two being
33 ministers writing the same thing and also the leader of the opposition. It's not that the leader
34 of the opposition, what he writes cannot be taken into account. He takes all this into account
35 and comes to a conclusion. The impression is given to Your Lordships as if the Governor has
36 acted without any application of mind or any material on record. This is according to me, My
37 Lords, more than sufficient material in all humility, because at the end of the day, if the

1 principal concern of the Governor is majority on the floor of the House, what better, what
2 better indicator of a majority on the floor of the House than MLAs in substantial numbers
3 writing to them to say that we do not support and we have no faith in this coalition
4 Government. And it is this with the Yediyurappa judgment dealt with. There in fact they went
5 a step further where they said, we have no faith in the Chief Minister of their own political
6 party. My Lords in Yediyurappa matter, there were MLAs of the BJP writing to the Governor
7 to say we have no faith in Mr. Yediyurappa continuing in that Government. And there should
8 be some other person from the party who should lead. And the Supreme Court said they have
9 not said they are forming another political party. They have not said we are supporting another
10 political party. This is not a case to attract 2(1)(a).

11

12 **CHIEF JUSTICE CHANDRACHUD:** All right.

13

14 **MR. KAUL:** Then My Lords, is the next question which is J. What is the scope of the powers
15 of the Election Commission of India with respect to determination of a split within a party?

16

17 **CHIEF JUSTICE CHANDRACHUD:** Question (J), will arise in the other matter which
18 pertains to the Election Symbols Order.

19

20 **MR. KAUL:** But yes. But now that it's there, may I take you to....

21

22 **JUSTICE KOHLI:** That's, if you don't want to hold that today...

23

24 **MR. KAUL:** ..the only thing that I wanted to say was that, right from Sadiq Ali downwards,
25 it is settled that the Election Commission has the exclusive jurisdiction to decide the issue and
26 the correctness of Sadiq Ali has not been questioned. The correctness of Sadiq Ali is nowhere
27 questioned.

28

29 **JUSTICE SHAH:** That you reserve your energy for....

30

31 **MR. KAUL:** Very well, very well. But My Lords, one factual thing that I wanted to point out,
32 as far as the Governor is concerned, on 21st itself, that resolution was sent to the Governor.
33 On 21st itself of June, it was sent to the Governor. On 25th, a letter was written to the Governor
34 of June, saying that our lives are in under threat. And even in that letter My Lords, which is
35 at Convenience Compilation Volume 2, PDF page 287. Para 2, says as is common knowledge,
36 we no longer want to be part of the corrupt Government or MVA government. All I'm saying
37 is My Lords, other than the resolution on the 25th, then we asked for the security also, we

1 again reiterate that we do not want to be part of the Government. So to say that we never
2 communicated this to the Government is... to the Governor is factually incorrect.
3 Now My Lords...

4

5 **JUSTICE KOHLI:** Mr. Kaul, just for our information, there are 34 signatures on this
6 document, resolution. Are any of these 34 members of Ministers in the House?

7

8 **MR. KAUL:** Yes.

9

10 **JUSTICE KOHLI:** How many?

11

12 **MR. KAUL:** At that time or now?

13

14 **JUSTICE KOHLI:** When this was signed, 21st?

15

16 **MR. KAUL:** Eight out of this 34.

17 As Your Lordship, you said I'm saving my.... I'm not then addressing Your Lordships on the
18 last question on the Election Commission issue.

19

20 **CHIEF JUSTICE CHANDRACHUD:** Yes. I think....anyway, does the law from Sadiq Ali
21 there is jurisdiction of the ECP.

22

23 **MR. KAUL:** Not only that very Interestingly just note Convenience Compilation 1, PDF page
24 82 ground D of Mr. Subhash Desai's own writ Petition 493, of 2022 he says, Can I just read
25 that line? Ground D. Because the Constitution of a political party under the Tenth
26 Schedule and the action of the Governor legitimizes what is expressively prohibited by the
27 Constitution, the Governor has sought to recognize what the Constitution prohibits.
28 The Governor is also not empowered under the law to recognize who is the Shiv Sena. That is
29 the domain of the Election Commission. Admittedly recognition of Shiv Sena and in its
30 leadership has been endorsed by the Election Commission, and there is no dispute whatsoever
31 to a challenge before the appropriate authority. Now, if that is the domain of the Election
32 Commission, and when a petition is moved that there is a rival faction in which is the party
33 within para 15 and the Election Commission now takes a decision on it and Your
34 Lordships were addressed for 4 hours on that day to say that Election Commission should not
35 proceed with it because Your Lordships are seized of this matter before a Constitution bench.
36 Till Your Lordships dismiss that stay application moved by them and they said the Election
37 Commission should not go on with them with the same convoluted argument *status quo*

1 *ante* relates back to the day they were disqualified. Thus everything else suffers from the sin
2 of unconstitutionality and thus Election Commission should not proceed because
3 any writ petition before the Election Commission would be tainted by what these MLAs have
4 done.

5

6 **CHIEF JUSTICE CHANDRACHUD:** As a matter of propriety, should the Governor have
7 invited Mr. Shinde to form the government?

8

9 **MR. KAUL:** My Lords, may I, with respect say that if Chief Minister resigns and a
10 combination emerges in the matter, what is wrong with it? This was a pre poll alliance also. In
11 fact the change which came about later was with a party they had opposed all their lives and
12 this was a pre poll alliance that the Governor at that stage feels that this combination can form
13 the government. You can't have a headless state of affairs. You can't have no one there. And he
14 asked them to face the floor test. It's not at... as if the governor after that gave them 20 days.
15 Your Lordships have very often even frowned upon that when a long leeway is getting to form
16 governments. He immediately said in a day from...prove your majority. Speaker the next day,
17 the government the day after.

18 So when we are testing the action of the Governor, there could be two views. By hindsight
19 people may be wiser on some issues. But as I respectfully submitted, is this a case merely
20 because the petitioner feels the only way out was a vote of no confidence. Which law says
21 for My Lords? From Bommai downward Your Lordship has said floor test is the best way to
22 do it. what was the need for him to ask for the Leader of the opposition to move the vote of no
23 confidence? Why could he have not asked the existing Chief Minister to face a floor test? And
24 why was the Chief Minister so scared of facing a floor test that he resigned within ten minutes
25 of the order being passed? Because he knew he did not have the majority. Now, if you can't
26 leave aside your party, that's why I said My Lords you exclude all those MLAs. You still don't
27 have the majority on the floor of the House. Can such a Chief Minister have any moral or
28 political authority to continue after that? And today wants all these actions to be annulled.
29 From Governor, calling a Government, floor test, everything to be annulled and *status quo*
30 *ante* to be restored. You refuse to face the floor. Firstly, My Lords, I respectfully submit these
31 39 MLAs cannot be excluded because the day on 27th, when the interim order was passed
32 here, firstly, of course, we said it was not based on Nabam, but even I take it was based on
33 Nabam. What was wrong on it My Lords? That was the stated constitutional position it held
34 the judicial field, till date holds the judicial field. If a bench of this Honourable Court relies on
35 a Constitution Bench decision, which says that a Speaker whose own removal is pending
36 cannot proceed with disqualification. What is wrong with it? If they had recorded that. It was
37 a very.. it was an absolutely valid order. They are questioning now in a reference. But it is still

1 the judicial.... It has held the judicial field. It's the accepted position today of five judges of this
2 Honourable Court. Till Your Lordship comes to a conclusion that it doesn't lay down the
3 correct law, if at all. So even if the 27-06-2022 decision was based on Nabam, it was only on
4 principles of natural justice. Suppose that also...,
5

6 **CHIEF JUSTICE CHANDRACHUD:** There's another way of looking at it also. There is
7 another way of looking at it. Suppose the interim order was not passed on the 27th, which
8 according to them effectively had the consequence of staying the action by the Speaker to
9 disqualify these people and take it at its worst that therefore, the Speaker would have
10 disqualified these persons. If the Speaker had disqualified these persons they would
11 have... they would have ceased to be members of the House. They would individually stand
12 disqualified. But would the Governor have still been justified in calling for a trust vote?
13

14 **Mr. KAUL:** Yes.
15

16 **CHIEF JUSTICE CHANDRACHUD:** Because he would have then said that 39 members
17 16 plus 22, 39 members have been disqualified from out of the ruling three party coalition. I
18 still want to have a trust vote. Would he have been justified in doing that? If we say in the
19 affirmative, then you have an answer really of how the voting has taken place,
20

21 **MR. KAUL:** Right.
22

23 **CHIEF JUSTICE CHANDRACHUD:** Excluding these people.
24

25 **MR. KAUL:** But My Lords, 2(1)(a) which they rely on, there is no case of 2(1)(a) made
26 out. Apart from everything because I do not attend two meetings.
27

28 **CHIEF JUSTICE CHANDRACHUD:** That is a separate issue. But on the point as to
29 whether this court's order,
30

31 **MR. KAUL:** Yes. My Lords I bow down. My Lords are absolutely right.
32

33 **CHIEF JUSTICE CHANDRACHUD:** Assume for a moment that is Court had not passed
34 the order, what would have been the consequence at the highest? The Speaker would have
35 disqualified the people, right?
36

37 **MR. KAUL:** Yes.

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CHIEF JUSTICE CHANDRACHUD: If they had been disqualified then they would have gone out. The Speaker would have... the Governor would have then called for a trust vote with the one change that Shinde would have not been called upon to be the Chief Minister then. Then the Governor would have called upon perhaps.....

MR. KAUL: And my Lords you take it forward.

CHIEF JUSTICE CHANDRACHUD: the BJP to form the Government.

MR. KAUL: There are too many hypothetical assumptions, presumptions on [UNCLEAR] part.

CHIEF JUSTICE CHANDRACHUD: [UNCLEAR]

MR. KAUL: So and so would have happened. Thus this would have happened. Then there's a Constitutional saying everything would have been annulled in the process. That's not how...

CHIEF JUSTICE CHANDRACHUD: They are right in to this extent that the request to Shinde to become and to swear in Shinde as a Chief Minister and the opportunity given to him to establish his majority on the floor of the House on the 30th came into being only because in the meantime that Speaker could not disqualify Shinde. Because if he had disqualified him, all the 39 would have gone out. It would have not made a difference. The Shiv Sena probably that coalition wouldn't have come back to power. possibly, possibly because these 39 go out. But with the 39 going out, the composition of the Government today would have been entirely different.

MR. KAUL: As I respectfully submitted these are....

CHIEF JUSTICE CHANDRACHUD: Hypothetical.

MR. KAUL: too many hypothetical. But all I'm saying is the Speaker could not continue with the disqualification.

CHIEF JUSTICE CHANDRACHUD: Not exactly hypotheticals, because you know what is happening and what would have happened.

1 **MR. KAUL:** No My Lords, what I am saying is...

2

3 **CHIEF JUSTICE CHANDRACHUD:** Because the Speaker was acting in post-haste. That's
4 why, you know, the writ petition...

5

6 **MR. KAUL:** My Lords, the Speaker was acting in post-haste in every which way, on the same
7 day he approves a new leader. On the same day, he says, you file your replies within two days.

8

9 **CHIEF JUSTICE CHANDRACHUD:** Of course, the 39 would have come to this Court and
10 said, well, we have been disqualified without giving us even sufficient notice.

11

12 **MR. KAUL:** My Lords, that's why I...

13

14 **CHIEF JUSTICE CHANDRACHUD:** In which case stay the order of disqualification is
15 contrary to law...

16

17 **MR. KAUL:** My Lords, that's why I wanted to point out...

18

19 **CHIEF JUSTICE CHANDRACHUD:** That is in different stream then.

20

21 **MR. KAUL:** One, timeline, which is important which I forgot when I was reading the timeline
22 and it has some relevance here. On 21st when the notice to the Deputy Speaker was sent for
23 removal, on 21st was sent to the Speaker it was signed by 34 MLAs, and it is admitted by
24 the Deputy Speaker in his...

25 Actually the chart I gave quite apart from removing the 39 or whatever the three
26 independents they were actually running away from actuals. 13 of the people who are
27 supporting them also abstained. 16 abstentions were there. 13 of them were their own people
28 who were supporting them abstained. That is how they came to 99 on that day.

29

30 **JUSTICE NARASIMHA:** What are you saying sorry?

31

32 **MR. KAUL:** Please My Lords?

33

34 **JUSTICE NARASIMHA:** You were saying something?

35

1 **MR. KAUL:** My Lords, the second page where if Your Lordships were to see the first chart
2 votes against Mr. Eknath Shinde: 99. These are my lords at 13 people of the 16 who have seen
3 24 abstained, 13. 13 were from Aghadi, the NCP.

4

5 **JUSTICE NARASIMHA:** Of the 24 who abstained, 13 of the other group.

6

7 **MR. KAUL:** Yes. So quite apart from the 42 being deleted, your own people were not there
8 to support your government. Yes that is why this number comes to 99.

9

10 **JUSTICE SHAH:** 13 from MVA abstained?

11

12 **MR. KAUL:** So your leave aside disqualification I have even given charts that if you exclude
13 the disqualified member still, we win. But here are people who are supporting you even they
14 abstained because you had lost the support. Yes. [INAUDIBLE] Now My Lord just to answer
15 what My Lords put to me My Lord, the Chief Justice to say that Mr. Shinde would not have
16 made it, is wrong for the simple reason, My Lord and I say this in humility, that a). Till he is
17 disqualified, he continues to be a member of the House.

18

19 **JUSTICE SHAH:** No, no what the Honourable Chief Justice says is if he would have been
20 disqualified then in that situation....So he was one of the person against whom the
21 disqualifying.....

22

23 **MR. KAUL:** My Lord, as I respectfully... But the speaker could not have gone ahead with that
24 disqualification in view of Nabam Rebia. So how do we presume had he been disqualified than
25 had he been annulled?

26

27 **JUSTICE SHAH:** That is not pressed at all. That is argued according to you.

28

29 **MR. KAUL:** But My Lords I said so I said so. And I've been right through saying from the
30 beginning because I argued I'm not for a minute suggesting that I did not argue Nabam.
31 Maybe I did argue Nabam Rebia.

32

33 **CHIEF JUSTICE CHANDRACHUD:** No but, Even if you look at it from a demurrer, that
34 suppose Nabam was not there, the consequence of Nabam not holding the field would be that
35 the Speaker would be entitled to decide the disqualification, notwithstanding the pendency of
36 a notice for his own removal. If he had decided that disqualification then these 39 would have
37 gone out. In which case still the government had to fall on the numbers which.....

1

2 **MR. KAUL:** Right. Absolutely. That's why I have given the charts with 42. I consciously make
3 these charts with 42, minus 42 and now I'm going a step further. Mr.
4 Jethmalani rightly pointed out to me. He said that these 13 also the ones who were supporting
5 them abstained. There were 16 abstentions. So whichever way we look, the numbers were not
6 there. And that's why this Chief Minister, the then Chief Minister, resigned within ten minutes
7 because he knew he did not have the majority. And he was not confident to face the floor.

8

9 **JUSTICE SHAH:** Because he was aware.

10

11 **Mr. KAUL:** He was aware what was happening. So everything we go back to say that because
12 of disqualification, this was fait accompli. You can't even take care of people
13 who were supporting you the 13.

14

15 **JUSTICE SHAH:** Mr. Kaul, you can consider from this angle also So far as Nabam Rebia is
16 concerned, the order dated 27-06 you might have pressed Nabam Rebia. At that time you
17 might have argued also and according to you, you argued also. But this court correct, did not
18 injunct Speaker. Correct? Maybe technically till 12th. Correct? He was restrained
19 from.... it can be said he was restrained. But there was no restrain at all. Correct? Against
20 the Speaker exercising the powers.

21

22 **MR. KAUL:** My Lords, I bow down to it.

23

24 **JUSTICE SHAH:** Otherwise if the Nabam Rebia would have been considered by this Court.
25 Then there....

26

27 **MR. KAUL:** Then he could not have continued.

28

29 **JUSTICE SHAH:** Then it would have...

30

31 **MR. KAUL:** Then no proceeding should have been stayed before him. My Lords I said so
32 repeatedly. The entire argument was heard. Ultimately, the Court considered because the
33 same argument made. There are problems, Nabam Rebia applies, doesn't apply. The Court
34 said only on pure principles of natural justice give them more time because the rules provide
35 for seven days and on a weekend you've given them two days. There was to say, that Your
36 Lordships order was the result and then Your Lordships are told because of that rewind
37 everything.

1
2 **JUSTICE SHAH:** On a lighter side everything went so fast.

3
4 **MR. KAUL:** My Lords, that is politics.

5
6 **JUSTICE SHAH:** No. No. We are not....That is why...

7
8 **MR. KAUL:** In fact My Lord, that's why in para 78, Your Lordship's say of Shivraj Singh
9 Chauhan, timing... on a particular date what happens? In whose favour what tilts? That's
10 Politics. And they said that's none of the concern of the Court. That's what Your
11 Lordship records in para 78 of Shivraj Singh Chauhan.

12
13 **JUSTICE SHAH:** You want to show some....

14
15 **MR. KAUL:** Yes, yes, yes My Lords. My Lords I'm not bothering Your Lordships with this.
16 But another argument which was made was that even in our notice to the Speaker, we had not
17 mentioned anything about majority. There was specific paragraph in the letter to the Deputy
18 Speaker that he has lost the majority. So to say that we had not mentioned it is factually
19 incorrect. And as far as notice to the Speaker is concerned, My Lord, that's the last point before
20 I go to the case law. 21st I give a notice. The Deputy Speaker files an affidavit in this Court that
21 that notice was received. Secondly on 22nd of June a hand delivered copy is given. On 24th
22 of June, an email is sent to which apparently the Speaker comes and that day Dr. Dhawan
23 appeared. He appeared in court and said that to this it was not from an authorized email. So I
24 pointed out that there is Rule 18 of the Maharashtra Legislative Assembly Rules, which just
25 talks about a signed notice being given. There's no other restriction on it. So even if we exclude
26 the 24th, 21st we sent, the Deputy Speaker accepted that such a notice was given. 22nd, a hand
27 delivered copy is given with a stamp, which we showed to the court when we went. So we said,
28 what are you talking about not receiving a copy? This is a hand delivered with a stamp and on
29 23rd is the disqualification petition. And that is why My Lords, I said the scope for misuse
30 of disqualification is enormous. And that is exactly what was sought to be done. You knew
31 there was discontent, you knew it was simmering. You knew it reached its culmination on 21st,
32 with a resolution being passed at the meeting that overwhelmingly the cadres were not happy
33 with this coalition. And you knew that the next sequitur to this will be a trust vote. You
34 immediately move a disqualification petition and the Speaker on the very same
35 day accepts your person. And then two days later I am told file a reply. It is under those
36 circumstances that I came because repeatedly your Lordships are told constitutional
37 propriety, morality abused. If at all there is been abuse on this matter My Lords, it has been

1 by the regime then in power and the then Deputy Speaker with the hurry that they moved, that
2 they did not even follow the basic norms of natural justice. If the seven days were required,
3 what was the hurry in giving two days? And the only argument the other side had was
4 that in one of the matters Your Lordships have held that even two days was enough. So I will
5 also cite five judgments to say that two days were not enough where Your Lordships have said
6 there's no straight jacket formula. It has to be seen in the facts of every case. That takes us
7 nowhere. But given the facts what was this great hurry? that over a weekend you wanted
8 replies to be filed. That's what led to our 32 being filed right apart from the fact that Kihoto
9 was not a bar to us because Kihoto works if you are seized of a matter, you know, Speaker
10 is seized of the matter. You do not go to Court, not in a case when Nabam applies. That
11 the Speaker has a disqualification pending against him, removal pending against him, and he
12 cannot proceed at all. It was in those circumstances that I came by way of a 32. Now, My
13 Lords I'll come to the case law.

14

15 **JUSTICE NARASIMHA:** Case law on the point?

16

17 **MR. KAUL:** Yes, yes My Lords. My Lords, I will start by distinguishing Mayawati's
18 judgment.

19

20 **CHIEF JUSTICE CHANDRACHUD:** Why don't you do this? You can actually cite the
21 judgments in chronological order and then distinguish whatever they have cited along the way.
22 So that perhaps we can do that in a chronological order, whichever judgments you are citing,
23 you can cite them chronologically and then if they have relied on a particular judgment, you
24 can distinguish it along with the way. That's one way of doing it or you can cite, Mayawati.

25

26 **MR. KAUL:** I thought My Lords, there are four or five crucial judgments that they relied on
27 for their case and then I'll come to.....

28

29 **CHIEF JUSTICE CHANDRACHUD:** Alright, fair enough. And then you can cite your
30 judgements.

31

32 **MR. KAUL:** Yes, My Lords.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Mayawati is at, where is that?

35

1 **MR. KAUL:** In fact, if Your Lordships permit, I'll just very briefly tell Your Lordships about
2 the facts. I won't bother Your Lordships with the paras at all. I'll just give the facts. I've
3 summed up the facts.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Just give us the reference in the compilation, that's
6 all. So if we have to...

7

8 **MR. KAUL:** Convenience compilation, Volume-2, PDF page 1080. (1998), Volume-7, SCC
9 517. In 1996, in the general elections to the UP Legislative Assembly, no political party
10 obtained an absolute majority case. So there was an agreement between the Bhartiya Janata
11 Party and the Bahujan Samaj Party. BSP at that stage had 67 MLAs and the BJP had 179...175
12 members in it's fold. On 21-09-1997, Mr. Kalyan Singh of the BJP was sworn in as the Chief
13 Minister. On 19-10-1997, the appellant, that is Mayawati announced withdrawal of
14 participation in support of the BSP to the coalition Government, all the BSP members resigned
15 from the Government. Immediately, the Governor of the State convened a special session of
16 the Assembly at 11:00 A.M. on 21-10-1997 -- That date is important -- And told Mr. Kalyan
17 Singh to prove his majority on the floor of the House after that. On 28-10-1997, appellant
18 issued a Whip directing all BSP MLAs to remain present in the House throughout the
19 proceedings on the next date and vote against the motion. That was the Whip issued. On 21-
20 10-1997, 222 members of the Assembly voted in favour of the Government. There was no vote
21 opposing it. On 24-10-1997, 13 petitions were filed seeking disqualification of those members
22 of the BSP of violating the Whip given on 28-10-1997, the Whip, which had been given. And
23 the petitions invoked only Clause 2(1)(b), of the Tenth Schedule. Your Lordships may note
24 that, the allegation was 2(1)(b) of the Constitution. On 25-11-1997, the concerned MLAs
25 against whom disqualification petitions had been filed, filed their written statements and
26 pleaded that a split took place between the members of the BSP on 21-10-1997 and more than
27 one-third legislators of the BSP got separated, and thus they relied on the protection of para 3
28 of the Tenth Schedule. The Speaker on 23-03-1998, dismissed the disqualification petitions
29 and recognized the MLAs as a separate political party. In this background is what the appellant
30 said, and in this background what the appellant said is that this..... that it is the Whip, which
31 is issued by the erstwhile Legislature Party of the BSP and not the new political party which
32 had been formed as used in para 2(1)(d) is the legislature party of the original political party
33 of those MLAs is what is to be read into 2(1)(b). The court said nothing doing. Political party
34 as mentioned there in 2(1)(b) cannot be read as a legislature party. So this was a split. A new
35 party had been formed and they were bound by the directions of the new party, and protected
36 by that.

37

1 **CHIEF JUSTICE CHANDRACHUD:** What were they relying upon in Mayawati in
2 particular?

3

4 **MR. KAUL:** That a Whip of the Legislative Party of the BSP, of which they were a member
5 before splitting had told them not to vote.

6

7 **JUSTICE NARASIMHA:** That is 20th October Whip.

8

9 **MR. KAUL:** Yes had told them not to vote in favour of the motion. So they said you violated
10 the Whip of the Legislature Party, and because you violated the Whip of the Legislature party
11 you are disqualified. They said we have split and we formed the new party and our new original
12 political party told us what to do. We did it in compliance with that. So Ms. Mayawati, argued
13 that you read Legislature Party into 2(1)(b), and that Whip ought to be obeyed of the old party.
14 The court said no, we will read it as the political party and they are protected by para 3 of the
15 Tenth Schedule. Now. My Lords, in our case, A) There is no rival faction which is split. The
16 rival faction is within the party. No new political party has been formed. The question is not of
17 an erstwhile legislature party of a party that you belong to vis-à-vis the new original political
18 party that you formed. The judgement at no point, says that when a Whip is whom the Speaker
19 interacts with, the Whip as appointed as per the rules conveyed by the leader, etc. should be
20 ignored and we should look at some deeper, other Whip which the political party
21 has appointed. That's not what it says. All it says is in the given fact and circumstances that
22 that legislature Whip of the party is not applicable because they are protected by the sanction
23 as given by the formation of the new political party. So Mayawati, according to us, My Lords
24 has no application at all. And in any case My Lords, as I have said, it's never been our case that
25 it's only the Legislature Party and not the political party. We have right through said both are
26 co-joined, organic, integrated, and any action of the Legislature Party has the political
27 authority of the political party to say what it says.

28 Now My Lords Rajendra Rana, Volume 1, PDF page 834.

29

30 **CHIEF JUSTICE CHANDRACHUD:** 834?

31

32 **MR. KAUL:** Yes. So My Lords Rana is relied on by them. I relied for a different purpose. They
33 rely on Rana for two essential purposes. One is disqualification is ex-post facto, so everything
34 goes back to the date of disqualification. And secondly, your Lordships in an appropriate case
35 decided the issue of disqualification as a court of first instance, rather than remanding the
36 matter or letting the Speaker decide. That is the two..... Those are the two grounds taken to
37 rely on Rana. Now My Lords just some facts. Quite apart from the second issue My Lords a

1 straight answer would be the matter was pending for three years in the High Court. The High
2 Court then remanded it back. The Supreme Court said the assembly elections are at the end of
3 the year. Rather than remand it, decide the matter. These are peculiar facts. Not that in every
4 case you bypass the constitutional authority and come to the Supreme Court as
5 a court of first instance. But on the first part, My Lords some crucial facts. After the
6 2002 UP elections My Lords to the UP State Assembly, a coalition government was
7 formed headed by the Bahujan Samajwadi Party. In 2003 My Lords, the Cabinet
8 recommended dissolution of the Assembly. And now this is important. Before the resignation
9 of the Cabinet on 27-08-2003, 13 MLAs of the BSP Party met the Governor and requested him
10 to invite the leader of the Samajwadi Party to form the Government. The opposition to form
11 the Government. The Governor acceded to the request and thereafter, Mr.
12 Swami Prasad Maurya who was with the BSP, filed a disqualification petition saying that they
13 had voluntarily given up the membership of the party by supporting Samajwadi Party and
14 going to the Governor. On 06-09-2003, 13 members, those 13 MLAs who had gone to the
15 Governor with Samajwadi Party MLAs, fortified by another 24 MLAs requested the Speaker
16 to recognize a split in the party and the Speaker recognized the split in the party. The Supreme
17 Court said that split and to be entitled to the benefits and protection of Para 3 of the Tenth
18 Schedule is an event which happened later. The Governor is only concerned with the day when
19 those 13 BSP MLAs met the Governor and requested him to invite the leader of the Samajwadi
20 Party to form the Government. And the Speaker should have only looked at the facts on that
21 day and said not at subsequent event and in that context said *ex post facto*, it will go back to
22 the day they were disqualified or incur disqualification under the Tenth Schedule. It could
23 have never been the intent of the Court and it did not say so that on one hand, the Supreme
24 Court says that till disqualification petitions are pending, you participate in all proceedings.
25 On the other hand the moment you're disqualified all your actions are annulled. So *ex post*
26 *facto* was specific because the Speaker started looking at subsequent events. The Speaker
27 started looking at the split, which had not happened on that day. And they said, this is an overt
28 2(1)(a) Act where you go to the Governor, request him to get the Samajwadi Party to form
29 the Government. It was in that context. The other part of Rajendra Rana, I pointed out
30 to My Lords that.... now, My Lords another judgment.....

31

32 **CHIEF JUSTICE CHANDRACHUD:** Mr. Kaul why don't you do this? Tomorrow morning,
33 just give us in two pages of small note on how you distinguish each of those judgements. It will
34 be very much helpful.

35

36 **MR. KAUL:** Very well, very well, no, no, I'll do that. I'll get for all those four or
37 five judgements a distinguishing note tomorrow.

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CHIEF JUSTICE CHANDRACHUD: Just two or three pages as a bulletin.

MR. KAUL: And what I'll do My Lords, tomorrow is I have also prepared a written note of the various propositions and judgments that I'm relying on.

CHIEF JUSTICE CHANDRACHUD: Right.

MR. KAUL: I'm in the process. I'll take Your Lordships through that. And wherever Your Lordship wants me to really read any particular paragraph, I can do that.

CHIEF JUSTICE CHANDRACHUD: All right. That'll be much quicker then. Just so that you know....How long would you take? Will you finish in about an hour or so tomorrow?

MR. KAUL: Yes.

CHIEF JUSTICE CHANDRACHUD: So we target starting by 11 o' clock tomorrow. So by 12:00 If you finish, then between Mr. Jethmalani ..

MR. MANINDER SINGH: What I am respectfully submitting My Lords....

CHIEF JUSTICE CHANDRACHUD: if you can Mr. Jethmalani and Mr. Maninder Singh can give us a brief note of a page or so...

MR. MANINDER SINGH: I was about to say that [UNCLEAR] we will furnish a note by today evening. And My Lord very 10-15 minutes, we will just make...

CHIEF JUSTICE CHANDRACHUD: If both of you can just give us, email the note to the Court Master so he will circulate it in the night to us and give it to Mr. Sibal because Mr. Sibal will also be then and you can also email your....

MR. SIBAL: My Lord the problem is Solicitor General is to argue, please remember that.

CHIEF JUSTICE CHANDRACHUD: Yes, of course. Now, what about the Solicitor? So maybe Mr. Kaul, is it possible for you to sort of confine complete by say 11:45. We will start at 11:00 because we have mentioning. You can try and compress it by 11:45. In between Mr.

1 Jethmalani and Mr. Maninder Singh by 12:15 that leaves 45 minutes to the Solicitor General.
2 If we can do that... I mean entirely...

3

4 **MR. JETHMALANI:** We'll try our best. As succinct as we possibly can will try.

5

6 **MR. SIBAL:** Otherwise it will be difficult.

7

8 **MR. KAUL:** Otherwise the rejoinder could be restricted to 1 hour. They've argued for
9 three and half hours My Lor.

10

11 **MR. SIBAL:** Otherwise it will be difficult if they don't finish by 01:00.

12

13 **JUSTICE SHAH:** Rejoinder depends on the how the other side has done.

14

15 **CHIEF JUSTICE CHANDRACHUD:** So how long is the Solicitor likely to take, any idea?

16

17 **MR. SIBAL:** He said one to one and a half hours to me. One to one and a half hours to me he
18 told.

19

20 **CHIEF JUSTICE CHANDRACHUD:** Alright, try and make your arguments as
21 compressed, but we'll wrap up with this cite before lunch... No, no only because we are
22 heading towards a week long break. And we don't want to keep this beyond the break.

23

24 **MR. SIBAL:** The one thing the Learned Chief Justice, is he never gets tired of anybody. He
25 never shows it at least.

26

27 **MR. JETHMALANI:** That's the theory.

28

29 **CHIEF JUSTICE CHANDRACHUD:** But that's a fact in my mind as well. Because if you
30 have an understanding about how vast the field of knowledge is, you can never tire of the
31 arguments which the lawyers are making because the last word is never said until the last
32 word is over.

33

34 **MR. SIBAL:** That's correct, that's correct.

35

36 **MR. KAUL:** Very grateful My Lords. Very grateful.

37

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END OF DAY'S PROCEEDINGS

CHIEF JUSTICE'S COURT

1

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE M.R. SHAH
HON'BLE MR. JUSTICE KRISHNA MURARI
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE PAMIDIGHANTAM SRI NARASIMHA

Subhash Desai

v.

Principal Secretary, Governor of Maharashtra and Ors.
W.P.(C) No. 493/2022
Item No. 501

TRANSCRIPT OF HEARING

02-Mar-2023

11:00 AM IST

1

2 **MR. KAUL:** My Lords as promised to Your Lordships yesterday, I'll now since my time is
3 curtailed to 45 minutes, I'll stick to four judgments. What I have done in the meantime is, I've
4 got three things done. The timeline that I gave to Your Lordships yesterday.

5

6 **CHIEF JUSTICE CHANDRACHUD:** Yes.

7

8 **MR. KAUL:** The timeline I gave to Your Lordships yesterday, I've got a note made.

9

10 **CHIEF JUSTICE CHANDRACHUD:** Yes.

11

12 **MR. KAUL:** The judgments with propositions that I'm relying on, I've got a note made. And
13 the distinguishing note on the judgments relied on by the other side, I've got that note made.
14 So let me just hand it over to Your Lordships, Your Lordship's permit that maybe easier and
15 then proceed with my argument.

16

17 **CHIEF JUSTICE CHANDRACHUD:** Alright.

18

19 **MR. KAUL:** This is My Lords, the list of cases we are relying on. Please give one copy to Mr.
20 Sibal. My Lords, these are the judgments that we are distinguishing. The ones I'm now
21 handing over are the judgments and lastly, what I'm giving to Your Lordships is, the timeline
22 that I relied on My Lord, so that Your Lordships have in place...

23

24 **CHIEF JUSTICE CHANDRACHUD:** They're in one place. You circulated to Mr. Sibal?

25

26 **MR. KAUL:** Yes, yes, My Lord, absolutely. Each of them, as I hand over to Your Lordships.
27 I'm giving him too. And My Lord, this timeline. I have consciously not included, the EC
28 events, because as Your Lordships said, that's not something that Your Lordships are getting
29 into, I pretty much stuck to about the first week of July and stopped to the first week of July as
30 far as these list of events are concerned. So My Lord, these three things are done and I have
31 given now My Lords, let me straight away come to the 3 or 4 cases that I need to cite and that's
32 it. But one argument My Lords, I just wanted to make before I go to the case law, are...my
33 submission yesterday for Your Lordships kind consideration was, that this is an artificial
34 distinction sought to be drawn between a legislature party and political party. It has never
35 been our case at all. In fact, we have right through said that it has the political authority of the
36 political party, their organically and integrally connected, and they are co-joined, and they

1 have to be seen together. That's how the framers of the Constitution always looked at it. And
2 in fact, whenever an attempt is made to segregate, they say, 'No, we must look at both'. Now
3 that is further fortified if Your Lordships were to have Para 4 of Schedule 10, which is a
4 defence. Of course, I am not on the defence argument at all because according to me, I have not
5 incurred 2(1)(a) or 2(1)(b), so I'm not on the defence at all. But please have that why they
6 should be considered together, and one has a bearing on the other. Please have para 4 of the
7 Tenth Schedule.

8

9 **CHIEF JUSTICE CHANDRACHUD:** Para 4 of the Tenth Schedule?

10

11 **MR. KAUL:** Yes My Lords. May I with Your Lordship's permission?

12

13 **CHIEF JUSTICE CHANDRACHUD:** Yes.

14

15 **MR. KAUL:** A member of a House shall not be disqualified under subparagraph 1 of
16 paragraph 2, where his original political party merges with another political party, and he
17 claims that he and any other members of his original political party, and please have 2, for the
18 purposes of subparagraph 1 of this paragraph, the merger of the original political party of a
19 member of the House shall be deemed to have taken place, if and only if, not less than two-
20 thirds of the members of the Legislature party concerned have agreed to such merger. So even
21 when you come to a defence, the bearing of what happens in a legislature party, in fact, they
22 say it's deeming. It's a deeming friction there as far as the defence of merger is concerned. I'm
23 not for a minute suggesting I'm coming under para 4. I'm just drawing analogy from para 4 to
24 say, what bearing does the two have on each other. So when you come and say that this is only
25 in the legislature party, nothing has happened in the in the political party. My Lords even
26 in Rana, which is one of the judgments I'll read out, when the defence was taken up of
27 whether there is a split or not, the question was, should the split only in Legislature party be
28 seen, or the split in political party be seen? Even there, the Supreme Court said, the Speaker
29 will not embark on an independent inquiry into whether there's a split in the political party,
30 it will just take a prima facie view. So they go hand in hand. And this whole argument that you
31 are only the Legislature party, not the political party, is a completely wrong argument in
32 law and in facts. Now, My Lord, straight away to the judgments. Kindly first have My
33 Lords Balchandra versus BS Yediyurappa judgment compilation 3D Volume 3D pdf page
34 25, starting at 58.

35

36 **JUSTICE SHAH:** You don't want to rely upon notes, straight away...

37

1 **MR. KAUL:** My Lords straightaway... because this is for all the judgments. I will now just...
2 four judgments I want to cite and would request Your Lordships to read with me, because that
3 is important for me.

4

5 **JUSTICE SHAH:** What is that judgement compilation?

6

7 **MR. KAUL:** Volume 3D. Judgment compilation PDF page 58, which is the relevant para 113.

8

9 **JUSTICE KOHLI:** What para did you say Mr. Kaul?

10

11 **MR. KAUL:** 113 on page, PDF Page 58. May I with Your Lordship's permission?

12

13 **CHIEF JUSTICE CHANDRACHUD:** Yes.

14

15 **MR. KAUL:** 'The main questions, which emerged from submissions made on behalf of the
16 respective parties and the facts of the case may be summarized as follows –

17 a). Did the appellants voluntarily give up their membership of the Bharatiya Janata Party?

18 b). Since only three days' time was given to the appellants to reply to the show cause notices as
19 against the period of seven days or more prescribed in Rule 7 sub-clause 3 of the
20 disqualification rules, were the said notices vitiated?

21 c). Did the Speaker act in/or haste in disposing of the disqualification application filed by Shri
22 B. S. Yediyurappa introducing a Whip on bias as to the procedure adopted? d). What is the
23 scope of judicial review of an order passed by the Speaker under Para 2(1)(a) of the Tenth
24 Schedule to the Constitution, having regard to the provisions of Article 212 thereof? The facts
25 of the case revealed that the appellant, along with Shri. M.P. Renukacharya and Narasimha
26 Nayak wrote identical letters to the Governor on 6-10-2010 indicating that as MLAs of
27 the Bharatiya Janata Party, they had become disillusioned with the functioning of
28 the Government headed by Shri B. S. Yediyurappa. According to them, there was widespread
29 corruption, nepotism, favouritism, abuse of power, and misuse of Government machinery in
30 the functioning of the Government headed by Chief Minister Shri Yediyurappa and
31 that a situation had arisen when the governance of the State could not be carried on in
32 accordance with the provisions of the Constitution. Accordingly, they were withdrawing their
33 support from the Government headed by Shri Yediyurappa, with a request to the Governor to
34 intervene and to institute the Constitutional process as the Constitutional head of the State.
35 The Speaker took the view that the said letter and the conduct of the appellants in moving
36 from Karnataka to Goa and other places and issuing statements both to the print
37 and electronic media regarding withdrawal of support to the BJP Government led by Shri

1 Yediyurappa and the further fact that the appellants are said to have negotiated with Shri H.
2 D. Kumaraswamy, the leader of the State Janata Dal and its members regarding the formation
3 of an alternative Government, was sufficient to attract the provision of para 2(1)(a) of the
4 Tenth Schedule to the Constitution. It was held by the Speaker that in the absence of any denial
5 to the allegation made by Shri K. S. Eshwarappa, the State President of the BJP, the same had
6 to be accepted as having meant proved against the appellants. In this regard, the Speaker
7 referred to the views expressed by the Constitution mentioned in Kihoto Hollohon, wherein
8 one of the issues which had been raised and decided was the act of voluntarily giving up the
9 membership of a political party may be either expressed or implied. Even greater emphasis
10 was laid on the decision in Ravi S. Naik, wherein it was observed that there was no provision
11 in the Tenth Schedule which indicated that till a petition signed and verified in the manner
12 laid down in the Civil Procedure Code for verification of pleadings was made to the Chairman
13 or a Speaker of the House. He did not get the jurisdiction to give the decision as to whether a
14 member of the House had become subject to disqualification under para 2(1)(a) of the Tenth
15 Schedule or not. The afore said view taken by the Speaker has to be tested in relation to the
16 action of the members concerned of the House, and it has to be seen whether on account of
17 such action a presumption could have been drawn, that they have voluntarily given up their
18 membership of the BJP, thereby attracting the provisions of para 2(1)(a) of the Tenth
19 Schedule. In the instant case, the appellants had in writing informed the Governor on 6-10-
20 2010 that having become disillusioned with the functioning of the Governor...of
21 the Government headed by Shri B. S. Yediyurappa, they had chosen to withdraw support to
22 the Government headed by Shri B. S. Yediyurappa and had requested the Governor to
23 intervene and institute the Constitutional process as the Constitutional head of the State. The
24 said stand was reemphasized in the replies to the show cause notices submitted by the
25 appellants on 9-10-2010, wherein they had inter alia denied that their conduct had attracted
26 the vice of defection within the scope of 2(1)(a) of the Tenth Schedule. In their said replies, the
27 appellants had categorically indicated that nowhere in the letter of 6-10-2010 had they
28 indicated that they would not continue as members of the legislature party of the BJP. On the
29 other hand, they had reiterated that they would continue to support the BJP and any
30 Government formed by the BJP headed by any leader other than Shri BS Yediyurappa, as the
31 Chief Minister of the State. They had also reiterated that they would continue to support any
32 Government headed by a clean and efficient person, who could provide good governance to
33 the people of Karnataka according to the Constitution of India and it was only to save the party
34 and Government and to ensure that the State was rid of a corrupt Chief Minister, that the letter
35 had been submitted to the Governor on 06-10-2010. At this point let us consider the contents
36 of letter dated 06-10-2010, written by the appellants to the Governor, which has been
37 reproduced here and before. The letter clearly indicates that the author thereof, who had been

1 elected as an MLA on a Bhartiya Janata Party ticket, having become disillusioned with the
2 functioning of the Government headed by Shri BS Yediyurappa on account of the widespread
3 corruption, nepotism, favouritism, abuse of power and misuse of government machinery was
4 convinced that a situation had arisen in which the governance of the State could not be carried
5 on in accordance with the provisions of the Constitution and Shri Yediyurappa had forfeited
6 the confidence of the people. The letter further indicates that it was in the interest of the State
7 and the people of Karnataka that the author was expressing his lack of confidence in the
8 Government headed by Shri Yediyurappa and that he was accordingly withdrawing his support
9 to the Government headed by Shri Yediyurappa with a request to the Governor to intervene
10 and institute the constitutional process as the constitutional head of the State. Although Mr.
11 Sorabji was at pains to point out that the language used in the letter was similar to the language
12 used in Article 356 of the Constitution, which according to him was an invitation to the
13 Governor to take action in accordance with the said Article, the same is not as explicit as Mr.
14 Sorabji would have us believe. The constitutional process has hinted at in the said letter did
15 not necessarily mean the constitutional process of proclamation of President Rule, but could
16 also mean the process of removal of the Chief Minister through constitutional means. On
17 account thereof, the Bhartiya Janata Party was not necessarily deprived of a further
18 opportunity of forming a Government after a change in leadership of the legislature party. In
19 fact, the same is evident from the reply given by appellant on 09-10-2010, in reply to the
20 show cause notices issued to them in which they had reemphasized their position that they not
21 only continued to be members of the Bhartiya Janata Party, but would also support
22 any Government formed by the Bharatiya Janata Party headed by any leader other than Shri
23 B. S. Yediyurappa as the Chief Minister of the State. The conclusion arrived at by
24 the Speaker, does not find support from the contents of the said letter of 06-10-2010, so as to
25 empower the Speaker to take such a drastic step as to remove the appellant from the
26 membership of the House.

27 Now kindly have My Lords para 142, page 64. My Lords have para 142?

28

29 **CHIEF JUSTICE CHANDRACHUD:** Yes.

30

31 **MR. KAUL:** On the very same day that is 06-10-2010, Shri Yediyurappa as the leader of
32 the Bharatiya Janata Party...Bhartiya Janata Legislature Party, in the Legislative Assembly
33 filed an application before the Speaker under Rule-6, of the Disqualification Rules 1986, being
34 disqualification application number one of 2010, for a declaration that all the 13 MLAs elected
35 on BJP tickets along with two other MLAs had incurred disqualification in view of the Tenth
36 Schedule of the Constitution. Immediately thereafter on 07-10-2010, the Speaker issued
37 show cause notices to the aforesaid MLAs, informing them of the disqualification application

1 filed by Shri BS Yediyurappa and informing them that by submitting letters to the
2 Governor, withdrawing support to the Government led by Shri Yediyurappa, they had violated
3 para 2(1)(a), of the Tenth Schedule to the Constitution and were therefore disqualified from
4 continuing as members of the House. The appellants were given time till 05:00 PM on 10-10-
5 2010 to submit their objections, if any, to the said application. Even if as held by this Court in
6 Dr. Mahachandra Prasad Singh, Rule 6 and 7 of disqualification rules are taken as directory
7 and not mandatory. The appellants were still required to be given a proper opportunity of
8 meeting the allegations mentioned in the show cause notices. The fact that the appellants had
9 not been served with notices directly, but at the same were pasted on the outer doors of their
10 quarters in the MLA complex, and that too without copies of various documents relied upon
11 by Mr. Yediyurappa, giving them three days' time to file the said notice...to file reply to the
12 said notices, justify the appellant's intention that they had not been given sufficient time to
13 give an effective reply to the show cause notices.

14 Please have then para 147, on page PDF 66. 147. May I My Lords?

15

16 **CHIEF JUSTICE CHANDRACHUD:** Yes.

17

18 **MR. KAUL:** The procedure adopted by the Speaker seems to indicate that he was trying to
19 meet the time schedule set by the Governor for the trial of the strength and the Assembly. And
20 to ensure that the appellants and the other independent MLAs stood disqualified prior to
21 the date on which the floor test was to be held. Having concluded the hearing on 1-10-2010 by
22 05:00 p.m., the Speaker passed the detailed order in which various judgments, both of the
23 Indian Courts and Foreign Courts and principles of law from various authorities was referred
24 to on the same day, holding that appellants had voluntarily given up the membership of the
25 Bharatiya Janata Party by their acts and conduct which attracted the provisions
26 of para 2(1)(a) of the Tenth Schedule of the constitution where under they stood disqualified.
27 The vote of confidence took place on 11-10-2010 in which the disqualified members could not
28 participate and in their absence Shri. B.S Yediyurappa was able to prove his majority in the
29 House. Unless it was to ensure that the trust vote did not go against the Chief Minister, there
30 was no conceivable reason for the Speaker to have taken up disqualification application in
31 such a great hurry. Although in Dr. Mahachandra Prasad Singh, this Court held that the
32 disqualification rules were only directory and not mandatory, and that violation thereof
33 amounted to only procedural irregularities and not violation of a constitutional mandate. It
34 was also observed in Ravi S. Naik that such an irregularity should not be such, so as to
35 prejudice any authority who is affected adversely by such breach. In the instant case, it was a
36 matter of survival as far as the appellants were concerned. In such circumstances, they
37 deserved a better opportunity of meeting the allegations made against them, particularly when

1 except for the newspaper cuttings, said to have been filed by Shri Yediyurappa along with the
2 disqualification application, there was no other evidence at all available against the
3 appellants.

4

5 Then please have para 151 at PDF page 67. This is important. My Lords, para 152. We cannot
6 lose sight of the fact that although the same allegations as were made against the appellant
7 Shri Yediyurappa, were also made against the Shri. M. P. Renukacharya and Shri Narasimha
8 Nayak, the retraction was accepted by the speaker despite the views expressed by
9 them submitting... that upon submitting the letter with drawing support to the BJP
10 Government led by Shri Yediyurappa, all the MLAs stood immediately disqualified under para
11 2(1)(a) of the Tenth Schedule to the Constitution, and they were accordingly permitted to
12 participate in the confidence vote for reasons which are not required to be spelled out.

13

14 Then para 154. Having considered all the different aspects of the matter and having examined
15 the various questions which have been raised, we are constrained to hold that the proceedings
16 conducted by the Speaker on the disqualification application filed by Shri BS Yediyurappa do
17 not meet the twin tests of natural justice and fair play. The Speaker, in our view, proceeded in
18 the matter as if he was required to meet the deadline set by the Governor irrespective of
19 whether in the process he was ignoring the constitutional norms set out in the Tenth Schedule
20 to the Constitution, and the Disqualification Rules 1986 and in contravention of the basic
21 principles that go hand in hand with the concept of fair hearing. As we have earlier indicated,
22 even if disqualification rules are only directory in nature, even then sufficient opportunity
23 should have been given to the appellants to meet the allegation levelled against them. And
24 kindly now have My Lords, the last para 157 on same page. The appeals are therefore allowed.
25 The order of the Speaker dated 10-10-2010 disqualifying the appellants on the membership of
26 the House under para 2(1)(a) of the Tenth Schedule of the Constitution, is set aside along with
27 the majority judgment delivered in writ repetition so and so, and the portions of the judgment
28 delivered so and so concurring with the views expressed by Honourable the Chief Justice
29 upholding the decision of the Speaker, so on so, filed by so and so. Consequently, that
30 is disqualification application filed by B. S. Yediyurappa is dismissed. So My Lords, a much
31 worse case, a case where the Chief Minister in question from the same party, they say they
32 have no faith. But they said where have they said that they are leaving the political party, they
33 are forming a new political party? They continue to support the party. Thus, the extreme
34 conclusion drawn to say that this ex facie attracts 2(1)(a) is wrong, because, My Lords, if this
35 is going to become the basis of 2(1)(a) that I express dissent within the party, then internal
36 dissent which is the bedrock of democracy and parliamentary democracy will completely be
37 thrown out of the window. Because at the end of the day, the moment anyone within a party

1 expresses dissent, you say it's a 2(1)(a) case. So in a much worse case, they said, this is not
2 a 2(1)(a) case. And My Lords I'm not for a minute suggesting as My Lord, the Chief Justice
3 said yesterday. My argument is not that the majority within a party cannot attract the Tenth
4 Schedule. The majority within a party can also disobey a Whip or for whatever reasons, floor
5 cross or align with the opposition party, go to the Governor for falling of the government.
6 That's not my case at all. My case is that to determine who is the rival faction under para 15 of
7 the Symbols Order.

8 There is an exclusive jurisdiction in the Election Commission of India, which looks at the
9 parameters as set by Your Lordships on Sadiq Ali downwards to see which is the rival faction
10 within the political party to be recognized. And my case, right through has been that
11 the legislature party and the political party go hand in hand. You are today seeking to draw an
12 artificial distinction between a legislature party and a political party, to say that you have
13 shown nothing in the political party, you've only shown the legislature party, whereas the
14 legislature party definitely reflects the political authority of the political party as well. In any
15 case, as far as a competent body is concerned it has come to a conclusion that we represent
16 within the Shiv Sena the recognized Shiv Sena today. So my case is not that a majority cannot
17 incur under 2(1)(a). My case is in the facts of the case for you to say this is only legislature
18 party and not political party, is without any basis. In any case the Speaker has to decide it. You
19 want to bypass the whole route and come to the Supreme Court in an Article 32 and say the
20 Supreme Court must decide before the Speaker, which is in the teeth of Kihoto. And my
21 coming under a 32 was on Nabam, which was on an entirely different footing. That was the
22 argument.

23

24 Next, My Lord, kindly have Volume 3D, PDF 787 at Page 815.

25

26 **JUSTICE KOHLI:** Same.

27

28 **MR. KAUL:** Same, same. Same volume My Ladyship.

29

30 **JUSTICE KOHLI:** [UNCLEAR]

31

32 **MR. KAUL:** That's right. That's right. 20. But I will only trouble Your Lordships one para,
33 since there's less time. Para 19.

34

35 **CHIEF JUSTICE CHANDRACHUD:** Page?

36

1 **MR. KAUL:** 815. Your Lordship may later see both the paras, 19 and 20, but I'll only read 19.
2 My Lords have 19? 'The Constitution is not a legal document, embodying a set of legal rules
3 for the passing hour. It sets out principles from an expanding future and is intended to endure
4 for ages to come and consequently to be adapted to the various crisis of human affairs.
5 Therefore, a purposive, rather than a strict literal approach to the interpretation, should be
6 adopted. A Constitutional provision must be construed not in a narrow and constricted sense,
7 but in a wide and liberal manner so as to anticipate and take account of changing conditions
8 and purposes so that a Constitutional provision does not get fossilized but remains flexible
9 enough to meet the newly emerging problems and challenges.' The reason I'm citing this
10 judgment, My Lord is in the context of Nabam, where it was said that the Constitution doesn't
11 provide as far as this, when does the notice period start? The Constitution does not provide for
12 it at all. But some provision will have to be looked at. If a situation emerges when
13 the Constitution was drafted and there was no Tenth Schedule to it at that stage, and a
14 problem arises today. Why can the court not interpret in a liberal manner to take care of the
15 fact that the Constitutional values are protected? Right My Lords? Now please have straight
16 away of... 946 at 956.

17

18 **JUSTICE KOHLI:** You're referring to the separate volume?

19

20 **MR. KAUL:** Judgment Compilation, Volume-2, serial number 3.

21

22 **CHIEF JUSTICE CHANDRACHUD:** 946?

23

24 **MR. KAUL:** Yes, which is at 956. Para 14.

25

26 **CHIEF JUSTICE CHANDRACHUD:** Is this Kuldeep Nair?

27

28 **MR. KAUL:** In the meantime, starts with it in the meantime My Lords? Kuldeep Bishnoi,
29 My Lords. Speaker Haryana Vidhan Sabha versus Kuldeep Bishnoi.

30

31 **JUSTICE KOHLI:** Volume-2, what page did you say Mr. Kaul?

32

33 **MR. KAUL:** My Lords, 946 the judgment starts, the para starts at 956.

34

35 **CHIEF JUSTICE CHANDRACHUD:** Yes.

36

37 **JUSTICE KOHLI:** Sorry I have the wrong volume. Judgment compilation Volume 2.

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MR. KAUL: Judgment compilation Volume-t2wo, serial number 3.

CHIEF JUSTICE CHANDRACHUD: This is Kuldeep Bishnoi na?

MR. KAUL: That's right. That's right. 946 it starts.

CHIEF JUSTICE CHANDRACHUD: One second.... given that Davinder Pal Singh Bhullar.

JUSTICE KOHLI: It starts at serial number, it's part two.

MR. KAUL: Bookmark 52.

JUSTICE KOHLI: Bookmark 52. Very well, thank you. Got it. It is 52 in the bookmarking, isn't it? It's at Kuldeep Singh Bishnoi, right. 2015-12, SCC-381.

MR. KAUL: Yes. My Lords, even if I'm not legally sound, I'm trying to take the sound technically correct by pointing out all the bookmarks.

CHIEF JUSTICE CHANDRACHUD: No, that's good.

JUSTICE KOHLI: You're making progress.

MR. KAUL: I'm inviting upon myself Your Lordships. Would Your Lordships be kind enough to have para 14. In the meantime, proceedings before the Speaker continued and since the same were not being concluded in terms of the assurances given, the Division Bench of the High Court directed the Speaker to file an affidavit on or before 11-11-2011. Finally being dissatisfied with the progress the pending disqualification petitions before the Speaker, the Division Bench took upon the letters, patent appeals on 02-12-2011, when the directions were given to the production of the entire records of the matter pending before the Speaker. On 7-12-2011, the relevant records of the proceedings before the Speaker was submitted to the High Court, which adjourned the matter till 19-12-2011 for further consideration. However as alleged on behalf of the appellants, the Bench was not constituted on 19-12-2011. And without any further hearing or giving an opportunity to the Speaker's Counsel to make submissions on the status report, the High Court proceeded to pronounce it's judgment on the letters patent appeals, by it's judgment which has been impugned in these proceedings. The Division Bench

1 held, the directions, the learned single judge directing the Speaker to decide the
2 disqualification petitions within a period of four months. However, while disposing off the
3 matter, the Division Bench state the operation of the order passed by the Speaker on the
4 merger of the... So, it also declared five MLAs, who have filed separate appeals before this
5 Court has been unattached members of the Assembly with the right to attend the session only.
6 It was directed that they would not be treated either as part of INC, or HJC party, with a further
7 direction that they would not hold any office either. It is aforesaid directions and orders which
8 have resulted in the filing of several special league petitions before this Court by the Speaker
9 and five MLAs. As a consequence of the order of the Speaker pass...The consequence of
10 the order passed by the Division Bench of the High Court, the five
11 independent appellants before us have been prevented from discharging their functions as
12 members of the Haryana Vidhan Sabha even before the disqualification petition filed against
13 them by Shri Kuldeep Bishnoi, could be heard and decided.

14

15 Then para 46 My Lords on page 965. Last para on that page. Para 46. My Lords have that? The
16 appeal filed by the Speaker of the Haryana Vidhan Sabha against the judgment of the Division
17 Bench of the High Court is not therefore capable of being sustained, and the appeals filed by
18 the Speaker is accordingly dismissed. The other appeals preferred by the five
19 disqualified MLAs, are therefore to be allowed to the extent of the directions given by the
20 learned single judge and endorsed by the Division Bench, that five MLAs would
21 stand disqualified from effectively functioning as members of the Haryana Vidhan
22 Sabha, till the Speaker decided the petitions regarding their disqualification within a period of
23 four months. In our view, the High Court has no jurisdiction to pass such an order which was
24 in the domain of the Speaker. The High Court assumed the jurisdiction which it never had in
25 making the interim order, which had the effect of preventing five MLAs in question from
26 effectively functioning as members of the Haryana Vidhan Sabha.

27

28 The direction given by the learned single judge to the Speaker, as endorsed by the division
29 bench, is therefore upheld to the extent that it directs the Speaker to decide the petitions or
30 disqualification of the five MLAs within a period of four months. The set direction shall
31 therefore be given effect to by the Speaker. The remaining portion of the order
32 disqualifying the five MLAs from effectively functioning as members of the Haryana Vidhan
33 Sabha is set aside. The said five MLAs would therefore be entitled to fully function as members
34 of the Haryana Vidhan Sabha without any restrictions, subject to the final decision that may
35 be rendered by the Speaker in the disqualification petitions filed under para 6 of Schedule
36 10 of the Constitution.

1 Now My Lords, this is, of course, the same principle as in continuation with Shivraj Singh
2 Chauhan, which I had read out to Your Lordships, and there was a question that Your
3 Lordships had put to me on the day before yesterday, that could someone say that Shivraj
4 Singh Chauhan was only on resignation? That's why I read out those paragraphs that Shivraj
5 Singh Chauhan... Your Lordships, don't just deal with resignation of MLAs. Your
6 Lordships, categorically in paragraph 78 to 81, talk about disqualification petition under the
7 Tenth Schedule, and say disqualification petitions under the Tenth
8 Schedule are pending, doesn't mean in the meantime they will stop discharging their
9 functions as a member of the House. My next judgment for Your Lordships kind
10 consideration, My Lords is Rajendra Rana.

11

12 **CHIEF JUSTICE CHANDRACHUD:** That would be Judgements Compilation?

13

14 **MR. KAUL:** No, My Lords, now on a point that I'm relying on. Till now I distinguished on
15 what they were relying on. They were relying on it for two purposes - *Ex post facto*, and
16 that Your Lordships as a court of first instance can decide. *Ex post facto*, I explained to
17 your Lordships saying that it was qua the Speaker that the events to be seen by him were on
18 the day when they incurred disqualification, not subsequent events was played. And as far
19 as Your Lordships deciding as the court of first instance was on an issue where it had been
20 there in the High Court for three years, then the High Court remanded it back. When it came
21 to the Supreme Court, the Supreme Court said the assembly elections... the term is to expire
22 by the end of the year. So let's decide the matter. That is quite different from this matter in
23 every which way. Now My Lords kindly have judgment compilation, Volume 1, bookmark
24 19, page 834.

25

26 **JUSTICE KOHLI:** Para?

27

28 **MR. KAUL:** Para 25 on page 855. My Lords, before I start, let me tell Your Lordships, the
29 context why I am citing this judgment. My Lords, the Chief Justice?

30

31 **CHIEF JUSTICE CHANDRACHUD:** Yes.

32

33 **MR. KAUL:** The reason I'm citing this judgment is, that in this... at that time, para 3, as a
34 defence, was available; at that time. Even when para 3 as a defence was available, the Supreme
35 Court said that the Speaker dehors disqualification does not embark on an independent
36 inquiry to find out about splits in the political party. He only takes a limited *prima facie* view
37 of the split within the political party. The reason I'm citing is, even when... a) this is not a

1 question of split, this is not a question of merger. But even where it was a question of split
2 and para 3 was still on the statute book, the court said the Speaker will not embark on an
3 independent inquiry into splits in the political party. Please have para 25 for a minute My
4 Lords, on page 855.

5

6 **JUSTICE NARASIMHA:** Split is only a jurisdictional fact for him to enter to give a finding
7 with respect to disqualification.

8

9 **MR. KAUL:** Grateful! Grateful! That's all. I couldn't have put it better. That's all. My
10 Lords, may I?

11

12 **CHIEF JUSTICE CHANDRACHUD:** Yes.

13

14 **MR. KAUL:** 25. In the context of the introduction of sub-article 2 of Article 102 and
15 Article 191 of the Constitution, a proceeding under the Tenth Schedule of the Constitution is
16 one to decide whether a member has become disqualified to hold his position as a member of
17 the Parliament or of the Assembly on the ground of defection? The Tenth Schedule cannot be
18 read or construed independent of Article 102 and 191 of the Constitution, and the object of
19 those Articles. A defection is added as a disqualification and the Tenth Schedule contains the
20 provisions as to disqualification on the ground of defection A proceeding under the Tenth
21 Schedule gets started before the Speaker only on a complaint being made that certain persons
22 belonging to a political party had incurred disqualification on the ground of defection. To meet
23 the claim so raised the Members of Parliament or Assembly against whom the
24 proceedings have initiated have the right to show that there has been a split in the original
25 political party, and then they form one-third of the members of the legislature party, or that
26 the party has merged with another political party, and hence para 2 is not attracted. On the
27 scheme of Article 102 and 191 of the Tenth Schedule, the determination of the question of split
28 or merger cannot be divorced from the motion before the Speaker seeking a disqualification
29 of a member or members concerned. It is therefore not possible to accede to the argument that
30 under the Tenth Schedule to the Constitution the Speaker has an independent power to decide
31 that there has been a split or merger of a political party, as contemplated by para 3 and 4 of
32 the Tenth Schedule to the Constitution. The power to recognize a separate group in Parliament
33 or Assembly may rest with the Speaker on the basis of the rules of business of the House. But
34 this is different from saying that the power is available to him under the Tenth Schedule to the
35 Constitution independent of a claim being determined by him that a member or a member or
36 a number of members had incurred disqualification by defection. To that extent, the decision
37 of the Speaker, in the case on hand, cannot be considered to be in order in terms of Tenth

1 Schedule of the Constitution. The Speaker has failed to decide the question. He was called
2 upon to decide by postponing a decision thereon. There is therefore some merit in the
3 contention of the learned counsel for BSP that the otherthat the order of the Speaker may
4 not enjoy the full immunity in terms of para 6 sub-clause 1 of the Tenth Schedule to the
5 Constitution, and that even if it did, the power of judicial review recognized by the
6 court in the Kihoto Hollohon, is sufficient to warrant interference with the order in
7 question. In a sense, this aspect may not be of great importance in this case since going by the
8 stand adopted on behalf of 37 MLAs, the Speaker was justified in keeping the petition
9 seeking disqualification of 13 MLAs pending, even while he proceeded to accept a case of split
10 in BSP. The question really is whether the Speaker was justified in doing so. As we have
11 indicated above, the whole proceeding under the Tenth Schedule to the Constitution is
12 initiated or gets initiated as a part of disqualification of a member of the House, that
13 disqualification is by way of defection. The rules prescribed by various legislatures including
14 the UP Legislature contemplate the making of an application to the Speaker when there is a
15 complaint that some member or members have voluntarily given up his membership or their
16 membership in the party. It is only then that in terms of Tenth Schedule, the Speaker is called
17 upon to decide the question of disqualification raised before him in the context of para 6 of the
18 Tenth Schedule. Independent of a claim that someone has to be disqualified, the scheme of the
19 Tenth Schedule or the rules made thereunder, do not contemplate the Speaker embarking
20 about an independent inquiry so as to... inquiry as to whether there has been a split in the
21 political party or there has been a merger. Therefore, in the context of 102 and 191 the scheme
22 of the Tenth Schedule to the Constitution, we have no hesitation in holding that the Speaker
23 acts under the Tenth Schedule only on a claim of disqualification being made before him in
24 terms of para 2 of the Tenth Schedule.

25

26 And now My Lords kindly read this with para 37 and then I'll come back to one more para I
27 need to show. Please first have para 37, PDF page 862 My Lords. My Lords have para 37?

28

29 **JUSTICE KOHLI:** Yes.

30

31 **MR. KAUL:** Thus, in the above decision, it is being clarified that it is not enough that a claim
32 is made on a split in the original party. In addition to showing that one-third of the members
33 of the legislature party have become out of the party, but it is necessary to prove it at
34 least *prima facie*. They say *prima facie* yes. But all the time emphasizing on this whole thing
35 that the Speaker will embark upon a full-fledged inquiry into the political party, the taluka, the
36 districts and decide on a split in a political party, is without jurisdiction. Quite apart from the
37 fact that you are seeking to draw an artificial distinction which does not exist. And I'll come to

1 that judgment. That para of Sadiq Ali. I will show to Your Lordships which is important for
2 this. Now, My Lords kindly have only for that other issue of ex post facto, I'll just sum it
3 up. On para 34 of the same judgment. I just need to show that

4

5 **JUSTICE NARASIMHA:** Here comes the test. The test is here.

6

7 **MR. KAUL:** Yes. 860. 860. Para 34. My Lords have that?

8

9 **JUSTICE NARASIMHA:** Yes.

10

11 **MR. KAUL:** As we see it, the act of disqualification occurs on a member voluntarily giving up
12 his membership of a political party, or at the point of defiance of the Whip issued to him.
13 Therefore, the act that constitutes disqualification, in terms of para 2, of the Tenth Schedule
14 is the act of giving up or defiance of the Whip. The fact that a decision in that regard may be
15 taken in the case of voluntarily giving up by the Speaker at a subsequent point of time cannot
16 and does not postpone the incurring of disqualification by the act of the Legislature. Similarly,
17 the fact that the party could condone the defiance of a Whip within 15 days, or that the Speaker
18 takes decision only thereafter in those cases, cannot also pitch the time of disqualification as
19 anything other than the point at which the Whip is defied. Therefore, in the background of the
20 objects sought to be achieved by the 52nd Amendment of the Constitution and on a true
21 understanding of para 2 of the Tenth Schedule with reference to other paragraphs of the Tenth
22 Schedule, the position that emerges is that Speaker has to decide the question of
23 disqualification with reference to the date on which the member voluntarily gives up his
24 membership or defies the Whip. It is really a decision *ex post facto*. It is in this connection that
25 the observation is made that subsequent facts of split, seeking a defence of split under the
26 Tenth Schedule will not be looked at. You will see on the day you went to meet the Governor,
27 in the facts of this case, some of the MLAs with the opposition party and asked the Samajwadi
28 Party to form the Government was an act which was squarely hit by 2(1)(a). And that is why
29 My Lords, I had respectfully submitted and read out instances of Ravi Nayak of this judgment.
30 They were overt acts under 2(1)(a). Yediyurappa's judgment clearly stays merely because
31 within the party I say I do not support a particular coalition of a Government is not a 2(1)(a)
32 case at all in the matter. In any case,
33 My Lords, who will decide it, whether it's a 2(1)(a) case or 2(1)(b) case? It still has to be
34 the Speaker under para 6, who is the sole and exclusive constitutional authority to decide it.
35 So, (a), I'm not a 2(1)(a) case.
36 (b), Yediyurappa is held merely because you showed support to a Government is not
37 a 2(1)(a) case.

1 And thirdly, My Lord, in facts of these cases, the facts which have to be seen as the facts on
2 that date. The *ex post facto* in that context. *Ex post facto*, doesn't mean that since your
3 disqualification will be decided on the date you incurred it, all your acts as a Members of
4 Parliament or members of the Legislative Assembly get annulled in the process. And that is
5 the deduction sought to be drawn now from the words *ex post facto* in Rana's judgment.

6 Now My Lords kindly have, just last two judgments and I'm done. Kindly have
7 Rameshwar Prasad versus Union of India, same volume bookmark 16, para 165. Relevant
8 para 165 is at page 521.

9

10 **JUSTICE NARASIMHA:** What's the... sorry...page?

11

12 **JUSTICE SHAH:** PDF page?

13

14 **MR. KAUL:** PDF page 521.

15

16 **CHIEF JUSTICE CHANDRACHUD:** Same compilation?

17

18 **MR. KAUL:** Same volume 521. My Lords have para 165? May I My Lords?

19

20 **CHIEF JUSTICE CHANDRACHUD:** Yes.

21

22 **MR. KAUL:** If a political party with the support of other political party or other MLAs, takes
23 a claim to form a Government and satisfies the Governor about its majority to form a
24 stable Government, the Governor cannot refuse formation of the Government and override
25 the majority claim because his subjective assessment that the majority was cobbled by illegal
26 and unethical means. No such power has been vested with the Governor. Such a power would
27 be against the democratic principles of majority rule. Governor is not an autocratic
28 political ombudsman. If such power is vested in the Governor or the President, the
29 consequences can be horrendous. The ground of mal-administration by a state government
30 enjoying majority is not available for invoking power of 356. Remedy for corruption or
31 similar ills, or evil lies elsewhere, and not on Article 356. In the same vein, it has ought to be
32 held that power under Tenth Schedule for defection lies with the Speaker of the House, and
33 not with the Governor. The power exercise by the Speaker under the Tenth Schedule is of
34 judicial nature. Dealing with question where the power of disqualification of members of the
35 House rests exclusively with the House to the exclusion of the judiciary, which in Britain was
36 based on certain practices of the Legislature, as far as concerned, it was said in Kihoto. It is
37 therefore inappropriate to claim that determinative jurisdiction of the Speaker or the

1 Chairman of the Tenth Schedule is not a judicial part, is within the non-justiciable legislative
2 area.

3 So the reason I'm citing this judgment My Lords, is for the fact that for a). of course, we say
4 that the Chief Minister lost his majority, the coalition government could not survive. We within
5 the party, were the overwhelming majority. And even if their argument was to be accepted,
6 which I am not conceding, that, 'Oh, you cobbled it up together in an illegal, mean, etc.', which
7 it is not. It was a perfectly legitimate government which was sworn in. The Governor is not to
8 sit on these matters and make his assessments if a probable, plausible coalition or partnership
9 comes before it and says... because ultimately, at the end of the day, someone has to head a
10 government My Lords. My Lord, the Chief Justice posed a question to me yesterday. After the
11 sitting Chief Minister resigns, someone has to be sworn in? Now, if a set of people come and
12 show that they have a sizeable or an overwhelming majority, he says go and test it on the floor
13 of the House. And what time does he give? Two days to do it. And Your Lordships have
14 normally said, those cases, where you are given a month, two months, and that is that is scope
15 for horse trading, etc. He immediately calls for a floor test in exercise of his Constitutional
16 duties and obligations and says, prove your majority. If you are the new government which is
17 taking its claim within the same political party, now in coalition with another political party
18 who's a pre-poll ally, what is wrong with that decision of the governor? Within two days.

19

20 Now My Lords, kindly have lastly, Sadiq Ali for a completely different proposition. Volume 2,
21 bookmark 39 PDF 85, at 98. Volume 2, bookmark 39 - The judgment starts at
22 page PDF 85, relevant para at PDF 98.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Para?

25

26 **MR. KAUL:** Para 27, page 98. Before I proceed to theMy Lords the Chief Justice, can
27 I.. before I proceed to read the judgment My Lords, the reason I'm citing it is, I right through
28 said, apart from all other arguments that you cannot segregate the two. One of the principal
29 argument for recognition of a political party under 6A and 6B of the Symbols Order... those
30 provisions I have not read... of 6A and 6B for a continued recognition and recognition of a
31 political party, is the number of percentage of votes polled by MLAs, MPs, its strength in the
32 House. These are all relevant factors. So what happens in the Legislature can't be just kept
33 aside. That's a relevant consideration within it. So to say that they're two completely distinct
34 things and political party is distinct and legislature party is distinct, is not correct. And that is
35 what Sadiq Ali also notices in this paragraph, is what I wanted to show it for. The other paras,
36 My Lords. I'm not bothering Your Lordships on all those powers of the EC because we are not
37 getting into that. It may be mentioned that according to para 6 of the Symbols Order, one of

1 the factors which may be taken into account in treating a political party as a recognized
2 political party, is the number of seats secured by that party in the House of people or the state
3 legislator assembly, or the number of votes polled by the contesting candidates set up by the
4 such party. The number of seats secured by a political party or the number of votes cast in
5 favour of the candidate of a political party, can be a relevant consideration for recognition of a
6 political party. One is at a loss to understand as to how number of seats in Parliament, state
7 legislatures held by supporters of a group of political party, can be considered to be irrelevant?
8 We can consequently discover no error in approach of the Commission in applying the rule of
9 majority and numerical strength for determining as to which of the two groups of Congress J
10 and Congress O was the Congress Party for the purpose of para 15 of the Symbols Order. Now
11 that is a separate matter which Your Lordships are dealing with where this has also become
12 one of the considerations. And this para on Sadiq Ali that other matter that your Lord shows
13 are dealing with. That this is one of the indicators, valid indicators available. So, to come and
14 say that you've only done it in the legislature party, there's nothing in the political party. And
15 there their entire argument, My Lords was, with great respect, that on 18th, you had a meeting
16 and you showed the minutes of 27th. It's factually wrong, I'll argue it there in that matter;
17 they're two separate meetings. There are factually incorrect statements made that you had a
18 meeting on the 18th, but there are no minutes, there are no signatures. That's not the subject
19 matter of the reference before Your Lordships at all. And I'll argue it there that there were two
20 separate meetings, requisite members attended it, and please do not confuse the minutes of
21 one meeting with the holding of another meeting.

22 My Lords I am very, very grateful. Your Lordships I mean, extremely kind and patient. I'm
23 extremely grateful My Lords. And the three notes I have given. I am extremely grateful.

24

25 **CHIEF JUSTICE CHANDRACHUD:** Thank you Mr. Kaul. Who will now argue? Mr.
26 Jethmalani will argue?

27

28 **MR. JETHMALANI:** I am told Mr. Salve has logged in. So he will just give a brief submission
29 first.

30

31 **MR. SALVE:** Can you hear me now?

32

33 **CHIEF JUSTICE CHANDRACHUD:** Yes Mr. Salve.

34

35 **MR. SALVE:** Yes. My Lord a short submission. I mean, Mr. Kaul has addressed
36 Your Lordship on issues which perhaps don't arise really, if Your Lordship sit back and
37 consider. What is it that your court has called to decide today? I mean, we have answered

1 everything on merits, but if Your Lordship take a step back and see what is it that Your
2 Lordships need to decide. The first step in this entire saga was....

3

4 **CHIEF JUSTICE CHANDRACHUD:** Mr. Salve is appearing for whom?

5

6 **JUSTICE KOHLI:** Mr. Salve, who do you appear for?

7

8 **MR. SALVE:** Yes, I'll just give Your Lordships the number.

9

10 **JUSTICE KOHLI:** Sorry. Who are you appearing for?

11

12 **CHIEF JUSTICE CHANDRACHUD:** Same set of arguments.

13

14 **MR. KAUL:** There are many respondents.

15

16 **CHIEF JUSTICE CHANDRACHUD:** There are different respondents.

17

18 **JUSTICE KOHLI:** Another set of petition.

19

20 **CHIEF JUSTICE CHANDRACHUD:** There you have told me to distinguish the case of the
21 Governor because the Governor will be represented by...

22

23 **MR. SALVE:** The Solicitor.

24

25 **SOLICITOR:** Client is not My Lords, in any case....there is no confusion about whom I
26 appeal.

27

28 **CHIEF JUSTICE CHANDRACHUD:** And the rest of Mr. Kaul, Mr. Salve,
29 Mr. Jethmalani...

30

31 **MR. SALVE:** We will give appearances.

32

33 **CHIEF JUSTICE CHANDRACHUD:** For the Individual party.

34

35 **MR. SALVE:** That's right.

36

37 **CHIEF JUSTICE CHANDRACHUD:** No problem.

1
2 **MR. SALVE:** The only thing I wanted to broadly respond to is Mr. Sibal's broad
3 submissions about what role the court should take onto itself to prevent political immorality.
4 This is a very slippery slope and Your Lordships have always resisted the temptation in certain
5 areas to go beyond a particular point. Interpreting the Tenth Schedule undoubtedly will be
6 inspired by the objects of the Tenth Schedule, namely to bring in a degree of political morality
7 in public life. But beyond that My Lord, I would submit for the court to embark on this
8 journey would be extremely perilous because there are very delicate balances between
9 institutions involved here. Mr. Uddhav Thackeray resigned. The Governor called for a floor
10 test of a sitting Chief Minister. There was no floor test held. The submission is if he had not
11 called for the floor test, and if this had happened, and if that had happened, he would have
12 won the floor test. A submission which Your Lordships should not even countenance for the
13 reason we do not know what happens in that part of the world when it comes to defending the
14 majority of a Chief Minister. And My Lords it becomes even more perilous in today's day and
15 today's world of coalition politics. How do you know who would have supported whom on that
16 momentous day? What if one of his coalition partners had said, 'sorry, I can see that you've
17 really lost support of your party. We don't want to support you anymore.' We don't know. And
18 it is not for us to understand, because these are matters beyond our understanding as lawyers.
19 So My Lords this entire submission that Your Lordship must assume a state of facts would
20 have prevailed is extremely hazardous, because this is in the realm not of legal fiction. This is
21 in the realm of the rough and tumble of politics and I'm not suggesting any political
22 immorality. My Lord why can it not be that two coalition partners say, 'We will not support
23 you anymore. We have lost faith in your ability to steer the ship.' We don't know whether that
24 would have happened. Would it have happened? Would it not have happened? How
25 can Your Lordships be invited to hazard that guess that if this had not happened, the but-
26 for test My Lord, which we call in our... in commercial law for bridge the but-for test cannot
27 apply here.

28
29 Yes, if Mr. Thackeray had contested the floor test, if he had lost by 10 and Your Lordships felt
30 16 disqualifications were affected, the court could have said, we need to fix this problem
31 because of our refusal to grant the test. Because Your Lordships said we will not stay the floor
32 test. We will make it subject to our judgment. And Your Lordship should have been in a
33 position to correct what went wrong. My Lord I know it's a much more mundane world
34 in board rooms and in company general meetings. But the principle is the same. Somebody
35 says so and so should not be allowed to vote, Your Lordships said count his vote separately
36 and we'll see what happens to the resolution. And the reason is, suppose he had contested the
37 floor test and lost by 70 votes, all this becomes academic. Yes, if they have defected, is the sin

1 of defection purged? Maybe not. So My Lords that's the first point which I wanted to make. If
2 that has happened and if I am right there that Your Lordship cannot and should not embark
3 on any but-for assumptions here. Because we do not know what would have happened on that
4 fateful afternoon. Please My Lord consider another scenario, I'm only giving this not because
5 I'm saying this would have happened, I'm saying this could have happened. Only to persuade
6 Your Lordships not to go down this road.

7 Let's take another scenario. These 16 were guilty of overt an overt act. They did not show up
8 for a meeting, somebody says that constitutes abandoning your party. Another 20 people may
9 have done something by which you say they have done an overt act. What do you know is
10 lurking in the minds of others. Look at what happened and just to buttress this point look at
11 what happened when Shinde came for his floor test. 13 of hardcore so-called supporters of Mr.
12 Thackeray abstained from voting, which basically meant it strengthened his hands. Now these
13 things happen in public life. How do you know how many more were not harbouring the
14 intention of walking away that day? So My Lords these are all.... All I'm saying is, this is
15 rank speculation as far as we are concerned. The politicians may feel that they knew what was
16 going on. And we've had and I'm just bringing it to Your Lordships' notice, Your Lordships
17 know this. We've had a very strange situation in this very state, in this very formation where
18 one Government was sworn in and within three days that Government fell and
19 another Government had to be sworn in. So My Lords these things happen and the person who
20 got sworn in as the Deputy Minister with another formation became Deputy Chief Minister.
21 These fast moving political waters take different turns at different points My Lords. We are
22 not to speculate about that. Now, if I'm right there then My Lords, that should be the end of
23 the matter. What is the Speaker's Constitutional obligation? The general Bommai principle
24 which Your Lordship has been shown in para 395 of Bommai is, that please, Mr. Speaker, do
25 not do a mathematics. And Mr. Governor, please do not do this mathematics of but-for. Call
26 for the floor test. Let this be decided on the floor. My Lord when Governors
27 have sacked Governments doing head counts, Your Lordships have taken him to tasks saying
28 you're failing in your job. Why? Because it is not for the Governor to count heads. What Mr.
29 Sibal and Dr. Singhvi are trying to do is persuading Your Lordships to count heads.
30 Because unless you do a head count, Your Lordship must then come to the firm conclusion
31 that the but-for these, Uddhav Thackeray would 100% have won. That's head counting. So,
32 what Your Lordships said, the Governor shouldn't embark upon, now the judiciary is being
33 asked to embark down that road. Nothing can be more perilous than that in my submission.
34 Yes, we have a problem.

35

36 We have a problem. We have the Tenth Schedule. Is the Tenth Schedule a perfect
37 solution? No, it's not. It has its leaks. Parliament... when the legislature sometimes tries to fix

1 it, sometimes there are conflicting interests; it is not fixed. My Lord the biggest example we
2 have of criminalization in politics. We've had this problem all the while. We have problems
3 about election donations, we have problem about elections funding, we have problems about
4 election spending. These are all problems My Lord we can't cross beyond a point. So My Lord,
5 first of all, I submit the first set of cases don't arise. Then comes the second situation - what
6 did the Governor do? He is left in Maharashtra without a Chief Minister. If he is left
7 in Maharashtra without Chief Minister, he has to invite somebody to form the government.
8 Now here, then two options - he has invited Mr. Shinde to form the government. Should he
9 have allowed Mr. Shinde to continue without a floor test? That would have been worse than
10 conducting a floor test. So My Lords, where are we in this case? Everything is academic. Yes,
11 the only thing which remains is the 36 pending disqualification petition which the Speaker will
12 decide. And if he gets them wrong, there is the High Courts which will correct
13 them Your Lordships. They are here which will correct them. Yes. Within the parameters of
14 judicial review, Your Lordship have tested and corrected these orders time and again. That
15 is My Lord my first submission.

16

17 My second submission is, what happens pending the disqualification petitions? Your Lordship
18 have been shown the judgments. But let's... Sometimes it helps, let's go back on first principles.
19 Please see two provisions of the Constitution, and whether Your Lordships find the answer
20 there. 190...

21

22 **CHIEF JUSTICE CHANDRACHUD:** We have seen that actually?

23

24 **MR. SALVE:** Your Lordship has seen it.

25

26 **JUSTICE NARASIMHA:** We have seen it.

27

28 **MR. SALVE:** The point which I wanted to make is just show Your Lordships of something in
29 the language of 190, just for two minutes.

30

31 **JUSTICE NARASIMHA:** 190 is Parliament. We are more concerned about 180....

32

33 **MR. SALVE:** The language is identical.

34

35 **JUSTICE NARASIMHA:** Identical, correct.

36

1 **MR. SALVE:** The principle of the two is very important. Let's see... compare the equivalent
2 provision My Lords. First see 173. These are qualifications. Person not qualified to fill a seat. I
3 don't need to trouble Your Lordships with the details. And then we come to 190, which
4 is Houses of the State of Legislature. So we are really concerned with 190, because we are
5 talking about state. And 190, sub-article 2 tells, Your Lordships, 'No person shall be a member
6 of two or more specified then after the expiration of the period, etc.' We are not
7 concerned, because we are really concerned with Sub-Article 3A - 'Becomes subject to any of
8 the disqualifications in one or two of 19... of 191'. So we My Lord, go to 191. 191 applies to at
9 both stages, for being chosen and for being a member.

10 B, C are post occurrence of events.' Unsound mind and stand so declared by competent court.
11 A pendency of a petition in a court to declare somebody incompetent is not good
12 enough.' Impending insolvency is not good enough. Look at E now My Lords. 'If he is not so
13 disqualified by or under any law made by Parliament.' Now today Your Lordship was told
14 eloquently of how terrible it is to allow those hit by Tenth Schedule to continue. My Lord it is
15 not every time that there is corruption because of which there is defection. There may be times
16 or people may defy a Whip. There may be time there may be a split in a political party. Now
17 that sub-article 3 has gone, you have a problem and people may say, 'We will brave
18 disqualification, but this Chief Ministry has to go.' But look at My Lord, the Representation of
19 People Act. You may have a person who's elected which there are allegations of
20 booth capturing, of violence. I remember My Lords once somebody was arguing the case for
21 one of the persons from Bihar My Lord, who was in jail and saying he should be allowed to
22 come. Mr. Tulsi was arguing, and he told Justice Nanavati, he said, 'See, the majority by which
23 my client has won the election.' Justice Nanavati said, 'If your client had had his way, he would
24 have had no opponent. Killed all of them.' So My Lords those kind of cases are
25 pending. A person, a known mafia king against whom there was a murder trial pending for
26 publicly gunning down people, continued in office.

27

28 **CHIEF JUSTICE CHANDRACHUD:** Where does it...?

29

30 **MR. SALVE:** My Lords we have cases and Your Lordships have dealt with these cases in
31 the High Court and sometimes in appeal in this Court. You have cases of the worst kind of
32 electoral offenses pending for trial. What happens to those people? They continue in office. So
33 My Lords there is nothing so shocking that in our system many times people continue in office
34 where there are serious allegations pending against them. That's the bane of our system. Now
35 with that, My Lords see the language of 191(2). 'A person shall not, shall be disqualified for
36 being a member, if he is so disqualified under the Tenth Schedule.' So that disqualification
37 must take place. And that disqualification in the Tenth Schedule does not take place until there

1 is a decision of the Chairman or the Speaker under paragraph 6. Any other view My
2 Lord would be equally or would be far more disastrous because today all you have to do then
3 paralyze.... to paralyze the working of an assembly is to file disqualification petitions.
4

5 **JUSTICE NARASIMHA:** Mr. Salve, till here there is no problem. The position under the
6 Constitution is very clear. And also the judgments of this court concluded with this expression
7 the decision. The problem arises, the time, context and the stage at which Speakers choose to
8 take a decision.
9

10 **MR. SALVE:** Yes. I was going to straightway address....
11

12 **JUSTICE NARASIMHA:** In that context that...
13

14 **MR. SALVE:** ...No My Lord...
15

16 **JUSTICE NARASIMHA:** either that he shows over anxiety to immediately decide violating
17 principles of natural justice or he just doesn't decide for times to come. So in context of...
18

19 **MR. SALVE:** The short answer...
20

21 **JUSTICE NARASIMHA:** Pending Tenth Schedule proceedings....
22

23 **MR. SALVE:** Yes.
24

25 **JUSTICE NARASIMHA:** The powers to be exercised either by the Governor or the political
26 process as it were goes on. So makes the application redundant many a times...
27

28 **MR. SALVE:** My Lords May I respectfully answer?
29

30 **JUSTICE NARASIMHA:** Sure.
31

32 **MR. SALVE:** This has been the biggest problem of appointing a Speaker. Mr. Sibal was right
33 when he said, Your Lordships express hope and faith that the institution of the Speaker will
34 rise above politics, where it comes to the Tenth Schedule. Our experience may not have fully
35 risen up to those expectations. But that's where we have to drop that. The point My
36 Lords is this.
37

1 **CHIEF JUSTICE CHANDRACHUD:** Yes.

2

3 **MR. SALVE:** My Lords, respectfully answering Justice Narasimha's question. If Your
4 Lordships have seen the rules here have in one sense, a constitutional status because the rules
5 are framed as a delegate under paragraph 8. And those rules can and should provide a time
6 frame in which these petitions have to be decided, both giving fair opportunity. So it.... these
7 rules normally say you'll give so much time for giving a reply. One of the reasons why our group
8 came to court is even that time was not given. And equally perhaps it's time has come for the
9 rules to say if a petition is filed, he shall, unless there are compelling reasons to the contrary
10 dispose it off in 90 days or 60 days or something like that. And there My Lord, then judicial
11 review will come in if a Speaker is dragging his feet and the rules say he must decide it, absent
12 compelling reasons within a given frame of time, judicial review will come in. You can go to a
13 High Court and say issue a writ mandamus directing him to dispose off because then you will
14 have a legal right to ask for a decision within a given time. So My Lords, these are the only
15 ways in which Your Lordships can address this lacuna.

16 Now, what is this relating back? Relating back has two dimensions. The event has taken place,
17 so ultimately the subsequent events will not affect it will not efface the wrong which you have
18 committed, the political wrong which you've committed, which disqualifies you. It's over. If
19 you enter into an office of profit you are disqualified. If you resign three months later from
20 that office of profit, it is not saved. You are disqualified on that date. So My Lords that
21 disqualification is based on a set of events. But please consider the consequences which will
22 be contrary to the terms of the Constitution, which says no act of the House shall be declared
23 invalid merely because a member participated, who was not entitled to. Now, first of all, here
24 you are entitled to participate. But even if a wrong person comes in, you cannot go
25 annulling the work being done. Today My Lords, if when the defection petitions are decided, if
26 some of them are allowed, in between laws have been made, resolutions have been passed by
27 the House, all of them can't be revisited. So My Lords, that's the respectful answer to
28 the *ex post facto* point, that as a matter of law, and My Lords, I read since Your Lordships
29 have kept his question back...

30

31 **CHIEF JUSTICE CHANDRACHUD:** What are you saying Mr. Salve? As a matter of law?

32

33 **MR. SALVE:** it's a matter of law My Lord, I read the Nabam Rebia judgment, not as laying
34 down an absence of power, but as laying down a code of conduct. Let me explain what I
35 mean My Lord. The Speaker...

36

1 **CHIEF JUSTICE CHANDRACHUD:** Mr. Salve, in a sentence, can you just summarize
2 your *ex post facto*. On *ex post facto* what is your...? So if you just formulate it, we can take it
3 down then, you know.

4

5 **MR. SALVE:** Yes. My formulation of *ex post facto* is as follows. The disqualification will have
6 to be decided on the basis of the acts and omissions of the allegedly delinquent member on
7 that date. But, subsequent events will not cure that. If on that date, you defied a party Whip
8 which was lawfully issued, that's the end of the matter. The fact that the party
9 collapsed thereafter is neither here nor there, if it is pursued to its logical end. That wrong has
10 been committed. And I give, My Lord, the example of somebody who takes an office of profit.

11

12 **CHIEF JUSTICE CHANDRACHUD:** If you can just continue to sort of complete the
13 formulation? I got that that the disqualification will have to be decided on the basis of the
14 acts of omissions of the allegedly delinquent member on that date, and subsequent
15 (UNCLEAR) will not be, will not... Mr. Kaul also has said.

16

17 **MR. SALVE:** Will not efface.

18

19 **CHIEF JUSTICE CHANDRACHUD:** What is the sequitur? What is the sequitur? How do
20 you formulate it?

21

22 **MR. SALVE:** However, until the date of decision, the person is entitled to participate
23 and Article 189, sub-article 2 makes it clear that his acts, his functioning in the House, in the
24 interregnum does not vitiate any actions of the house. If this is so My Lords, we have no
25 problem in reconciling to the fact that people with the most serious allegations of having been
26 elected by wrongful means such as booth capturing, threatening witnesses or rampant
27 corruption in election, also continue in office. That's one of the banes of our system till such
28 time as a election tribunal declares them to be wrongly elected, disqualified. That's the way it
29 is. So My Lords, my respectful submission is that, yes, the rule should be amended. Speaker
30 should... decision-making should be made time-bound, judicial review will be available
31 where a Speaker is holding back. All those are ways which we can fix this. But My Lords, the
32 legal consequence of the pendency of these proceedings and its ultimate decision, this is the
33 principle of *ex post facto* which must apply. No less, but no more.

34

35 **CHIEF JUSTICE CHANDRACHUD:** Anything else, Mr. Salve? We got the *ex post facto*...

36

1 **MR. SALVE:** Yes. Third point which I wanted to make My Lord is, since the point is still in
2 play - the Nabam Rebia judgment. And I had, My Lords, given a note earlier. I believe
3 Mr. Trivedi had handed it over, Mr. Jethmalani had handed it over.

4

5 **JUSTICE SHAH:** Last time you read also when you appeared.

6

7 **MR. SALVE:** Yes. No, after that I gave a note My Lord. I read the judgment as more, not the
8 absence of power, but the manner of it exercise. So it is by filing a disqualification or rather a
9 removal of Speaker. Because all those provisions are shown to Your Lordship saying
10 the Speaker doesn't, as a matter of law, is not put in suspension. They are right. So there is no
11 absence of power. I was My Lord only saying....

12

13 **CHIEF JUSTICE CHANDRACHUD:** It's about the manner of exercise rather than the
14 absence of power.

15

16 **MR. SALVE:** Correct. Because My Lord abuse of Constitutional power is a head which we
17 now recognize the judicial review. My Lord is Chief justice saying something to me? I can't
18 hear.

19

20 **CHIEF JUSTICE CHANDRACHUD:** You don't read Nabam Rebia as an absolute principle
21 that the Speaker is disabled from exercising his jurisdiction when there is a motion for his
22 removal pending.

23

24 **MR. SALVE:** No.

25

26 **CHIEF JUSTICE CHANDRACHUD:** It's a caution to the Speaker and ultimately, it's for
27 the Speaker to take a call, whether you know, if there's a frontal assault on his continuance,
28 whether he would like to go ahead with the hearing of the disqualification petition.

29

30 **MR. SALVE:** Correct. And as I read that judgment Your Lordships have not said that
31 the Speakers ceases to have power. But...

32

33 **CHIEF JUSTICE CHANDRACHUD:** What you're telling us would be either to sort of
34 restrict it a little bit or put a gloss on the judgment. I mean, if you really read those...

35

36 **MR. SALVE:** My Lord, we always...Judgments are not statutes, and we always learn to
37 understand them. Sometimes when things are written. My Lord, those facts were very stark.

1 So maybe the language used was a little strong. But I read that judgment because please see My
2 Lords the analysis. And Your Lordships have read the judgment. I'm not going to waste your
3 time reading it. The facts were so stark. What really, Your Lordship was doing is that
4 there...are saying it that the Speaker had no business to do this. The actions of the Speaker in
5 that case My Lord were open and shut case of abuse of power. It's the finding. So I don't read
6 that judgment as absence of power. Your Lordship never said that he ceases to have. There are
7 50 other things the Speaker does My Lord. He runs the whole administrative office of the
8 legislature. Surely he's doing all that. It's only in one area that the Speaker should not act. If
9 there is pending consideration of all these rumpus. If there was any other resolution, of course,
10 he would preside and run the House. So once Your Lordships read that judgment that
11 way that what really the court was trying to say is, not an absence of power, but the actions of
12 a Speaker will be tested. A Speaker should have put to caution when there is a notice, when
13 there is a removal. His actions will be testing on well-known principles of abuse of power.
14 Then My Lords the concern which Your Lordships have would go away with that judgment
15 being read as absence of power.

16

17 And finally My Lord if I may just hark back a little to my first opening point. Apart from this
18 understanding of the Nabam Rebia judgment, nothing else really survives. There is a note
19 which I believe is placed at note J.

20 My Lords I believe, I'm sorry, my friend informs me my earlier note saying what I have just
21 formulated for Your Lordship's consideration is in note F, and there is yet another note, note
22 J.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Filed last night.

25

26 **MR. SALVE:** Yes. This is only to show the hazards of the but-for test. I was just told My Lords
27 that it is marked as note J.

28

29 **JUSTICE KOHLI:** It says written submissions. It doesn't say note J.

30

31 **MR. SALVE:** It says brief note on arithmetic for hypothetical trust.

32

33 **CHIEF JUSTICE CHANDRACHUD:** Mathematics.

34

35 **MR. SALVE:** Yeah, it's just the math. My Lords this is only to indicate to Your Lordships that
36 this but-for test is extremely hazardous to guess what would have happened on that
37 fateful day, had a trust vote taken place is inviting rank speculation. F is the earlier one on the

1 Constitution Bench Judgment the Nabam Rebia judgment. And this note J only sets out...I'll
2 quickly tell Your Lordships what we have basically said. I have given different places where in
3 the writ petitions they have mentioned.

4

5 Basically My Lord, please gives you at one place, It's not as, there is no big deal, Your
6 Lordships knows it is there. Basically what we are trying to say is, we've given Your
7 Lordships the para numbers and the page numbers. If Your Lordship sees from paragraph 3,
8 on 23rd June only 16 disqualification petitions were filed. Let's be very clear My Lords of a
9 few dates. On 25th June, Speaker issues notice to 16. The order of Your Lordships on
10 27th June was limited to 16. The suggestion that there was 39 or 40 disqualifications, in
11 fact look at 4-C. There are two of them who are independent. They may have vote one way or
12 the other, their party to decide whether they consider it a breach. No prayer in any of the
13 petition that 39 or 40 should not be allowed to vote. So My Lords these figures which are being
14 given and I have given Your Lordships, the shifting stands in different places. And I again
15 underscore the point. This was only.....

16

17 **CHIEF JUSTICE CHANDRACHUD:** Mr. Salve, Mr. Sibal, all of you. What you are
18 thinking, was that Mr. Salve, roughly...

19

20 **MR. SALVE:** I'm done in five minutes.

21

22 **MR. SIBAL:** That's alright. But it won't finish now. It can't finish. There's no point.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Mr. Salve, you will take about five minutes?

25

26 **MR SALVE:** 5-7 minutes. I'll be done by lunch. 100%.

27

28 **CHIEF JUSTICE CHANDRACHUD:** Mr. Jethmalani, we're not at all rushing anyone of
29 you, because these are important matters at the moment. We are not just.... forget the stats,
30 but this is an important matter at the moment. So, how much would you take?

31

32 **MR. JETHMALANI:** For these circumstances about half an hour, but I could curtail it for
33 20 minutes, 25 minutes.

34

35 **CHIEF JUSTICE CHANDRACHUD:** That's half an hour. Then Mr. Maninder Singh? Half
36 an hour, all right. Mr. Solicitor?

37

1 **MR. SOLICITOR:** Few more minutes My Lord.

2

3 **CHIEF JUSTICE CHANDRACHUD:** Between the two of three of you it will take 2 hours?

4

5 **MR. SOLICITOR:** Realistically speaking, it may not be over.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Alright. Mr. Kaul one more thing. I thought we
8 curbed you unduly, and then you are gracious enough to follow our edict. The idea was to
9 finish today, but we may not be able to wrap up today. It doesn't appear that we will be able to
10 wrap it up today. In which case....

11

12 **MR. SIBAL:** Then let's have it on Tuesday then, My Lord.

13

14 **CHIEF JUSTICE CHANDRACHUD:** Mr. Kaul one more thing, is your conscience
15 clear that you know, are you satisfied that you have argued fully? Is there something which
16 you would have still liked to? Because as a judge who's seen so many seasons...

17

18 **MR. SIBAL:** Never give that opportunity to a lawyer My Lord.

19

20 **JUSTICE CHANDRACHUD SINGH:** You don't want to give the impression that you have
21 not...

22

23 **Mr. KAUL:** I would have like to take Your Lordships through some of the judgments, if
24 I could, which I would have liked to. But, what do I say My Lords to this, I can't... I leave it to
25 Your Lordships. I can't say...

26

27 **CHIEF JUSTICE CHANDRACHUD:** All right? What we will do is this. We will hear Mr.
28 Salve now and just... wrap it up, or we can... *kya karein?*

29

30 **MR. SIBAL:** Let's wrap it up and then have it on Tuesday, My Lord, soon after reopening.
31 That's the only way My Lords, on the reopening.

32

33 **CHIEF JUSTICE CHANDRACHUD:** What we can then do is on Tuesday, after we, after
34 we reopen, the three of you who have to now argue and.... Honestly, if there's something you
35 want to still show us in the morning after Mr. Salve has wrapped up, we'll give you a little
36 time... And anyway, there's no prejudice to Mr. Sibal, because you still have to re-join.

37

1 **MR. SIBAL:** Yes Yes... I'll re-join without the haste.

2

3 **CHIEF JUSTICE CHANDRACHUD:** Would it be all right to assess that on Tuesday in the
4 first session, the three of you will be able to finish?

5

6 **MR. SIBAL:** Yes.

7

8 **CHIEF JUSTICE CHANDRACHUD:** Right. Maybe so if you take...

9

10 **MR. JETHMALANI:** But are we not continuing this afternoon also?

11

12 **MR. SIBAL:** No, no. No need.

13

14 **CHIEF JUSTICE CHANDRACHUD:** They're now going spilling over beyond the...

15

16 **MR. JETHMALANI:** Then we get some more time also, isn't it?

17

18 **CHIEF JUSTICE CHANDRACHUD:** Then what we can do is we can keep it on Tuesday.
19 Mr. Salve, we'll hear you for five minutes on Tuesday?

20

21 **MR. SALVE:** Yes. Yes.

22

23 **CHIEF JUSTICE CHANDRACHUD:** You may want to just...

24

25 **MR. SALVE:** Very well.

26

27 **CHIEF JUSTICE CHANDRACHUD:** And then Mr. Kaul, if you still want to make a few
28 submissions on your judgment, no problem. We'll hear you on that, because let's not go....

29

30 **MR. KAUL:** Yeah, very kind of Your Lordship. Very kind.

31

32 **CHIEF JUSTICE CHANDRACHUD:** Then Mr. Jethmalani and Mr... we'll hear the
33 Governor. And equally Mr. Sibal, we'll give you a full...

34

35 **MR. SIBAL:** That's right. Because there's lots of things that have been said, My Lord,
36 which...

37

1 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sarode, what is that you wanted to
2 say now? Don't say now, don't mention anything as there's no time.

3

4 **MR. SARODE:** No My Lord, I am intervener on behalf of the voters. I may be given some
5 time to narrate...

6

7 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sarode, if we allow interveners, there will be
8 interveners on this side, interveners on that side. Give us a small note of a page or so, we'll look
9 at your notes. No difficulty.

10

11 **MR. SARODE:** No My Lord, I'm supporting... I'm supporting Mr. Sibal sir and the party MY
12 Lord. But My Lord, the voter's side is very important as allowed by the Honourable Court.

13

14 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal, and Dr. Singhvi will be very happy with
15 your support, but I'm not sure they want you to support them in their courts. You can have a
16 word with Mr. Sibal. If you have some specific point, you know, which they have not covered,
17 then you can certainly have a chat with Mr. Sibal and give that point to him. And I'm sure
18 he will place it before us.

19

20 **MR. SARODE:** Yes My Lord, I will do that.

21

22 **MR. SALVE:** Very well then My Lord. On Tuesday I'll take ten minutes.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Justice Narasimha also, we have both been
25 discussing this also earlier. Justice Nariman's judgment on whether there should be a time
26 limit on the Speaker to decide what referred...

27

28 **MR. SIBAL:** Yes My Lord, I was going to cite that.

29

30 **CHIEF JUSTICE CHANDRACHUD:** We can note that and maybe we can....

31

32 **MR. SALVE:** I'll assist Your Lordship on that for 10 minutes on Tuesday.

33

34 **JUSTICE NARASIMHA:** Note the reference order, as you can note. 2016 SCC Online 1875

35

36 **MR. SIBAL:** That's Sampat My Lord. Not this. This is something different.

37

1 **JUSTICE NARASIMHA:** Meghchandra's reference.

2

3 **MR. SIBAL:** The other issue is My Lord where 90 days have been fixed
4 by Justice Nariman for the Speaker to decide.

5

6 **JUSTICE NARASIMHA:** Correct, correct.

7

8 **MR. SIBAL:** That's not that 2016.

9

10 **JUSTICE NARASIMHA:** I just got it from my law club. That must be a separate reference.

11

12 **MR. SIBAL:** That's Right.

13

14 **JUSTICE NARASIMHA:** Considered in that judgement. Please work on it.

15

16 **MR. SIBAL:** Yes.

17

18 **MR. SALVE:** Lordship please.

19

20 **CHIEF JUSTICE CHANDRACHUD:** Tuesday.

21

22 **MR. SALVE:** Tuesday.

23

24 **MR. KAUL:** Very Grateful.

25

26 **MR. SIBAL:** Obligated My Lord.

27

28

29

30

END OF DAY'S PROCEEDINGS

CHIEF JUSTICE'S COURT

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE M.R. SHAH
HON'BLE MR. JUSTICE KRISHNA MURARI
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE PAMIDIGHANTAM SRI NARASIMHA

Subhash Desai

v.

Principal Secretary, Governor of Maharashtra and Ors.

W.P.(C) No. 493/2022

Item No. 501

TRANSCRIPT OF HEARING

14-Mar-2023

11:00 AM IST

1
2
3 **MR. HARISH SALVE:** My Lords, I had made a submission last time about the Speaker's
4 conduct when he is fraught with emotion. And My Lords one of the things Your Lordships have
5 been considering is the problem about whether those were observations of the earlier
6 judgement of Nabam Rebia. Whether they are to be read as a Speaker being denuded of power
7 to act. Whether he is being subject to a code of conduct. My Lords one can perhaps put it more
8 on the manner of exercise of power as I submitted last time, rather than absence of power
9 because there are 50 other functions which a speaker has to do. A Speaker has administrative
10 jobs. He has to run the Assembly. There may be other things going on. Surely My Lord one
11 cannot suggest that the Speaker must sit at home and set it out since his motion is heard. There
12 is some check and balance within the system and Your Lordships have in the statute
13 compilation the Maharashtra Assembly Rules, and I believe there are similar rules in other
14 assemblies too. Your Lordships have Rule 11 which gives the time limit of 15 days. And My
15 Lord my respectful submission is, it might be...it may not be really feasible to say in black and
16 white, in what circumstances the Speaker should or should not act. Normally a person who is
17 under a significant challenge should not act. If My Lord a Speaker... look at our I mean now
18 academic, but the reason why we went to court is the Speaker did not even give the period
19 which we have to give for a reply under the rules. And it could be that the numbers were such
20 that the Speaker may have lost, most probably lost his position. Because My Lord one thing I
21 do want to restate, I said this the other day, we know paragraph 3 about split has been deleted.
22 One of the things which did prevail when Your Lordships upheld this law in Kihoto, has not
23 been an anti-dissent but anti-defection law is that if there is a sizable number of breakaways,
24 then it is not a defection. Then it is <UNCLEAR> because there is one has to balance the right
25 dissent with....

26
27 **CHIEF JUSTICE CHANDRACHUD:** But Mr. Salve then what is the sizable number of..

28
29 **MR. SALVE:** That's not for Your Lordships.

30
31 **CHIEF JUSTICE CHANDRACHUD:** But then <UNCLEAR> be bringing in split by the
32 back door.

33
34 **MR. SALVE:** No, no, I'm sorry. I'm not inviting the court to do that. I'm saying something
35 very different, My Lord. In fact, my respectful submission is Your Lordships has to take it as
36 you find it. There was a provision for a split which has now been deleted.

37

1 **CHIEF JUSTICE CHANDRACHUD:** So therefore the plain consequence is that a split goes
2 away as a defense completely.

3

4 **MR. SALVE:** I am sorry My Lord. I am not saying to the contrary.

5

6 **CHIEF JUSTICE CHANDRACHUD:** Whether it is 1/3rd or 2/3rd or...

7

8 **MR. SALVE:** It is to be ignored today. That's irrelevant. If you are found to have crossed the
9 line it's, no, it doesn't help you to say that the number of people who cross the line was more
10 than 1/3rd. But whether that law, whether Kihoto or Mr. Sibal also said maybe someday Kihoto
11 will have to be relooked, maybe even on this Kihoto will have to be relooked because has this
12 law crossed the line and become an anti-dissent law is something Your Lordship will consider
13 if the law is challenged. Because one thing My Lord which Your Lordships would consider.
14 Yes, we know there is a problem about political morality. But that problem is on both sides of
15 the fence. It cannot be once you are in, you lock the barn doors to say that a person becomes
16 Chief Minister if his entire legislative party is rebelling against him. You must wait till he goes
17 to the Election Commission, then they get the party split at the Election Commission level.
18 And then what happens? I go to the Election Commission and say we are the real party. You
19 come and have all your legislative members disqualified because no split now. So you come to
20 the Speaker and say, all my entire party is rebelled, throw everybody out. I am the sole person,
21 you can't remove me from Chief Ministership. This is surely not what the law was meant to be.
22 So all I'm saying is My Lord, yes, we know there is a problem. But and the Legislature has tried
23 to address it by bringing in the Tenth Schedule to the extent it has. But this over statement
24 saying because this is so, you must unscramble everything, you must transfer everything to
25 Supreme Court. A resigned Chief Minister must be asked by a mandamus to come back and
26 take office or is the accept of his resignation must be set aside? God knows My Lord, what sort
27 of reliefs have been asked for. So My Lord my respectful submission is, and even as far as the
28 Governor's concern, the Solicitor is addressing Your Lordship. But since one of the issues does
29 arise, is challenge to the Governor's Order.

30 My Lord, one thing which Bommai has laid down and laid down very clearly is that floor tests
31 are not to be in Raj Bhavan, floor tests are to be in the Assembly. Head counting is not to be
32 done in Raj Bhavans, because that is the root of a major evil. Whenever there is a question
33 mark on the ability of the Chief Minister to command confidence of the house, the Governor
34 must call for a vote of confidence. The Governor must not entertain people at Raj Bhavan and
35 do head counting. Now that is the law Your Lordships have laid down to prevent politics from
36 entering Raj Bhavan if at all that is possible. So My Lord, when the governor calls for a vote of
37 confidence, why should a Chief Minister continue in office even one day if he doesn't command

1 the numbers? So yes, there is a problem of horse trading. But you are also leading a party. If
2 there is a problem within your party, the problem is not only to be resolved in courts.

3 So My Lord my respectful submission is getting into this thicket is inviting Your Lordships to
4 depart from established Constitutional principles, which are judicially, manageable. We have
5 judicially manageable standards. Your Lordships have said floor tests are the test. Let
6 democracy play out in the floor of the House. That's a that's a lodestar of this law. The
7 Governor did nothing wrong in calling for a floor test.

8

9 **CHIEF JUSTICE CHANDRACHUD:** Yes Counsel.

10

11 **MR. SALVE:** Yes My Lord. So My Lord my...

12

13 **CHIEF JUSTICE CHANDRACHUD:** Yes Counsel.

14

15 **MR. SALVE:** Yes. So My Lord my respectful submission is on the three steps. As far as the
16 Nabam Rebia judgment is concerned, first of all that question doesn't arise and it's not a matter
17 which is free from difficulties. But if Your Lordships do... are pursuant to get into My Lord
18 relooking that judgement, then there has to be some discipline and that discipline can be
19 brought in by a doctrine which we understand and that's abuse of power. So My Lord, it's not
20 absence of power. It's the manner of it's exercise. And if in the facts of a case you find that
21 there is abuse of power, a Speaker has jumped a gun and done something which he shouldn't
22 have, the courts are there to remedy it. So My Lord that is the submission, as far as Nabam
23 Rebia is concerned.

24

25 Now My Lord, one other question, which had come up, which I mentioned and Your Lordships
26 are also seeing, can a mandamus be issued to the Governor to decide? My Lord that actually
27 stands answered because, although it had been referred to five judges, a later judgment
28 answers it My Lord based on the observations in Rana. But on first principles also, there
29 should be no difficulty if Your Lordship sees the Kihoto judgment on this. The problem which
30 is sort of the genesis of this submission is Paragraph 54 of Kihoto. It's in the compilation PDF
31 Page 111, the judgment compilation My Lord. And the limitation on judicial review comes out
32 of paragraph 7. And the question really is in one sense, a mundane question. What is the
33 meaning of the phrase quia timet action, or an interlocutory intervention which Your
34 Lordships have said is not permissible.

35

36 **JUSTICE KOHLI:** 54?

37

1 **CHIEF JUSTICE CHANDRACHUD:** 54 and...

2

3 **MR. SALVE:** Para 54 My Lord.

4

5 **JUSTICE KOHLI:** This is second compilation or third?

6

7 **MR. SALVE:** Second My Lord.

8

9 **JUSTICE KOHLI:** Second.

10

11 **JUSTICE SHAH:** Second compilation, judgment 2?

12

13 **MR. SALVE:** Judgment 2, PDF page 111 for that, at least the page which I have.

14

15 **JUSTICE SHAH:** Volume 1?

16

17 **MR. SALVE:** Volume 1.

18

19 **JUSTICE KOHLI:** Volume 1. Serial number 2 is Guru Gobind Basu...Kihoto. Yeah it is serial
20 number 6.

21

22 **MR. SALVE:** It is compilation Volume 1.

23

24 **JUSTICE KOHLI:** Okay.

25

26 **JUSTICE SHAH:** PDF page number?

27

28 **MR. SALVE:** PDF is Page 111. Para 54.

29 And this is My Lord, discussed in paragraph 7. Para 55 cites in fact the well known rule in Mask
30 and Company that this has to be strictly construed. And once Your Lordship has held that the
31 Speaker is a quasi judicial tribunal, then My Lord this has to apply in that sense. If Your
32 Lordship sees para 62, in the present case, though the amendment does not bring directly any
33 change in the language of 136, 226 and 227. However, in effect, para 7 curtails the operation
34 of the Articles and matters falling in Tenth Schedule. There is a change in so on so within the
35 meaning of Clause B of 368(2). Para 7, therefore attracts the passage and in regard to the
36 introduction of so and so in the Tenth Schedule, in effect, bring about a change in 136. So My
37 Lord, it is in this context that your Lordship said you cannot have a quia timet injunction in

1 para 54. Now today My Lord, law has moved far ahead including My Lord, the proposition that
2 even if by Constitution Amendment, you cannot water down 226, we have at the later cases.
3 But My Lord, I don't see this as a problem on the issue which Your Lordship is considering.
4 The later judgement, where Justice Nariman has gone into definitions, a three judge bench
5 2020 SCC Online, SC page 55 in this very bundle, Your Lordship will find it at page 1324.

6

7 **JUSTICE KOHLI:** What's the cause title, Mr. Salve?

8

9 **MR. SALVE:** It is Keisham Meghachandra Singh, and Speaker of Manipur.

10

11 **JUSTICE KOHLI:** Bookmark 32. There are two, 31 and 32 both.

12

13 **MR. SALVE:** I think this is 32. 31 was the first one.

14

15 **JUSTICE KOHLI:** Right.

16

17 **MR. SALVE:** 31. It is a bench of three learned judges. What Your Lordships did in this case,
18 because here this question came up Your Lordship, said we have referred it, but without
19 noticing that the matter already stands answered by Rana and the relevant passage straight
20 away, if I may cut to the chase My Lord, if Your Lordship comes straight to page 1332, PDF
21 para 20 citing from Rana. In fact My Lord, if Your Lordship turns to page 1331 from para 15
22 your Lordships are citing Rana's judgment and at the extracts in para 17 of this judgment,
23 which says after referring to the courts decision in Kihoto and Ravi Nayak in para 22, the court
24 held, then in para, Your Lordships extract para 22 suffice it to say decision of the Speaker on
25 6 September were not immune from challenge before the High court in 226, 227. The court
26 then went down to hold, then para 25 on the scheme of 102 and 191 of the Tenth Schedule. The
27 determination of the question of split of merger cannot be de hors from the motion before the
28 Speaker seeking the disqualification of member/ members definitely not possible to exceed
29 that under Tenth Schedule, Speaker as an independent power to decide if there has been a
30 been a split or merger as contemplated by para 3 and 4. The power to recognize a separate
31 group in Parliament may rest with Speaker on the basis of rules of business, but that is
32 different from saying that the power is available under the Tenth Schedule to the Constitution,
33 independent of a claim being determined or a number of members had incurred
34 disqualification. To that extent the decision of the Speaker on the hand cannot be considered
35 to be an order in the terms of the Tenth Schedule. The Speaker has failed to decide the question
36 he was told upon to decide by postponing a decision thereon.

1 My Lord this is the starting point of proposition. Therefore, there is a failure to do your duty.
2 It's a Tribunal which fails to do the duty. Then My Lord in the next para about six or seven
3 lines. There is a line which is underscored and says - 'The failure on the part of the Speaker to
4 decide the application seeking a disqualification cannot be said to be merely in the realm of
5 procedure. It goes against the very Constitutional scheme of adjudication contemplated by the
6 Tenth Schedule read in the context of 102 and 191 of the Constitution. It also goes against the
7 rules framed in that way have and the procedure he was expected to follow.'

8 And then My Lord, Your Lordships, if Your Lordships turn to Page 1332. The extracts in para
9 20 of Your Lordship's judgment. Your Lordships start by saying - 'The court then adverted the
10 scope of judicial review being limited as those decided in Kihoto as follows..'

11 And then My Lord after those passages in Kihoto, para 40 is set out My Lord, at the foot of
12 that page which says - 'Coming now to the case in hand. It is clear, Speaker in the original
13 order left the question of disqualification undecided. Thereby, he failed to exercise the
14 jurisdiction conferred on him in para 6. Such a failure to exercise jurisdiction cannot held to
15 be covered by the shield of para 6 of this schedule. He has also proceeded to accept that a split
16 being merely on a claim. He has entered now finding on the split in the original party was
17 prima facie proved or not. The action was apparently based on his understanding of the ratio
18 of Nayak. He misunderstood the ratio. Now that we have approved the reasoning and
19 approach of Jagjit Singh and the ratio is clear, it has to be held. Speaker is committed in error
20 which goes to the root of the matter. So fundamentally, even a limited judicial review has to
21 be interfered with. Therefore, no hesitation in agreeing. In view of our conclusions about
22 nothing turned on the arguments urged on what was described as significant facts on the
23 alleged belatedness of the amendment of the writ. It is indisputable, the order was originally
24 subjected to the writ, Speaker specifically refrained from deciding the petition. On our
25 reasoning clearly there was an error which attracted the jurisdiction of the High Court in
26 exercise of power of judicial review.'

27

28 So Your Lordships have said failure to decide itself is a jurisdictional error which can be
29 corrected under 226, reviewed under 226. This question already stands answered And then in
30 para 24 My Lord -- I will not take Your Lordship's time reading it beyond that one definition
31 in blacks.

32 'A quia timet is because you fear or you apprehend'. Now here, there is no fear or
33 apprehension. If a Speaker is not deciding something, there is no fear or apprehension. It
34 is...it's an established fact.

35 Then para 29 and 32, and then I'm done with this My Lord.

36 Para 29 is at the foot of page 1334 - 'The reading of the decision showed
37 that what was meant to be outside

1 the pale of judicial review in para 110 of Kihoto are quia timet actions in the sense of
2 injunctions to prevent the Speaker from making a decision on the ground of imminent
3 apprehended danger which will to be irreparable in the sense that if the Speaker proceeds to
4 decide that a person be disqualified, he incurs the penalty of forfeiting his membership of the
5 House for a long period. 110 and 111 of Kihoto do not therefore in any manner interdict judicial
6 review in aid of the Speaker arriving at a prompt decision as to the disqualification in the
7 provision of the Tenth Schedule. Indeed, the Speaker and acting as a Tribunal of the Tenth
8 Schedule, is bound to decide within a reasonable period. What is reasonable will depend on
9 the facts of each case, but absent, exceptional circumstances for which there is good reason. A
10 period of three months from the date in which the petition is filed is the outer limit within
11 which the disqualification filed before the Speaker must be decided, then the Constitutional
12 objective of disqualifying persons who infringed the Tenth Schedule has to be adhered to. This
13 period is fixed keeping in mind that the ordinary life of the Lok Sabha and Legislative
14 Assembly of the states, is so and so, so and so...'

15

16 And then My Lord finally the foot of page 1335 para 32.

17 My Lord, after having held all this, please see what Your Lordships do. 'It is not possible to
18 accede to Mr. Sibal's submission that the court issued a writ of qua warranto quashing the
19 appointment of the Respondent as the Minister of a Cabinet led by the BJP government. Mr.
20 Dewan is right in the stating that a disqualification under the Tenth Schedule from being an
21 MLA and consequently Minister, must first be decided by the exclusive authority in this behalf
22 namely, the Speaker of the Manipur Legislative Assembly. It will also not be possible to accede
23 to the argument that the disqualification petition decided by this court in these appeals, given
24 the inaction of the Speaker, it cannot be said that in the facts of the present case are similar to
25 the Rana case. In the present case the Legislative Assembly comes to an end in March '22
26 unlike the case, unlike in Rana, where the court...But for the court deciding the
27 disqualification, no relief could have been given to the petitioner etc. The only relief that can
28 be given is that the Speaker be directed to decide the disqualification pending before him
29 within a period of four weeks from the date on which the judgment is intimated to him.'

30 My Lords I commend this judgment for Your Lordship's acceptance. It's sound on principle,
31 It's sound on logic.

32

33 So My Lord, to close, therefore I start by saying My Lord, Your Lordship is being invited to
34 embark on a journey which is entirely political in nature. It's a journey without a destination.
35 And that journey is to speculate on what would have happened had a trust vote actually
36 happened. Even in, because Your Lordships had never come to the conclusion and I daresay
37 Your Lordships never will that the pendency of a challenge if somebody is continuing in the

1 House, renders that person legally disqualified until he is requalified by dismissal of a
2 disqualification. So those till your disqualification is decided you are entitled to participate
3 and vote. Yes, the system is not powerless, the courts are not powerless. If you find that a trust
4 vote in fact, was vitiated by the participation of a large number of people who, three days later
5 were disqualified and what has happened is an abuse of the power and abuse of the
6 Constitutional provisions, the courts can always intervene. Now My Lord, today, apart from
7 the figures which we have given to Your Lordships, the admitted position is there was 16
8 petitions on which notice was issued and the gap was 58. Now what would have happened?
9 Forget this 58. This is also a coalition government. God knows what would have happened
10 when the trust vote, if it had at all, taken place. So My Lord to invite Your Lordships to assume
11 like a legal fixture, that if that trust vote had happened and if these 20 had been left out or
12 these 32 had been left out, and then the balance would have had a change of heart or something
13 else would have happened and then all these votes would have gone and our coalition partners
14 would have supported and so and so would have won the trust vote, My Lord is a journey which
15 Your Lordships should not embark on. Now if I am right there, then My Lord nothing survives
16 in the first part of this case.

17

18 The second part of this case is swearing in of Eknath Shinde. Now My Lord what did the
19 Governor do wrong? A Chief Minister has resigned. He has to accept his resignation. Another
20 person comes and says, I represent a party on which elections have... I represent a majority in
21 the House. He goes. He has My Lord won the majority. Now, if somebody says that he has won
22 the majority by abuse of power because disqualification petitions are pending, those are
23 matters yet to be resolved. How many numbers? How many are pending? What has happened
24 to the disqualification? And I do remember My Lord before the former Chief Justice because
25 the tide had turned as they say and there were cross disqualification petitions against those
26 who voted against the present incumbent. And they did also want the Speaker to decide those
27 disqualification. So virtually there was My Lord and I remember in one of the hearing the idea
28 was don't aggravate things, let things lie. That's why things have not been decided. Your
29 Lordship will direct in whatever reasonable time, the Speaker will decide now all pending
30 disqualifications. If somebody is dissatisfied, you have your remedies under Article 226. If the
31 Speaker gets it wrong that's all that remains in this case now at this stage is my respectful
32 submission. So that's one broad submission. The second is my lord, there is no occasion,
33 because this...

34

35 **CHIEF JUSTICE CHANDRACHUD:** Yes Mr. Salve.

36

1 **MR. SALVE:** The second My Lord, I was submitting even this Nabam Rebia My Lord is a
2 very thorny issue, but if Your Lordships do get into it, then I have made my submission.
3 Thirdly My Lord, there is no impediment in issuing any direction to the Speaker to decide and
4 that's really where this case must now end. Your Lordship will direct the speaker within a
5 defined period of time. My Lord, dispose off all pending cases and the matter must end there.
6 That My Lord is the submission, unless there's anything else I can assist Your Lordship with.

7

8 **CHIEF JUSTICE CHANDRACHUD:** Thank you, Mr. Salve. Thank you.

9

10 **MR. KAUL:** As your lordships were kind enough on the last day to permit me to sum up
11 because I had submitted my arguments and I had also handed over to Your Lordships three
12 things My Lords. One was the judgments which we had distinguished, the other was the
13 timelines My Lords, the crucial events as they unfolded. And the third was propositions in case
14 law, which I handed over. And then I had read out on the last day the crucial, relevant
15 paragraphs. Let me now just sum up some of the crucial events because there's no point in my
16 again getting into those timelines which Your Lordships have read and re-read again and again
17 and we both will have our side to say on the timelines My Lords. My Lords firstly, it has been
18 right through our contention that this is neither a case of merger or a case or split. Our case
19 right through has been that a rival faction within the Shiv Sena, is actually the Shiv Sena and
20 is entitled to be recognized as the recognized political party under the Symbols Order para 15.
21 Which today has been accepted by the competent constitutional body, which is the Election
22 Commission, and the matter is pending before Your Lordships. Now till 2nd of July 2022, the
23 entire allegation was a para 218, Tenth Schedule allegation that you have voluntarily given up
24 the membership of the party. And why have you voluntarily given up the membership of the
25 party? Because you failed to attend a meeting at a two day notice. Sorry, you failed to attend a
26 meeting for the same evening and the other where we never got a notice. And then the... and
27 then the Speaker, contrary to the rules, gives us two days instead of what is provided for. And
28 it is at that stage that we approached this honorable court, saying (A) violation of principles of
29 natural justice, (B) threat to our life in the state concerned and (3) relying on Nabam Rebia to
30 say that constitutional propriety requires that the Speaker should first decide his own removal
31 before deciding disqualification. So My Lords

32 till 2nd, it's only a 2 (1)(a) case. And our respectful submission is, My Lord that internal
33 descent is the essence of democracy and in repeated judgments, Your Lordships have held that
34 merely because within a party, people are aggrieved by what is happening, question the leader,
35 question the Chief Minister, even from the same party, is not a 2(1)(a) case at all. And that is
36 exactly what Your Lordships held in Balachandra versus Yediyurappa to say that even where
37 from within the party the Chief Minister of the same party was questioned as continuing, it

1 was held that this was not a 2(1)(a) case at all. So I don't have to rely on any defense at all or
2 para 3 in any case which doesn't exist or para 4. Because I am saying that as far as I'm
3 concerned, this is the party. And I've been recognized today as the rival faction within the party
4 and definitely questioning and passing a resolution on the 21st, which categorically said that
5 there is overwhelming, overwhelming resentment with the fact that we are continuing in a
6 coalition or were continuing in a coalition at that time with a party which has been politically
7 and ideologically opposed to us, for decades is causing great amount of resentment amongst
8 the cadres and the party workers. So that is the resolution which reached the Governor. Now,
9 at this stage, My Lords, so 2(1)(a), our respectful submission is, this is not a case at all of a
10 2(1)(a) case. In any case, My Lords, whether it is a 2(1)(a) case or a 2(1)(b) case, who will decide
11 that? The argument being raised before Your Lordship says these are per se cases because we
12 say so it is per se case, nothing else is required. And Your Lordship should bypass the entire
13 constitutional machinery of coordinate constitutional authorities and decide it yourself,
14 without the Speaker having decided the issue, because today we feel the Speaker who ought to
15 have been there is today not the only person. He's still the Deputy Speaker. There is a Speaker
16 in place, who will be biased, so you decide the whole thing. This is the legal argument being
17 made before Your Lordships. Contrary to every judgment on the point, including Kihoto that
18 Your Lordships will not interfere till a final decision comes from the Speaker on the point. Now
19 My Lords, as far as the second part is concerned, which is 2(1)(b) which really commences on
20 second, because then we are looking at two rival Whips being issued. And our Whip, as I said
21 by an overwhelming majority of the Legislature Party had been appointed on 21st of June,
22 itself. They on the same day reiterated their faith in the... their earlier continuing Whip. Now
23 the fundamental mistake in this argument is, as if what is happening is only in the Legislature
24 party and not in the political party. And our argument on that My Lords repeatedly has been
25 that these are co-joined, integrally connected, organically connected and each influences the
26 other. And that is why My Lords, I had read out to My Lords on the last date even para 4 of
27 Schedule 10 which categorically provided that a deeming friction that for a merger of a political
28 party if 2/3rd of the legislature party merges, that is taken as a merger of the political party.
29 As an indicator that you can't segregate the two because this whole argument is based is that
30 it's only the political, ... it's only the legislature party, not the political party. We also draw
31 strength on what we are saying My Lords, from the Symbols Order which itself provides that
32 for the continued recognition and existence of a political party, the number of votes polled, the
33 number of MLAs and MPs which form the pool, are all part of the continuing existence and
34 recognition of a political party. We also draw sustenance for our argument from Sadiq Ali's,
35 paragraph that I had read out to Your Lordships on the last date to say, that percentage of
36 votes, number of MPs relying on the Symbol Orders, is an important integral indicator for a
37 continuance of a political party and is to be taken into account when the EC decides the matter.

1 So My lords, to say that you just represented the Legislature Party and not the political party
2 is a complete fallacy and misleading of the law and facts, because this has been no one's case
3 ever. In fact, a resolution consciously reflected the dissent within the party. The resolution did
4 not say that it is just the Legislature Party. It talked about the political workers, the political
5 party in question.

6

7 Now My Lords, as a practice there, I had also respectfully shown to My Lords on the last date,
8 the Maharashtra Legislative Assembly Rules that at the end of the day who is the Speaker in
9 touch with? The Speaker is necessarily reliant My Lords on the leader of the Legislature Party
10 when it comes to recognizing a Whip. Because under the rules a member is elected as the
11 leader of the legislature party. The legislature party's leader is the one who is in touch with the
12 Speaker. The leader of the legislature party indicates to the Speaker the various designations
13 and posts held by the people. The leader of the legislature party also indicates to the Speaker
14 under Rule 3 sub-clause 4, any change which occurs. So today to say, that the Speaker, in
15 exercise of his power under para 2(1)(b) of the Tenth Schedule will embark on an inquiry into
16 the issues of the political party and will not confine himself what to the Whip or the leader of
17 the party says, is wrong. Because a) he cannot do it. He doesn't have the wherewithal. A
18 political party is a much larger amalgam of Taluka leaders, of district workers, of political
19 workers of parties. It's the ECI which is the constituted Constitutional authority which goes
20 into it. And has exercised his jurisdiction, was at that time wanting to exercise his jurisdiction.
21 Then Your Lordships were asked to stay that. And Your Lordships have refused that stay
22 saying that the order must come from them. So the Speaker does not embark on that inquiry
23 at all. Now even when para 3 existed My Lords, and I am purposely now not getting into
24 judgments again, even when para 3 existed My Lord, in Rana Your Lordships said two
25 significant things that the Speaker will not embark on an independent inquiry as to a split in
26 a political party, dehors the issue of disqualification. And as far as the issue of disqualification
27 is concerned, it's a prima facie view that the Speaker will take. Because what is being asked
28 today is that the Speaker will usurp a power that the Speaker does not possess and will get into
29 the politics of the political party. Of course, the first presumption being that they are two
30 independent and thus an inquiry must be carried out there. Now My Lords the practice of the
31 legislature party of the Shiv Sena right through My Lord has been, and those two letters have
32 already been shown to My Lords also handed over. One is part of the record, the other was
33 handed over. Where it is always the legislature party or the leader of the legislature party,
34 which writes to the Speaker to say, who is the Whip of the party. There is no doubt that an
35 overwhelming MLA as the majority appointed Mr. Gogavale as the Whip and that the earlier
36 Whip was removed. There is no doubt about it. Now today we have a situation even from 2nd
37 July, if it is a 2(1)(b) case we have two rival Whips issuing two rival directions presuming they

1 are right and there was a rival. So there are two rival Whips as per them. Now who will decide
2 this? Again the same argument of 2(1)(a). Your Lordships are being told that per se, because
3 we feel they have incurred disqualification, Your Lordships are not required to send it to
4 anyone and please decide it yourself. And that is a common thread that I will keep coming
5 back to because Your Lordships are being asked... first Your Lordships are asked to bypass
6 the Election Commission, which Your Lordships refused. Now Your Lordships are being asked
7 to bypass the Speaker, which Your Lordships have to consider. And the third issue is of the
8 Governor, which I'll touch upon separately My Lords. So, three coordinate Constitutional
9 authorities vested with Independent specific powers and areas of concern and interference,
10 which they have to deal with. The Governor deals with - does the Chief Minister and the
11 Government enjoy a majority? Is there political accountability? Does he enjoy the majority on
12 the floor of the house? That's why...

13

14 **JUSTICE NARASIMHA:** Sorry for interrupting. See the difficulty is rising because you are
15 formulating this principle of prima facie determination by the Speaker. So the defense that
16 you would take as against a case of a split, would be that there is actually a realignment of the
17 political party and that you are the political party. Those defenses are all right, but we have to
18 formulate the principle with respect to the decision that the Speaker is going to take at this
19 stage. As I was indicating earlier, it may be a jurisdictional fact. Here the distinction between
20 a split and the case that you set up that it is actually a case where you control the political party
21 is very thin. So it's very easy for a Speaker at one stage to say prima facie, I think that it is there
22 or very easily he can say prima facie, I don't think it's not a case. So to formulate that... that
23 principle that Speaker will take a prima facie view and come to a conclusion that it is not a case
24 of a split, but it is a case where you have set up the control over the political party. What are
25 the contours of that? That is one aspect. Another aspect of it is that this being a jurisdictional
26 fact, because if he comes to the conclusion prima facie that it is not a case of a split, but is the
27 case where you have the control of the political party, you go out of the Tenth Schedule so there
28 is severely contested by the other side. So this goes to judicial review on this very point
29 invariably, in reality. So the speaker has taken a prima facie view and adjourned the matter till
30 determination by the Election Commission is what the order would be. So he says, this can't
31 be done and according to it, the entire thing will revolve around numbers or the material that
32 is there before the Speaker to take that prima facie view. So it's a very slippery ground in that
33 sense of now expecting the Speaker to take a prima facie view and the kind of a material that
34 is available for him to do it. And what kind of prima facie case? And I accept that there are
35 signatures, as in the case of over 34 MLAs and aspects such as how much of the political party
36 has vouchsafed for one group or not, how much would be available at that stage? So as a

1 principle I would take it that your submission is that he would only take a prima facie view and
2 refrain from proceeding with Tenth Schedule expecting that the Electio
3 n Commission will determine the matter and after the Election Commission says that it is not
4 a case where the other group has control, matter comes back to the Speaker and he will
5 determine the case. That's the way you have....

6
7 **MR. KAUL:** And just to add to it My Lords, because a Constitution bench of this court in
8 Rana has taken a view that you will not embark on an independent enquiry dehors
9 disqualification, and a prima facie view. And prima facie view on split, yes. And I will tell Your
10 Lordships why? The Speaker cannot get into something. The Election Commission of India
11 has the machinery to determine that. But the other problem which also arises in this matter is
12 Your Lordships are right. There could be a problem, the peculiarities of a case. The problem
13 arises also out of saying two distinct entities, the Legislature and the political party. We are
14 undermining the importance of overwhelming members of a legislature party, their
15 resolutions passed, people supporting them, a competent body deciding on the issue, because
16 that is the only argument being made, that the Speaker today should have gotten into it and
17 should have not gone only by what the legislature party said. But that is a presumption that
18 it's only the Legislature Party. That presumption in law is wrong. Because it is never alone a
19 legislature party, they are both integrally connected, organically connected, co-joined. You
20 can't presume when you say that is just one and not the other. And that is why, from the
21 Symbols' Order down to Sadiq Ali, everywhere the word used is existence, recognition,
22 continuance of political party. You fall back also, amongst other grounds, also on the
23 percentage of votes, the MLAs, the MPs, and an indicator of it. And that's why I said, My Lords,
24 these are all indicators, in furtherance of what we are arguing, including para 4, Tenth
25 Schedule. Now My Lords, that whole deeming friction, why is it there then? And in any case
26 My Lords, to go back to what Your Lordships asked me, today the question is, will Your
27 Lordships, in a case like this get into and say that we'll decide it? Because it's a per se, because
28 they say it's a per se case. So every second party will come to court and say so it is a per se case
29 as per us and you don't need to go anywhere else. No other constitutional authority needs to
30 get into it. And your Lordship should act as the court of first instance and decide all these
31 issues so you are taking away and depriving every other competent coordinate constitutional
32 authority of their jurisdiction and are being asked to act as the court of first instance in all
33 these matters. And Rana My Lord as I had submitted was a completely different case. In fact,
34 Justice Nariman in the judgment which, Mr. Salve also just read out, also deals with this issue,
35 saying that for four years something was pending in the High Court and then it came there.
36 And then it was remanded back, it was being asked to be remanded back by the High Court.
37 At that stage the Supreme Court said the Assembly's term is coming to an end. So Your

1 Lordships were said that it's been done. But when is it been done? In what circumstances has
2 been done? Is the law of the land, that all other authorities will be deprived of their
3 jurisdictions? Because in the peculiar facts of Rana, it was said that court in a particular case,
4 who decided in the manner it did. It can't be. Then, My Lords, as I had respectfully submitted,
5 the two letters I had pointed out to My Lords which clearly demonstrates a practice. Now today
6 to turn around and say. So when you issued the letter that was fine. At that stage the practice
7 was fine. And necessarily, My Lord, from the rules as I said, that's the only way to do it. If a
8 member or the leader of the Legislature Party has to be a member of the House. The rules say
9 he will communicate. The rule says he will point out changes, he will point out designations.
10 Disobedience of the Whip he will point out under rule 3(5). Not those rules, I am not rereading
11 My Lords. I have taken My Lords through each of those rules. Until and unless Your Lordships
12 will direct me I'll read those rules. It's provided therein. So where will the Speaker today
13 embark on this independent inquiry on disobedience of the Whip etc.? It has to be within the
14 contours of what the rules provide. And the Constitution provides. Will he go and call members
15 from everywhere political party? And then the argument made to Your Lordships was that at
16 that stage only the leader of the political party, he should be in direct touch with. Can't be. We
17 have to go by what the Constitution and the practicality says. If there are overwhelming
18 majority today saying that we don't have a faith in the leader, let's test the proposition. Suppose
19 an overwhelming members say we don't have the faith in the leader, but we want to be within
20 the political party. So to say, Speaker will get into an area where a Constitution Bench says -
21 yes, you will take a prima facie view. Now those contours of how the Speaker exercises
22 jurisdiction will first be left to the Speaker to exercise it. Because judicial review is always
23 available to Your Lordships of a decision by the Speaker. What contours, what standards, what
24 principles the Speaker follows. After all, in Kihoto, that's why Your Lordships said no quia
25 timet. No interim injunctions. Let an order come, then we will examine it. And today Your
26 Lordships are told that in the legislature party, this was only the legislature party, and they've
27 hijacked the political party. And because the Deputy Speaker no longer, it's another Speaker
28 who is deciding thus Your Lordships must decide it. That's the argument being made today.
29 And it's a per se case. So all authorities, all principles be ignored because we say it's a per se
30 case Your Lordships must decide it. And because, Rana had decided. Then My Lord... My
31 Lords another question. That Your Lordships had earlier also posed to us and today also Your
32 Lordships has posed to Mr. Salve also was on relating back and whether applying
33 prospectively. Rana, as I had respectfully read out was a decision where the Supreme Court
34 exercised its jurisdiction to say that on the day disqualification was incurred, the split had not
35 happened. The Speaker went ahead with the split and not decided the disqualification issue.
36 This court said when it said it relates back ex post facto. The facts as far as disqualification are
37 concerned will be seen on the date when they incurred disqualification. Not by subsequent

1 split in the party that may have happened. That's an event only in consequential for deciding
2 disqualification. Ex post facto was used in that context. Now that ex post facto is being used to
3 argue before Your Lordship that if they are disqualified it will relate back to the day they
4 incurred disqualification and thus, all their exercise awards, including the floor test vote will
5 be an annulled and is vitiated. That's the argument being made before Your Lordships.

6

7 Now My Lords, Your Lordships have repeatedly from Kuldeep Bishnoi, Pratap Gowda Patil,
8 Shivraj Chauhan, Nabam Rebia repeatedly reiterated that till a disqualification petition is
9 pending, an MLA has every or an MP has every right to participate, whether it's for a floor test
10 whether it's for a disqualification, for a removal of a Speaker or in a floor test, has every right
11 to participate. Now if that is the law laid down by Your Lordships, how can it now be argued
12 and I showed My Lords Shivraj Chauhan where exactly the same argument was made and
13 rejected and Your Lordships consciously talked about the Tenth Schedule being completely
14 different from the other part. The two couldn't be mixed up. Now today the same argument is
15 being made to Your Lordships. So every bill, every a apportionment, every decision taken will
16 tomorrow be annulled because as per them the disqualification will relate back to the day you
17 incurred it, and thus all decisions and participation in the House stand vitiated.

18

19 Now My Lords, Shivraj Singh Chauhan, Your Lordships had consciously said, and categorically
20 said so that exercise of powers by the Speaker to decide resignation or disqualification exists
21 in a separate realm than a floor test. My Lords and the reason I pointed out because My Lord,
22 the Chief Justice had then said that - could it be argued that was the case only relating to
23 resignation and I respectfully submitted that - No, Your Lordships did consider the issue of
24 disqualification in the matter and floor test.

25

26 You can't let the two be interfered with. Now today Your Lordships are repeatedly said thus
27 because it would be vitiated the whole thing is annulled. And I'll come in the end, My Lord,
28 lastly, to what all Your Lordships are being asked to annul. That I will come to as a consequence
29 of once I complete. All the acts which will flow in the waterfall as per them which should be
30 annulled. Because Your Lordships order led to the toppling of a Government, which of course
31 is another argument which I will deal with.

32

33 Now My Lords, Article 189 Sub-clause 2 was respectfully read out to My Lords, also for the
34 same proposition that even if a person voted who was ineligible, the votes will be continued to
35 be counted. Again in furtherance of the same argument that I am making that I am drawing
36 sustenance from. Also My Lords Article 190, Sub-clause 3 read with Article 191 says that
37 vacancy arises when you incur disqualification. And when do you incur disqualification? You

1 incur disqualification either under Article 191(1) or 191(2), which is a Tenth Schedule. The
2 Constitution does not say that the moment a disqualification is filed a vacancy arises. Again
3 an indicator of the fact that till a decision is taken on the disqualification how do you presume?
4 And My Lords the dangers of that is that we will have today constituencies unrepresented in
5 Parliament and in the legislature because a disqualification petition is pending, that's one.
6 Please see for a bedrock of democracy where every constituency ought to be represented in
7 Parliament we are being today told that because a disqualification petition is pending should
8 go unrepresented a constituency or...

9

10 **JUSTICE SHAH:** Mr Kaul, if we accept your submission in that case suppose Speaker doesn't
11 decide for number of years paragraph 6.... sorry 8 point as observed by Justice Nariman in the
12 judgement. Correct? And what was observed by Justice A S Verma in that Coelho judgment.
13 In between so many things happen. One thing you can argue, one thing that whatever is in
14 between decided, on correct cannot be annulled? Or cannot be revert back. Or cannot be
15 recalled. But to say that the disqualification cannot be from the date on which the
16 disqualification takes place will be the... Too much to argue on.

17

18 **MR. KAUL:** My Lords, I did not for a minute.. Your Lordships are absolutely right. I did not
19 for a minute, did not say..

20

21 **JUSTICE SHAH:** But you will be giving premium to the...

22

23 **MR. KAUL:** No no, I'm not even saying that My Lords, because today on that there is a
24 complete answer in Rana. I'm not even saying that. I'm just saying till the disqualification
25 order is passed and MLA continues with all the vigor and robustness and legality at its
26 command under the Constitution, to exercise his rights as an MLA or an MP. I'm not for a
27 minute suggesting that ultimately if it's held in his... against him, it cannot relate back to the
28 day he incurred disqualification. That's very different as Your Lordships rightly said, from in
29 the meantime the action which are taken. Because till then he is not disqualified, till then there
30 is no decision on it.

31

32 **JUSTICE SHAH:** And under the Constitution....

33

34 **MR. KAUL:** That is why when I said it is prospective, is in that context I said. When the order
35 is passed, it may relate to events which occurred earlier. The disqualification may be incurred
36 on date A. The order of the Speaker may be passed on date B, relying on an earlier event. But
37 that's quite different from saying that in the meantime all that has been done gets wiped away.

1 That is the submission I'm dealing with My Lords. And if in... My Lords that is why, on the last
2 date I had respectfully pointed out, look at the danger of this to a democracy. A minority
3 government can continue indefinitely by having all whoever is inconvenient to them, filing
4 disqualification petition that no timeline of the Speaker to decide it. Unlike a removal of a
5 Speaker, which I respectfully submitted, has a timeline and that is why one of the concerns of
6 Your Lordships in this matter and other matters has been that there should be a timeline to
7 the Speaker also deciding on disqualification. So conveniently, there will be no floor test or
8 you will continue as a minority government because whoever you feel will not vote with you,
9 there will be a disqualification petition pending or as in Nabam Rebia, the Supreme Court
10 dealt with and said that conveniently because a Speaker against whom a removal has been
11 moved, you file disqualification petitions and none of them can vote. Now, today, in any case,
12 in each of these scenarios Your Lordships have already held, it no longer res integra. Whether
13 it's a floor test, whether it is a resignation, whether it is disqualification, anything. They said a
14 member against whom a disqualification petition is pending, participates. So these issues have
15 been considered by Your Lordships and ex post facto as used in Rana can never be interpreted
16 to me that that MLA or MP ceases to exercise validly his rights as an elected representative of
17 the people. It was in that context, My Lords, that I pointed out, it's a danger to the bedrock of
18 democracy, that if a constituency goes unrepresented in the meantime, as far as a
19 disqualification is concerned, My Lord, that will ultimately be can be rectified in a judicial
20 review. Now what happens if you keep holding on to it without a timeline? And that's a very
21 legitimate concern that Your Lordships have expressed about can a Speaker hold onto it and
22 not decide at all. And that is what Justice Nariman in that judgement, expressed his concern
23 with and said that as the court understood it, that matter actually stood answered in Rana,
24 because in Rana, ultimately, My Lords, what did the court do? When some reference came in
25 Sampat Kumar, Justice Nariman, in the later judgment of 2020, considered the issue and said
26 that the very fact that in Rana, the Court interfered and said that you should have only looked
27 at the decision and the facts as they existed on that date and no subsequently made. There was
28 already an exercise of judicial review of a timely action by the Speaker. Because what was the
29 import in Rana? The import in Rana was that the Speaker ought to have decided on the date
30 the disqualification was incurred. And there was no, there was no indicator of any split in the
31 party on 6th of September on that day, in that matter.

32

33 So Justice Nariman said that the very import of that decision in Rana is that you should have
34 taken a prompt decision, which the speaker did not do, and thus the Supreme Court interfered
35 in Rana, in the manner. And then Justice Nariman went on to say that three months or five
36 months would be in a.. three months would be an appropriate timeline. Because the life of the
37 Legislature is five years. And Now if Your Lordships that para has been read out to Your

1 Lordships. If I just for a minute without even troubling Your Lordships, the lines used were, -
2 'has clearly been answered, stating that a failure to exercise jurisdiction vested in a Speaker
3 cannot be covered by the shield contained in Paragraph 6 of the Tenth Schedule, and that when
4 a speaker refrains from deciding a petition within a reasonable time, there was clearly an error
5 which attracted jurisdiction of the High Court and exercise of power of judicial review.'
6 Because the Speaker, then, without deciding on it, sitting on it, went on to decide something
7 else, which was the split. And the Court said that something much later. You first decide on
8 that particular day what happened. And in it implicit was, the argument is, the Court said in
9 this matter, in this Meghachandra Singh's matter that implicit in it, in judicial review was the
10 fact that the Speaker should have decided promptly and the fact that Speaker delayed that
11 decision in Rana, called for judicial review, and thus a time limit should be fixed. So my
12 respectful submission on that would be My Lords, that even that very pertinent question of
13 Your Lordships and that concern of a timeline today does stand answered in Meghachandra.
14 Irrespective of the Sampat Kumar reference, which has been made and in fact My Lords, even
15 in fact My Lordships even in Sampat Kumar, I'm not.. if Your Lordships were to see, I'm not
16 bothering Your Lordships with the order but even there while referring it to a larger bench
17 because Kihoto was there, the Supreme Court said that if a decision of a Speaker is subject to
18 judicial review on disqualification, equally an indecision of the Speaker would be subject to
19 judicial review. So if a Speaker decides to hold on and not decide, an indecision is equally
20 susceptible to judicial review as a decision is, even while referring it to the larger bench.
21 Because what was concerning the court was Kihoto and then the Court in Meghachandra
22 explained it to say that Kihoto was in the context of interlocutory injunctions, in the context
23 of quia timet action, which was not the case where a Speaker indefinitely sits on something
24 and doesn't decide it. And that has its own consequences, in politics, in a parliamentary
25 democracy. My Lords the....

26

27 **JUSTICE NARASIMHA:** He referred it in December '16.

28

29 **MR KAUL:** Please, My Lords.

30

31 **JUSTICE NARASIMHA:** This Nariman referred it in 2016 December for deciding this
32 question, as he formulated present petition raises a question of great constitutional
33 importance, namely, whether the speaker of a Legislative Assembly acting under the powers
34 granted to him under the Tenth schedule of the Constitution can be ordered by the High Court
35 exercising jurisdiction at 226 to decide a particular disqualification petition pending before
36 him within a certain period of time, directly the question. But then he decided that question

1 having referred in December '16 and January 2020, Meghachandra answers the questions.
2 This reference is a two judgment.

3

4 **MR. KAUL:** And he, My Lords, refers to the facts of Rana because in Rana the facts were that
5 the speaker failed to exercise some jurisdiction which he ought to have exercised on that day
6 and went ahead and recognized the split in the party. And in that, Justice Nariman said, is
7 implicit the fact that he ought to have decided that in that decision itself or indecision of not
8 deciding.

9

10 **JUSTICE SHAH:** So your submission is in exceptional case only like Rana, correct? The
11 Court may interfere at the stage of disqualification. Otherwise it is to be left to the Speaker.

12

13 **MR. KAUL:** My Lords I'm very grateful. And my respectful submission on that is this My
14 Lord. Firstly, that's what the Constitution provides for in terms of the scheme. These are
15 coordinate Constitutional authorities to whom Your Lordships have given equal deference and
16 respect as they have given to this Honorable Court. And there are jurisdictions carved out
17 where they must exercise their jurisdiction. And the court does not act as a court of first
18 instance in these matters. There may be a rarest of rare case, where a term is coming to an end
19 in two months, three months. And for four years it was pending in the High court. And My
20 Lords, most importantly in Rana, there was a decision of the Speaker, ultimately. Whether to
21 remand or not was the case there, as far as the High Court was concerned. And then they said,
22 let us decide it here. But that does not mean and cannot be stretched to an extent to say that
23 Your Lordships will start deciding all this along yourself.

24 Then My Lords, as far as the issue of the Governor's exercise of power is concerned, My Lords,
25 my respectful submission was, My Lords there were three important facts, which were before
26 the Governor. One - 7 independent MLAs withdrew support to the Government.

27

28 **CHIEF JUSTICE CHANDRACHUD:** Governor. Mr. Tushar Mehta.

29

30 **MR. KAUL:** Yes, My Lords . I'll just sum it up. I'll be the shortest on this point and then leave
31 it to the learned solicitor. So one was seven independent MLAs.

32

33 **CHIEF JUSTICE CHANDRACHUD:** Just one second. Yes. What were you saying? The
34 Governor had before him..

35

36 **MR. KAUL:** The cogent material My Lords, to call for a floor test is what Your Lordships are
37 looking at, was 7 Independent MLAs withdrew support to the Government. 34 Shiv Sena MLAs

1 sent a resolution, where the party, the political party as per them and the legislature party
2 reflected on and said that there's huge discontent within the party for politically opposed
3 ideologies. Discontent within party workers, large section of the party, sent that and the faith
4 in the coalition Government was doubted or questioned any continuance with the coalition
5 Government and thirdly, the leader of the opposition also notified the Governor that the
6 Government in power, did not enjoy the majority of the floor of the House. Now My Lords in
7 Bommai Your Lordships have said - any material or any process or means - of course, it can't
8 be extraneous. Of course it can't be irrational. Any material, process or means can be used by
9 the Governor to come to the conclusion that a floor test is required and the Governor will not
10 sit on his own and do a head counting in the Raj Bhawan. So the two or three principles which
11 have emerged, My Lords is, no head counting by the Governor, prima facie view based on
12 cogent material and floor test at the earliest because floor test is the litmus test of democracy
13 and should brook no delay as Your Lordships have said. And ordinarily do not give too much
14 time to any political party because then that whole problem of *Aaya Ram Gaya Ram*, horse
15 trading starts. Now what does the Governor do in this case, My Lords? A resolution with
16 overwhelming Members of the Legislature Party says that we have a problem with the coalition
17 Government, 7 independent MLAs say so in the case. Now for him to tomorrow tell the Chief
18 Minister to come and face the floor test is this an exercise of his power without any material
19 so arbitrary, if at all, it can be argued that its arbitrary that Your Lordships exercise Your
20 Lordship's extraordinary jurisdiction to interfere with it.

21
22 Or it's a plausible view that the Governor could have taken in the facts of the case. If it's a
23 plausible view that the Governor could have taken in the facts of the case. And to say, My Lord,
24 and another argument was made was that he should have asked for a no confidence. But My
25 Lords there is nothing in the Constitution. Incumbent Governments have been asked to face
26 floor tests as we showed to Your Lordships in Judgements. So to say it's never happened, is
27 wrong. And where is this rule that you should only ask the leader of the opposition or any other
28 person to move a motion of no confidence?

29 There is no legal prohibition. In fact, I would go to the extent to saying My Lords, if the
30 Governor is satisfied that a Government has lost the majority on the floor of the House, it is
31 the duty of the Governor to call for a floor test at the earliest and not indulge in House.. indulge
32 in head counting sitting in the in the Raj Bhawan and that's all that he did and the day he does
33 it, a petition is filed.

34
35 **JUSTICE KOHLI:** Mr. Kaul, how many times has that power been properly exercised by a
36 Governor in some recent examples that we have?

37

1 **MR. KAUL:** Ma'm, I will find out.

2

3 **JUSTICE KOHLI:** It was the duty of the Governor..

4

5 **MR. KAUL:** I will.. But may I only answer that by saying two things. One, I'll give that, I will
6 just find that out but I take it for a minute, I take it for a minute, it had never happened before.

7 So what? If a Governor is within his powers to do what he is doing and there is no prohibition

8 to what he is doing, he is not bound by just precedence. The law on Bommai says any process

9 or means and material. Now if material is before the Governor to come to this informed

10 decision, what is wrong with it?

11

12 **JUJUSTICE KOHLI:** What happens to abuse of power in that case of excess use of power?

13

14 **MR. KAUL:** That My Lords, in every case we will see.

15

16 **JUSTICE KOHLI:** You are saying Speaker's decisions are subject to judicial review. As you
17 said, having acted or not acted, both ways.

18

19 **MR. KAUL:** And then that is why I said, what is to be seen is the material before him.

20

21 **JUSTICE KOHLI:** Right.

22

23 **MR. KAUL:** If according to us, according to us, if 7 independent MLAs, 34 or 51 MLAs with
24 a resolution saying , we don't want to continue, what better indicator that a Government does

25 not enjoy the majority on the floor of the House. Ultimately, now again, the Governor is not

26 going to embark on the enquiry which the Election Commission embarks on. The problem

27 here is that the Speaker is being asked to embark on the inquiry which Election Commission

28 embarks on, the Governor is expected to embark on an enquiry which the Election

29 Commission embarks on. Governor will look at the material placed before him which is an

30 overwhelming number of MPs who have been supporting the Government earlier, write to say

31 we don't support the Government. He doesn't call upon and swear in anyone else into power.

32 He asks you to face the floor test and you know you don't have the majority. The moment you

33 don't get the stay, you resign within ten minutes of that order, which came that night. Within

34 ten minutes you had resigned because you knew you did not enjoy the majority on the floor of

35 the House. He did not directly swear in someone. Now, after that if a coalition comes before

36 him and says that we want to stake our claim and a coalition which actually was a pre polles

37 alliance earlier. What is wrong with it?

1 Now My Lords, the next point for Your Lordship's kind consideration is that Your Lordship's
2 order led to the toppling of the government. Firstly all that Your Lordships did on 27th was
3 extend the time because the action of the speaker was in gross violation of the most elementary
4 principles of natural justice, contrary to the Maharashtra Legislative Assembly rules, giving
5 two days on a weekend, to file our reply. We did argue Nabam, I have repeatedly said, we did
6 argue natural justice, and we did argue threat to life. The Court extended the time and also
7 said protection to their life to be given. Now I go a step further, My Lords, suppose the court
8 had relied and incorporated the Nabam principle in its order, what is wrong with it? Nabam
9 till date holds the judicial field, Nabam is the law of the land. It's a Constitution bench of this
10 country, of the Supreme Court holding the decision. So if it had relied on Nabam also there
11 was nothing wrong with it. It was fully within its power and justified to use and rely on Nabam.
12 And then to say that a Government came to be toppled because after that because we are given
13 more time and the Governor asks you to face the floor test and you resign because the stay is
14 not granted by the Supreme Court. You say Your Lordship's order of 27 toppled the
15 Government because Your Lordships had given more time because had that time not been
16 given, then the disqualification was per se would have been incurred in the meantime, that's
17 the convoluted argument being made before Your Lordships. But that can never be so. Then
18 My Lords came the 29th order.

19
20 Now 29th order, My Lords, when they came and said apart from the fact that it said, subject
21 to the proceedings on trust vote on 30th of June 2022. We argued that a floor test brooks no
22 delay ought to be occurred at the earliest. In fact, the words used in Bommai are that a Chief
23 Minister cannot shirk his responsibility to face a floor test and if he refuses or shies away from
24 a floor test , it's a prima facie view that he is not confident that he enjoys the majority in the
25 House. So what did the Governor do? Said - face a floor test. The Supreme Courts Said - how
26 can we stay a floor test? Because we keep coming back round and round to the same argument.
27 Had disqualification being decided, had time not been given, then this would not have gone
28 through. That's not the way. First be a Speaker will have to take a decision. And I came on
29 principles of natural justice. The court said, give them more time. How can you say - a court
30 order led to toppling of a Government? And the 29th order specifically said that the
31 proceedings of 30th are subject to court proceedings but nothing happened because the Chief
32 Minister had resigned. After that fresh floor test was held a few days later where
33 overwhelmingly the new Government and the new Speaker were sworn in.

34 My Lords, the EC issue. I'm not touching on that 18th meeting relied on 27th, that is wrong.
35 They were independent meetings and I haven't really gotten into the EC issues because Your
36 Lordships have so indicated. And we have right through said that all this had started on 21st
37 which was really a culmination of the dissent brewing for a long time and ultimately

1 culminated in that resolution on that day. And at appropriate times on 25th and 30th, when it
2 suited them, they wrote to the same Election Commission and then came before Your
3 Lordships to say that no stay. The Election Commission should not exercise it's jurisdiction.
4 My Lords as far as the Nabam issue is concerned, My Lords again, that is something that I
5 don't need to readdress. Your Lordships extensively on. And the principle concern My Lords
6 there was one, and specialty when Para 238 onwards when Justice Mishra dealt with it was
7 that Constitutional propriety demands that after the introduction of the Tenth Schedule if
8 that Speaker within the period of the notice and the date when it's actually held alters the pool
9 what happens? And they relied on what in the constituent assembly debates, including Dr.
10 Ambedkar's reference to the 179 C of the then members. The then members argument My
11 Lords, even then emphasized on not just present on voting, but the emphasis was on the pool
12 of the House. Now that is the exact principle which Nabam also follows that if between the day
13 of the notice to the date when the resolution is moved, a you altered the pool. You do not then
14 reflect the correct composition of the House because you have altered it in a manner to suit
15 yourself. And there is a conflict of interest as far as that is concerned. Now My Lords an
16 argument which was sought to be then made was that Article 181 provides that the Speaker
17 cannot preside over the House only on the day of the resolution of the removal of the Speaker
18 and not from the date of his removal as communicated. That was the argument on 181 made.
19 What is 181? 181 is also an argument to say that you cannot be judge in your own cause. You
20 should not on that day, for instance, not count certain votes. Carry it out in a manner. The very
21 principle of 181 is, what is also applied if at all 181 serves my argument. <UNCLEAR> My
22 argument because what Nabam says is that given the introduction of the Tenth schedule, there
23 would be a clear conflict of interest. And in any case, there is a timeline provided therein within
24 that you decide your removal within the timeline provided, and then go ahead and uses the
25 word that if the Speaker is confident he can continue, but the danger, the flip side to it is, My
26 Lord, a Speaker's election if he proves his majority is not questionable. But what is
27 questionable is a disqualification at the end of the day. So they said that in a matter like this,
28 first show your majority, and then you continue with it. So to say that the constituent assembly
29 debates were to the contrary was wrong, even in the constituent assembly debates. Firstly, they
30 were dealing with the removal of the Vice President and other issues. They weren't dealing
31 with Tenth Schedule at all. There was no Tenth Schedule at that stage. The then members was
32 interpreted in the context and to say that the House composition on the day the resolution is
33 moved is in that context to read that. The resolution is moved. And in Nabam the court was
34 wrong in reading it from the day of the notice is completely wrong. Because if the court doesn't
35 read it the way the court has read as the court has said, that this would have led in a matter
36 like this to sustain a robust vitality of the growing Constitution were the words used and to
37 avoid any conflict of interest, this would be the most appropriate, constitutional and ethical

1 argument to tell the Speaker to do it in a time bound manner as far as you are concerned, and
2 then go ahead with it. So my respectful submission is My Lords, Nabam requires no reference,
3 lays down the correct law, requires no reference to a larger bench. Now My Lords lastly, to end
4 my case law note is already with Your Lordships, on each of the propositions I have given. So
5 My Lords, effectively if everything that is annulled is their argument, then Mr. Thackeray's
6 voluntary resignation should not have been accepted because he resigned, he should not been.
7 He should have continued. The Governor should not have acted in his constitutional capacity
8 to invite the largest party as its then saw, or the coalition to come and form a government. The
9 confidence motion in the House reiterating overwhelmingly the faith in the new Government
10 and the new Speaker needs to be reversed. The Governor ought not to have administered t
11 he oath of office to Mr. Shinde. The Speaker ought not to have been elected by the House, not
12 once confidence reinforced in him again. So everything needs to be annulled because
13 everything relates back to that one day when disqualification was incurred, and because the
14 Speaker was not out of the.. Deputy Speaker was not allowed to decide that. Everything that
15 has happened is vitiated and in the process, that you refuse to face the floor test, you did not
16 have the confidence of the House is all immaterial and a Government which overwhelmingly
17 proves it's majority, everything should be annulled. And despite all the law that Your
18 Lordships have laid down, that every member is entitled to vote on the floor of the House,
19 irrespective of his disqualification pending, should all be ignored. My Lords, in Nabam I must
20 also lastly point out to Your Lordships subject to correction, I am instructed to say that
21 apparently a review was also filed against the judgment in Nabam, raising the same grounds
22 of challenge and it also raises the same interpretation of all the then members to be the date
23 on which the vote takes place. And the Article 181 argument and that review was also
24 dismissed. Now, My Lords, is it fair to re-agitate the same issue all over again before another
25 Constitution bench is another argument for Your Lordships kind consideration. My Lords I
26 am extremely grateful, Your Lordships are kind enough to call upon me again. I'm very grateful
27 for that.

28

29 **CHIEF JUSTICE CHANDRACHUD:** Thank you, Mr. Kaul. Yes. Mr. Jethmalani.

30

31 **MR JETHMALANI:** My Lords, I have a note which is note K in Your Lordship's record.

32

33 **JUSTICE KOHLI:** Mr. Jethmalani we have 44 files and PDF, all part of the written
34 compilations.

35

36 **MR. JETHMALANI:** Well, I empathize with Your Lordships.

37

1 **JUSTICE KOHLI:** Written on behalf of...17 pages?

2

3 **MR. JETHMALANI:** But there's no PDF, I'm told there's no PDF. It's a separate document.

4

5 **JUSTICE KOHLI:** It's a 17 page document.

6

7 **MR. JETHMALANI:** It's a separate document marked Note K. I would for the sake of saving
8 time, I would run through that note a little bit so if Your Lordships could have it. Your
9 Lordships got it?

10

11 **CHIEF JUSTICE CHANDRACHUD:** I think we can run through the 17 pages.

12

13 **MR. JETHMALANI:** I beg your pardon.

14

15 **CHIEF JUSTICE CHANDRACHUD:** I think we can run through the 17 pages.

16

17 **MR. JETHMALANI:** It would be difficult. It will be a spillover. It's right to state that every
18 case depends to a large extent on its own facts. My Lord, my learned friends have taken
19 recourse to some facts but My Lords I propose a deal more substantially facts and only
20 incidentally with the law because a lot has been said on the law. To point out that the
21 fundamental propositions of law which my learned friends have raised in this case on the facts
22 of this case don't arise at all. But Mr. Salve has said something on it in his brief submission. I
23 will just expand a little on it but essentially the two points of law, as I understand, in sum and
24 substance what it boils down to is

25 a) The question of deemed disqualification. My Lords to use that term is if sometimes used
26 and sometimes steered away from. The question of deemed disqualification i.e. they were
27 liable to disqualification. Disqualification never took actual place, but they were liable to be
28 disqualified and consequentially as a result of that deemed disqualification, the second
29 proposition of law and that is that the court must set the clock back, relying mainly on Rana,
30 again, extensively dealt with by my learned friends, Mr. Salve and Mr. Kaul. And set the clock
31 back completely because the concept of deemed disqualification since it dates to the date when
32 the acts entailing disqualification took place are the ones that are relevant for the purpose of
33 disqualification. So you must look at that. Now My Lords, a brief conspectus of facts as I
34 pointed out earlier when we are dealing with referral, there's a very short time span. And that's
35 between 21st and the 4th. My Lords it's important to note that while discontentment and
36 division commenced from the very inceptual of the post poll alliance of the MVA Government.

1 The commencement of irreconcilable differences occurred on 21st June. That's the first date.
2 The differences chiefly centered around the <UNCLEAR>_to continue with the MVA alliance,
3 which, as per the Eknath Shinde group, was causing serious turbulence among party cadres
4 for two reasons. The Shiv Sena had entered into a pre poll alliance with the BJP for the
5 elections held in November 2019, and their voters and cadres were aggrieved by the betrayal
6 of that pre poll alliance by the constitution of the MVA coalition Government. And two, that
7 the party cadres were finding it difficult to reconcile longstanding ideological battles with their
8 coalition partners, namely the Congress and the NCP and the cadres of the different party and
9 the coalition far from working in cohesion but at loggerheads with one another. Now Lord,
10 there are many statements even before the 21st. Ministers of the then Shiv Sena, the Joint Shiv
11 Sena, many statements expressing dissatisfaction in public. Public. MLAs have complained
12 about it. So this is all My Lord...20- 21st is the only date which this record which this court has
13 a record of. But it happened much earlier. But the first step as per the record of this court that
14 led to the rendering the differences irreconcilable but admittedly initiated by the Uddhav
15 Thackeray group. My Lord the first salvo was filed on 21st June by the Uddhav Thackeray
16 group. In it's Resolution of 21st June 2022, a minority of members of the Shiv Sena Legislative
17 Party in the Assembly, removed Eknath Shinde from the post of group of Shiv Sena Legislative
18 Party.. of leader of the Shiv Sena Legislative Party. On the same day the Chief Whip, one Sunil
19 Prabhu issued a party whip summoning all members of the Shiv Sena Legislative Party to
20 attend the meeting at the CM's residence on the same day. The removal of Eknath Shinde, My
21 Lords, this is where it starts, because My Lords, Justice Kohli was asking about could there be
22 no reconciliation? Was there no party forum to re
23 solve these differences. My Lords, the first salvo that was filed was on 21st June, and it was a
24 very drastic salvo file. The salvo was you remove him as a legislative leader. After that it
25 became irreconcilable, nothing could be done and I'll tell Your Lordship what happened
26 afterwards. Those facts are very important as to why the party forums became irrelevant. What
27 was done by the party organization and the party leaders, including people in, their party
28 leaders in Parliament. The removal of Eknath Shinde as a leader of the legislative party
29 indicated that intention on the part of the Uddhav Thackeray faction to escalate a simmering
30 dispute to a point of no return. Now My Lord, neither the Resolution nor the whip issued by
31 the Chief Whip were communicated to any of the Shiv Sena MLAs who were not signatories to
32 the resolution. Eknath Shinde and the other MLAs only learnt about the resolution in the Whip
33 on 21st June through media reports of the same day. On its part, the Eknath Shinde group,
34 consisting of 34 MLAs passed a resolution on the same day, setting out various grievances of
35 the party leadership, for forming the MVA Government and the impact that it had on the
36 party, it's organization, cadre and voters. Now My Lord, all of this has been read, so I'm not
37 going to read in detail, but My Lords, Your Lordships will recall that the letter of 21st June was

1 a response by Eknath Shinde to his removal, in which he pointed out that it was not just the
2 legislators but it was also the cadres who were disappointed. So the organizational
3 disappointment, along with the legislator disappointment were both highlighted in that letter
4 of 21st June, which, as I said, was a response to their letter. By the resolution, 34 MLAs
5 reaffirmed Shinde as the leader of the Shiv Sena Legislative Party, removed Sunil Prabhu as a
6 Chief Whip with immediate effect and appointed Mr. Bharat Gogawale as Chief Whip in his
7 place. The resolution was sent. This is important My Lord. The resoluti
8 on was sent and received by the Governor of Maharashtra. So the Governor of Maharashtra to
9 answer again, My Lord, Justice Kohli's, had his first intimation of a simmering dispute on the
10 21st June. The resolution was sent and received by the Governor of Maharashtra, the Deputy
11 Speaker to the Legitimate Assembly, and the Secretary of the Maharashtra, the Legislative
12 Assembly, both by email and a hard copy. The 34 MLA's on the same day, we're still on 21st
13 June, also sent the notice to the Deputy Speaker, Mr. Zirwal, of intention to move a resolution
14 for his removal under Article 179 C of the Constitution read with Rule 11 of the Maharashtra
15 Assembly rule. My Lord I'll read those rules in a minute because My Lord they are quite
16 important. They deal with the 14 page, 14 period.. 14 day period notice prior to consideration
17 and it's and the rule and the article are both mentioned in that letter sent to the Governor and
18 the Deputy Speaker, on the ground that he no longer enjoys the support of the majority of the
19 House and accordingly, has lost his right to continue as Deputy Speaker. In view of the decision
20 in Nabam Rebia, the Deputy Speaker was requested to refrain from acting as Deputy Speaker
21 till such time as he could prove the support of the majority in the House. My Lords, what are
22 the contentions of the petitioner? First, that if the respondent had a grievance with the party
23 leadership, he ought to have sorted it out within the party and not sent the notice under the
24 Article 179 C to the Deputy Speaker. That the notice of the Deputy Speaker was flawed because
25 in any event the Deputy Speaker's disability under the Article 181, commenced on the
26 consideration of the notice of a resolution was removal, and not when notice had been given
27 of the intention to move the resolution and the Article 179 C. The decision of Nabam Rebia to
28 the contrary needed reconsideration and the resolution of 34 MLAs of Eknath Shinde Group
29 was without jurisdiction, as Eknath Shinde had been removed as a leader of the legislative
30 party in the House, that's by their letter of 21st June.

31 Now My Lord, this is the response of the... As we got to reply to to one above - the question of
32 resolving grievances against the leadership within the Party did not arise as a party leadership
33 had precipitated the issue and made any reconciliation impossible by unilaterally and illegally
34 removing Eknath Shinde as leader of the legislative Party. My Lords no hearing, no notice,
35 nothing. This unilateral removal had to be viewed as a hostile act, which would be followed by
36 more serious consequences. In the circumstances, the letter to the Deputy Speaker under
37 Article 179 C was a protective step against any escalation by the Uddhav Thackeray group.

1 Significantly at this stage, now this is important, the Eknath Shinde Group did not take any
2 step in the direction of unsettling the Government by withdrawal of its support, necessitating
3 a floor test. Now My Lord, on the applicability of Nabam Rebia. My Lord, although on fact, it's
4 my respectful submission that Nabam Rebia's case, the case doesn't arise at all, on the facts of
5 this case. Nevertheless, My Lords, if Your Lordships do intend to say something about Nabam
6 Rebia, My Lord this is my respectful submission that it should be to reaffirm especially Justice
7 Mishra's view. I concede that the then members part of 179 C has been wrongly construed,
8 particularly in view of the Constituent Assembly debates, and particularly the view of Dr.
9 Ambedkar in that. But there's much more to be said, apart from the then members part of it.
10 For reaffirming Justice Mishra has very eloquently put view in that separate judgement. On
11 the applicability of Nabam Rebia, the construction of that judgement regarding the time when
12 the Speaker's disability at the Article 181 commences was established law by a Constitution
13 bench, and the Deputy Speaker was bound to act according to as directed . My Lords that is an
14 aside. In any event whether you like Nabam Rebia or not, the Deputy Speaker was bound by
15 its mandate, and its disobedience at that particular point of time. It's a serious breach on his
16 part of his duties and the role envisaged for him by the Constitution, impartiality and of course,
17 obedience of the law. As regards the correctness of the view taken on this aspect in the decision
18 in Nabam Rebia. It is respectfully submitted that this Honorable Court should reaffirm review
19 in Nabam, most emphatically enunciated by Justice Mishra that when there is an expression
20 of intention to move a resolution, My Lords, may I just read Paragraphs 236 and 238 of Justice
21 Mishra, just three paragraphs, at this stage. It's PDF 1167 because he makes the case for what
22 he says compelling.

23 236 - 'In this regard it is essential to understand the character of the Tenth Schedule. The
24 Tenth Schedule to the Constitution is conferred adjudicatory powers of the Speaker while
25 deliberating on the constitutionality of the Tenth Schedule. The majority in Kihoto's case has
26 stated, the Speakers/ Chairmen, while exercising powers and discharging functions under the
27 Tenth Schedule, act as Tribunal, adjudicating rights and obligations under the Tenth Schedule
28 and their decisions in that capacity are amenable to judicial review. However, having regards
29 to the Constitutional scheme of the Tenth Schedule, judicial review should not cover any stage
30 prior to the making of a decision by the Speakers/Chairmen. Having regard to the
31 constitutional intendment and the status of the repository of the adjudicatory power, no quia
32 timet injunction actions are permissible. Now My Lords, pausing there for a minute, if it is a
33 Constitutional violation by the Speaker, the actual order of disqualification, that is not
34 contemplated by Kihoto's judgement. For instance when he.. when he did not comply with the
35 notice period and that notice period is under Rule 8 of the Tenth Schedule, a court could
36 intervene because that was a denial not only of natural justice but a contradiction of the rules
37 framed by them in their wisdom, under rule 8, under clause 8 of the Tenth Schedule. And

1 Kihoto says something about the sanctity of those rules. I'll come to that later. At Para 6(1) of
2 the Tenth Schedule, to the extent it seeks to impart finality of the decision of the
3 Speakers/Chairmen.. a chairman is valid, but the concept of statutory finality embodied in
4 Para 6(1) does not detract from the abrogate judicial review under Articles 136, 226, 227 of the
5 Constitution. In so far as infirmities based on violations of constitutional mandates, mala
6 fides, noncompliance with the rules of justice and perversity are concerned.'

7 But Kihoto says more on Paragraph 8 rules and I'll come to that. My Lords the rest of that is,
8 Your Lorship may just see J - 'that contention that the investiture of adjudicatory functions of
9 the Speakers/Chairmen would by itself vitiate the provision of the ground of likelihood of
10 political bias is unsound and is rejected. The Speakers/Chairmen hold the pivotal position in
11 the scheme of parliamentary democracy and are Guardians of the rights and, privileges of the
12 House. They are expected to and do take far reaching decisions in the functioning of
13 parliamentary democracy. Vestiture of power to adjudicate questions under the Tenth
14 Schedule, in such constitutional functioning should not be considered exceptionally.'

15 Now come Justice Mishra's own enunciation. 'The aforesaid reasoning eloquently speaks of
16 the power, position and the status the office of the Speaker enjoys under the Constitution. It
17 also States about the scope of the friction, the Court has constricted the power of judicial
18 review and restricted it to the stage, carving out certain extreme exceptions. It is because the
19 Speaker while exercising the authority/ jurisdiction exercises the part of Constitutional
20 adjudication, the concept of Constitutional adjudication has constitutional value in a
21 parliamentary democracy and constitutional values sustain democracy in the sovereign
22 republic. The speaker is expected to maintain propriety as an adjudicator.'

23 My Lords when I show the facts of this case as subsequently transpired, I will show Your
24 Lordships that the Speaker repeatedly violated his constitutional duty as envisaged. 'The
25 Speaker when function as a tribunal, has the jurisdictional authority to pass adverse orders. It
26 is therefore required that his conducted not only be impartial, but such impartiality should be
27 perceptible. '

28

29 **MR. JETHMALANI:**

30 My Lord I was reading Paragraph 237..

31

32 **CHIEF JUSTICE CHANDRACHUD:** Instead of reading the 17 page note, why don't you
33 formulate what the essential points are?

34

35 **MR. JETHMALANI:** Yes.

36

37 **CHIEF JUSTICE CHANDRACHUD:** So that then we can..

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MR. JETHMALANI: Yes.

CHIEF JUSTICE CHANDRACHUD: We know where you stand.

MR. JETHMALANI: At the end of each, I was going to make my proposition. At the end of the... so I just finish this.

CHIEF JUSTICE CHANDRACHUD: So why don't you formulate what you have to say. That we will read the note. There's no difficulty in that.

MR. JETHMALANI: Yes. May I just finish reading 237 and 238 or not, Your Lordships are familiar with it.

CHIEF JUSTICE CHANDRACHUD: You've already read that judgment.

JUSTICE SHAH: You continue from your note.

CHIEF JUSTICE CHANDRACHUD: or if you can formulate what your submissions are. Isn't that? That may be better if you...

MR. JETHMALANI: As I said, my submission on the aspect of the matter. First of course, it's not necessary to go into any revisit of the judgment in Nabam Rebia, but if Your Lordship do want to revisit it, it should be for reaffirming the view enunciated in particular by the decision of Justice Mishra. Which is that he is disabled, a Speaker or a Deputy Speaker is disabled qua his functions as a Speaker at the time of a notice to remove him. And not at a subsequent stage when that notice is under consideration.

CHIEF JUSTICE CHANDRACHUD: Yes.

MR. JETHMALANI: Now so that view, I'm now reading Page 6 of my note, is fortified by the following submissions the fact that a prior notice of 14 days is to be given. Has Your Lordship got that My Lords? Page 6 of my note.

JUSTICE KOHLI: We have.

1 **MR. JETHMALANI:** Presents every opportunity to those aggrieved by the said notice to
2 thwart the intention of the rules. A Speaker or a Deputy Speaker whose removal is intended
3 will be tempted to take all steps available to him to dissuade or prevent the mover of the motion
4 from proceeding with it further in that 14 day period. So that 14 day period provides him an
5 opportunity which not only is capable of being misused, it has been misused. And I'll show
6 that particularly with reference of the fact of the instant case. And that's my second
7 propagation, that subsequent events revealing gross misconduct and partisanship on the part
8 of the Deputy Speaker as more particularly set out here. And My Lord I'll come to those. During
9 the 14 day notice period, vindicate the view in Nabam Rebia regarding the period when the
10 Deputy Speaker's or Speaker's disability under the Article 181 commences. Then third, now
11 My Lord Article 181 deals with the situation where the resolution for the removal of the
12 Speaker is under consideration and prescribes the restrictions on the Speaker or Deputy
13 Speaker that at a sitting, My Lord that article is concerned with a sitting of the Legislative
14 Assembly. Please note that My Lords.

15

16 **CHIEF JUSTICE CHANDRACHUD:** Yes.

17

18 **MR. JETHMALANI:** At a sitting of the Legislative Assembly when such resolution is under
19 consideration, then the Deputy Speaker or the Speaker as a case maybe shall exercise all the
20 powers available to a member of the Legislative Assembly, but not those that pertain to the
21 Office of Speaker/Deputy Speaker.

22 Now My Lords, this is logical. I'm sorry. This is logical as the notice for removal is from the
23 office of Speaker/Deputy Speaker, and not as a member of Legislative Assembly. While Article
24 181 uses the word any resolution and not notice of intention for removal of the Speaker, that
25 is because while consideration of the resolution has to be during the sitting of the Assembly,
26 My Lord it can only be when the House is in session. A notice of intention can be given even
27 when the Assembly is not sitting. So Article 181 itself does not prohibit a construction that a
28 Deputy Speaker cannot act as such Deputy Speaker from the time a 179 C notice is moved. 181
29 deals with a sitting for consideration of the Legislative Assembly and My Lord the rules
30 between 179 C and 181, that is, notice given, and then 181 consideration of the notice there is
31 a vacuum. That vacuum is filled up by Rule 11. The House itself has made rules as to what will
32 happen in that interregnum. My Lords if Your Lordships want I will read it very quickly. Rule
33 11.

34

35 **CHIEF JUSTICE CHANDRACHUD:** That's all right. We have seen the rules.

36

1 **MR. JETHMALANI:** My Lords there is ...In short My Lords, he has to give a notice for 14
2 days period and then as soon as maybe. My Lord the House rules make it almost impossible
3 for there to be any serious delay in the matter pertaining to disposal of this issue of his removal.
4 Because it is only that 14 day period. Immediately after the 14 day period he has to refer it to
5 the House, and then...so basically it's 14 days.

6

7 **CHIEF JUSTICE CHANDRACHUD:** So according to you, the prohibition, the period when
8 the Speaker is barred from considering a petition for disqualification commences the moment
9 a notice is given.

10

11 **MR. JETHMALANI:** Yes,

12

13 **CHIEF JUSTICE CHANDRACHUD:** Commences the moment a notice is given.

14

15 **MR. JETHMALANI:** And any misuse is circumscribed by the rules of the House, which say
16 immediately after 14 days almost, you must put it up to the House. If you get 29 members, it
17 will then be considered. You don't get 29 members after 14 days, the issue is dead there and
18 then.

19

20 **CHIEF JUSTICE CHANDRACHUD:** All right, what is the next point?

21

22 **MR. JETHMALANI:** Then, the provisions of Article 181 of the Constitution are based upon
23 the rule against one being a judge in one's own cause. In other words, the nemo iudex in causa
24 sua rule. There is no reason why this rule should be restricted to the case of consideration of
25 resolution, but not at the stage of notice. When a Speaker who continues to function as the
26 Speaker, can use his powers as a Speaker to alter the constituency that will decide on his
27 removal. So he can gerrymander the constituency that decides on whether he should, if he's
28 allowed to remove them. And that's the whole purpose of....

29 Now My Lordship will kindly have. What is it that is prevented by 179 or 181. It is that a Speaker
30 cannot preside, he cannot preside over the House. That word is important. By presiding over
31 the House he gets several powers which get.. My Lord and his powers, at least under our
32 Constitution are almost paramount. They are unset. His is the last word regarding procedure
33 in the House and decisions taken. His is the final word. There is no check on it within the
34 House. It's only governed by the rules, that's it. Your Lordships will quickly see two rules which
35 has not been pointed out so far. Rules 53 and 58 of the Maharashtra Assembly Rules PDF 34
36 and compilation 3C.

37

1 **JUSTICE SHAH:** Which is the PDF page?

2

3 **MR. JETHMALANI:** PDF 34. My Lord, it is the possible abuse of his power to preside that
4 has warranted 181, that has brought 181 into existence. Now under Rule 53, for instance, I am
5 just giving an example as to what he can do to scuttle the constituency, to scuttle the number
6 of members who might vote against him. The Speaker may direct any member who refused
7 to... refuses to obey his decision or whose conduct is in his opinion, grossly disorderly to
8 withdraw immediately from the Assembly, and any member so ordered to withdraw, shall do
9 so forthwith, and shall absent himself during the remainder of the day's meeting.

10 Now this is a part of suspension essentially. On that day.. on a particular day when he's being
11 voted, he can resort to this power and there is no check. That is why his powers of presiding
12 over the House are suspended when his motion is under consideration for his removal. Now
13 My Lord, by a parity of reasoning what applies here should equally apply to that 14 day period.
14 Because he can scuttle members during that time. In fact, as happened in this case, he can
15 totally ignore the notice at all. A Speaker prone to doing that as he has done in this case can
16 My Lords, scuttle the entire removal procedure. And I'll briefly remind Your Lordship, at the
17 appropriate time as to what he did in this case. So for logical reasons, there is no ground to
18 distinguish between the 181 stage and the 179 stage. The Nemo Judex Rule will and must apply
19 at both stages. Otherwise you check him at the 179 stage, but he can scuttle the entire removal
20 motion at the 14 day period, 179 stage.

21 58 is an all...58 of the rules is the all.. is his residual power. He is the final residuary authority
22 of all power in the House. All matter is not specifically provided for these rules, and all
23 questions relating to the detail working of these rules shall be regulated in such manner as a
24 Speaker may from time to time direct. So anything that's not provided for in the rules, is at his
25 sole discretion? That's how powerful he is.

26 Now, My Lord that's the proposition. The proposition is that the judgment in Nabam Rebia
27 must be reaffirmed and put on stronger ground for the reasons I respectfully submit, I have
28 advanced in this note. There may be something to say about the then members part but there
29 are stronger grounds. This judgment can be put, this authority can be put on stronger grounds,
30 if Your Lordships are to revisit the judgment.

31 Now My Lord I come to the next factual conspectus and that is now on 22nd June. On 22nd
32 June, 2022 Sunil Prabhu acting as Chief Whip of the Shiv Sena Legislature party issued a
33 notice calling all members of the SSLP to attend a meeting to be held at the CM's residence on
34 the very same day at 05:00 pm, failing which consequential action against the delinquent
35 MLAs, under the relevant provision of the Constitution of India, would be taken resort to..
36 recourse to. The said letter was replied by Shri Eknath Shinde on the same day, disputing the
37 authority of Sunil Prabhu and further stating that Bharat Gogavale had been appointed the

1 Chief whip of the SSLP. It was also said in the same letter that the notice was Invalid. PDF
2 Page 51 - In view of non attendance by Shinde and other MLAs of the Shiv Sena, an illegal
3 resolution was passed. Now My Lord please note, they didn't attend that meeting for that very
4 elementary ground a notice was then issued, a resolution was passed by 14 MLAs of the UT
5 faction to take disability action as provided under.. so this is the starting point, disciplinary
6 action under the Tenth Schedule. For what? For not attending the meeting.

7 Now My Lord the contention of the petitioner is that the notice is issued on 21st and 22nd were
8 validly issued, and by binding an all members of the Legislative Assembly. Our contention that
9 the two resolutions of 21st and 22nd were illegal for the for... for the following reasons.

10 - Prabhu had been removed as the party Whip by 34 MLAs of the Eknath Shinde Group on
11 21st June itself. After he had been removed he passed, he issued that notice or notices. Notices
12 were therefore without jurisdiction.

13 - Now very important. Moreover, it is well settled that a party Whip can only be issued for
14 actions on the floor of the Assembly and not outside the House. The party Whips of 21st and
15 22nd June were misconceived and illegal in so far as their content was concerned.

16 Now, My Lord, over here is a new document which is not before Your Lordship but we have
17 filed it just now regarding the Legislative Assembly debates. It's a parliamentary debates
18 pertaining to the 52nd Amendment in 1985. I'll just read the speech of one member.

19

20 **CHIEF JUSTICE CHANDRACHUD:** What is the reference?

21

22 **MR. JETHMALANI:** It is the last document on record.

23

24 **JUSTICE NARASIMHA:** Last document means where is it?

25

26 **CHIEF JUSTICE CHANDRACHUD:** Is it a scan?

27

28 **MR. JETHMALANI:** We just filed it in the lunch break. I'm sorry My Lords. We just
29 discovered this document.

30

31 **CHIEF JUSTICE CHANDRACHUD:** All right. You can just refer to it.

32

33 **MR. JETHMALANI:** This is State, this is the speech. What happened My Lord... And there's
34 another. There's another provision.

35

36 **CHIEF JUSTICE CHANDRACHUD:** Who's the speech by?

37

1 **MR. JETHMALANI:** By Sharad Dighe, one of the members, one of the members of
2 Parliament in the Lok Sabha. Who said this. Now what happened was, originally the bill had
3 three provisions under 2.

4 2(a) as it presently stands. 2(b) as it presently stands, and 2(1)(c) there was a third provision.
5 That third provision permitted disqualification for activities outside the House. Now that I
6 haven't got the exact provision, but I'll get it by this evening and tender it because we only just
7 discovered this. The third one was removed by debate. It was deleted. 2(1)(c) was deleted and
8 Your Lordship will just see one... it's at PDF 38, Your Lordships will just note.

9

10 **CHIEF JUSTICE CHANDRACHUD:** Where is a marked part ?

11

12 **MR. JETHMALANI:** This is what he says. This is what Mr. Dighe says in parliamentary, in
13 parliamentary debates of 1985. I'm reading from the Parliamentary debate.

14 'Now there have been several clauses in this bill and I am happy that the Law Minister has also
15 announced that two of the clauses are to be amended. As far as clause 2 Sub-clause 1,
16 Paragraph C is concerned that has to be deleted, and Paragraph B has to be amended suitably.

17 It was very much necessary to delete Paragraph C, because if a member has to be expelled from
18 a political party in accordance with the procedure for anything done outside the House it
19 would have created several practical problems, and it would have given a handle specially to
20 the bosses of smaller parties where this paragraph would have created some difficulties.
21 Therefore, the main principle of this disqualification is that for something which a member
22 does in this House, in the presence of this House, such as voting against the party or abstaining
23 from voting against the direction of the party. Now this is something which is proved beyond
24 doubt. No other inquiries <UNCLEAR> by any other committee or anybody else. So it is very
25 clear that any act done by a member in the presence of a presiding officer, namely voting or
26 abstaining from voting, would entail him to this disqualification. So there is no injustice,
27 though chance of any injustice being done, nor is the scope for any doubt whether he has
28 committed that act or not. Therefore from that point of view acts done outside the House have
29 been deleted or are proposed to delete it now because they would have been the question of
30 proving them. Some doubts may arise and there will be the questions of giving a hearing to the
31 member. Also, the rules of natural justice would have to be followed.'

32 So the Whip squarely applies for disobedience with.. on the floor of the House. It doesn't apply
33 to act outside the House. This is not to say that 2(1)(a) is out. 2(1)(a) is still there.

34

35 **CHIEF JUSTICE CHANDRACHUD:** But isn't that on the merits of the disqualification?
36 This wouldn't really help you..

37

1 **MR. JETHMALANI:** Right now, I'm not on the..

2

3 **CHIEF JUSTICE CHANDRACHUD:** Therefore, your contention was would be that well,
4 the disqualification was not attracted, but even assuming that is so that's the jurisdiction of
5 the Speaker.

6

7 **MR. JETHMALANI:** Yes, Your Lordship is right. So therefore, therefore, what is being done
8 in this case or proposed to be done, because it was never acted upon. What was proposed to
9 be done by the letter seeking my disqualification was to bring in through the back door a
10 2(1)(a) situation which is because this was an act outside the House, which is prohibited,
11 2(1)(c) legislative intendment was to take out 2(1)(c).

12

13 **CHIEF JUSTICE CHANDRACHUD:** Then, Mr. Jethmalani, In that sense, Mr. Sibal's
14 argument was that this was a per se disqualification. You are now dealing with a per se
15 disqualification on merits. Your argument all along has been.. the argument of your side has
16 been.. don't go into the per se disqualification argument at all because it lies within the domain
17 of the Speaker to decide. Now you're really by going into the merits.

18

19 **JUSTICE NARASIMHA:** Actually, this is your..

20

21 **MR. JETHMALANI:** At the moment, I am not.. at this moment, I'm not on the
22 disqualification petition which I will come to.

23

24 **CHIEF JUSTICE CHANDRACHUD:** And if you are inviting us to go into Mr. Sibal's
25 argument as to whether there is a per se disqualification. He may be right on that.

26

•

27 **MR. JETHMALANI:** At the moment, I am not on the disqualification petition. I am on the
28 two letters which are sent to me. Please see the..

29

30 **CHIEF JUSTICE CHANDRACHUD:** Why should I go into the merits of the
31 disqualification at all. Because once you say..

32

33 **MR. JETHMALANI:** Alright..

34

35 **CHIEF JUSTICE CHANDRACHUD:** ..that disqualification lies exclusively within the
36 domain of the Speaker then perhaps.. then it will be internally inconsistent for you to argue
37 that, well, there was no disqualification.

1
2 **MR. JETHMALANI:** There were two grounds in the disqualification petition. And they were
3 both based on this letter.

4
5 **JUSTICE SHAH:** But you can very well say that it is the <UNCLEAR> of Speaker to consider.
6 <UNCLEAR>

7
8 **MR. JETHMALANI:** It can stop there, Your Lordship is absolutely..

9
10 **JUSTICE SHAH:** Don't try to justify whether there was a disqualification or not.

11
12 **MR. JETHMALANI:** I agree.

13
14 **MR. JETHMALANI:** We don't need to go that far. But since those two letters were the very
15 grounds of my disqualification.

16
17 **JUSTICE NARASIMHA:** Okay Mr. Jethmalani.

18
19 **CHIEF JUSTICE CHANDRACHUD:** Alright. What is the next point now Mr. Jethmalani?

20
21 **MR. JETHMALANI:** Now the next one.

22
23 **JUSTICE KOHLI:** Mr. Jethmalani, what was the page number? Since we've got that
24 downloaded, airdropped to us.

25
26 **MR. JETHMALANI:** I'm saying Nabam should be reaffirmed.

27
28 **JUSTICE KOHLI:** No no, the speech... the debate that you referred to at 85. It's been air
29 dropped to us just now. Just indicate the page please for us. What page?

30
31 **MR. JETHMALANI:** Page 38.

32
33 **CHIEF JUSTICE CHANDRACHUD:** 38. All right.

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35 **MR. JETHMALANI:** Now of the second..

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37 **CHIEF JUSTICE CHANDRACHUD:** What's the next point?

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MR. JETHMALANI: The next point is that the fact of 34 MLAs being part of the real recognized Shiv Sena, and this is more substantial, was disclosed to the Deputy Speaker the said MLA's letter on 21st June, wherein that enclosed the resolution to the same date which clearly spelt out.

CHIEF JUSTICE CHANDRACHUD: Mr. Jethmalani, where you.. which part?

MR. JETHMALANI: I'm reading now at page at P 11.

CHIEF JUSTICE CHANDRACHUD: Page Eleven.

MR. JETHMALANI: Yes, the second point.

CHIEF JUSTICE CHANDRACHUD: All right.

MR. JETHMALANI: That the fact of Respondent 34.. of 34 MLAs being part of the real recognized Shiv Sena party was disclosed to the Deputy Speaker in the said MLA's letter on 21st June wherein they had enclosed the resolution of the same day, which clearly spelt out that they were the real Shiv Sena party. The Deputy Speaker ought inter alia to have desisted from proceeding any further with the disqualification petitions, as it should have been obvious to him that they are being now two groups each claiming to be the recognized Shiv Sena. The dispute on the issue was a matter which was squarely within the jurisdiction of the Election Commission under Clause 15 of the Symbols Order. So My Lord the proposition here is that once the claim is made that we are the real Shiv Sena as opposed to a second group, that we are, in other words, that we have both legislative and organizational majority or heft, the Speaker should desist from proceeding further with the disqualification proceeding, pending and adjudication by the ECI because the Speaker can only go into legislative matters. He cannot go into the organizational situation. In the facts of this case, I may say one more thing, in the facts of this case, all the MLAs in this case, all MLAs, this is part of the party constitution. All MLAs, all MPs, of every House are ex officio members of the Pratinidhi Sabha which is the supreme organisational body of the Shiv Sena. So even if the speaker in this case were to adopt the twin test, the second one being the organizational issue.

CHIEF JUSTICE CHANDRACHUD: But Mr. Jethmalani, this also point.. this point Mr. Kaul has also made.. already made that it is not the case of your side. That there was either a

1 split or merger in the political party. The contention was that a rival faction in the Shiv Sena
2 represented the real Shiv Sena and this is now been found to be true and correct by the
3 subsequent order passed by..

4

5 **MR. JETHMALANI:** By the ECI. So My Lord, a question was posed..

6

7 **CHIEF JUSTICE CHANDRACHUD:** Mr. Kaul has made that point. I don't think you need
8 to..

9

10 **MR. JETHMALANI:** So the question was posed whether what should be the conduct of the
11 Speaker when such a situation has been pointed out to him. Not a split.

12

13 **CHIEF JUSTICE CHANDRACHUD:** You are saying he has no jurisdiction at all...

14

15 **MR. JETHMALANI:** Yeah. He has no jurisdiction. He must submit to the jurisdiction of the
16 ECI. He should desist from pursuing the disqualification proceedings further. Now My Lord,
17 we come to the very important aspect of this matter which actually takes out the foundation of
18 the applicability of Nabam Rebia. Now on 24th June 2022, the Deputy Speaker wrote an email
19 to the advocate for the 34 MLAs in response to their notice of 21st June under Article 179 C,
20 stating that he could not recognize the email ID from which the notice under 179 C was sent.
21 Therefore, he would take no further action until and unless the genuineness or veracity of the
22 said signatures on the letter or the email ID is ascertained. So in fact he did.. he ignored Nabam
23 Rebia or ignored it on extremely specious frivolous grounds that I could not recognize it. And
24 I would wait for verification. That verification was never communicated. So where is Nabam
25 Rebia even involved in this case? You either ignored the dictates of a Constitutional bench
26 judgment or alternatively you ignored it, you rejected it on the basis of extremely flimsy
27 grounds. But in any event you never acted upon it. That notice under 179 C never ever
28 obstructed the Speaker from what he went on to do. Because he contemptuously ignored it on
29 specious grounds and he disobeyed the then mandate. Nabam Rebia was good law and he
30 ought to have obeyed it. So now this is a real nub of the issue with the whole case is one of
31 deemed disqualification and Nabam Rebia is invoked because of that notice under 179C that
32 you hindered me in my job as Speaker by issuing that notice, notwithstanding the fact that
33 Nabam Rebia was good law. In fact, you were not hindered. Factually you were never hindered
34 because you tossed my notice into the dust bin. That see, that's the end of anything further,
35 your deemed disqualification doesn't apply now.

36

37 **CHIEF JUSTICE CHANDRACHUD:** Right.

1
2 **MR. JETHMALANI:** Then My Lord, something very important starts from 25th June. On
3 25th June, the Deputy Speaker issued summons, now My Lord, all along we are told that there
4 are 39 MLAs. Your Lordship has made all those calculations on 39 MLAs. Now My Lord, there
5 is a serious issue here, the Deputy Speaker on 25th June issued summons to 16 MLAs only,
6 informing them that a disqualification petition had been filed against them, which was served
7 along with all Annexures only on 16 MLAs. Now My Lords for the first time they inform us,
8 now My Lords, this is a very serious issue. First time they inform us is on the 14th of July when
9 a disqualification petition allegedly dated 27th June. Now I will point out the pleading very
10 briefly. I'll just point out.

11 There has never been any reference, never been any reference to a 27th June disqualification
12 petition. Admittedly they were not served on us. Admittedly. The so-called 27th June petition
13 for disqualification of the remaining 23 MLAs. Apart from 16, Lordship remembers there were
14 39 MLAs. 16 MLAs has been the theme throughout. Even during the hearings in the Supreme
15 Court which they challenged against, the hearing in the Supreme Court on the 29th and the
16 29th, when they moved the Supreme Court to challenge the Governor's decision to call for a
17 floor test. Even on that date, the reference was only to 16 MLAs. But in arguments it is being
18 sought to portray that all 39 MLAs received disqualification notices.

19 Now there is a second aspect here, a legal issue. Your Lordship turns to Page 12 , regarding
20 that notice regarding the disqualification petition. In every pleading Your Lordship will note
21 that contrary to what is being suggested to Your Lordship, in every pleading there is no
22 mention of the remaining 23 MLAs. My Lord that is a matter which has misled this court. I
23 had no idea myself till it was pointed out. I assumed that was always 39 MLAs. But it has
24 through out been... and there is a reason for that. There's a good reason why they only serve
25 these disqualification notices and petitions to 16 because they wanted to split the two cans. 16
26 still made it possible for them to survive a majority of the floor of the House. 39 most certainly
27 didn't. So till the last minute, till the last minute they only talked about 16. It is only after, it
28 is only after the new Government came into existence. The new Speaker was appointed. The
29 new Government came into existence that they referred to 39 MLAs.

30
31 **CHIEF JUSTICE CHANDRACHUD:** We will just get up for two minutes. The Chief Justice
32 of Kenya has to have other meetings. And we'll come back in two minutes. So it's according
33 to you only after the new Government came ...

34
35 **MR. JETHMALANI:** For the first time in a petition Your Lordship may Note of 14th July,
36 Sorry. 8th July. Which they filed before this court in that 8th July petition, they said 39 MLAs

1 totally and they referred to disqualification petition of 27th June which nobody was served
2 and they never referred to any of their earlier pleadings.

3 Now of this whole exercise on 16 MLAs would never have taken your Lordships so many days,
4 unless you wanted to revisit Nabam and all that. But on facts, if they had been fair and said
5 there were only 16 MLAs disqualified at all times and not more, the situation was purely
6 academic and the reason is mala fide why this division. The reason is mala fide. You wanted
7 to split the troop. You were hoping that you would get back 23 of them and your majority
8 would survive, that is why only 16 MLAs. But when the Government fell, that necessity didn't
9 arise. When that Government fell, that rationale had gone. Now you want to do topple the
10 whole Government.

11 Now My Lord on this disqualification, this disqualification issue, a second major fault on the
12 part of the Speaker. He gives me two days to reply. Now My Lords, it is very important. A little
13 factual digression is necessary, but it is a little law and a little factual because this is very
14 important. This reveals mala fide on the part of the Speaker in the extreme. Sorry, Deputy
15 Speaker. Incidentally, there was no speaker for two years in Maharashtra.

16

17 **CHIEF JUSTICE CHANDRACHUD:** There was no Speaker at all.

18

19 **MR. JETHMALANI:** Yes.

20

21 **JUSTICE KOHLI:** Deputy.

22

23 **MR. JETHMALANI:** Now My Lord, within seven days, please see Rule 7(3)(b) it's at PDF
24 129 JC 1.

25

26 **CHIEF JUSTICE CHANDRACHUD:** What does Rule 7(3)(b) say?

27

28 **MR. JETHMALANI:** Statute compilation..

29

30 **CHIEF JUSTICE CHANDRACHUD:** Fifteen days right?

31

32 **MR. JETHMALANI:** Seven days.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Seven days. okay.

35

36 **MR. JETHMALANI:** That's all I want to point out. Really, it's seven days. But what is
37 important is whereas, the Maharashtra Assembly Rules may be subject to Article 212, which

1 says irregularities of procedure can't be looked at into the.. by a court, mere irregularities. If it
2 is a serious irregularity, the latest judgement of Justice Khanwilkar's Three Judge Bench says
3 that if it involves the question of natural justice in another Maharashtra Assembly case, then
4 it's escalated to the level of a Constitutional provision which must be obeyed and the violation
5 would be 14 of 1421 etc. But as far as the rules, Disqualification Rules are concerned. And when
6 I talk about 7(3)(b) in, at Page 12. This is not part of the Assembly Rules. This is now part of
7 the Disqualification Rules. And these are framed under Paragraph 8. And my submission is
8 that these rules are mandatory and any breaches of them by a Speaker/Deputy Speaker are
9 not immune from judicial review, as per other procedural regulations under 200 and.. under
10 208, whose effects are diluted by 212. Now My Lord, just two paragraphs of two different
11 judgments. Actually, I have set out, but Your Lordships may just see Kihoto's judgment. PDF
12 129 judgments compilation one.

13

14 **JUSTICE NARASIMHA:** You are referring to these Kihoto and Shrimant to say that
15 principles of Natural Justice is mandatory. There is no dispute on that. We take the point.

16

17 **MR. JETHMALANI:** Not just that, it is in specific reference to the. I'll just read one
18 paragraph, the Lordships will see what I'm getting at.

19

20 **JUSTICE KOHLI:** Para?

21

22 **MR. JETHMALANI:** Para 97 in Kihoto, Page 129.. PDF 129.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Para 97?

25

26 **MR. JETHMALANI:** Yes, it's not just the rules pertaining to natural justice. Paragraph 8
27 rules are all immune from the dilution provided by Article 212 because these are, I'll tell Your
28 Lordship the reasoning comes there. Please see that that's why I want Your Lordship to just
29 see it. The reason is contained in Paragraph 97.

30 'That apart, even after 1986, when the Tenth Schedule was introduced the Constitution did not
31 evince any intention to invoke Article 122 or 212 in the conduct of resolution of disputes as to
32 disqualification of members under Articles 191 and 121. The very deeming provision implies
33 that the proceedings of disqualification - the deeming provision says these shall be deemed to
34 be proceedings of the house - the very deeming provision implies that the proceedings of
35 disqualification are in fact not before the House, but only before the Speaker as a specially
36 designated authority. The decision under Paragraph 6 (1) is not a decision of the House, nor is
37 it subject to the approval of the House. The decision operates independent with the House. A

1 deeming provision cannot by its creation, transcend its own powers there is therefore no
2 immunity under Articles 122 and 212 from judicial scrutiny of the decision of the Chairman,
3 Speaker or Chairman exercising power under Paragraph 6(1) of the Tenth Schedule.'

4 Now My Lords 6(1) includes the whole gamut of procedure starting with the petition for
5 disqualification. The entire gamut of the procedural provision 6(1) and Your Lordship may
6 then just see 8.

7

8 **CHIEF JUSTICE CHANDRACHUD:** Para 6.8?

9

10 **MR. JETHMALANI:** 8 says -'Submit to the provisions of the Subparagraph 2 of this
11 paragraph, the Chairman or the Speaker of a House may make rules for giving effect to the
12 provisions of the Schedule and in particular and without prejudice to the generality of the
13 foregoing. Such rules may provide for' -

14 And Your Lordships may kindly turn to -

15 'd) the procedure for deciding any question referred to in Subparagraph 1 of Paragraph 6. '

16 So when my learned friends talk about the Supreme Court intervening with that notice period,
17 which is prescribed the 20 and I am talking about the 27th decision, which is prescribed under
18 rules framed under 8, i.e. 7(3)(b), the Supreme Court was fully justified. The bench of that day
19 was fully justified. Apart from the fact that it ill behoves a Legislative Assembly to say that
20 rules framed by it under a constitutional provision can be blindly ignored by it. They are the
21 legislatures. If they set that precedent, God save the rest of the country.

22 Now My Lord, even in the latest case of Shrimant Patil, I'll just read it for my note, relevant
23 provision. 'Even the latest case of Shrimant Patil.

24

25 **CHIEF JUSTICE CHANDRACHUD:** Where it is?

26

27 **MR. JETHMALANI:** I'm now at the bottom of Page 12 on D, I'm on D. 'Even in the latest
28 case of Shrimant Patil' - My Lord this was, the I believe the Karnataka assembly case, - 'where
29 time for a reply to a disqualification petition was contrary to the rules of the Karnataka
30 Assembly, the court held in Para 190.7 as under - findings on allegations of not granting
31 specific time in all the above cases are based on the unique facts and circumstances of the case.'

32 My Lord actually after Kihoto's case and the elevation of those rules under Paragraph 8. They
33 should never have been any leniency in time given to file a reply to a disqualification notice.
34 You are affecting not only the MLA but his constituency. It should not be understood to mean
35 that the Speaker could cut short the hearing period. The Speaker should give sufficient
36 opportunity to a member before deciding a disqualification proceeding and ordinarily follow

1 the time limit prescribed in the rules of the legislature. Now My Lord, an exception was carved
2 out in that case. But even so, the principle was reaffirmed that the rules are mandatory.
3 Now My Lord, on the one hand, a disqualification petition is given to us, the Speaker ignores
4 Nabam Rebia. Two, he gives me a two day instead of a seven day period. Three, what happens.
5 Now My Lord kindly see I am now on 13 and this is a very important aspect, while those
6 disqualification petitions are pending, everything is done to prevent me from coming for a
7 hearing. Please see. Now My Lord, I would request Your Lordships, this is the prelude to my
8 petition before this Honorable court on the 27th. This is what actually happened. I did pray
9 for staying of the disqualification proceedings. And in my respectful submission even had a
10 quia timet, my Learned friend, Mr. Kaul pointed it out. Even if a quia timet injunction had
11 been granted, restraining me on the.. restraining the Speaker from pursuing the
12 disqualification proceedings on the ground that a constitutional provision i.e. 179C was being
13 ignored because Nabam Rebia was a law in that.. at that time. Even if they had done it, which
14 they didn't do, there would have been nothing wrong with it. In the in the...What they actually
15 did ultimately was only confined the reliefs granted to police protection. And I'll come to Your
16 Lordships why? And the time period extension from 7 to 14.. from 2 to 12 day. Now My Lords,
17 Your Lordships will kindly see the threats that were given to me. First Your Lordships will
18 kindly see. And this is very important because I couldn't come. They prevented me from
19 dealing with my disqualification application. First, it first say they ignored the 179 C. They
20 chucked it to the dustbin. Secondly, they gave me practically no time, two days and then kindly
21 see the threats that
22 were issued to me. But the first one, Your Lordship may see, is 24th June..

23

24 **JUSTICE NARASIMHA:** Mr. Jethmalani, not necessary to read the threats.

25

26 **CHIEF JUSTICE CHANDRACHUD:** You relied on Para 97 of Kihoto. You have also
27 distinguished..

28

29 **MR. JETHMALANI:** but very important..

30

31 **CHIEF JUSTICE CHANDRACHUD:** It was compelling for you to come to.

32

33 **MR. JETHMALANI:** Yes, but I'll summarize what those threats were. First of all My Lord,
34 security to I was out of Bombay, security to my family members was withdrawn. Death threats
35 were being given, security was being.. Security was withdrawn. And publicly there were
36 pronouncements of the leaders of the Uddhav Thackeray faction that if I come back to Bombay,
37 if I come back to Mumbai, my body would be sent straight to a crematorium. That's the nature

1 of threats. In view of that, I had to move the Supreme Court for multifarious reliefs. Out of
2 those on, the 27th, only two were granted. There were serious death threats, My Lords, one of
3 them a gentleman called Tanaji Sawant, an MLA. I think he was the Minister of the
4 Government when the.. when the Government was united, his office was burnt. It was the most
5 serious situation at that time. And kindly see the response, now only I don't want to tread on
6 the solicitor's province but Your Lordships may just see the letter of the Governor at that time..
7 And that time, because this shows the kind of information that the Government was always
8 receiving, continuously receiving, which ultimately culminated in this decision to call, cause a
9 floor test. Page 306 PDF.

10

11 **JUSTICE SHAH:** The letter to the Governor was read and reread. So way we know that these
12 are the thing, correct. Earlier there is a threat and earlier there was a coalition government,
13 there is a breach, everything has been read.

14

15 **MR. JETHMALANI:** So this letter pertains to the Governor saying the situation is extremely
16 serious, please give them security. My Lord, they're talking now about a Speaker and a
17 Government that ignores a constitutional mandate. I just want to just see what is happening.
18 That the threat. You threw out the leader of the legislature party. He gives you a notice fearing
19 disqualification under 179 C. You ignore it on complete specious grounds, then you serve me
20 the next day, next day, you serve me a disqualification petition for 16 MLAs. Divide and rule.
21 When I get that disqualification petition, in the notice that you say reply within two days,
22 contrary to rules, mandatory rules and finally, you prevent me from coming to Mumbai. I am
23 entitled to a hearing. You prevent me from coming to Mumbai with death threats and
24 withdrawal of security to my wife and children and burn houses. Conduct of the Speaker,
25 therefore, needs to be that's the only reason why, notwithstanding that the fact that the factual
26 basis of this case doesn't warrant any legal relook at Nabam Rebia, because as I said earlier
27 Nabam Rebia was never an issue because the notice was never, ever acted upon.
28 Notwithstanding that fact, restriction circumscribing misuse of power by the Speaker need to
29 be imposed and Justice Mishra's judgment in Nabam Rebia, needs to be reaffirmed. So I am
30 not going into the Governor's letter.

31

32 **CHIEF JUSTICE CHANDRACHUD:** What else?

33

34 **Mr. JETHMALANI:** My Lord, under article 164(2), my learned friend talks about a very high
35 constitutional principle. He elevates the entire conspectus of this case to the evil of defection.
36 You know the evil of a Speaker and a Government hell bent upon power is an even greater evil.
37 But there is a Constitutional principle if Your Lordships just look at (g) at Page 14. Now the

1 principal emanates from 164(2) which says that the Council of ministers are collectively
2 responsible to the Legislative Assembly of the state. My Lord, what does this mean in practice?
3 It means that when the Council of Ministers collectively lose the support of the majority of the
4 House they have to step down. So My Lord, much higher than the evil of defection is the
5 principle of majority rule in this country. That is paramount and the principle of majority rule
6 is to be found, there are judgments on 164(2), is to be found in 164(2). And that's why the
7 Governor is given the right to form, to form a new Government headed by that person, not
8 headed by a political party. Headed by that person who commands the majority in the House.
9 And he has to ignore says Rameshwar Prasad and Shivraj Chauhan, which my learned friend
10 Mr. Kaul read out, he has to ignore the fact of any potential disqualification of those members
11 who might support the new Government.

12 Now at Page 15, Your Lordship just may note point 2.

13 Main heading H - Supreme Court refused to grant stay on floor test and 2. So these two I am
14 not going to read these petitions but they say there are only... on 29th June and they say that
15 there are only 16 MLAs disqualified. That is the last date on which anything could have affected
16 them. 29th June itself the petition was for disqualification of 16 MLAs as I said the 16 MLAs
17 issue came only on.. and till today we don't know the number of that petition. It was allegedly
18 filed. It was allegedly filed before the Deputy Speaker. We do not know the disqualification
19 petition number till today. It is placed before Your Lordships. I'll just give Your Lordship the
20 page, never served upon us, but the contention is 39 MLAs, 39 MLAs all along.

21 Now My Lords, just the last three points very briefly at K, at Page 16. K, L and M sorry, J, K
22 and L. The floor test was never held. My Lord there's some limit to causation in the law, to say
23 that Mr. Uddhav Thackeray resigned because of all that went before is, My Lords, stretching
24 credulity to the nth degree. He resigned because he knew he had lost the majority. But My
25 Lord, there has to be.. this is too remote a cause in law for that to be a consequence of all that
26 happened before, he voluntary stepped out. Now My Lord J, K, L. I'll just read it out quickly,
27 and then I conclude. The question of deemed disqualification, there is no such concept as a
28 deemed disqualification. Disqualification has to be actual, and there is a mandated procedure
29 for disqualification proceedings. My Lord I request Your Lordship to just indulge me and read
30 rule 77. This under the Disqualification Rule. Not now, under anything else. Not under the
31 Assembly Rules. 7(7), Your Lordships were referred earlier to 7(3)(B) which was that notice
32 period. Now 7(7) is the rest of the procedure. Please have a look at it and for the question of
33 deemed disqualification. My Lords Page 12 of the statute compilation volume. 7(7),

34

35 **JUSTICE SHAH:** We were on 7(7).

36

1 **MR. JETHMALANI:** 7(7) - 'The procedure which shall be followed by the Speaker for
2 determining any question, and the procedure which shall be followed by the Committee for
3 the purpose of making a preliminary inquiry under Sub-rule 4, shall be so far as may be, the
4 same as the procedure applicable for the determination by the committee of any question as
5 to breach of privilege of the assembly by a member, and neither the Speaker, nor the
6 committee shall come to any finding that a member has become subject to disqualification
7 under the Tenth Schedule without affording a reasonable opportunity to such member to
8 represent his case.'

9 There has to be a mandatory hearing in this matter. There cannot be a disqualification without
10 a hearing. Therefore, to talk about a deemed disqualification in the absence of a hearing, is to
11 suggest this.

12 Now My Lord, it is suggestive, my submission on this point. 'A deemed disqualification is
13 suggestive of a contention that the reply of a delinquent MLA and the hearing, which he has a
14 right to before the Speaker are both empty formalities. It further suggests that the Speaker
15 would be necessarily of predetermined mind and partisan <UNCLEAR> to deem
16 disqualification. That means the hearing is an empty formality, something which are litigant
17 to claims to be upholding lofty ideas and unbiased procedure should be loathed to canvas.'

18 Then My Lord equally untenable is the contention of dating back of a disqualification. The
19 judgments with both Rana and Patil are no authority for setting the clock back on all events
20 that took place up to date of the action which made an MLA libel for defection. A plain reading
21 of those judgments Mr. Kaul has read about, clearly revealed, see for example Rana's case in
22 Para 34 that the Speaker has to decide, that is all that Rana is authority for, the question of
23 disqualification with reference to the date on which the member voluntarily gives up his
24 membership or defies a Whip, it is really a decision ex post facto. The phrase ex post facto does
25 not entail retro, just retrospective operation. The argument also completely ignores Articles
26 189(2) and 191(2) of the Constitution, both of which clearly indicates that an order of
27 disqualification only had retrospective effect. Particularly important My Lords is 191(2), which
28 says he shall be disqualified when he is disqualified. It has only, disqualification only has
29 prospective effect, not retrospective effect.

30 And lastly, (L) I've already taken this point so I won't repeat it. My Lord I am deeply grateful
31 for a very patient hearing.

32

33 **MR SINGH:** Only a couple of points My Lord. Not to repeat anything. We have I think heard
34 My Lord the same thing over time and again. My Lord, if Your Lordship may just have a note
35 I, My Lord. We had filed it and My Lord refer, there are brief submission which I have put in
36 the index itself. The points are being flagged My Lord. First point My Lord, if Your Lordship
37 have got that note I.

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JUSTICE NARASIMHA: What aspects will you be dealing with Mr. Singh?

MR SINGH: I am dealing with the three or four aspects. My Lord, one being on Nabam, very briefly which is not specifically highlighted. Number two, Kihoto Para 122 with relation to 2(1)(b) and My Lord, the two judgments which they have relied upon on the other side to contend My Lord that there is a permissibility under the Constitution scheme for the court to deal with a disqualification petition directly and the Karnataka judgment is My Lord a bible on not attending meetings constituting a disqualification under 2(1)(a).

My Lord I am going to - With reference to Para 122 of Kihoto it is only two kinds of meetings which fall under 2(1)(b).

The first point is Nabam and that My Lords respectful submission is rule against participation of the Speaker till the time the removal resolution process is completed. If Your Lordship will come to the index. Kindly scale the first one. My Lord there is a one page index.

CHIEF JUSTICE CHANDRACHUD: Rule against participation.

MR SINGH: So the first point Your Lordship may skip My Lord. The relevant dates Your Lordship have considered, noted down. I am not reading anything from there. The first is rule against participation of the Speaker. Kindly come to that at Page 5.

CHIEF JUSTICE CHANDRACHUD: Page 5.

MR. SINGH: And My Lord, Your Lordship may take it, I am not reading anything. Unless Your Lordships have not seen any part. Rule 181 is against participation of the Speaker. 179 is removal. Now My Lord my respectful submission is 181 is founded on the basic principle of conflict of interest that where you are personally involved or your personal action is or activity is going to be considered you should remain out. This conflict of interest gets elevated to the level of Constitutional adjudication. A conflict of interest at the degree , even in executive functioning. If you have to now test it for a Constitutional adjudication, the level would be far higher. So My Lord, there is a.. there is a dissent My Lord.. intraparty dissent, which can be shown and My Lord, the rule against participation of the Speaker and My Lord, this became a question in the Constitutional validity challenge which was laid before this honourable court in Kihoto that intraparty dissent is also a part of the Constitutional scheme, as well as democracy. How do you create a balance? This My Lord is laid down and I made a submission earlier My Lord, the proviso to 179 C is the beginning of that rule against participation, proviso to Article 179 C is the commencement of the times time... time duration of commencement of

1 rule of nonparticipation and it gets concluded in terms of the main provision of 179C when the
2 removal resolution is considered in the House. Kindly have a look at that My Lord. 181(2) is
3 rule against participation, this is my submission, based on the conflict of interest and when it
4 is to be tested in the touch stone of the constitutional adjudication because Clause 6 of the 10th
5 Schedule is Constitutional adjudication by the Speaker. Now My Lord, if Your Lordship may
6 kindly see the next page, at Page 6 of my written note at Para number 5, which reproduces the
7 relevant portion of 179 C.

8

9 **CHIEF JUSTICE CHANDRACHUD:** Yes.

10

11 **MR. SINGH:** And I'm not going to read it My Lord, my respectful submission is that the
12 proviso is the commencement of that nonparticipation period to begin and main proviso to
13 179 C is the conclusion when the removal resolution is taken in the House. Then Clause 11 from
14 the Legislature Rule.. Maharashtra Legislature Rules have been reproduced. I am not reading
15 it. I want to read, these three paragraphs again from justice.. Honourable Mr. Justice, as Your
16 Lordship <UNCLEAR> Dipak Misra's Judgment, from Para 235 to 230 A, which are
17 reproduced at Page 8 and 9. Now My Lord, when this conflict of interest is raised to the level
18 of Constitutional adjudication and My Lord the intraparty dissent is to be kept in mind on the
19 basis of the validity of this entire schedule was upheld, Tenth Schedule was upheld. Kindly
20 come to 235, the purpose of referring to the said Article is to highlight the nature of
21 participation of the Speaker.

22

23 **CHIEF JUSTICE CHANDRACHUD:** And Yes.

24 << Badari Reviewing from here>>

25 **MR. SINGH:** I am sorry My Lord, if I am missing something. The purpose of referring to the
26 said article is to highlight the nature of participation of speaker when the question of his
27 removal arises. It is clearly different under the Constitution. He is entitled to take part in the
28 proceeding and speak therefore he is in a position to contest, appreciating the scheme of the
29 Constitution, and especially keeping in view the language employed in the first proviso to
30 Article 179C. It is quite clear that it is the constitutional design that the speaker should not do
31 any act in furtherance of his interest till the resolution is moved. Then 237, the aforesaid
32 reasoning eloquently speaks of the power, position and the status of the office of the Speaker
33 enjoys under the Constitution. It also states about the scope of the friction. The court has
34 constricted the power of judicial review and it is restricted to the state carving out certain
35 extreme exception. It is because the Speaker while exercising the authority jurisdiction
36 exercise the power of Constitutional adjudication. The concept of Constitutional adjudication
37 and Constitutional value in a parliamentary democracy and Constitutional value sustain the

1 democracy in a Sovereign Republic. The Speaker is expected to maintain propriety as an
2 adjudicator. The Speaker when functions as a tribunal at jurisdiction authority to pass adverse
3 orders, it is therefore required that his conduct should not only be impartial, but such
4 impartiality should be perceptible. It should be beyond any reproach. It must reflect the trust.
5 Repose the name under the Constitution. Therefore the power which flows from the
6 introduction of Tenth Schedule, by constitutional amendment is required to be harmoniously
7 construed with Article 179C. Both the provisions of the Constitution are meant to subserve the
8 purpose of sustenance of democracy which is a basic feature of the Constituion. Manurula, we
9 are speaking about democracy has opined that democracy in India is a product of rule of law.
10 And it is not only a political philosophy, but also an embodiment of Constitutional philosophy.
11 Thus, regard being had to the language employed in Article 179C of the Constitution and the
12 role ascribed to the Speaker under the Tenth Schedule, it is necessary that Speaker, as a
13 Tribunal, has to have completed detachment and perceivable impartiality. When there is an
14 expression of intention to remove, to move the resolution, to remove him, it is requisite that
15 he should stand the test and then proceed. That is the intendment of Article 179C, and the said
16 interpretations serves the litmus test of sustained democracy founded on rule of Law and the
17 Founding Fathers had so intended and the constitutional value, trust, and morality
18 unequivocally to suggest it would be an anathema to the concept of Constitutional adjudication
19 if the Speaker is allowed to initiate proceedings under the Tenth Schedule of the Constitution
20 after intention to remove him from office is moved. The 14 days period being mandatory. The
21 words all the then members gain more significant the Constitution has confidence in the
22 Speaker. I would like to call it repose of Constitutional confidence. Simultaneously the
23 command is to have the confidence of the majority of the actual or real figure. This
24 understanding is gatherable from the express provision of the Constitution and it clearly
25 brings in harmony between Constitutional confidence or trust and the Constitutional control.
26 Be it stated the position has to remain the same even after introduction of Tenth Schedule to
27 sustain the robust vitality of our growing Constitution and it embraces the seminal spirit of
28 rule of law that control all the powers, even the prerogative power.

29

30 So My Lord therefore, this is how My Lord the court brings in a balancing between these two
31 apparently areas which may be in conflict with each other, but Your Lordships brought an
32 interpretation to ensure that it is a smooth functioning. Now this is founded on the principle
33 of elimination of conflict of interest and that conflict of interest when it is required to be
34 demonstrated by in a process of Constitution adjudication. Your Lordships laid down the
35 duration of rule against participation of the Speaker, from the date of issuance of that intention
36 of notice of moving the resolution and its completion when the resolution is moved and My
37 Lord, whether it is sustained or it is not sustained, so that's the first respectful submission My

1 Lord. Does not require any fresh look, because the reasoning is very, very sound My Lord. And
2 is based on the principle which has stood the test of time.

3

4 Now My Lord, Your Lordship may then come to kindly move a little ahead on the next part of
5 my note. My Lord, Rana was pressed time and again with utmost respect to the other side.
6 Please see Rana. Rana is a judgment which clearly reveals and clears the way for entertaining
7 a disqualification directly by the courts. My Lord Rana is a case and I will only make one line
8 submission here which has also been made earlier the original disqualification petition is
9 considered by the Speaker. It is then met a fate of its non sustainability by the High Court. The
10 matter when came to Your Lordship, Your Lordship then said now there is no need to remand
11 and we will rule on it. To rely on this judgement to say - No, It gives a permissibility to the
12 other side to raise a submission that the Speaker jurisdiction should now get vested with the
13 courts, and courts should come under an obligation to consider such a petition at the
14 threshold. My Lord is not permissible. It would not reserve My Lord deserve any approval by
15 Your Lordships. My Lord Page 13 there cannot be and should not be any deemed
16 disqualification. Civil consequences compliance with principles of natural justice, prejudice
17 caused on the removal of an elected member of the House. My lord, it would be, with utmost
18 respect to my friends on the other side, would be preposterous to even suggest that when a
19 particular action can have such consequences that you remove an elected member, inflict an
20 election again on the same constituency. Can there be that there is no notice and hearing?
21 Because My Lord, to say that there is a deemed disqualification is making a submission of
22 complete elimination of any process to be followed before giving that, My Lord, position. No
23 process to be followed. Then if a gentleman according to that test commits and he must go
24 home straight away whether elected by a constituency of say 20 lakh people. MP constituency
25 now is between 16 to 20 lakhs, so the expression of their will toward the democracy must suffer
26 a deemed removal. A negation, totally. My Lord totally unknown to any civilised society norms,
27 forget the Constitutional scheme. The suggestion is with utmost respect is preposterous,
28 should not deserve even to be entertained as an argument and My Lord only thing which I
29 want to rely additionally, a judgment of three judges, My Lord, of Your Lordships which I have
30 cited My Lord at Page 13 para 7, where My Lord leading evidence in a 2(1)(a) petition, Your
31 Lordships have remanded it back that full opportunity, including leading of evidence, would
32 flow from 2(1)(a), My Lord, this is 2022 2SCC 759, a short judgement, I will keep or leave a
33 copy with Your Lordships..

34

35 **JUSTICE SHAH:** Manipur judgement?

36

1 **MR. SINGH:** Yes My Lord. Now My Lord, after that I want to read 122 in this background
2 My Lords, we start from page 14, 122 of Kihoto. My Lord Intra-party dissent was one of the
3 argument.. one of the argument to.. My Lords up to establish unconstitutionality and invalidity
4 of the Tenth Schedule. That the one of the rights of elected candidates is to speak again their
5 own party, if need be. That itself is a part of democracy, that how much I can speak on various
6 large public interest issues within my party or outside against my party.. Can this be curtailed?
7 Totally. In the name of party discipline and embarrassment to the party. Can it be curtailed?
8 Totally. Should it be eliminated? Your Lordships upheld the validity and kindly make a note
9 of para 44 of Kihoto 17,44, 121, 122, and 123, let me repeat 17, 44, 121, 122 and 123. Now My
10 Lord, your Lordship may also kindly consider a respectful submissions. If Your Lordship may
11 kindly see Clause 2 of the Tenth Schedule, which is reproduced at page 14. My Lord, the grey
12 area now only remains is 2(1)(a), 2(1)(b) Your Lordships have decided in Kihoto, 122 and I'm
13 going to read it. My Lords Your Lordships have dealt with this matter even in the 239 AA first
14 round of the Constitution Bench any and every direction. What is the meaning of any in such
15 constitution provisions? Kihoto is relied upon in 239 AA by Your Lordships in paragraph it
16 says Any can't mean every. Now My Lord, 2(1)(b) uses the word any direction. Kindly have a
17 look at 2(1)(b). If he votes or refrains from voting, in such House, contrary to, please mark the
18 next words, any direction. So the argument raised was, wherever any is, it would include every.
19 Any has no other meaning but to every. So this was pressed into survey that the language is so
20 clear, how can this be curtailed? Now My Lord, if Your Lordship now kindly see page 15 where
21 para 13 of Kihoto is reproduced. Kihoto dealing with 2(1)(a) says literally meaning 2(1)(a)
22 mean when you leave a party. When you leave a party that is 13. 17 My Lord, Your Lordships
23 record the contention on intra party dissent to remain a very, very important right of every
24 elected member. Kindly now come to 121 at page 17. 121. 44 My Lord, Your Lordship may make
25 a note, I am not reading it. I'll just bother Your Lordship from 121 and 122. Your Lordship may
26 also add 123 there, but I want to read these two. We may now notice one other contention as
27 to the construction of the expression, any direction occurring in Para 2(1)(b). It is argued that
28 if the expression really attracts within its fee, every direction or whip of any kind whatsoever,
29 it might be unduly restrictive of the freedom of speech and the right of dissent, and that
30 therefore should be given a meaning limited to the objection and purposes of the Tenth
31 Schedule. So straight question and Your Lordships utilizes the interpretation by limiting that
32 power kindly see 122. While construing para 2(1)(b), It cannot be ignored that under the
33 Constitution, members of the Parliament as well, the State legislator enjoy freedom of speech
34 in the House though this freedom is subject, to the provisions of constitution and the rules and
35 standing order regulating the procedure of the House Article 105(1), 194(1), the
36 disqualification imposed by 2(1)(b) must be so construed as not to unduly impinge on the said
37 freedom or speech of a member. This would be possible if para 2(1)(b) is confined in its scope

1 by keeping in view the object underlying the amendments contained in Tenth Schedule,
2 namely to curb the evil or mystery for political defections motivated by the lure of office or
3 other similar consideration. The said object would be achieved if the disqualification incurred
4 on the ground of voting or abstaining from voting by member is confined to cases where a
5 change of government is likely to be brought about or is prevented, as the case may be a result
6 of such voting or abstinence or when such voting or abstinence is on a matter which was a ma
7 jor policy and program on which the political party to which the member belongs, went to the
8 polls. What was your manifesto? How did you go to the poll? What presentation you made?
9 For this purpose the direction given by the political party to a member belonging to it, the
10 violation of which may entail disqualification under para 2(1)(b) would have to be limited to a
11 vote. Now kindly see My Lord, would have to be limited to, please mark this word one here My
12 Lord, because these are only two situations. One, first, a vote on motion of confidence that is
13 number one. So it is limited to only two situations. One when there is a vote of confidence in
14 the House, and where the word starts, My Lord, or it is two. Or two, no confidence in the
15 government or where the motion under consideration. I'm sorry, My Lord. The second 'or' the
16 two is where the motion under consideration relates to a matter which was an integral policy
17 and program of the political party on the basis of which it approached the electorate, the voting
18 or abstinence from voting by a member against the direction by the political party on such a
19 motion would amount to disapproval of the program on the basis of which he went before the
20 electorate and got himself elected. And such a voting or abstinence would amount to a breach
21 of trust reposed in him by the electorate. Kindly see where there is a coalition, they left the
22 coalition. They've got the votes on coalition and the argument is made against us. The vote is
23 by the coalition, you are responsible for that vote which is given in your favor on that
24 presentation. Therefore My Lord, dissent against the leader.

25

26 So therefore My Lord my respectful submission is this. That 122 restricts it to only two kinds
27 of Whips of direction which fall within the purview of 2(1)(b). There is no other Whip for
28 direction which Your Lordships have now permitted to be falling within the purview of 2(1)(b).
29 I go a step further My Lord. If there is a vote in the House, two situations can be there. There
30 can be a Whip or it is absence of any Whip. Can it be said my lord, a Whip to attend a particular
31 meeting, not in the House, outside. Nothing to do with the vote on a policy, can it be put in
32 2(1)(a) if it doesn't fall under 2(1)(b) because under 122, it doesn't fall under 2(1)(b). Any
33 direction or a Whip for any meeting outside nothing to do with vote or these two categories, it
34 doesn't fall under 2(1)(b) because precondition for 2(1)(b) is a Whip for a direction which get
35 restricted to only to two categories. Now these two categories, when there is no Whip, can it
36 be brought by any Speaker to say, I will put it into 2(1)(a) now? Impermissible. It would be
37 abuse of that process and surrection of a nonexistent jurisdiction by the Speaker and they are

1 raising it to deem, My Lord they're two meetings of a party. In the present case, two meetings
2 of the party. Not for a House meeting for vote.

3

4 **JUSTICE NARASIMHA:** These are the merits of the matter.

5

6 **Mr. SINGH:** I'm not on merits. . I am on the, with at most respect. I'm not going to the
7 merits. I'm conscious.

8

9 **JUSTICE NARASIMHA:** This will only be in a context of the merits only.

10

11 **Mr. SINGH:** My Lord the judgment.

12

13 **JUSTICE NARASIMHA:** in the sense that Speaker could not have gone into this issue.

14

15 **Mr. SINGH:** I'm on the other, I'm deeply obliged My Lord, Your Lordships are pointing out
16 to me. I'm conscious. I'm only answering because one of the judgment which they have relied
17 upon is that any direction which is not complied with, therefore, we are saying it is a per se
18 automatic disqualification.

19

20 **JUSTICE NARASIMHA:** You are answering the per se points that even we should not
21 decide in this manner.

22

23 **MR. SINGH:** I'm only . I'm respectfully only saying that judgement.. My Lord I'll show it to
24 Your Lordship that judgment also doesn't say so because.. Your Lordship may straight away
25 come to at this point, kindly come to Page 29 of this note. I'll come back a little later. Kindly
26 come straight away to 29. I will finish in next 5-7 minutes. Kindly, see Page 29. My lord
27 Repeatedly, repeatedly an argument is made that for not attending the meetings and then find
28 the direction on that account is per se disqualification. And kindly see at Page 29, Shrimant
29 Balasaheb Patil's case My Lords which is pressed into service again and again. Only three
30 points on that. They had resigned from the party, those 17 MLA, number One. Number two,
31 they failed to attend two meetings which were not 2(1)(b) meetings and three, failed to attend
32 the trust vote violating the Whip, leading to falling of the Government. Not the other meeting.
33 So Your Lordships said - in the light of these facts, we declared that this is the consequence.
34 What I am highlighting and pressing in service before Your Lordships kind consideration,
35 define the whip for attending the trust vote in the House, that My Lord this judgment doesn't
36 have any applicability in our case. And my lord similarly, if you kindly see Page 28, Page 28,
37 all the three cases which have been relied upon there is something more than not coming to

1 the meeting. Kindly see Ravi Nayak - the two members of one political party, MGP supporting
2 the Chief Minister of the other party. Then secondly, Mahindra Prasad Singh, he was elected
3 on the Congress ticket and then as MLC and then goes as an Independent leaving that party.
4 Similarly, My Lord Rana, they say 13 candidates say - No, no. Bring the Samajwadi Party into
5 power and followed by the Shrimant Balasaheb. There is a defiance of not attending the
6 meeting in the House when the vote is to take place and the Government falls. And last one of
7 my last submission is kindly my lord come back to the judgment My
8 Lord, of Yediyurappa. My Lord, at page 22.

9

10 **JUSTICE SHAH:** Mr. Mehta today.

11

12 **MR. SINGH:** I am finishing My Lord.

13

14 **JUSTICE SHAH:** No just...we just...

15

16 **MR. SINGH:** I am counting My Lord. I have only taken approximately 20 minutes.

17

18 **JUSTICE SHAH:** Give some opportunity today to him or tomorrow ..

19

20 **MR. SINGH:** Today today My Lord. It's right, it is on its way My Lord, today.

21

22 **JUSTICE KOHLI:** Last word also.

23

24 **JUSTICE NARASIMHA:** It is very dangerous.

25

26 **MR. SINGH:** My Lord, I knew at serial number 4, I will have this My Lord. Your Lordships
27 enormous patience, My Lord. I will not test it. I can't afford to do that. Only last submission
28 My Lord.

29

30 **JUSTICE SHAH:** No no, you continue. You have come this far, go ahead.

31

32 **Mr. SINGH:** Inter party dissent which became the subject matter of judgment in
33 Yediyurappa's case. It came from High court, My Lord. They were where was the descend
34 between two Honorable judges. Honorable the Chief Justice and Justice Kumar and then My
35 Lord, Justice Kumar didn't agree with the Honorable, the Chief Justice Kehar there My Lord.
36 And the matter was referred to Third Judge and Your Lordships, My Lord, the honourable
37 Chief Justice Kehar had held that they are too disqualified. The third judge agreed with the

1 Honorable the Chief Justice. Justice Kumar's view was No, they have not been disqualified
2 because they were opposing the leadership of Yediyurappa. Your Lordships accepted that
3 judgment of Justice Kumar and My Lord held it was not a disqualification. I have only taken
4 the liberty to reproduce two three paragraphs from Justice Kumar's view which at para 45 and
5 62 at page 22 and 23, which I am not reading. I want to read few portions of three, four
6 paragraphs of Your Lordship judgment in Supreme Court in Yediyurappa and then sit down
7 immediately. My Lord, 822 and 23 of that note. 45 and 62 I am not reading. Your Lordship
8 may just mark it. I want to read only two three paragraphs. My Lord I will do it without even
9 Your Lordships.. Kindly come to My Lord, para 22 again. We are not leaving para 122 from
10 Kihoto to Yediyurappa.

11

12 **CHIEF JUSTICE CHANDRACHUD:** Although Mr. Sorabji..

13

14 **MR. SINGH:** Yes, My Lord, although Mr. Sorabji was at pains to point out the language using
15 the matter was similar to the language used in Article 356 of the Constitution which according
16 to involve an invitation to the Governor to take action in accordance with the side article. The
17 same is not as explicit as Mr. Sorabji would have us believe the Constitution process as
18 intended at in the said letter, did not necessarily mean the constitutional process of
19 proclamation of President rule, but could also mean the process of removal of the Chief
20 Minister through constituent means. On account there of the Bharti Janata Party was not
21 necessarily deprived of further opportunity or formula or formulate a government forming a
22 government after a change in the leadership of the Legislature Party. In fact the same is evident
23 from the reply given by the appellants on 9th in the reply to the show cause notice issued to
24 them if they re emphasize their position that they are not only continue to be members of BJP,
25 but would also support any government formed by BJP and by any other leader other than
26 Shri so and so of the state. The conclusion arrived at by the speaker does not find support from
27 the contents of that letter so as to empower the speaker to take her drastic steps as to remove
28 the appellant from the membership of the House. 128, in arriving at such conclusion that by
29 such short notice, no prejudice has been caused to the appellant since they had filed their
30 detailed reply to the showcause notice, the speaker had relied on two decisions of this Court,
31 in Mahichandra Prasad Singh and Ravi Nayak, wherein it had helped that 1986 rules were
32 directly and not mandatory in nature. And as a result, he ordered at a 10-10-10 could not be
33 set aside only on the ground or departure they are from. Even if less than seven days time is
34 given to reply to the show cause notice, the legislature must not be prejudiced or precluded
35 from giving an effective reply to such notice. The procedure adopted by the speaker, para 147,
36 seems to indicate that he was trying to meet the time schedule set by the Governor for the trial
37 of strength in the assembly and to ensure that the appellants and the other independent MLAs

1 to disqualify prior to the date on which the floor test was to be held. Having concluded the
2 airing on 10-10-10 by 05:00 p.m.. The speaker passed the detail order in which various
3 judgment both of Indian Court, Foreign Court and Principles of law from various authorities
4 were referred to on the same day holding that appellants had voluntarily given up their
5 membership of BJP by their acts and conduct, which attracted the provision of 2(1)(a) of Tenth
6 Schedule to the Constitution where under they stood disqualified. The vote of confidence took
7 place on 11-10-10 in way the disqualified members could not participate and in their absence,
8 Shri so and so were able to prove his majority unless it was to ensure that the trust vote did
9 not go against the Chief Minister, there was no conceivable reason for the speaker to have
10 taken up the disqualification application in such a great hurry, although in Dr. Mahesh
11 Chandra Prasad case and in Ravi Nayak's case, this court had held that the disqualification
12 rule were only directive and non mandatory, and that violation there of amounted to only
13 procedure, irregularities and not violation of a Constitution mandate. It was also observed in
14 Ravi Nayak's case, that such an irregularity should not be such so as to prejudice any authority
15 who is affected adversely by such breach. In the instant case, it was a matter of survival as far
16 as the appelants were concerned. In such circumstances, they deserved a better opportunity
17 of meeting the allegation made against them, particularly when except for the newspaper
18 cutting said to have been filed by Shri so and so along with the disqualification application,
19 there was no other evidence at all available against the appellant. Having considered all the
20 different aspects of the matter and having examined the various questions which have been
21 there. We are constrained to hold that the proceeding conducted by the speaker on the
22 disqualification application do not meet the twin test of natural justice and fair play. The
23 speaker in our view proceeding, in the matter as if he was required to meet the deadline set by
24 the Governor irrespective, whether in the process he was ignoring the Constitution not set out
25 in the Tenth Schedule to the Constitution and the disqualification rule and in contravention of
26 the basic principle and go hand in hand. The appeals are allowed. All doubts on the Speaker
27 are set aside. My Lord this is the test which Your Lordships have laid down and My Lord
28 therefore I appeal to a Lordships that this case with Your Lordships now deciding on that day
29 of deference of consideration to refer the Nabam decision to larger bench. In so far the other
30 points are concerned nothing would survive My Lord, that's our respectful submissions. It is
31 only academic, specially My Lord, when the gentleman concerned did not face the vote of
32 confidence in House. That's our respectful submission. Deeply obliged.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Thank You, Mr. Manindar Singh, Mr. Mehta? How
35 long will you take?

36

37 **MR. MEHTA:** One hour outer limit. Maybe 5-10 minutes more.

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CHIEF JUSTICE CHANDRACHUD: So by between 11 and 12 will give you an hour tomorrow. Mr. Sibal, How long would you take after that? Between you and Dr. Singhvi.

MR. SIBAL: I don't think so My Lord, I'll take the end of the day. It was five days have been taken this side.

CHIEF JUSTICE CHANDRACHUD: Now I think we have to wrap.

MR. SIBAL: I think Your Lordship, best is Your Lordships tell me which are the areas Your Lordships want clarification, I'll answer it. There's no issue.

CHIEF JUSTICE CHANDRACHUD: What you can do Mr. Sibal is you can start your rejoinder. And then if we feel that you know we can go to the next point. We'll tell you that.

MR. SIBAL: There's no issue My Lord. I didn't trouble Your Lordship on the earlier occasion. I won't stop you again. I'll just answer all the questions.

CHIEF JUSTICE CHANDRACHUD: If possible it will be good. If both you and Dr. Singhvi, we can.

MR. SIBAL: That may not be possible. That may not be possible. Your Lordships have been so, so, very patient.

CHIEF JUSTICE CHANDRACHUD: Mr. Kamat and then Mr....12:00 o clock

MR. SIBAL: Your Lordships have been so, so very patient with all of us.

CHIEF JUSTICE CHANDRACHUD: 12 o'clock you will start tomorrow.

MR. SIBAL: Yeah, that's fine.

CHIEF JUSTICE CHANDRACHUD: 11:00 to 12:00 for Mr Mehta... 12:00 for your rejoinder.

MR. SIBAL: No issue.

1 End of day's proceedings

2

3

CHIEF JUSTICE'S COURT
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE M.R. SHAH
HON'BLE MR. JUSTICE KRISHNA MURARI
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE PAMIDIGHANTAM SRI NARASIMHA

Subhash Desai

v.

Principal Secretary, Governor of Maharashtra and Ors.

W.P.(C) No. 493/2022

Item No. 501

TRANSCRIPT OF HEARING

15-Mar-2023

11:00 AM IST

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JUSTICE SHAH: What's your estimate?

MR. MEHTA: One hour My Lord, and I'll not repeat anything and I'll just point out My Lord seven points I have to assist Your Lordship with, and first I'll narrate those seven points and Your Lordships would find most of them are not....

JUSTICE SHAH: You confine to Governor only?

MR. MEHTA: Yes, yes, yes My Lord, Governor. That's why I wanted to inform that these are the seven points I will be dealing with.

JUSTICE SHAH: [UNCLEAR]

MR. MEHTA: Perfect, My Lords, that's a

JUSTICE SHAH: [UNCLEAR]

MR. MEHTA: Yes, yes My Lord, I would not test Your Lordship's patience...

CHIEF JUSTICE CHANDRACHUD: Mr. Sibal, now you must tell Mrs. Sibal what my learned brother told.

JUSTICE SHAH: I say the one hour means the actual one hour...

CHIEF JUSTICE CHANDRACHUD: Please tell him the last part of what my learned brother had said.

MR. MEHTA: Thereafter you have to sit down.

JUSTICE SHAH: I said, see I told him in Gujarati, so that straightway the message can go.

MR. MEHTA: In letter and in spirit otherwise in English, it's only letter which goes, the spirit is not translated. My Lord the first point I'll make is the objective material which the Honourable Governor has considered. Second My Lord...

1 **JUSTICE SHAH:** One minute.

2

3 **MR. MEHTA:** My Lord, I'm giving the proposition note. Your Lordships may not write
4 the, write down right now.

5

6 **CHIEF JUSTICE CHANDRACHUD:** Sometimes very good to write or type. You know
7 why? That keeps the judge's audio sensory perception a little quiet because otherwise we tend
8 to talk and then eat up a lot of time. So when you're typing, you know, you let the lawyer talk.

9

10 **MR. SIBAL:** I mean when I was young lawyer..

11

12 **MR. MEHTA:** You're still a young lawyer.

13

14 **MR. SIBAL:** Thank you very much. Thank you very much. My Lords, in Justice
15 Chandrachud's Court and Justice Bhagwati's Court, the kind of dialogues that used to go on,
16 that's unbelievable. The judges used to talk because the judges used to express themselves to
17 actually seek answers and in fact, when judges don't talk, My Lords it is very dangerous
18 because you never know...

19

20 **CHIEF JUSTICE CHANDRACHUD:** I felt that when I was a lawyer, if you have a judge
21 who is very quiet, it's very dangerous thing, you never know...

22

23 **MR. SIBAL:** You never know, so we can't even clarify what's in his mind. So it's good
24 wherever...

25

26 **CHIEF JUSTICE CHANDRACHUD:** The trouble is very often now with this live meeting,
27 you know, people don't realize that what is said in the court is not what...

28

29 **MR. SIBAL:** Exactly...

30

31 **CHIEF JUSTICE CHANDRACHUD:**...to illicit the response of the Counsel.

32

33 **MR. SIBAL:** And they misinterpret things.

34

35 **CHIEF JUSTICE CHANDRACHUD:** Ultimately, you know, you look at the holistic
36 perspective of the matter. There may be a little point here against a counsel, a point there

1 against a Counsel, you never have a hundred percent case in favor of one party or the other.
2 They are rare cases.

3

4 **MR. SIBAL:** Right, right.

5

6 **MR. MEHTA:** That tend to make the lawyer argue additional points, thinking that this might
7 be in the mind of the...

8

9 **MR. SIBAL:** The enunciation of the law has to be through a dialogue. It can't be any other
10 way.

11

12 **JUSTICE SHAH:** Sometimes the questions are asked to get the answer, so that we can also
13 know what is...Suppose we are in confusion...

14

15 **MR. SIBAL:** Absolutely, absolutely My Lords.

16

17 **CHIEF JUSTICE CHANDRACHUD:** So, the first point is the objective material.

18

19 **MR. MEHTA:** Objective material My Lord, which is considered. Second point, the
20 submission of the petitioner that Tenth Schedule has a direct correlation with the Governor's
21 exercise of power under Article 174. And I have to wait, when I say I My Lord, I'm sorry I
22 represent the Honourable Governor has to wait till the Speaker decides.

23

24 **CHIEF JUSTICE CHANDRACHUD:** So the argument that the Tenth Schedule has a direct
25 correlation with?

26

27 **MR. MEHTA:** No, that's their argument which I will deal with. The Governor is not
28 concerned with Tenth Schedule or the consequences flowing therefrom. That's my respectful
29 submission.

30

31 **JUSTICE NARASIMHA:** You are saying the Tenth Schedule has a direct relationship with
32 the power of the Governor?

33

34 **MR. MEHTA:** Yes. It doesn't have.

35

36 **CHIEF JUSTICE CHANDRACHUD:** No it doesn't have...

37

1 **MR. MEHTA:** Doesn't have the power.

2

3 **CHIEF JUSTICE CHANDRACHUD:** He is dealing with the argument.

4

5 **MR. MEHTA:** It's their argument. Yes. My Lords are right. It's their argument. I am dealing
6 with that argument that Governor is not concerned with consequences contemplated in the
7 Tenth Schedule. My Lord the other side relied upon, I'm sorry, the other side relied upon....

8

9 **CHIEF JUSTICE CHANDRACHUD:** Third point now?

10

11 **MR. MEHTA:** Yeah the third point. But it is a subcategory of this very point.

12

13 **CHIEF JUSTICE CHANDRACHUD:** We'll take it as three.

14

15 **MR. MEHTA:** Yes. My Lordships would recall the other side relied upon heavily on para 397
16 of Bommai, to show that no the Tenth Schedule and Governor there is...You cannot say that
17 there is no correlation. I will point out that it was in a context and completely different context.
18 In fact on the proposition, whether the Tenth schedule as anything to do with the Governor's
19 exercise of power under Article 174, the real judgment is Rameshwar Prasad. I will read only
20 few paragraphs. I have earmarked, and I will not repeat any other thing. The next point which
21 the petitioners urged, was the Governor should have required, My Lord my learned friend's
22 side, to move a no confidence motion rather than directing a floor test. My Lord, next point
23 is, Dr. Singhvi My Lord raised this point, and in my respectful submission squarely covered
24 by Shivraj Singh Chouhan My Lord, that power under 174 to conduct floor test can be
25 exercised only when the government is formed for the first time and not subsequently. But
26 that is dealt with by Your Lordships My Lord in Shivraj Singh Chauhan. It was argued with the
27 same zeal My Lord by which it was argued here, and it was dealt with. And that is a good
28 law My Lord, that's my respectful submission. And last, why did the Governor invite
29 Mr. Eknath Shinde and not interacted with the party or the President of the party as to whom
30 should I invite? My Lord, these are the propositions My Lord, and I will be as brief My
31 Lord as I can be under the facts case.

32

33 **CHIEF JUSTICE CHANDRACHUD:** Only five propositions?

34

35 **JUSTICE KOHLI:** These are five propositions.

36

1 **MR. MEHTA:** Six propositions. My Lord, so far as the objective effects are concerned, My
2 Lord, I have filed a compilation, it's a very short compilation. Documents Your Lordships have
3 seen, but I have compiled it in one chronological order.

4

5 **JUSTICE NARASIMHA:** Which is this document?

6

7 **MR. MEHTA:** Compilation on behalf of the Honourable Governor, that's the... My Lord, I
8 have the physical copies also.

9

10 **JUSTICE KOHLI:** We found it.

11

12 **JUSTICE NARASIMHA:** There are two documents from your side, Governor LOD with
13 documents and written submissions of Tushar Mehta.

14

15 **MR. MEHTA:** Yes. Governor LOD, My Lord.

16

17 **JUSTICE NARASIMHA:** Yes, we have got that.

18

19 **MR. MEHTA:** Yes, My Lord.

20

21 **CHIEF JUSTICE CHANDRACHUD:** Just give me one second.

22

23 **MR. MEHTA:** And My Lord, the original file of the Honourable Governor is present with the
24 responsible representative of the Governor, if Your Lordships would like to peruse, but all
25 these documents are supplied to them also. Since My Lord, it was once... it fell from My
26 Lord, from the Chief Justice of India that we may call for the file of the Governor, therefore
27 it is kept here. And I will not read My Lord the documents. It is only My Lord for... My
28 Lord can I give the physical file? Could Your Lordships find... ?

29

30 **CHIEF JUSTICE CHANDRACHUD:** LOD? Yes, we got the LOD.

31

32 **MR. MEHTA:** So kindly come to page one, My Lord, this is, Your Lordships, are aware My
33 Lord, there is a concept of legislature party and political party. The Legislature party appoints
34 or elects My Lord, Shri Eknath Shinde as the group leader of Shiv Sena Legislature Party in
35 the legislature.

36

37 **CHIEF JUSTICE CHANDRACHUD:** This is your list of dates, right?

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MR. MEHTA: Yes, My Lord, I'm sorry. PDF page 8, I am sorry.

CHIEF JUSTICE CHANDRACHUD: PDF page?

MR. MEHTA: Eight.

CHIEF JUSTICE CHANDRACHUD: Eight.

MR. MEHTA: I am not taking Your Lordships to the list of dates. The list of dates are essentially for showing which document is for what purpose.

CHIEF JUSTICE CHANDRACHUD: Alright.

MR. MEHTA: I'll show the document itself, just to save time. Page 8, My Lord, it is 25th of November 2019, the Shiv Sena Legislature Party, meaning all MLAs belonging to Shiv Sena, were elected under the banner of Shiv Sena, elects Shri Eknath Shinde as the leader of the House as we say, they say group leader of Shiv Sena Legislature Party and My Lord, this fact is not a fact in dispute. This would have a bearing as to why the Governor called Eknath Shinde when the dispute arose first. But I'll come to the little later, I'm just showing the document. Now, My Lord, kindly see PDF page 12. My Lord, this is Annexure B of my compilation. Your Lordships gets that, My Lord? Today, this is addressed by Shri Eknath Shinde to the Deputy Speaker with a copy to the Governor, which Your Lordships would find marking of copy at PDF page 13. May I read My Lord? Today through media report it has come to our knowledge that there was a meeting of the members of Shiv Sena Legislature Party called without any notice of the said meeting given to any of us including existing leader of Shiv Sena Legislature Party. It has come to our knowledge that only 16 MLAs out of 55 MLAs of our Legislature Party attended the said unauthorized meeting and passed the resolution to remove Shri Eknath Shinde as leader of the Shiv Sena Legislature Party. It is pertinent to note that the said meeting was without any notice and without any quorum and without following the due procedure. We state that 16 out of 55 MLAs could not have appointed a new leader of Shiv Sena Legislature Party in as much as the requirement of even quorum was not met. It has come to our knowledge that Mr. Chaudhry has been unauthorizedly stated to have been appointed as a leader of Shiv Sena Legislature Party. We have today unanimously passed the resolution resolving that the said resolution dated 21st June '22 passed at 12:30 p.m., appointing Shri Ajay Chaudhary is void as being without jurisdiction and the same is inoperative. And kindly see My Lord, PDF Page 14, this is the resolution which is signed My

1 Lord, Your Lordships would find at page 18 onwards, by 34 members. Meaning I'm sorry -
2 - meaning thereby, as on this date, My Lord, that is 21st of June '22 the Honourable Governor
3 was informed that there is no change in the leader of the Legislature party and Shri
4 Eknath Shinde continues to be the leader of Legislature Party in Maharashtra Legislature.
5 My Lord thereafter... I am sorry, My Lord, can I proceed, My Lord? Kindly come to PDF page
6 21.

7

8 **CHIEF JUSTICE CHANDRACHUD:** This resolution is also of the 21st, no?

9

10 **MR. MEHTA:** 21st, My Lord. Yes. Letter sent to the Honourable Speaker and
11 the Honourable Governor on the same day, informing that any unauthorized meeting where
12 14, 15 MLAs may have gathered to change the leader is unauthorized and Shri Shinde who was
13 appointed in 2019 continues. And all 34 have signed. Now My Lord page 21.

14

15 **CHIEF JUSTICE CHANDRACHUD:** Page?

16

17 **MR. MEHTA:** 21. On 25th of June '22, approximately, not approximately, exactly I'll
18 give you the figure. The 38 MLAs, it contains signature of 38 MLAs, writes to
19 the Honourable Governor that malicious withdrawal of security of our family members have
20 taken place and there they point out certain shocking facts and also produced before
21 the Governor, the video clips of national news channels which Your Lordships would find
22 at PDF page 22, para 5 bottom. One leader of the party says, let all the MLAs come to the floor
23 of the House. We'll see then these MLAs who have left, they will find it difficult to return and
24 move around in Maharashtra. Then the NDTV clip is produced. Then these are the signatures
25 of, I'm sorry there are I'm sorry, My Lord. I stand corrected, my learned friend is right.
26 There are not only 38 MLAs, 38 MLAs belonging to Shiv Sena. And at page 2 My Lords there
27 is some other party, small party, Prahar Janshakti Party. They have two. So meaning
28 thereby My Lord, 40 and 7 independent. So, 47 members of
29 the House, 38, 2 and 7 informed the Governor about the threat being administered.

30

31 **CHIEF JUSTICE CHANDRACHUD:** 38 MLAs, right?

32

33 **MR. MEHTA:** 38 MLAs of Shiv Sena Legislature Party, two belonging to one smaller party
34 called Prahar Janshakti Party and seven independent MLAs. That this is the threat being
35 given, our securities is withdrawn and they say that the one of the leader, important leader of
36 the party says that let them come here. They won't be able to move around in....

37

1 **CHIEF JUSTICE CHANDRACHUD:** This is that letter at page 21?

2

3 **MR. MEHTA:** Page 21. And signed up to page 28.

4

5 **CHIEF JUSTICE CHANDRACHUD:** So that, that composition of those MLAs, just give us
6 again.

7

8 **MR. MEHTA:** Yes, kindly come to page...

9

10 **CHIEF JUSTICE CHANDRACHUD:** 38, Shiv Sena.

11

12 **MR. MEHTA:** Yes. 38 Shiv Sena. Yes. Your Lordships are right. That Your Lordships would
13 find the last figure at page 26, PDF 26. 38, Shiv Sena...

14

15 **CHIEF JUSTICE CHANDRACHUD:** Right.

16

17 **MR. MEHTA:** Then at page 27, Prahar Janshakti Party Amdar. Amdar would mean, a
18 member of Legislative Assembly. Amdar and Khasdar. Khasdar means a Member of
19 Parliament. My Lord, the Chief Justice would be obviously knowing. Then page 28. These are
20 Apaksha Amdar. So independent members, they are seven. So total 47 members, pointing out
21 that threats are being administered. Thereafter at page 29 the Honourable Governor informs
22 the Central Government as well as the State Government that these are...This is the
23 representation which I have received and therefore he requested, kindly see page 29, the
24 letter addressed to the Home Secretary of the country. Unnumbered middle para, that would
25 be relevant. Your Lordship has that?

26

27 Your Lordships, may I read, second unnumbered paragraph, "I have already issued directions
28 to the state police to provide adequate police protection to the MLAs, their families and
29 homes, on an immediate basis". Now please see, "Despite this, offices and homes of some of
30 the MLAs have been vandalized, with the police being a mute spectator. It is accordingly
31 requested that adequate provision of central security forces be made and kept ready, in case
32 required, to address the situation". The next page 30 is a similar letter to the Chief Secretary
33 of the State of Maharashtra. Kindly see the second unnumbered paragraph. "I therefore direct
34 you to provide adequate police protection to the MLAs, their families and homes, on an
35 immediate basis". Similar letter, I am not reading, at page 31, to Additional Chief
36 Secretary, State of Maharashtra Home Department, that you provide immediate security. A
37 similar letter at page 32, PDF page 32 addressed to the Director General of Police, State

1 of Maharashtra. Same My Lord direction, that you provide immediate security. I am not
2 reading it My Lords. Next is My Lord, page 33, similar letter to the Police Commissioner,
3 Mumbai. Now My Lord comes page 34, Bharatiya Janata Party, Maharashtra
4 Vidhi Mandal Paksh, means Legislative.... Legislature Party of the Bharatiya Janata Party
5 writes a letter dated 28 of June, 2022. Kindly My Lord, allow me to place this. This was not
6 read My Lord. My Lord, this is signed by the leader of the Legislative... Legislature party. Shri
7 Devendra Fadnavis in the House on behalf of the Party, and there is no dispute that he is the
8 leader of the House so far as this party is concerned. "I am elected"... Your Lordships can skip
9 first... "The election to the Maharashtra Legis " Am I with the Your Lordships at page 34?

10

11 **CHIEF JUSTICE CHANDRACHUD:** Yes, yes.

12

13 **MR. MEHTA:** "The elections to the Maharashtra Legislative Assembly was held on 21st
14 October and the result were declared". Then he gives the bifurcation. Your Lordships have
15 taken note. "Shiv Sena had contested the election in prepoll alliance with the BJP. However,
16 after declaration of results, the Shiv Sena are chose to enter into a post poll alliance
17 with NCP and INC to form Mahavikas Aghadi Government. The BJP is just the principle
18 opposition party in Maharashtra Assembly, having 106 members. It appears that over the last
19 eight to nine days, there has been an internal strife within the Shiv Sena legislature party. It is
20 common knowledge through widespread media coverage, that a majority of Shiv
21 Sena Legislature Party is feeling that their party's ideology is compromised. It is reliably
22 learned that Shiv Sena Legislature Party and its leader have clearly indicated to the Chief
23 Minister Shri Thackeray, and that they want to end the alliance with NCP and INC. The Chief
24 Minister has thus lost majority in the Assembly. My belief that the Chief Minister Shri
25 Thackeray has lost the majority in the Vidhan Sabha is further reinforced by various news
26 reports circulating on electronic as well as social media, where a group of 39 MLAs of Shiv
27 Sena are seen declaring that they want to exit the unnatural alliance with NCP and INC. The
28 chain of circumstances and events as [UNCLEAR] in the electronic media and various
29 statements made by the majority group of 39 MLAs. It makes it sufficiently clear Shri
30 Thackeray does not enjoy the majority of the floor of the Vidhan Sabha. I say and submit that
31 there is a wide coverage in the electronic media about the members of Shiv Sena
32 Legislature Party being threatened by their top leadership and there have been incidents of
33 attacks on the residences and offices of such members. Further, there appears to be the
34 provocative statements made by the leaders close to the Honourable Chief Minister to incite
35 violence against the members of Shiv Sena Legislature Party. I submit that the same is being
36 used to browbeat and coerce the aforesaid members to fall in line and to make up for the lost
37 majority of the Chief Minister. I submit that the violence unleashed against the members

1 of Shiv Sena Legislature Party is at the behest of leaders close to the Honourable Chief
2 Minister. For instance, Shiv Sena Melava in Bombay, some rally or a gathering, Shri so and so
3 issued a disturbing threat saying and My Lord, video is attached for the Governor to see which
4 the Governor has seen, 40 bodies will arrive from Guwahati and they will be directly sent for
5 post mortem. This is not denied or disputed on facts before Your Lordships or before.. earlier.
6 So, Governor My Lord, relied upon it. That's all I'm saying. Another instance of a clear threat
7 by Shri So and So is where, in an interview given to a leading channel, he has clearly stated
8 that the ongoing violence is only a warmup and that the trailer will come later. He has further
9 stated in the said interview that stones now will now be pelted at the MLAs. The said interview
10 can be accessed and the link is given. It's not just *ipse dixit* or My Lord, some personal view of
11 any particular individual. Then My Lord, he gives several other links for the Governor to see.
12 My Lord, this was the material before the Governor. Now, My Lord, please come to page 38.
13 My Lord, this is.... I'm sorry this is, My Lord, attached. This is the attachment to the email,
14 My Lord, Your Lordships may skip that. Then My Lord, next is letter dated 28th of June '22.
15 My Lord, this has been read and reread and therefore, I am not reading it. Substantially... I'm
16 sorry, My Lord, this is not read. My Lord, I am sorry.

17

18 **JUSTICE SHAH:** What is 38? 37 or 38, that letter.

19

20 **MR. MEHTA:** My Lord, 38...

21

22 **JUSTICE SHAH:** Attachment. What is that attachment?

23

24 **MR. MEHTA:** Yes My Lord, I will just... letter of independent MLAs to the Governor. I'm
25 sorry My Lord. My Lord, the attachment is at next page, My Lord.

26

27 **JUSTICE SHAH:** Please read. What is it?

28

29 **MR. MEHTA:** Allow me to read My Lord, this was not placed by my colleagues My Lord.
30 Request to... this is by the independent MLAs, seven independent MLAs.

31

32 **JUSTICE SHAH:** Those who earlier supported.

33

34 **MR. MEHTA:** Yes My Lord, the very, very same MLAs. They say request to ask
35 the Honourable Chief Minister to prove the majority in the shortest possible time. We are
36 members of so and so, Your Lordships can skip, My Lord, the statistics. Para 4, however, in
37 past few days it has become crystal clear that Shri Thackeray Chief

1 Minister... Honourable Chief Minister does not have a majority in the Assembly. The same was
2 reflected in the recently concluded elections for Rajya Sabha members as well as the elections
3 for seats of Maharashtra Legislative Assembly. My Lords, this is also another material that he
4 didn't... he couldn't My Lord get the people of his party elected. The dwindling majority of the
5 incumbent MVA government has been further reduced when more than 38 MLAs of Shiv
6 Sena who were earlier supporting the Honourable Chief Minister declared in press as well as
7 social media that they want Shiv Sena to break its unnatural alliance with NCP and INC.
8 Various photographs and videos have been in circulation in the media of Shiv Sena MLAs
9 reaffirming the same claim. The turmoil within the Shiv Sena Legislature Party and Shiv
10 Sena has raised serious doubts about the Honourable Chief Minister Shri Thackeray,
11 commanding the support of the majority of members in Maharashtra Legislative Assembly. In
12 short, the events that have unfolded in the past few days in the state of Maharashtra have made
13 it absolutely clear that the current incumbent MVA government, led by the Honourable Chief
14 Minister no longer enjoys the majority in the Assembly and therefore does not have any moral,
15 legal, constitutional, or democratic right to continue as the Chief Minister of Maharashtra. We
16 have also come to know that Shri Thackeray and his colleagues with a view to convert the
17 majority into... minority into majority are trying to get certain MLAs of Shiv Sena disqualified
18 by misusing and violating the provisions of anti-defection law. We have already addressed a
19 communication in this regard, vide our letter dated 24th June to the Deputy
20 Speaker, copy whereof is attached herewith. Your Excellency will agree that in a democratic
21 setup, only a person who enjoys the majority support of the House has a right to continue as
22 the Chief Minister. A person who does not enjoy such majority has no right to continue as the
23 Chief Minister and is obliged to prove his majority on the floor. In view of the matter and
24 keeping in view the established democratic principle, they said the immediate floor test be
25 directed. My Lord, now Your Lordships have read this letter, which is at PDF page 42. This is
26 read and reread, whereby the Honourable Governor request, the then Honourable Chief
27 Minister Shri Thackeray ji to prove his majority. I am not reading it, but kindly see My
28 Lord, the request is a special session. This is at page 45. Therefore, I'm just showing My Lord,
29 this was exercise of powers under Article 174 read with 175(2), therefore, in keeping with
30 the Constitutional and Democratic values, and principles as also the law laid down by the
31 Honourable Supreme Court of India, and in pursuance of the powers conferred under Article
32 174 read with Article 175(2), of the Constitution, I hereby issue the following directions, a
33 special sessions of Maharashtra Assembly be summoned on 30th June at 11:00 A.M. And My
34 Lord, other consequential directions. My Lords, suffice to say Your Lordships have seen the
35 Honourable Governor relies upon Bommai, Rameshwar Prasad, Shivraj Singh Chauhan
36 etc., that floor test is the only test. And the only satisfaction which the Governor is supposed

1 to reach at this stage is the satisfaction that floor test is required. He's not supposed to
2 record a satisfaction that yes, you have lost majority. He doesn't do that.

3

4 **CHIEF JUSTICE CHANDRACHUD:** He does that. He does that. Governor says I
5 am therefore confident that you and your Government has lost the trust of the House.

6

7 **MR. MEHTA:** My Lord for the purpose of... Yes, for the purpose of his justifying his
8 direction, that now you go and prove it otherwise that no, you have the trust of the House.
9 Otherwise he would have invited somebody else immediately, if he would have arrived at that
10 satisfaction, which he could never have arrived at constitutionally. It has to be the satisfaction
11 to call for the floor test that you go and face the test. This is prima facie material, material is
12 unimpeachable. Everything is in public domain. The elected people are coming and
13 representing to me in writing, go and face the floor test. Now, if that satisfaction is not
14 recorded that there is a...

15

16 **CHIEF JUSTICE CHANDRACHUD:** So really speaking Mr. Solicitor, the material before
17 the Governor was only three things. One, the resolution by 34 MLAs that any change in the
18 leadership of the House is not warranted. That therefore they continue to have reaffirmed that
19 the leadership will be with Eknath Shinde, not with Chaudhary or Gogawale. One. Two, the
20 letters by 47 MLAs about the threat to their security....

21

22 **MR. MEHTA:** For converting minority into majority.

23

24 **CHIEF JUSTICE CHANDRACHUD:** And the third, the letter of the leader of the
25 opposition.

26

27 **MR. MEHTA:** Yes.

28

29 **CHIEF JUSTICE CHANDRACHUD:** That 39 MLAs of the Shiv Sena want to exit the
30 alliance with the BJP, with the INC and the NCP.

31

32 **MR. MEHTA:** Yes. And saying...

33

34 **CHIEF JUSTICE CHANDRACHUD:** Essentially all this correspondence boils down to
35 three aspects, three things basically. Independent MLAs, the leader of the...

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37 **MR. MEHTA:** And the resolution passed.

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CHIEF JUSTICE CHANDRACHUD: ...[UNCLEAR] and the 34 MLAs.

MR. MEHTA: The resolutions passed by them respectively, letter is accompanied by resolutions to show that this is not happening for any other reason, this is happening because the Chief Minister has lost majority and he wants to convert his minority into majority. That's the only thing My Lord in my respectful submission, the Governor is supposed to see. In fact, he appears to have been reduced into minority, but he can go to the floor of the House, that's the ultimate...

CHIEF JUSTICE CHANDRACHUD: Ultimately, it boils down to this. Suppose there is a policy difference between a group of MLAs within a party. It was on the alliance with the NCP and the INC. Suppose there is a policy difference on whatever aspects, pending funds for a backward region in the state, we don't want this to be done...

MR. MEHTA: Several. Yes sir.

CHIEF JUSTICE CHANDRACHUD: The difference of the MLAs can be on a variety of things. Does the policy difference of a group of MLAs within a party... because Governor also says, they also don't say that we are leaving the party, because the moment they say that, they incur the Tenth Schedule. Can the Governor, merely on that basis, say now I'm of the view that you must prove your trust vote in the... you must go do a floor test.

MR. MEHTA: I will answer that My Lord, but that I would better answer after showing the law on the point. Because the answer is this, the immediate answer is this. The reasons for that dissatisfaction or reasons based upon which the sitting Chief Minister has lost majority, is not the consideration for the Governor. That can be a ground for disqualifying them, taking any other action within the party fold etc. The Governor is supposed to only understand My Lord, and that's what the law Your Lordships have laid down whether he has lost majority support or not? Whether...

CHIEF JUSTICE CHANDRACHUD: These are two different things. You see, one is whether the Governor has material to indicate that, well, that the existing government has lost majority on the floor the House. Equally, the Governor must be conscious of the fact that his very calling for a trust vote may lead to a precipitate loss of majority for the government. Because, that calling for a trust vote may itself be a circumstance which will lead to the toppling of the government.

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MR. MEHTA: I don't think My Lord... profound respect, as I understand, the Governor My Lord cannot take that call...

CHIEF JUSTICE CHANDRACHUD: The Governor... the Governor should not really lend their office for effectuating a particular result.

MR. MEHTA: Kindly see My Lord, kindly examine it.

CHIEF JUSTICE CHANDRACHUD: The leader of the Opposition writes... The leader of the Opposition's letter is irrelevant according to me. The leader of the Opposition will always write to the Governor, look, these people are acting contrary to the constitution, that their policies are anti-people. That is no ground for the Governor to act. The independent MLAs who said, or the MLAs who said my security is under threat, this was not a report under the Article 356. He was not saying that the government of the State cannot be carried out in accordance with the dictates of the constitution.

MR. MEHTA: That's going to be my submission My Lord.

CHIEF JUSTICE CHANDRACHUD: So the threat to security cannot be a ground for calling for a trust vote. So, both those are out of reckoning. The only thing which survives is the impact of the 34...

MR. MEHTA: May I answer that? May I answer that?

CHIEF JUSTICE CHANDRACHUD: ...34 is something which is... because 34 in a party which has 55 MLAs. So...

MR. MEHTA: May I answer that? First of all, the parameters for Article 356 are different, and 174 is...

CHIEF JUSTICE CHANDRACHUD: What the Governor indicates is, that he was of the view, that there was a certain dissension within the party on whether to continue with the alliance with the Indian National Congress and the NCP, right? Can that be a ground for the Governor to say you call for a trust vote?

MR. MEHTA: Kindly My Lord, allow me to answer. The Governor...

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CHIEF JUSTICE CHANDRACHUD: Then you're virtually breaking a party.

MR. MEHTA: My Lord, the difficulty is, I'm answering this question before my legal submissions are over, because most of Your Lordships questions can only be answered from my legal submissions which are yet to follow. But my immediate answer is this.

CHIEF JUSTICE CHANDRACHUD: You see, looking at it in hindsight... looking at it in hindsight, in hindsight, they had lost the... they had lost the... The mathematical equation they had lost. It was very obvious. That when 34... and that's why when Mr. Jethmalani said yesterday, they were not willing to disqualify all the 39, because they also realized the moment you disqualify 39, then it redounds to their disadvantage. So, they were trying to disqualify the 16, so that you know you give a threat to the other 23 that look, you will also suffer the same fate. Alright? They also knew that they were likely to lose the plot. But we are now on the Governor's powers, we're not so much on the mathematics. And okay, now at the end of it is obviously... it's very obvious that they had lost the numbers' game. But equally, you know what is a very serious concern, is that the Governor should not enter into this... any area by which their action will, in fact, precipitate the fall of a government.

MR. MEHTA: That is where I would very earnestly and respectfully, My Lord differ constitutionally, and I'll answer that...

CHIEF JUSTICE CHANDRACHUD: You stand away and say that look...

MR MEHTA: Can I? Before Your Lordship concludes on this point. Would Your Lordships allow me to place the law on the point, because law as I have understood My Lord, subject to Your Lordships' final approval, may not support this conclusion. My Lord, if there is a dissatisfaction the Governor's responsibility is to ensure that the stable government is there and government functions in a stable way. If somebody goes and says that there is a party dissatisfaction inter se may not be a ground for the Governor My Lord, possibly to call for a trust vote.

CHIEF JUSTICE CHANDRACHUD: Suppose there is a political party, and MLAs of a political party feel that our leader is not true to our ideology. That our leader is not carrying out the basic ideological premise of our party. Take it, forget Uddhav Thackeray, forget Shiv Sena for a moment. They have their remedies. They can always say that they will.. we will vote our leader out. We want it to be believed that, you know, our leader does not pursue

1 the ethos of our party. They can always vote the leader out in a party forum. But can the
2 Governor say that because there is a dissention about certain aspects of the
3 leadership, therefore I will ask the... I'll ask them to now prove their.... it's a government which
4 has been formed. It is a government which has established majority on the floor of the House.
5 It's a government, which is a functioning government and you know, these kind of and we are
6 now not an inception where you have to ask for a trust vote. It is not... I'm not saying that there
7 is an absence of power in the Governor. There is of course, there is a power in the Governor,
8 even after a government is formed because the variety of things may happen, which will lead
9 the Governor to say no, prove your trust on the floor of the House. But what is really the
10 problem here is that Governors in exercising that power may actually precipitate the fall of
11 the government. And that is something which is very... that is very, very serious for our
12 democracy.

13

14 **MR. MEHTA:** May I answer My Lord? As I am running against time. Your Lordship would
15 accommodate me, obviously if... I'm on the first point right now.

16

17 **CHIEF JUSTICE CHANDRACHUD:** This is irrespective of their numbers. There's no
18 doubt about it that they lost numbers at that point of time.

19

20 **MR. MEHTA:** But I'm answering, as a proposition of law, kindly allow me to at least
21 answer My Lord. I have understood My Lord, Your Lordships concern on the Constitutional
22 proposition, which is canvassed by a party which has otherwise lost the majority support, as
23 the figure suggests.

24

25 **CHIEF JUSTICE CHANDRACHUD:** And all these hyperboles that you
26 know, you will have 40 corpses, it's Maharashtra, it's not some... it is a very highly cultured
27 developed state. I mean things are said in politics. Sometimes things are said which are
28 inappropriate, they should never be said. Just the other day. Mr. Mehta that we said to Dr.
29 Singhvi, in a matter where he was appearing, that there has to be some level of constitutional
30 disperse and dialogue which is unfortunately going down in our country. So, we are not
31 condoning it. We are not at all condoning it.

32

33 **MR. MEHTA:** Please don't... this amounts to condoning, that is what my concern is.

34

35 **CHIEF JUSTICE CHANDRACHUD:** No, no, we are not condoning it, in fact we have
36 expressed this as the most serious concern about where the.. it's like, in fact, in one of our
37 orders, Justice Narasimha and I say it's like a race to the bottom. But that is different. I mean,

1 you know, we're not condoning it at all. We are deeply concerned with it as a constitutional
2 court. But equally, we have to also say that what about the Governors? They have to.. they must
3 exercise these powers with the greatest circumspection and caution.

4

5 **MR. MEHTA:** Would Your Lordships consider deferring this view till My Lord my...

6

7 **CHIEF JUSTICE CHANDRACHUD:** Alright. We will see the judgements of course.

8

9 **MR. MEHTA:** Yes My Lord. My Lord, kindly allow me to answer at the outset. I will show
10 the judgements, My Lord. My Lord, whenever the Governor's prime responsibilities, that a
11 stable government continues, number one. Kindly only allow me to complete. Number
12 two, the democratically elected leaders should not only enjoy the confidence of the House
13 when the government is formed. He should continue to enjoy the confidence of the House
14 throughout the tenure. And that's going to be another limb of submission when I examine, My
15 Lord, the Governor's power, in facts of the case is concerned. Otherwise, there would not be
16 any accountability on the leader, so far as his constituent electorate is concerned. He can say
17 that now I am elected, to hell with you. I will not concern. I'm not concerned. Allow me to...

18

19 **CHIEF JUSTICE CHANDRACHUD:** Mr. Solicitor, the monsoon session was coming. This
20 is all happening in the third week of June, the last pillar of June.

21

22 **MR. MEHTA:** Can I complete My Lord.

23

24 **CHIEF JUSTICE CHANDRACHUD:** The monsoon session of the State Legislative
25 Assembly was going to take place, when you will play supplementary demands. That's the
26 surest test. If they have to seek the vote of the House on passing legislation, on supplementary
27 demands, one aspect of a revenue measure and if the government does not get a vote. They are
28 out.

29

30 **MR. MEHTA:** My Lord, I will show the judgments.

31

32 **CHIEF JUSTICE CHANDRACHUD:** ...of the monsoon sessions which was going to take
33 place.

34

35 **MR. MEHTA:** I'll have to My Lord, read some judgments also, and therefore I
36 would earnestly request Your Lordships to defer this <UNCLEAR> conclusion.

37

1 **CHIEF JUSTICE CHANDRACHUD:** This is not a conclusion at all. This is a concern which
2 we are <UNCLEAR>....

3

4 **MR. MEHTA:** Another this My Lord....

5

6 **CHIEF JUSTICE CHANDRACHUD:** We may eventually accept your submission and we
7 will equally put your argument, Mr. Sibal...

8

9 **MR. MEHTA:** No, no I understand. I am confident. I am fully conscious of it....

10

11 **CHIEF JUSTICE CHANDRACHUD:** What is happening is extremely...

12

13 **MR. MEHTA:** My worry is different.

14

15 **CHIEF JUSTICE CHANDRACHUD:** Ultimately, whoever fails, whoever succeeds, if a
16 separate issue, but you are not...

17

18 **MR. MEHTA:** My worry is different. My worry is different and I'll put it first, thereafter I'll
19 answer that question at the outset and elaborate. What was said was not just an inappropriate
20 statement which the Governor could have ignored. It was a threat that you will be brought
21 dead and sent to post mortem. That the Houses being, please don't condone it. Inadvertent...

22

23 **CHIEF JUSTICE CHANDRACHUD:** He wrote to Mr. Limaye, he was the additional Chief
24 Secretary, provide security. That is duty by providing that, that please provide protection.

25

26 **MR. MEHTA:** Permit me My Lord to, anyway...

27

28 **CHIEF JUSTICE CHANDRACHUD:** But bringing down Government because of some
29 member of the Legislative Assembly saying that you know, we will, you know that's...

30

31 **MR. MEHTA:** Sorry My Lords, that's too simplistic a way to look at it. Please look at it
32 holistically. 34 persons, 34 MLAs goes that we have lost confidence. They might be
33 disqualified. They may not be disqualified. Whatever is the consequence, forget it for the time
34 being. Along with two plus seven other MLAs that this man is not enjoying majority support.
35 Kindly My Lord, allow me to complete before Your Lordships expresses the concern. They are
36 not saying that we don't like him, or we don't like that A, B, C, D reasons and therefore he has
37 not...He has lost our confidence. Now My Lord all these allegations, all these threats are being

1 administered and the Governor is supposed to be not a mute spectator because the threats are
2 administered not as a law and order situation. The threats are administered and Governor is
3 informed that with a view to create an artificial majority, now not only threats are
4 administered on public platforms, but really attacks are taking place. My Lord would I expect
5 the Governor to sit as a mute spectator and say that you wait till your monsoon session, this is
6 your internal dispute, you sort it out internally. The minimum thing the Supreme Court has
7 said is, that the Governor is not only entitled, he is duty bound to hold up, to direct that if this
8 is the situation, you hold a floor test. If that according to their perception might aggravate the
9 situation for the Chief Minister, again, that consequence is not for the Governor to keep in
10 mind. If in a democratically elected body, like the member, like a Legislative Assembly, if I am
11 elected as a leader, I should not only inspire confidence at the outset I should continue to have
12 that confidence throughout my tenure otherwise it results into complete lack of accountability
13 and answerability, which is a facet of democracy and it would result complete...In complete
14 tyranny that now I am elected you can do nothing to me. My Lord, that is not what is conceived
15 of the Governor's function, because Governor comes into picture only in rare situations like
16 this. That for whatever reasons you have lost your confidence. If 34 people have come maybe
17 because of my floor test 34 may become 40, I am taking the extreme example.
18 As Your Lordships have very rightly expressed the concern that it might aggravate the
19 situation, but that is how the democracy works. That is how leadership works. And
20 therefore they say that you can inherit leadership you cannot inherit leadership qualities. And
21 that is where the leadership quality comes into play in a democracy...

22

23 **CHIEF JUSTICE CHANDRACHUD:** The only concern Mr. Mehta is, that what happens
24 is, people start ditching a Government. And you know, you ditch your Government and then
25 for a variety of reasons the Governments and the Governors are willing allies by saying, hold
26 a trust vote. So you give sanctity to this fact...

27

28 **MR. MEHTA:** I'm not entering into the area whether they should have or they should not
29 have. That is for them to answer.

30

31 **CHIEF JUSTICE CHANDRACHUD:** This is a very sad spectacle, you know, in our
32 democracy that you know, you allow...

33

34 **MR. MEHTA:** My Lord, I don't. But as a Governor, I can't answer that question. But
35 otherwise, if Your Lordships...

36

1 **CHIEF JUSTICE CHANDRACHUD:** This is irrespective of the morality of the Shiv Sena
2 having joined with the INC and...

3

4 **MR. MEHTA:** That was also, the majority feels was a sad spectacle. Ultimately, all
5 this resolution say that having gone before the electorate and I would like to read, kindly allow
6 me My Lord. Kindly allow me. In Kihoto, Your Lordships very carefully say it, that when you
7 go before the electorate you are not going as an individual. You are going as a representative
8 of a particular ideology. You are doing two things.

9 A.) I am representing a particular ideology, vote for me. He represents another ideology, Don't
10 vote for me. Now the situation before Your Lordships and before the Governor was, that
11 majority of me, who went with a particular ideology, particular coalition, particular joint
12 program, sit with him against whom we contested the election, and majority say that this is a
13 spectacle we would not like to be a part of. I'm not concerned as a Governor. I'm not concerned
14 as a Governor. So that's My Lord...

15

16 **CHIEF JUSTICE CHANDRACHUD:** But they broke bread for three years, no? They broke
17 bread with the Indian National Congress and NCP for three years. What happened overnight
18 after three years of happy marriage?

19

20 **MR. MEHTA:** Please see My Lord, then I'll read My Lord what is their reason? Because it's
21 not my function to answer that, that's a political debate...

22

23 **CHIEF JUSTICE CHANDRACHUD:** The Governor has to ask himself this question.

24

25 **JUSTICE SHAH:** On a lighter side, you can very well say, staying together for three years
26 cannot be said to be a happy life.

27

28 **CHIEF JUSTICE CHANDRACHUD:** The Governor has to ask himself this question, what
29 were you fellows doing for three years? You're not in one month after the election has taken
30 place. One month after the election takes place, the Chief Minister suddenly breaks up with...
31 bypasses the BJP and joins with the INC. The Governor can say sorry, there's a serious
32 discontent in the party. Three years you cohabit, and then suddenly one fine day in a group of
33 34 say that there is discontent.

34

35 **MR. MEHTA:** Kindly allow me to place the point...

36

37 **CHIEF JUSTICE CHANDRACHUD:** And, all went and became ministers.

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MR. MEHTA: But the difficulty is, out of...

CHIEF JUSTICE CHANDRACHUD: Enjoying the spoils of office, and then suddenly, you know, one day you just...

JUSTICE KOHLI: ...wake up to the fact that...

MR. MEHTA: I leave it to Your Lordships. That's a political debate, but I have an answer. If Your Lordship allows me, I'll answer.

JUSTICE SHAH: You can go to the Law Council.

CHIEF JUSTICE CHANDRACHUD: Yeah, now tell us show us the law.

MR. MEHTA: I will, I will, but before that, let me answer.

JUSTICE SHAH: You state the law first and then supply the letter. Please do one thing, you can show the law, the power of the Governor, what can be weighed with the government, and thereafter you take us to the letter that whether it fits in the law or not.

MR. MEHTA: My Lord, kindly note here at this page 14, is the answer. I will come to it later. On page 14, why these three years of cohabitation My Lord, and why thereafter a divorce? I'll answer. They have answered to me, they have shown it to me. Me means the Governor. The Governor is given why we have been together and now what are... and why it's now a 'now or never' situation. Kindly allow me to place it at page 14. Now Your Lordships may kindly take this proposition, and that would My Lord, perhaps answer Your Lordships questions. Because otherwise, I may not be able to fulfil my promise of concluding in...

CHIEF JUSTICE CHANDRACHUD: You are right, absolutely. I took some time out on asking... you're right. It's just that sometimes...

MR. MEHTA: No, no on a lighter side, when the court is quiet, as I said, the arguments are longer. And My Lord, just since everything is now very, very serious, and I want to start the new point not on that serious note, kindly allow me to use My Lord, one... kindly... before Your Lordships takes the proposition. Before Your Lordship takes the proposition. On a little light note I'll start. There is a Urdu couplet. Mr. Sibal is fond of... both of us share that... there is a

1 very good Urdu couplet on the situation which is arising. *Main chup raha toh aur galat*
 2 *fehmiyaan badhi*. This is for the court. When the court is quiet, then we do not understand
 3 what is passing in the court's mind. *Main chup raha toh aur galat fehmiyaan badhi. Woh bhi*
 4 *suna hain usne joh maine kaha nahin*. So this is...

5

6 **CHIEF JUSTICE CHANDRACHUD:** *Woh bhi suna jo mainey kahaa nahin*.

7

8 **MR. MEHTA:** *Woh bhi suna hain usne joh maine kaha nahin. Main chup raha tha...* when
 9 Your Lordships are quiet, we understand that there are ten points.

10

11 **CHIEF JUSTICE CHANDRACHUD:** But Mr. Mehta, *Woh bhi suna jo mainey kahaa*
 12 *nahin*. What we in legal parlance call "Reading between the lines".

13

14 **MR. MEHTA:** My Lord, those who write *shers*, they don't write for legal documentation, they
 15 write for some particular person My Lord. They write for one individual. That one individual
 16 is relevant for them, those who write.

17

18 **CHIEF JUSTICE CHANDRACHUD:** Who is the author of the couplet, Iqbal or who is it?

19

20 **MR. MEHTA:** No My Lord, this is Wasim Barelvi.

21

22 **MR. SIBAL:** Very fine.

23

24 **MR. MEHTA:** Very fine. One of the My Lord, top ranking alive.. poet who is alive.
 25 Contemporary Urdu poet.

26

27 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal, I don't know if Mr. Tushar Mehta whether
 28 you read this book called *Dilli oh Dilli*, it is written by one of our lawyers, <UNCLEAR>.

29

30 **MR. SIBAL:** Yes, yes.

31

32 **CHIEF JUSTICE CHANDRACHUD:** Beautiful book on the variety of Urdu poets.

33

34 **MR. MEHTA:** Yes My Lord, Delhi had that tradition, now it's dying. Unfortunately, the best
 35 tradition was in Lucknow. Lucknow also, I asked people that there's a dying tradition. In
 36 Allahabad also, Firaq Gorakhpuri and all My Lord, now that tradition is fading away, I will not
 37 say dying, but it's fading away it's not. But there are young writers, My Lord.

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MR. SIBAL: It's the language, My Lord, actually language is taken over and Urdu is a dying language as of today, that's the reality. And that therefore we are losing a lot of that culture, that's what it is.

MR. MEHTA: Yes.

CHIEF JUSTICE CHANDRACHUD: You would like to go through your propositions?

MR. MEHTA: Yes, kindly My Lord...

CHIEF JUSTICE CHANDRACHUD: ... go through your propositions and then we are done.

MR. MEHTA: Para 4 My Lord, para 4, page 1, para 1 My Lord. In a parliamentary democracy, the Cabinet and the Chief Minister must enjoy and must continue to enjoy the majority support of the House at any given point of time. It is the constitutional obligation of the Governor to ensure that government is stable and the government as well as Chief Minister enjoys majority support in the House. The argument My Lord, third, right now Your Lordships may ignore it, I will come to it a little later. Fourth, the question as to whether the government or Chief Minister has lost confidence or support of the House is not to be decided by the Governor and shall have to be decided on the floor of the House. The Governor, based upon the material from wherever derived, this expression I have borrowed from Bommai, from wherever derived, because this was an expression used by the Committee of Governors appointed in seventies, and Bommai has approved that report My Lord, can only arrive at a conclusion that prima facie the Cabinet of the Chief Minister has lost confidence support of the House, which requires to be tested on the floor of the House. His satisfaction is limited only to the requirement of floor test and not whether A enjoys majority or B enjoys majority. Now My Lordship's very pertinent question was, that if I am sorry My Lord, Your Lordships are here, that merely because there is some internal dissatisfaction amongst the party, can the Governor take this call or not? My Lord, a similar question arose, in case of Rameshwar Prasad, where the question was that you're permitting somebody to request you to hold a floor test would violate Tenth Schedule because what these people, this group who is expressing no confidence against the Chief Minister stand disqualified or will stand disqualified under the Tenth Schedule. And the question before the Court was whether the Governor, while taking a decision under say Article 174 and 175 is concerned, what will be the effect of their act ultimately in the Tenth Schedule? I hope My Lord, I am able to make myself clear. While taking

1 the decision I am supposed to be cognizant that what they are doing might be a reason
2 for Tenth Schedule punishment, a consequence subsequently. Your Lordships through a
3 Constitution bench says no. My Lord, please take My Lord, 2006, Volume 2, SEC. Page One, I
4 will read only four paragraphs on this point. The Governor is agnostic to Tenth Schedule. He
5 has to be satisfied that the confidence is lost prima facie, it needs to be tested on the floor. They
6 may suffer consequence, they may not suffer consequence. That's not the Governor for the
7 Governor to see. That's what Your Lordships have said. Kindly see PDF page 393
8 in JC Volume 1.

9

10 **CHIEF JUSTICE CHANDRACHUD:** There are two important things which the Governor
11 has not taken into account, which to my mind were extremely important. One that in so far as
12 the Congress and the NCP are concerned, there is absolutely no shaking up of the.. there's no
13 internal dissension in either the Congress or the NCP. Congress had 44 members. NCP had 53
14 members. This is a block of 97, absolutely no dissension in either Congress or the NCP. So in
15 the 97, the 97 still continues to be a solid block. What is disturbed is, say out of the 56 which
16 the Shiv Sena had, 34 have expressed a...

17

18 **MR. MEHTA:** Which brings it down to, Your Lordships are...

19

20 **CHIEF JUSTICE CHANDRACHUD:** So, out of the 97...second thing which the Governor
21 had to bear in mind is this, that as of this date there is not even a suggestion that the Shiv
22 Sena is going to team up with the BJP to form the Government. So that's again a circumstance
23 is totally alien and alien to his consideration. So he can't be oblivious to the fact that in a three
24 party coalition the dissension has taken in one party out of the three. The other two are
25 steadfastly for the coalition. And they are not, they are not by any means, you know psychics.
26 They are almost at par, all the three are virtually at par except the Congress, which was a
27 little...

28

29 **MR. MEHTA:** May I make only one request? To examine the facts of the case after I show
30 the law on, Your Lordships are shown but some of the paragraphs, some of the law is
31 unfortunately not assisting.

32

33 **CHIEF JUSTICE CHANDRACHUD:** 2006.

34

35 **MR. MEHTA:** Thereafter also. Why the Governor can take that step even if NCP Congress
36 Block is not disturbed. I will answer that. It is para...

37

1 **CHIEF JUSTICE CHANDRACHUD:** What is the citation Mr. Mehta?

2

3 **MR. MEHTA:** My Lords, 2006, Volume 2, SEC page one, para 85.

4

5 **JUSTICE KOHLI:** Which compilation is it?

6

7 **MR. MEHTA:** Judgment Compilation-1. PDF page 482.

8

9 **JUSTICE SHAH:** Starts from page 393.

10

11 **MR. MEHTA:** Yes My Lord.

12

13 **JUSTICE SHAH:** You want to go to 482.

14

15 **MR. MEHTA:** 482, para 85. I am reading 85-161, 164 and 165, which is on this point. And
16 My Lords kindly bear one factor in mind, whether the Court would have taken the same view
17 which the Governor took, may not be the test while determining the decision taken by
18 the Governor. What may perhaps on the facts arrive at a different conclusion. My Lords, 85.
19 Certainly there can be no quarrel with the principle laid down in Kihoto case about
20 the ill effects of defections, but the same have no relevance for determination of the point in
21 issue. The stage of preventing members to vote against the declared policies of the political
22 party to which they belong had not reached. If MLAs vote in a manner so as to run the risk of
23 getting disqualified, it is for them to face the legal consequences. That stage had not reached.
24 In fact, the reports of the Governor intended to fore stall any voting hence taking the claim to
25 form the Government. My Lords, this was a case of 356. He sent a report that now dissolve
26 the Government.

27

28 **JUSTICE NARASIMHA:** The stark distinction so far as Rameshwar is
29 concerned, Rameshwar Government was not formed. It was at the initial stage immediately
30 after elections where there was no party who got the majority. Instead of waiting for somebody
31 to form a majority, the Governor asked for dissolution of the House.

32

33 **MR. MEHTA:** 356, My Lord, he exercised.

34

35 **JUSTICE NARASIMHA:** And the reason he has given is that if I spend more time to allow
36 a coalition to be formed, they will cobble up a majority and thereby violate Tenth Schedule and
37 then create a Government. So court said the Governor cannot assume that the one of the

1 political parties would go ahead, cobble up majority by coalition. This is a wrong inference that
2 the Governor has drawn. But as against Rameshwar Prasad's case, this is a case where
3 the Government is subsisting for more than three and a half years. So that's the distinction
4 between Rameshwar and ours. I'm just putting it to you.

5

6 **MR. MEHTA:** Facts yes. But the legal proposition which I would place for Your Lordship's
7 consideration maybe the same. The consequence which would, the power of the Governor or
8 the exercise of power of the Governor at the time of initial formation or subsequent shall have
9 to be the same. That is my respectful submission. Please come to now PDF page 520, at para
10 161. Because I with profound respect do not see any dis...Any reason to not read this ratio for
11 exercise of power under 174 and 175 also. This was also the case where the Supreme Court said
12 you should have called for the floor test. You could not have said that no, they might
13 incur disqualification. 161, If your Lordships... We are not impressed with the argument based
14 on a possible disqualification under the Tenth Schedule if the MLAs belonging to LJP Party
15 had supported the claim of so and so to form the government. At the stage, it was wholly
16 extraneous to take into consideration that some of the members would incur disqualification,
17 if they supported a particular party against the professed stand of the political party, to which
18 they belong. The intricate question as to whether the case would fall within the permissible
19 category of a merger or not, could not have been taken into consideration, assuming that it did
20 not fall in the permissible arena of merger, and the MLAs would earn the risk of
21 disqualification. It is for the MLAs or the appropriate functionary to decide and not the
22 Governor to assume disqualification, and thereby prevents staking of the claim by
23 recommending dissolution. My Lord, Your Lordships are right. My Lord Justice Narasimha is
24 right. The fact situation was 356, but why... My Lord I'm posing a question to myself... does
25 this ratio not apply when the Governor decides to call for a floor test, which Your Lordships
26 said is the only test? My Lord further, it is not necessary for us to examine for the present
27 purpose, para four of the Tenth Schedule, dealing with merger and or deemed merger. In this
28 view, the questions ought to be raised... My Lord, please see the last line. It could not have
29 been gone into by the Governor for recommending dissolution.

30

31 My Lord, what fell from my Lord, the Chief Justice would be... if I put it in the context of this
32 ratio... would be, that the Governor will have to first form an opinion that these people are
33 working since three years. They have a reason to... they have shown reason to the Governor
34 why they are parting ways after three years. But, can they do it after three years? Would it not
35 amount to a split? Would it not amount to disqualifications under Chapter 10? Schedule 10?

36

1 My Lord, kindly come to 162, the provision of the Tenth Schedule dealing with
2 defections. Those of the RP Act dealing with corrupt practice, electoral offenses, and
3 disqualification, etc., and are legal safeguards available for ensuring purity of public life in
4 democracy. But insofar as the present case is concerned, this had no relevance at the stage
5 when the dissolution of the Assembly was recommended without existence of any material
6 whatsoever. There was no material for the assumption that claim may be staked based on
7 democratic principles, but based on manipulation by breaking political parties. Now kindly
8 come to 164 and 165. It is true. Does Your Lordships have that? It is true... and kindly My Lord,
9 for my satisfaction, read it as 174, 175 instead of 356. It is true, as has been repeatedly opined
10 in various reports and by various constitutional experts, that defections have been a bane of
11 Indian democracy. But at the same time, it is to be remembered that defections have to be
12 dealt with in the manner permissible in law. If the political party with the support of other
13 political party or other MLAs stakes claim to form a government and satisfies the Governor
14 about its majority to form a stable government, the Governor cannot refuse formation of the
15 government and override the majority claim because of his subjective assessment that the
16 majority was cobbled by illegal and unethical means. No such power has been vested with the
17 Governor. Such a power would be against the democratic principles of majority rule. The
18 Governor is not an autocratic political ombudsman. If such a power is vested in the Governor,
19 and/or, the President, the consequences can be horrendous. The ground of maladministration
20 by a state government enjoying majority, is not available for invoking power under Article 356.
21 The remedy for corruption or similar ills and evil lies elsewhere and not in Article 356 (1). In
22 the same vein, it has to be held that the power under the Tenth Schedule for defection, lies
23 with the Speaker of the House, and not with the Governor. The power exercised by the Speaker
24 under the Tenth Schedule is of judicial nature dealing with the question whether power of
25 disqualification of members of the House vests exclusively within the House to the exclusion
26 of the judiciary, which is in Britain, was based on certain practices of the British Legislature as
27 far as India is concerned. My Lord, it has been said.... I will skip that. Please see 166. The
28 Governor cannot assume to himself the aforesaid judicial power, and based on that
29 assumption, come to the conclusion that there would be violation of the Tenth Schedule, and
30 use it as a reason for recommending dissolution. My Lord, he also cannot refuse floor test.

31

32 **CHIEF JUSTICE CHANDRACHUD:** But look at what the consequence of these
33 observations in the present case is. The Governor...

34

35 **MR. MEHTA:** I earnestly request Your Lord...

36

1 **CHIEF JUSTICE CHANDRACHUD:** But since we are on those two paras. Just those two
2 paras. No such, the court says the Governor cannot refuse the formation of the government
3 and override the majority because of his subjective assessment that the majority was cobbled
4 by illegal, unethical means. Therefore, irrespective of what the Governor feels or what
5 somebody else feels about, you know the fact that in forming a government with the INC and
6 the NCP, you give up a pre-poll alliance, it is irrelevant to the Governor. This is a
7 government.... This is a government which has been legitimately formed. Alright, that's step
8 1. Second para 166 says, that the Governor cannot assume to himself the aforesaid judicial
9 power and based on that assumption, come to the conclusion that there'd be a violation of the
10 Tenth Schedule. So, it was alien to the Governor's mind that these 34 would have to be
11 excluded from consideration because they have incurred a disqualification under the
12 Tenth Schedule. For the Governor, he has to treat these as part of the Shiv
13 Sena irrespective of what their internal <UNCLEAR> is. Therefore he cannot now say that this
14 34... the letter which this 34 have given me, is a ground for shaking the faith of the
15 government or the trust of the government, which they have. He has to take these 34 as
16 forming a part of the Shiv Sena Legislature Party...

17

18 **MR. MEHTA:** Now let me show.

19

20 **CHIEF JUSTICE CHANDRACHUD:** And if they are a part of the Shiv Sena Legislature
21 Party, where is there any.. Where is there any ground to say that, Well, there is a there's now
22 a change in the... in the position of trust in the House? Prima facie at least for him.

23

24 **MR. MEHTA:** Now My Lord let me show the judgment of the High Court, which was dealt
25 with by Bommai judgment. Your Lordships My Lord, very right concern comes in the form of
26 Mr. Sorabji's arguments, which was rejected. And Your Lordship in Bommai did not accept
27 that rejection. Kindly My Lord, allow me to place My Lord, that High Court judgment because
28 when we cite Bommai, we generally don't see the High Court judgment. Can we see para 32,
29 and this would be My Lord an answer and My Lord, please again My Lord I am requesting
30 please examine the law as agnostic of the facts right now and thereafter, My Lord, I
31 will assist Your Lordships on the facts. What is the law? What is the power of the Governor?
32 What are the contours of power? What are the limitations? Please come to para 32 at 2472.
33 The right-hand side top is the pagination.

34

35 **JUSTICE SHAH:** One minute.

36

37 **MR. MEHTA:** 2472, para 32. This can be my answer.

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JUSTICE SHAH: Para 32?

MR. MEHTA: 32 at page 2472 of this judgment, left or right-hand side, My Lord, top is pagination. May I read My Lord? Mr. Soli Sorabji also contended, this is his argument before the High Court, that the factors like alleged unethical methods adopted during the formation of Janta Dal, expansion of cabinet, horse trading and atmosphere getting vitiated are not only vague but have no rational nexus at all. The question of failure of constitutional machinery. The Learned Council also laid, kindly come down, My Lord, anti-defection law, it says... I will just read fully, the Learned Council of also laid great stress by contending that Governor, by acting upon the latest given by 19 legislators head circumvented the anti-defection legislation, the primary aim of which is to discourage the toppling game by legislators by changing their loyalties and by acting upon those letters, the legislators were permitted in substance to play the game of toppling the ruling party, ruling Ministry without incurring the consequence of anti-defection law, because if these legislators had withdrawn their support in the House and voted against the Ministry, they would have incurred disqualification under anti-defection law. The reliance upon these letters is contrary to the underlying purpose and the essence of anti-defection legislation and therefore illegitimate and prohibited. Kindly mark this, the Learned Counsel buttressed this arguments by contending that if the floor tests had been held, the legislators would have written letters, who had written letters might have changed their mind for several valid reasons i.e. change of the style of functioning of leadership, change in the leadership, realization for maintaining party unity, unwillingness to incur disqualification under anti-defection legislation and five, not giving a pretext for imposition of President's Rule. In support of the contention that the floor test has always been recognized as the legitimate and relevant method, Shri Sorabji relied on the judgment of Odisha High Court so and so, so and so. My Lord he was insisting that please allow floor test because that's what the law says is the only test that's what we call dance of democracy is on the floor of the House, not outside. And the Governor cannot go beyond a particular point. This was rejected by the High Court. At para 54, sorry at 34. Page 2475. May I read My Lords? Mr. Soli Sorabji had made pointed reference to the Tenth Schedule that is anti-defection law for bringing home this point that the factom of the withdrawal of support by 19 legislators was wholly irrelevant. This argument was advanced to his point in 34. I'm sorry My Lords, page 2475, para 34. I'll read again for My Lord Justice's assistance. Mr. Sorabji had made pointed reference, this is the finding of the High Court, pointed the reference to the Tenth Schedule i.e. anti-defection law for the bringing home his point that factom of withdrawal of the support by 19 legislators was wholly irrelevant. This argument was advanced to prove his point that, in the context of anti-defection legislation

1 floor test was the most relevant, legitimate and surest method to determine whether the
2 Council of Ministers headed by Sri Bommai commanded the majority in the House or not. We
3 are afraid, we are unable to agree with this submission of the Learned Counsel. The
4 introduction of Tenth Schedule in the Constitution has not in any way affected the exercise of
5 powers under Article 356, nor has it amended Article 356 in any manner. The amending body
6 which inserted the Tenth Schedule to the Constitution had before it the several decisions
7 especially the Rajasthan case as to the scope of Article 356. There is a presumption that the
8 law making body was aware of the existing interpretation and the courts said that, no he should
9 have kept Schedule Nine, Schedule Ten in mind while exercising powers under 356.
10 Now please see how Bommai Judgment deals with this. My Lord, it was pointed out t
11 hat para 397 was read out of context to show. My Lords kindly see Bommai is, JC Volume
12 2, PDF page 516.

13

14 **CHIEF JUSTICE CHANDRACHUD:** 516?

15

16 **MR. MEHTA:** Yes, Your Lordships in the judgment of Justice Jeevan Reddy at page 516,
17 para 389 formulates the question. The allotted time is over My Lord. Kindly allow me. I am
18 not repeating anything.

19

20 **CHIEF JUSTICE CHANDRACHUD:** Certainly.

21

22 **MR. MEHTA:** The 389, as Your Lordship has. I am not reading all questions because they
23 are not relevant for the present. Only question number six. A special Bench of three judges of
24 High Court heard the writ petition and dismiss the same on the following reasoning. Please
25 come to six My Lord. The introduction of Tenth Schedule of the Constitution has not affected
26 in any manner the content of power under Article 356. The argument of Mr. Sorabji was, that
27 all right, you are not concerned with Tenth Schedule. Direct floor test to be held. Don't dismiss
28 the Government under 356 straightway. And the Court thereafter records page 393. I am
29 sorry, 397. In this context the Court examined this that it is wrong. The Governor should
30 consider before removing the ministry, before not installing the Government and imposing
31 President's Rule you should have given the floor test. And that in that context My Lord, 397.
32 Please see 397. May I read? We are equally of the opinion that High Court was in error in
33 holding, that enactment or addition of Tenth Schedule to the Constitution has not made
34 difference. The object of Tenth Schedule is to prevent and discourage floor crossing and
35 defections, which at one time assumed alarming proportions. Whatever may be his personal
36 predilections, a legislator elected on the ticket of a party, is bound to support that party in case
37 of division or vote of confidence in the House, unless he is prepared to forego his membership

1 of the House. The Tenth Schedule was designed precisely to counteract horse trading. Except
2 in case of split, a legislator had to support his party willy-nilly. This is the difference between
3 the position obtaining prior to, and after Tenth Schedule. Prior to the said Amendment, the
4 Legislature could shift the loyalty from one party to the other, any number of times without
5 imperilling his membership of the House. It was, as if he had property in the office. My Lord,
6 in that context, the request was, that give me floor test, don't impose President's Rule. Let the
7 Tenth Schedule play its role. If somebody votes against the will of the party, he will be
8 disqualified. But don't take extreme step of 156, take step under 174 and 175. That's what
9 precisely the Governor has done. And My Lord, a similar situation arose... and My Lord, now
10 I will read Your Lordships' judgment in Shivraj Singh Chauhan, where all this is considered.
11 But before that, please come to para 7 of my proposition.

12

13 There are more than one reasons My Lord, why this cannot be the argument of the petitioner.
14 And I'll demonstrate, My Lord, what is the flip side of this argument. If your Lordships were
15 to hold, that Governor cannot examine the inter se dispute or, he waits till the Speaker decides
16 disqualification. What is the flip side? I must assist Your Lordships with that flip side, para 7.
17 There is one more reason why Governor cannot pre-empt the decision of the Speaker at the
18 stage of directing floor test, since it is possible that the original political party of the members
19 of the House might condone the defiance of the Whip, as contemplated under para 2(1)(b) of
20 the Tenth Schedule. Kindly pause here for a minute. My Lord, disqualification is not
21 automatic. If I as a member of Legislature Assembly... Legislative Assembly of a particular
22 party, vote in defiance of the Whip, there is a provision that the party may condone it within
23 15 days. So, Governor cannot say that I'll wait for 15 days, when he is presented with the facts
24 that this is the dissatisfaction, the Government has lost majority, there are attacks taking place,
25 there is vandalism taking place, threats being administered. Then I will not wait for 15 days,
26 because party may... Your Lordships are examining proposition.

27

28 **CHIEF JUSTICE CHANDRACHUD:** Mr. Solicitor there are two different... distinct things.
29 One is, dissatisfaction within a party, right? And, the other is a loss of majority of the
30 government. One is not necessarily indicative of the other.

31

32 **MR. MEHTA:** Correct.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Now tell us, in this situation which we had over here,
35 we now put ourselves in the shoes of the Governor. What was it that would have led the
36 Governor to come to the conclusion that the government had lost the majority? What was the...
37 what was the factual... what was the factual basis for him to conclude?

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MR. MEHTA: Only My Lord one thing, kindly bear....

CHIEF JUSTICE CHANDRACHUD: Only 134.

MR. MEHTA: Who were part of the government, who were supposed to be having confidence of the Chief Minister,

CHIEF JUSTICE CHANDRACHUD: Right. Therefore, so let's go to the bottom of it.

MR. MEHTA: Can I first take Your Lordships to the bottom of it?

CHIEF JUSTICE CHANDRACHUD: What is the Governor saying? What is the Governor saying? These 34 who were part of the Shiv Sena, have now expressed that dissatisfaction with the leadership of the Shiv Sena. Unless the Governor says that the natural corollary is, that these 34 will cease to support the Shiv Sena...

MR. MEHTA: I'm sorry.

CHIEF JUSTICE CHANDRACHUD: We will take.. we will take.. make every assumption in favour of the Governor's decision. Because that's how we test the proposition. What would the Governor have said, though he doesn't say that.. that these 34 person.. these 34 persons who were part of the alliance between the Sena, the Congress and the NCP have now expressed their dissatisfaction. He can call for a floor test if he has any circumstances before him to indicate that the strength of this three party coalition has been substantially reduced. The Bommai is absolutely correct. It binds us anyway, that this disqualification issue under the Tenth Schedule is completely relevant. So what is the consequence? The Governor has to treat these as continuing members of the Shiv Sena. Even before us, they are not saying that we have ceased to be members of Shiv Sena.

MR. MEHTA: Yes.

CHIEF JUSTICE CHANDRACHUD: Now, if they continue to be members of the Shiv Sena, and the Shiv Sena therefore continues to have 55 or 56 members, which it originally had...

1 **MR. MEHTA:** Then if they vote against, they will incur disqualification. Governor would say
2 that.

3

4 **CHIEF JUSTICE CHANDRACHUD:** Right. But then where is the question? What is the
5 reason for calling a trust vote?

6

7 **MR. MEHTA:** Because they say that.

8

9 **CHIEF JUSTICE CHANDRACHUD:** All our judgments say Rameshwar Prasad says
10 that, Bommai says that, that the Tenth Schedule disqualification is irrelevant to the exercise
11 of judgment by the government...

12

13 **MR. MEHTA:** I am obliged.

14

15 **CHIEF JUSTICE CHANDRACHUD:** <UNCLEAR> authority goes to the Speaker.
16 Therefore, the facts as they stand before the Governor indicate that these 34 are part of the
17 group of 56 Shiv Sena MLAs. Now if that is so, on what cogent material does a Governor call
18 for a floor test? What has changed for it to call for a floor test?

19

20 **MR. MEHTA:** The difficulty is..

21

22 **CHIEF JUSTICE CHANDRACHUD:** Tell us one reason why he has to call for a floor test?

23

24 **MR. MEHTA:** My Lord, Your Lordships are again on facts My Lord, I'm on propositions
25 first. And then, My Lord, I will try and fit into the propositions to the facts of the case. Number
26 one, number two...

27

28 **CHIEF JUSTICE CHANDRACHUD:** Forget the facts. Forget the facts.

29

30 **MR. MEHTA:** Principally...

31

32 **CHIEF JUSTICE CHANDRACHUD:** Forget the facts. The Governor as a matter of
33 principle now, Bommai tells us, and Rameshwar Prasad tells us that circumstances which
34 would lead to the warrant, which would warrant the invocation of the Tenth Schedule are alien
35 to the mind of the Governor when he calls for a floor test.

36

37 **MR. MEHTA:** Correct.

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CHIEF JUSTICE CHANDRACHUD: all right. So therefore, the possibility that these 34 in our case would incur a disqualification is irrelevant to the exercise of power by the government.

MR. MEHTA: I bow down, My Lords.

CHIEF JUSTICE CHANDRACHUD: Right. Now, if that is so, then the Governor must forget the facts of this case, the principle. The Governor must proceed on the basis of the position as it obtains. Where the government has been formed, there is nothing which has unless there is something, some subsequent event which alters the legal Constitution of the government.. of the government. The Governor must continue to have before him and analyse the situation on the basis of the situation as it was when the government was formed and prior to the 21st of June, in our case. He can't go into the Tenth Schedule, that's the Speaker's jurisdiction. If he can't go into that Speaker's jurisdiction, which is the Tenth Schedule, then what is the basis for calling a floor test? The only reason why he could have called for a floor test is that these 34 numbers.. these 34 have alienated themselves. They have given up. They say that we have lost faith in Uddhav Thackeray . And therefore these 34 are excluded, their numbers.

JUSTICE NARASIMHA: But there also Mr. Solicitor, there's one difficulty for them. And we are only looking at the material that is available for the Governor to draw an inference, that floor test is necessary. We are not about the facts of the case. Three factors you have indicated. One is the 21st of June letter. Second is the case of threats. Third is about BJPs, and fourth is about the Independence letter. Those two if we eschew from consideration because from the opposition side, for him to base his decision apart from threats which is purely a law and order situation, what is remaining is the 21st..

MR. MEHTA: It's not... I am sorry.

JUSTICE NARASIMHA: 21st of June 2022 letter. That letter merely informs the Governor that we reaffirm that Shinde to be appointed and continues to be appointed as the leader of the House, number one. Number two, Gogawale will be the Whip. You continue to recognize that, nothing more than that. It doesn't say anything more than that in that letter.

MR. MEHTA: Allow me to answer that.

1 **JUSTICE NARASIMHA:** Now where does he draw an inference on the basis of this letter,
2 which will become part of the material for him to take consideration.

3

4 **MR. MEHTA:** Please come to page 14 of the material which I have placed on record. It's not
5 just a letter, it is coupled with....

6

7 **JUSTICE NARASIMHA:** Yeah, we have seen that. Yeah.

8

9 **MR. MEHTA:** The resolution. Coupled with a resolution. And My Lords kindly bear with...

10

11 **CHIEF JUSTICE CHANDRACHUD:** Resolution of the 34, right?

12

13 **MR. MEHTA:** 34. It's not read before Your Lordships.

14

15 **CHIEF JUSTICE CHANDRACHUD:** Alright. Just one second let's go to that.

16

17 **MR. MEHTA:** PDF page 14.

18

19 **CHIEF JUSTICE CHANDRACHUD:** LOD of the Governor.

20

21 **MR. MEHTA:** LOD of the Governor. Yes.

22

23 **JUSTICE NARSIMHA:** That's what I was referring to. Correct.

24

25 **MR. MEHTA:** The following members of the 14th Maharashtra Legislative Assembly
26 belonging to Shiv Sena. We are notified as the members of Maharashtra Legislative Assembly
27 as members of so and so. We have unanimously elected Mr. Shinde on so and so as group
28 leader. There was pre-poll alliance between Bhartiya Janta Party and Shiv Sena Party. There
29 has been great dissatisfaction prevalent amongst the members of our party that is Shiv Sena of
30 our, and our party cadre at large on account of corruption in the Government. Why this three
31 years co-habitation and then an attempt for divorce using that sort of expression.
32 Administration regarding police posting, corruption by the then Home Minister Shri
33 so and so, and sitting Ministers Shri so and so, who is also in jail for involvement with
34 underworld don Dawood. Apart from above reasons, our party cadre faced tremendous
35 harassment and distress on political as well as personal grounds from the opposition
36 ideological parties who are not now a part of the Government, and we're using their office and
37 power to undermine the base and foundation of our Shiv Sena cadre. This is their reason I am

1 not justifying, nor can I put myself into the shoes of the Governor, and with profound
2 respect, Your Lordships would also examine not what Your Lordships would have decided
3 with these facts, but whether there exists...

4

5 **CHIEF JUSTICE CHANDRACHUD:** But the Governor can constitutionally decide. We are
6 not saying to go into that what our view is the situation...

7

8 **MR. MEHTA:** Kindly allow me to complete the sentence.

9

10 **CHIEF JUSTICE CHANDRACHUD:** It is the duty and power of the Governor and the
11 situation.

12

13 **MR. MEHTA:** My Lords can I kindly complete the sentence.

14

15 **CHIEF JUSTICE CHANDRACHUD:** And see page 17 now. PDF page 17. Hence it is
16 unanimously at the end of it what do they say?

17

18 **MR. MEHTA:** My Lords I am on 15, kindly allow me to read 15 also.

19

20 **CHIEF JUSTICE CHANDRACHUD:** Yes, yes.

21

22 **MR. MEHTA:** This is enormous discontent. There is enormous discontent amongst
23 the cadre of our party that is Shiv Sena, for forming the Government with NCP and Indian
24 National Congress were ideologically opposed to our party, that Shiv Sena. Initially they say
25 that they are destroying our cadre base. They are corrupt. They found to be corrupt
26 in near past. We are facing embarrassment. Then they say there had been a compromise on
27 the principles of our party, Shiv Sena, which had been a party with fierce ideological base and
28 was formed for fighting of the rights of local Marathi people. For last two and a half years, our
29 party and it's leadership has compromised party principles by aligning with the contrasting
30 ideologies for the sake of achieving power in the State of Maharashtra. The ideology of our
31 party's leader Late Shri Balasaheb Thackeray was to give clean and honest Government to the
32 people of Maharashtra and also without compromising on the principle of so and so, which
33 was defeated at the first day itself by aligning with the opposition ideologies. Shiv Sena and
34 Bhartiya Janta Party had forged a pre-poll alliance for 2019 Maharashtra Assembly elections.
35 They sought the blessing of voters for this Shiv Sena BJP alliance, which the voters accepted
36 and voted in favour of this alliance. After the results were out, the Sena severed it's ties with
37 BJP and formed an alliance with opposing parties, which they fought against in the

1 2019 Assembly elections. This act of our party leaders had a tremendous negative impact upon
2 the voters and the party cadre at large. As an elected member, I am answerable first to my
3 voters, then to anybody else. Because 39 members can say that we will vote against the party
4 even at the cost of being disqualified and ceasing to be MLAs. Then the Governor is faced with
5 the situation where there would be instable Government. Government which cannot
6 withstand on it's state...

7

8 **CHIEF JUSTICE CHANDRACHUD:** Which means he is going to go into, he's going to the
9 disqualification issue.

10

11 **MR. MEHTA:** No, I'm sorry.

12

13 **CHIEF JUSTICE CHANDRACHUD:** That's the problem. All that you are reading up
14 to PDF page 17, where they passed the resolution. The resolutions at page 17. There are two
15 parts of this letter. Two parts of the resolution. First part is let's formulate it. One. The first
16 part is, BJP and Sena had a pre poll alliance. One. In breach of the pre-poll alliance, the Shiv
17 Sena teamed up with the Indian National Congress and the NCP, two. Three, by teaming up
18 with the NCP and the Indian National Congress, the Shiv Sena has militated against the core
19 ideology of the Shiv Sena. Four, that there has been corruption in the government, and five,
20 that there is discontent within the cadre of the party. This by itself will not justify the Governor
21 in calling a trust vote. Never! That's what our judgments has repeatedly said...

22

23 **MR. MEHTA:** Your Lordships have said otherwise in Shivraj Singh Chauhan.

24

25 **CHIEF JUSTICE CHANDRACHUD:** The fact that the government... the fact that the
26 conduct of a government has gone against the core ideology of that party, can never call for a
27 trust vote. Now, what then is in that letter? What then comes in the resolution? Two things,
28 that we reaffirm that Eknath Sambhajirao Shinde, who is elected as a leader of the party,
29 continues to be the leader, and two, that Gogawale, that we reaffirm that Gogawale is elected
30 as the Chief Whip. Two things. The first part of the resolution has no bearing on a trust vote at
31 all. The first part of it only reflects on the fact that there is this grave disquiet among these
32 people that well, you militated against our pre-poll alliance and the core ideology of the Shiv
33 Sena. That's alien to the Governor, because they have already come... they have formed
34 government already. Second, what do they do? They merely reiterate that Eknath Shinde
35 continues to be the leader of the party in the Legislature... the Legislative Party. How is this a
36 justification for a trust vote?

37

1 **MR. MEHTA:** I'll just answer that question. Kindly come to Page 21, PDF page 21. This is
2 signed by 41 MLAs. My Lord, the difficulty is, we are trying to examine and analyse the
3 justification given by 34 or 39, whether it could have been a justification for floor test? For
4 Governor, he has to only examine that... but for this 39, the government would fall. I would
5 rather go for the floor test.

6

7 **CHIEF JUSTICE CHANDRACHUD:** In which case he is now assuming... but you are right.
8 You are absolutely right. You spot on, there's no difficulty about it at all. Therefore, what the
9 Governor is saying is, but for these 39, as you rightly say, the government will fall. Can he look
10 into the fact that but for these 39 the Government will fall, when exclusion of these 39 is
11 postulated on the Speaker passing an order for their disqualification under the Tenth
12 Schedule? Until that order is fast, he cannot... he cannot assume that they are going to be...

13

14 **JUSTICE KOHLI:** It is a peremptory move.

15

16 **MR. MEHTA:** I think we are...

17

18 **JUSTICE KOHLI:** In fact, they continue to say that we remain part of that, but we are not
19 parting company.

20

21 **MR. MEHTA:** My Lords are saying the same, my Lord...

22

23 **CHIEF JUSTICE CHANDRACHUD:** They say we continue to be in the Shiv Sena.

24

25 **MR. MEHTA:** Correct, My Lord, but still, we don't support the government.

26

27 **CHIEF JUSTICE CHANDRACHUD:** If they continue to be in the Shiv Sena, then how do
28 you call for a trust vote?

29

30 **JUSTICE KOHLI:** What is the apprehension that the Governor had?

31

32 **MR. MEHTA:** Trust vote is not Shiv Sena, trust vote is against the government, against the
33 Chief Minister. My Lord, suppose what happens if the leader loses the confidence while
34 members remain? My Lord, now kindly see the flip side of this. Flip side is this. My Lord, today
35 there is a government of Shiv Sena and BJP. Now Your Lordships' prima facie view is, that
36 merely because some people go and say that we don't trust this government, Governor should

1 not do anything. Not that he cannot do anything Your Lordships' the prima facie view is... this
2 is the debate, I hope this is not the conclusion.

3

4 **CHIEF JUSTICE CHANDRACHUD:** ... Shiv Sena. It's a dialogue.

5

6 **MR. MEHTA:** Yes, it's a dialogue. Suppose today BJP has got 106 members. If 100 members
7 were to say that we have lost faith in the leader, even our Chief Minister. Kindly allow me to...

8

9 **CHIEF JUSTICE CHANDRACHUD:** Right, right? But, 106 say we have lost faith in
10 Fadnavis, he was a leader. For a moment, postulate it. Yes, yes, you are right,
11 absolutely. Exactly. You are absolutely on spot on!

12

13 **MR. MEHTA:** Kindly see, would Your Lordships consider giving Governors the power to
14 wait for the floor test and ensure that there is some management whereby majority is created?
15 That's the flip side of it.

16

17 **CHIEF JUSTICE CHANDRACHUD:** Mr. Solicitor, you can never allow the Governor to
18 ask for a trust vote, when there is absolutely nothing to shake the majority on the floor of the
19 House. What is a Trust vote for? Do you have the numbers in the House? The trust vote is not
20 for determining who is going to be your leader in the House. No. The trust vote. What is the
21 purpose of the trust vote? In a House of 288, do you have 144? That's the purpose. And if there
22 is nothing to indicate that 144 is disturbed, who will lead those 144 is alien to the Governor. It
23 may not have been Uddhav Thackeray, they could have elected somebody else. The
24 INC, NCP and the Sena would have said, we are electing somebody else.

25

26 **MR. MEHTA:** Would Your Lordships come to page 21. There is a dia..

27

28 **CHIEF JUSTICE CHANDRACHUD:** That is a matter of internal party discipline. That can
29 never be a matter for the Governor. Governor's trust vote is where the majority in the House
30 is shaken. And where was there anything to indicate that?

31

32 **MR. MEHTA:** Page 21.. page 21.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Yes, page 21.

35

36 **MR. MEHTA:** 47 MLAs writing to the Governor on 25th of June. Para 2. As is common
37 knowledge, we no longer wanted to be a part of the corrupt MVA government. However, we

1 were being continuously threatened to continue supporting the incumbent government
2 without our free will. Thus left with no option. We were constrained to flee away, at so and so,
3 so and so. However as yet another attempt to break out our resolve and arm twist us to give in
4 to the demands of MVA government comprising NCP and INC goons, security which was
5 earlier provided, etc. etc. They say we don't wish to support this government.

6

7 **JUSTICE KOHLI:** Mr. Mehta, if you would look at para 11, that's the conclusion. We
8 demand security. That's all, they don't say we are parting company. Where do they say
9 that? They say, Please give us adequate security as also our family, because it's withdrawn.

10

11 **Mr. MEHTA:** My Lord, the Governor is not a court where where this prayer was not
12 couched in this manner. He has to based upon the material before him arrive..

13

14 **JUSTICE SHAH:** No, no, Mr. Mehta, what is being pointed out is this, this communication
15 cannot be said to be withdrawing the support to Mr. Uddhav Thackeray. This is that what
16 happened earlier....

17

18 **MR. MEHTA:** But what it says, it may say that give us protection, but they say we no longer
19 want to be a part of this corrupt government. Thereby, 47 people are minus now from the
20 magical mark.

21

22 **JUSTICE SHAH:** What is being pointed then thereafter they don't say further,
23 that henceforth, correct, we are not supporting this <UNCLEAR>

24

25 **MR. MEHTA:** If it is a petition, there is no prayer.

26

27 **JUSTICE SHAH:** For the subjective satisfaction.

28

29 **JUSTICE KOHLI:** What is the next step they took after they said we no longer want to be
30 part of the corrupt government?

31

32 **CHIEF JUSTICE CHANDRACHUD:** Alright, can just reflect on it.

33

34 -----LUNCH BREAK-----

35

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37 **CHIEF JUSTICE CHANDRACHUD:** Yes Mr. Mehta. 21.

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MR. MEHTA: 21 of the compilations of the Governor My Lords.

CHIEF JUSTICE CHANDRACHUD: Right.

MR. MEHTA: My Lords please note one difference, it's not Legislative Party members showing lack of confidence in their party. It's not their internal party affairs anymore. These members are saying that we are withdrawing support from the government. That's the distinction. My Lords I would hasten to add, that this not being a petition or a suit may not have a prayer clause, etc. But Governor, as I will from show from one para of Bommai from whatever material if he comes to the prima facie satisfaction and that test is accepted by My Lords in the Shivraj Singh Chauhan judgement that there is loss of confidence by this government and he can ask, not only can ask, he should ask the floor test. Kindly see para 2 once again. As is common knowledge, we no longer wanted to be a part of corrupt MVA government. However, we are being continuously threatened to continue supporting the incumbent government without our free will, thus left with no option, etc. etc. and this is signed by 47 members of the Legislative Assembly, not just Shiv Sena MLA's but independents and two members of Prahar Janshakti Party saying we are withdrawing support from the government. And this is My Lord, in my respectful submission the material as... My apologies, page 21. [UNCLEAR] No its past and continuous also that we have already declared that we don't want to support, but now we are being pressurized to support. My Lords kindly see and I will show My Lord para 393 Bommai. But from whatever material he comes to prima facie conclusion that there needs to be a floor test My lord, he would be under an obligation. We don't want to support this government and therefore give us security because we are being threatened. Second, what is the fact situation before the Governor and I will read only one para from Bommai. One set of MLAs, namely, 49....47, saying that we want to withdraw support from the government. One set of MLA, MLAs or the leader of the party, saying that we will see when you come on the floor of the House. In my respectful submission, I am posing a question to myself, would the government not just Governor not be justified informing an opinion that the Governor, that the government has lost confidence. I am not saying anything. I am not pre-empting anything. As Mr. Sorabji narrated several possibilities, I am only asking for a floor test. Maybe they might change their view. Maybe they might sacrifice themselves. Maybe they stand disqualified. May be they are persuaded. Maybe the leadership changes. There are several possibilities. The Governor My Lord, in my respectful submission, will have no jurisdiction once he has a material. And what can be the material apropos, Her Ladyship's question. My Lords, page 393. Para 393, of S. R. Bommai. It need not be a letter also. Suppose in a given set of circumstances, it is in public media, everywhere which cannot

1 be disputed. All channels are showing something. My Lord I am posing a question to myself,
2 can the Governor not examine those facts also? Ultimately he is not just when a 174, 175
3 situation arise, he is not supposed to be a mute spectator. He will have to act. His actions would
4 be subject to judicial review within the parameters which Your Lordships have fixed for My
5 Lord's future assistance. But please see 393, which is at volume Judgment Compilation
6 Volume-2, PDF 518. That's Bommai Judgment My Lord. Am I, with Your Lordships? My
7 Lords, Justice...

8

9 **CHIEF JUSTICE CHANDRACHUD:** And Lok Prahari and these 17 independent MLAs
10 were backing the Government up to then.

11

12 **MR. MEHTA:** Yes, seven My Lords.

13

14 **CHIEF JUSTICE CHANDRACHUD:** Seven.

15

16 **MR. MEHTA:** And one set of 393. In this connection, it would be appropriate to notice the
17 unanimous report of the Committee of Governors appointed by the President of India. The
18 five Governors unanimously recommended that the test of confidence in the Ministry should
19 normally be left to a vote in the Assembly, where the Governor is satisfied by whatever process
20 or means. Please kindly see My Lord. It need not be a prayer that please hold a floor test etc.
21 People are telling him that the Government has, is not enjoying our support. They have lost
22 the confidence. By whatever process or means that the Ministry no longer enjoys majority
23 support. You should ask the Chief Minister to face the Assembly and prove his majority within
24 the shortest possible time. If the Chief Minister shirks this primary responsibility and fails to
25 comply, the Governor would be in duty bound to initiate steps to form an alternative Ministry.
26 A Chief Minister's refusal to test his strength on the floor of the Assembly can well be
27 interpreted as prima facie proof of he is no longer enjoying the confidence of the legislature.
28 I'm sorry, Your Lordships gets it.

29 The subsequent event of the Honourable Chief Minister not deciding... deciding not to face
30 justifies the decision that whatever material I gathered and the satisfaction I arrived at was the
31 right satisfaction that the Government has lost the majority confidence. Now, My Lords may
32 allow me to place the Shivraj Singh Chauhan judgment, and that I would earnestly
33 request Your Lordships to permit me to read because that was read by the petitioner bits and
34 pieces on this side, but not from the Governor's point of view. I'm sorry, page 395. My learned
35 friend is right. Para 395 also in Bommai My Lords. 395. Because it's not a luxury which is
36 conferred upon the Governor. It's the duty. 395 of SR Bommai.

37

1 **CHIEF JUSTICE CHANDRACHUD:** What is the PDF page, can you give me?

2

3 **MR. MEHTA:** 518 of the judgment compilation-1...Two I am sorry. 518 My Lords, 395. The
4 High Court, in our opinion, erred in holding that the floor test is not obligatory if only one
5 keeps in mind the democratic principles underlying the Constitution and the fact that it is the
6 Legislative Assembly that represents the will of the people and not the Governor. The position
7 would be clear beyond any doubt. In this case, it may be remembered that the Council of
8 Ministers not only decided on so and so to convene the Assembly on so and so, but also offered
9 to prepone the Assembly if the Governor so desire. It pains us, it pains us to note, Your
10 Lordships that's from the facts of the case My Lords. The Governor did not choose to act upon
11 the said offer, and that was frowned upon by the court. Indeed, it was his duty to summon the
12 Assembly and call upon the Chief Minister to establish that he enjoyed the confidence of
13 the House. Not only did he not do it, but when the Council of Ministers offered to do the same,
14 he demurred and chose instead to submit the report to the President. Here I am being asked
15 by the person who did not choose to face the vote of no confidence. That why did you call for
16 the vote of confidence? Why did you call for the floor test? The converse situation and more
17 drastic My Lord in terms of the facts. In the circumstances it cannot be said that the
18 Governor's report contained or was based upon relevant material. There could be no question
19 of the Governor making an assessment of his own. The loss of confidence of the House was an
20 objective fact which could have been demonstrated one way or the other on the floor of the
21 House. In our opinion wherever a doubt arises whether the Council of Ministers has lost the
22 confidence of the House, the only way of testing it is on the floor of the House, except in an
23 extraordinary situation where because of all pervasive violence, the Governor comes to the
24 conclusion and records the same in his report that for the reasons mentioned by him a free
25 vote is not possible in the House. So, My Lord, it's not his right. It's his obligation.

26

27 Now My Lord kindly come to My Lord the.... and the threshold in my respectful submission is
28 that some material which creates a doubt in his mind and My Lord, I would at the cost of
29 repetition and with profound respect. Please, this is a constitutional submission My Lords
30 don't misunderstand the submission. My Lords the threshold of Your Lordships judicial
31 review, which I am not disputing, would be whether there was any material. Whether based
32 upon that material Your Lordships may perhaps would have taken a different view may not be
33 a test. Now Your Lordships kindly come to Shivraj Singh Chauhan. Volume-1, PDF 1360. My
34 Lord I want your Lordships to see the contentions reached because that was not read before
35 Your Lordships and this would really be illuminating and will assist Your Lordships to lay
36 down the law correctly.

37

1 **CHIEF JUSTICE CHANDRACHUD:** 1360?

2

3 **MR. MEHTA:** Yes My Lords. 1360 PDF. It is internal page 22 of Shivraj Singh Chauhan. My
4 Lords this is the arguments of Dr. Singhvi, which, My Lords, were pleased to record. 17.2 My
5 Lords I have marked my copy so that I do not have to read everything and I will
6 leave some things which is not relevant. Your Lordships can trust my discretion on that. 17.2
7 - There is a fallacy in the assumption that the Governor has any locus to direct the Chief
8 Minister to conduct a floor test, to establish a majority on the floor of the House. Next,
9 this court ought not to enforce the direction for convening a floor test as it will have the effect
10 of short circuiting as it was described. The large discretion which is entrusted to the Speaker
11 on the matters of resignation by Members under Article 190.

12

13 Then My Lords 17.8 - the precedent of this Court in regard to convening of the
14 trust vote have arisen in the context of fresh elections held to the Legislature and not in the
15 context of a running Assembly. My Lord, Shivraj Singh Chauhan was a case of a
16 running Assembly. And in the midst of the government functioning the then Chief Minister
17 lost the confidence. This is what Your Lordships were dealing with.

18

19 Now My Lord kindly come to para 19. Again My Lord submission. Elucidating on
20 the above submissions, it was urged that the object of exercise undertaken by the so and so is
21 to find a way around the two-third stipulation contained in the Tenth Schedule by engineering
22 resignations of the 22 members in a running House. The submission is that if a trust vote were
23 to be held before a decision has been taken by the Speaker on whether to accept the resignation
24 of the members, this will pave the way for the 16 members whose resignations have not been
25 accepted till date to abstain from voting. Their abstention it has been urged would alter the
26 strength of the members present and voting thus modifying the required majority in the House
27 and impacting the outcome of the trust vote. Now Your Lordships may kindly directly go to
28 para 26 my learned senior Mr. Sibal's submission. My Lord it would be at PDF page 1363.
29 1363. Mr. Sibal contends that the observations of the Constitution Bench in Nabam Rebia on
30 the authority of Governor to order a trust vote to be conducted on the floor of an ongoing
31 Legislative Assembly are purely orbiter. Nabam Rebia was also an ongoing Assembly, not first
32 time government formation. The case before the Constitution Bench in Nabam Rebia dealt
33 with a situation where the Governor had preponed the date for meeting of the Legislature
34 Assembly to decide the question of Speaker's removal. It was submitted that Nabam Rebia is
35 not a precedent for the proposition that the Governor is entitled to require a trust vote to be
36 conducted on the floor of a legislative Assembly, which has been duly constituted and is in
37 session. Mr. Sibal submitted that the consequences of upholding the power of Governor would

1 be to encourage both the demolition of an elected Government and democratic structures of
2 the governance. Mr. Sibal's submission, in Mr. Sibal's submission, Governor would have the
3 power to summon the House where it is not in session. Since under Article 168, the Governor
4 is a part of the Legislature, if the House is not in session, it is open to a Governor to seek a
5 special session where fact indicate that the existing government has lost it's majority. But this
6 is in support of what I did as a Governor, that if it's not in session and something would
7 turn My Lord, he has written another argument that no confidence motion was the only way
8 and not the confidence vote by floor test. However, in a similar vein Dr. Singhvi's submission,
9 Mr. Sibal urged that this course of action is not open to the Governor when the House is in
10 session and in such an eventuality the only remedy is to seek a motion of no confidence to test
11 whether the incumbent government is possessed of the confidence of the House. With respect
12 to exercise of the power of the Governor by calling for a trust vote it has been submitted by Mr.
13 Sibal that there must exist an objective satisfaction of the Governor based on material in his
14 possession. Absent a physical verification, it cannot be said that mere tendering of resignation
15 by members led to valid exercise of power by the Governor to call for a trust vote. Here My
16 Lord withdrawing support from the Governor... government in the present case. The Governor
17 had no material to conclude that 16 members had submitted their resignations voluntarily.
18 Legislative history in the country indicates that minority governments have survived. And
19 unless it is shown that mere tendering of resignations actually cause the loss of confidence in
20 the incumbent government, it is not open to the Governor to conclude that actions of the
21 16 members would result in a loss of confidence. Here they specifically say in writing that we
22 are... we want to withdraw support from the government. Your Lordships kindly then skip my
23 submissions. I happen to appear for the Governor there. Kindly My Lord come to
24 1369, PDF 1369.

25

26 **JUSTICE SHAH:** Para?

27

28 **MR. MEHTA:** Para 42.

29

30 **JUSTICE SHAH:** PDF page?

31

32 **MR. MEHTA:** 1369 My Lord. 1369. The Governor relied upon My Lords this. Para 42
33 My Lords have? My Lord Justice Narasimha. The letter sent by the Governor to the Chief
34 Minister indicate that the Governor relied on the following circumstances in coming to the
35 conclusion that a floor test was urgently required. A receipt of information by the Governor
36 that 22 members who had previously supported the incumbent government had submitted
37 their resignations to the Speaker of the Assembly. The members who had tendered their

1 resignations had communicated their decision through the print and electronic media. Copies
2 of the letters of resignation had been submitted by the 22 members to the Governor. The 22
3 members had asked the Governor to provide security to facilitate their appearing before
4 the Speaker. Amongst the group of 22 members who had tendered resignations, were six
5 Cabinet Ministers whose resignations had been accepted by the Speaker.

6 Now My Lord may kindly come to 43. It was on the basis of the above material and
7 circumstances that the Governor informed the Chief Minister of his having formed the opinion
8 prima facie that the Governor.... government had been reduced to a minority in the House,
9 making it necessary to conduct a floor test immediately after the address of the Governor at
10 the budget session. Then My Lord para 44. The action of the Governor requiring a trust vote
11 be carried out has essentially been assailed on three broad grounds of challenge. It has been
12 submitted that Governor had no power to order a trust vote in course of an
13 ongoing Legislative Assembly or at any rate, while the Legislative Assembly was in session. If
14 the Governor did possess such a power, then the exercise of the power by the Governor in
15 ordering a trust vote impinged upon the authority entrusted to the Speaker under proviso to
16 Article 190, sub-article 3B. And three, the Governor had no objective basis of or material to
17 form the prima facie opinion that incumbent Government had lost it's majority in the Madhya
18 Pradesh Legislative Assembly.

19

20 Now questions before the court My Lord, kindly come to para, PDF 1371, para 46. The present
21 controversy raises two separate but intertwined constitutional questions. First, whether the
22 Governor is entrusted with the authority to call for a trust vote in the course of a
23 running Assembly? And second, whether the Governor exercised this authority correctly? If
24 the Governor does not possess the authority, the action of calling for an immediate floor test is
25 ultra-virus and unconstitutional. Alternatively, if the Governor does possess the authority to
26 call for a floor test, this court must determine the contours of such power and answer the
27 question of whether the Governor acted within these contours. It was briefly contended before
28 us that this court should be wary of entering the realm of politics, where no judicially
29 manageable.... Your Lordships can skip that.

30

31 Now kindly come to para... page 1372, para 50. Constitutional role of the Governor. I don't
32 think My Lords, anything more is required to be said by me except very respectfully adopting,
33 My lord's judicial determination. Para 50, Your Lordships have My Lord? Can I read para 50?
34 We must consider the constitutional scheme in operation between the State
35 Legislature and the office of the Governor. As a matter of constitutional principle, the State
36 Legislature comprised of the Governor and the Legislative Assembly. The Governor is not an
37 elected member of the State Legislature. The Governor is appointed by the President and is

1 the head of the executive branch in whom under Article 154, the executive power of the State
2 is vested. While holding office at the pleasure of the President, the Governor as a
3 Constitutional authority, is not a member of either House of Parliament or the Legislature of
4 the State. Thereafter, My Lords were pleased to trace the history which with My Lord's
5 permission, I may skip at this stage. It may not be necessary how the Governor, as a
6 constitutional head, came into being.

7

8 Please come to page 1375, para 57. The Constituent Assembly thus decided to vest the office of
9 the Governor with certain discretionary powers under the Constitution. In taking this decision,
10 the Constituent Assembly was aware that there were certain associated risks in granting the
11 Governor discretionary powers including in question of formation, disruption and dissolution
12 of democratically elected Governments. However, the framers felt that this discretion was
13 necessitated by unique historical factors that existed at the time of adopting the Constitution
14 and it was hoped that with the maturing of our polity, a level of constitutional statesmanship
15 and trust would taper over the crux of constitutional choices necessitated by more
16 violent times.

17

18 My Lord kindly come to para 61 at PDF page 1377. All arguments which are made here were
19 advanced, were present before Your Lordships and My Lords, thereafter are pleased to lay
20 down the law. Para 61. The issue of whether a Governor can call for a trust vote in an already
21 constituted legislative Assembly is no longer...is not entirely res integra. Before a nine judge
22 Bench of this Court in S. R. Bommai, the individual cases which came up for consideration
23 included the dispute emanating from the State of Karnataka. In the State of Karnataka
24 following elections to the Assembly in March 85, the Janta Legislature Party emerged with the
25 majority. Shri Hegde was elected as the leader of the House. Kindly allow me to read these
26 facts. There is something which may assist Your Lordships.

27

28 Shri Hegede was elected as the leader of the party and was sworn as Chief Minister. Following
29 his resignation Shri Bommai was elected as the leader of the party and was sworn in as Chief
30 Minister on so and so on. In September there was a merger of Janta Party with Lok Dal B
31 resulting information of Janta Dal. On so and so a legislator defected from the party and
32 presented it letter to the Governor of Karnataka withdrawing his support from the Janta Dal
33 government. The legislature met the Governor on the next day and presented 19 letters
34 purportedly of 17 Janta Dal Legislators and independent and the BJP legislator withdrawing
35 support from the Janta Dal government. On so and so the Governor sent a report to the
36 President opining that as a result of withdrawal of support, the ruling party had been reduced
37 to the minority in Karnataka Legislative Assembly and recommended that action be

1 initiated under Article 356 of the Constitution. Because if this is the correct assessment of the
2 Governor, there are two options either go for a floor test or 356 which Your Lordships have
3 frowned upon. Subsequently on so and so, seven legislators submitted letters to the Governor
4 complaining that their signature had been obtained by misrepresentation and reaffirmed their
5 support to Shri Bommai's government. The State Cabinet decided to convene an Assembly on
6 so and so and the Chief Minister met the Governor, offering to prove his majority on the floor
7 of the House if necessary, by preponing the Assembly session. In spite of this, the Governor
8 submitted another report to the President on so and so and a proclamation was issued under
9 Article 356. It was in this background that nine judge bench, My Lord 391, I have already read.
10 I'll skip that. Kindly come to My Lord 65, para 65 at 1380 where Your Lordships are now
11 analysing Bommai's judgment in SR Bommai's case.

12

13 In analysing the observations made by the Nine Judge Bench in SR Bommai. It is pertinent to
14 remember that the Governor in that case did not call for a floor test. Rather, the Governor of
15 Karnataka sent a report to the President based on which a proclamation was
16 issued under Article 356, the observation in Bommai can be relied on in determining whether
17 the Governor possesses the power to call for a floor test. This is what I was respectfully urging.
18 I can see both My Lord but can't help it. Power to discerning the subsequent question of
19 whether when the exercise of such power is appropriate is a distant issue. On a perusal of the
20 above observation in SR Bommai it is evident that Your Lordships finding whether or not the
21 Council of Ministers has lost confidence of the House must be determined only on the floor of
22 the House and not by the Governor conducting an independent verification. Where the
23 Governor has reasons to believe, he is not supposed to pass a judgment, when he has a reason
24 to believe that incumbent government does not possess the support of the majority in the
25 Legislative Assembly. The correct course of action would be for the Governor to call upon the
26 Chief Minister to face the Assembly and to establish the majority of the incumbent government
27 within the shortest possible time. An exception to the invariable rule of testing when whether
28 the government has the Assembly's confidence are on the floor of the House is envisaged only
29 in extraordinary situations where because of existence of all pervasive violence, a free vote is
30 not possible in the House. Then 66 - As a matter of constitutional law, it would not be correct
31 to proceed on the basis that constitutional authority entrusted to the Governor to require the
32 Council of Ministers to prove their majority on the floor of the House can only be exercised at
33 the very inception after general elections are hailed and not when the Governor has objective
34 reasons to believe that the incumbent government does not command the confidence of the
35 House. Therefore I say, you should not only command the confidence, but continue to
36 command the confidence that is the requirement of democratic functioning.

1 The Governor is not denuded of the power to order a floor test where, on the basis of the
2 material available to the Governor it becomes evident that the issue as to whether the
3 Government commands the confidence of the House requires to be assessed on the basis of a
4 floor test. Undoubtedly the purpose of entrusting such a function to the Governor is not to
5 destabilize an existing government. When the satisfaction on the basis of which the Governor
6 has ordered a floor test is called in question, the decision of the Governor is not immune from
7 judicial review. The Court would be justified in scrutinizing whether the Governor prima
8 facie had relevant and germane material to order a floor test to be conducted. It must be noted
9 that Governor does not decide whether incumbent government commands the confidence of
10 the House. The purpose of holding a floor test in the Legislative Assembly is precisely to enable
11 the elected representatives to determine whether the Council of Ministers commands the
12 confidence of the House. That verification is not conducted by the Governor. The decision in
13 SR Bommai in fact held at recourse of the power, recourse to the power under 356 was not
14 warranted in a situation, Your Lordships can skip the rest.

15

16 Now para 68, Your Lordships were pleased to reject the argument. The argument was that the
17 exercise of power by the Governor under Article 174 and 175 should also be based on aid
18 and advice. Your Lordships were pleased to reject that submission. I am not troubling Your
19 Lordships with that. Now 69, at page 1383. Judgment after judgment it is settled. Please allow
20 me to place Nabam Rebia only...

21

22 **CHIEF JUSTICE CHANDRACHUD:** Just read para 71 and 72 also.

23

24 **MR. MEHTA:** Yes My Lords, I'm coming to that. My Lords 70 also. 70, according to me, I'll
25 reach 70 also. We are unable to accept the submission of, that the observations of the
26 Constitution Bench in Nabam Rebia are orbital. The observation in Nabam Rebia are
27 consistent with the formulation of principles in the Nine Judge Bench decision in SR Bommai
28 as we have discussed earlier. Please note My Lord, the power and Article 174 of the
29 Constitution to summon the House and to prorogate is, prorogate is one which is exercised by
30 the Governor on the aid and advice of the Council of Minister. But in a situation where the
31 Governor has reasons to believe that the Council of Ministers headed by the Chief Minister has
32 lost the confidence of the House. Constitutional propriety requires that the issue be resolved
33 by calling for floor test. The Governor, in calling for a floor test cannot be construed to have
34 acted beyond the bounds of constitutional authority. And loss of confidence mean in a
35 running Assembly.

36

1 Now My Lord, if Your Lordships may, kindly 71. The powers which are interested to
2 constitutional functionaries are not beyond the pale of judicial review, where the exercise of
3 discretion by the Governor to call for a floor test is challenged before the Court. It is not
4 immune from judicial review. The Court is entitled to determine whether in calling for the
5 floor test, the Governor did so on the basis of objective material and reasons which were
6 relevant and germane. These are the potent words used by Your Lordships. It should not be
7 irrelevant material or something completely not germane to the issue. The exercise of such
8 power is not intended to destabilize or displace a democratically elected government
9 accountable to the Legislative Assembly and collectively responsible to it. The exercise of the
10 power to call for a trust vote must be guiding, guided by the overarching consideration that
11 the formation of satisfaction by the Governor is not based on extraneous considerations. So
12 My Lord, when there are extraneous considerations, Your Lordships would step in and
13 exercise the power of judicial review. And extraneous would mean completely irrelevant and
14 not germane to the issue. Issue namely whether the Governor would be justified in forming an
15 opinion or entertaining a doubt about the government having lost the majority support. If the
16 documents are not irrelevant or not germane then perhaps Your Lordships may not take a
17 second guess on the basis as to what Your Lordships would have perhaps perceived the
18 situation to be capable of.

19

20 My Lord kindly para 73. Para 73 My Lord. I have something to say on that no confidence
21 because that was not argued by anyone of us. In a situation where the House has been
22 summoned following the aid and advice of the Council of Ministers, the position would be
23 more nuanced in the sense that the remedy of a no confidence motion would be available to
24 any segment of the Legislature seeking to espouse the view that the government has ceased to
25 command the confidence of the House. When the government calls for House being, the
26 session being called. In exercising the constitutional authority to demand a trust vote, the
27 Governor must do so with circumspection in a manner that ensures that authority of the House
28 to determine the existence or loss of confidence in the Government is not undermined. Absent,
29 exigent and compelling circumstances, there is no reason for the Governor to prevent the
30 ordinary legislative process of no confidence motion from running it's due course. My Lord,
31 74. In discharging this crucial role, it is necessary that the Governor bear in mind that the
32 purpose underlying the entrustment of the authority to require a trust vote is not to displace
33 newly elected government, but to intervene with caution when the circumstances which are
34 drawn to the attention of the Governor indicate a loss of majority. Circumstances should be
35 present before the Governor. This power is granted to the Governor to ensure that principle of
36 collective responsibility is maintained at all times and must be exercised with caution. The
37 circumstances on the basis of which the Governor forms a prima facie opinion leading to a

1 communication requiring a trust vote in the Legislative Assembly must be of an objective
2 nature. The decision of the Governor to do so is not immune from judicial review and must
3 therefore withstand the ability of being scrutinized on the touchstone of circumstances. Again,
4 My Lords, Your Lordships are careful in saying being relevant, germane and not extraneous.

5

6 I had 47 members before me saying that we don't want to support this Government. We want
7 to withdraw support from this Government. That is itself and enough ground in my respectful
8 submissions. Kindly My Lords, thereafter see, Your Lordships were pleased to para 77, at page
9 1386. Your Lordships were pleased to record several past cases where the Governor either
10 decided to direct a floor test, parties came here, and Your Lordships did not intervene or
11 Governor was not directing floor tests, parties came here and when required, sitting at
12 midnight. Your Lordships directed that immediate floor test and the only purpose was, I'm
13 sorry, My Lords are typing. I'm sorry. The object of My Lord was, Your Lordship may complete.
14 I'm sorry... That there is no time for either pressure, threat, coercion, violence, allurements
15 etc. etc. Whatever is the will should be reflected at the first available opportunity. Therefore
16 Your Lordships sat at night in case of Karnataka. There are several such instances. And
17 therefore I am not reading but there are large number of cases which Your Lordships were
18 pleased to reproduce and thereafter, say at page 1389 at para 78, at the foot of 1388. The idea
19 underlying the trust vote in the ultimate analysis is to uphold the political accountability of the
20 elected Government to the State Legislature. Therefore, I was saying that you should not only
21 command the majority support at the time of formation of the Government, you must continue
22 to command that. That's the democracy. Assertion of accountability is a mirror image of
23 collective responsibility of the Government to the Legislature. The requirement of the trust
24 vote fulfils that purpose in the present case. The present controversy has shown a light on the
25 often fluid allegiances of democratically elected representatives. This is a matter of their
26 conscience and the court expresses no opinion on the matter. However, it is important to note
27 that in directing a trust vote, the Governor does not favour a particular political party. It is
28 inevitable that the specific timing of a trust vote may tilt the balance towards the party
29 possessing a majority at the time the trust vote is directed. All political parties are equally at
30 risk of losing the support of their elected legislators just as the legislators are at the risk of
31 losing the vote of the electorate. This is how the system of parliamentary governance operates
32 and the learned Senior Counsel on both sides of, of the dispute congenially admitted that the
33 outcome of the trust vote is the ultimate litmus test for the legitimacy to govern. However, we
34 note that where the evidence indicates the circumstances of violence and coercion exist, that
35 would undermine a free and fair vote in Assembly, the Governor and the court must take
36 measures to ensure that the sanctity of the trust vote is maintained. In circumstances as they
37 have emerged in this case, the exercise of authority by the Governor was based on

1 circumstances which were legitimate to the purpose of ensuring that norm of collective
2 responsibility is duly preserved. There existed no extraordinary circumstances for the
3 Governor to determine that the trust vote was not the appropriate course of action on 16th
4 March. So it is only in extraordinary circumstances that there would be a departure from
5 floor test rule. Otherwise, floor test is the rule. That's what the test Your Lordships were
6 pleased to lay down. Because when we say My Lord, that defection is the highest political
7 sin My Lord running a government after losing the confidence of the electorate, namely, the
8 House is a larger constitutional sin to which Governor should not be a party.

9

10 My Lord Kindly last para 80 at page 1390.

11

12 **JUSTICE NARASIMHA:** One minute.

13

14 **MR. MEHTA:** This is para 79. The submission that short-circuiting the Speakers power. That
15 Governor by asking for the floor test has short circuited the Speaker's power
16 and Your Lordships are My Lord dealing with that at para 80. It is trite law that neither the
17 Governor, nor for that matter, this court as the power to impinge upon the authority of the
18 Speaker to take a decision on the above issues. The issue, however, is whether the convening
19 of a trust vote has to be deferred until such time as the Speaker has taken a decision on whether
20 or not to accept the resignation, and if so, the consequence of the members departing from the
21 fold of the party on whose ticket they were elected under the Tenth Schedule. Holding of a
22 trust vote operates in a distinct field from the issue as to whether one or more individual
23 members of the Legislative Assembly have embarked upon a voluntary act of resignation, or
24 have incurred the wrath of Tenth Schedule. Holding a trust vote is necessary to ascertain
25 whether the Council of Ministers headed by the Chief Minister has the confidence of the
26 House. The continuous existence of that confidence is crucial to the legitimacy and hence
27 survival of the government. I could never have put it like this. Continuous existence of that
28 trust gives you the legitimacy in democracy. It is a matter which can brook no delay, since the
29 authority of the Government presided over by the Chief Minister, depends on the Council of
30 Ministers continuing to have the faith of the legislative body as a collective entity particularly
31 where the members resigned in an expression of lack of faith in the existing government. The
32 convening of a floor test is the surest method of assessing the impact of resignations on the
33 collective will of the House. The consequence of the acceptance of a resignation is to reduce
34 the numerical strength of the House. Until the resignations are accepted members who have
35 resigned continue to be reflected in the strength of the House having regard to the language
36 which has been employed in Article 193B. Whether in a situation such as the present and
37 elected government is entitled to continue despite resignations of 22 of its members has a

1 significant bearing on the issue of confidence. If this is right then the Governor is right that if
2 47 people want to withdraw support, it is the most relevant fact to be considered while
3 deciding the floor test. Nothing beyond that. Governor does nothing beyond that. Neither the
4 Governor nor for that matter, the Court can entrench upon the power of Speaker, but the
5 pendency of proceedings before the Speaker cannot be a valid basis not to have the confidence
6 of the House in the Government determined by convening of a floor test. Added to it is a factual
7 circumstance in the present case that the Speaker except.... that is on the facts of the case.

8

9 Kindly allow me last para 81. We have highlighted above factual scenario only to emphasize
10 that convening of a trust vote is of crucial importance to affirm fundamental values of the
11 Constitution namely, abiding by the rules which govern a parliamentary democracy. The
12 fundamental precept of parliamentary democracy is that Government owes collective
13 responsibility to Legislative Assembly and as a collective body, the Legislative Assembly is
14 entitled to hold the Government to account the ultimate expression of accountability is the
15 exercise of or the lack of confidence in the Council of Ministers. We are therefore unable to
16 accept the submission that the holding of a trust vote would short circuit the jurisdiction of
17 the Speaker. Rest may not be relevant My Lord.

18

19 Now last, kindly take my propositions My Lord. Para 7. I will just quickly go through it. There
20 are only two pages left. Para 7. There is one more reason why Governor cannot pre-empt the
21 decision of the Speaker at the stage of directing, Your Lordships may read them. I am not
22 reading it for the sake of convenience.

23 a). The Governor is satisfied based upon the material available, Your Lordships can skip that.
24 Kindly come to 10. The Governor, in the instant case, did not recognize the split as alleged. If
25 the Governor would have recognized the split in Shiv Sena as alleged, he would have directly
26 called Shri Eknath Shinde to take oath. There was a split. The Governor merely based on
27 objective material before him, none of which is disputed on facts formed an opinion as to the
28 doubt about... as to the doubt as to whether Shri Thackeray enjoys majority in the House and
29 considering the threats and violence, he should be immediately called upon to face the floor
30 test. Now this is, 11 is important. The argument was that floor test could not have been ordered
31 because they, this side and other independents etc. who withdrew support from the
32 Government. They should have gone for no confidence motion. And this is a new point which
33 I would be urging for Your Lordship's consideration, not argued so far. First of all whether it
34 is a floor test, which is a motion of confidence or a no confidence motion which is negatively
35 worded. The result is the same and therefore, that can never be a ground to invoke Your
36 Lordships equity jurisdiction in a 226. Floor test also, the numbers will be counted and people
37 would decide whether I have the majority. In no confidence, numbers will be counted and

1 members would decide whether I have the majority. But there is something more than that.
2 Please come to PDF page 40 of Convenience Compilation 3-C. The provision in the
3 Maharashtra Legislative Assembly Rules regarding no confidence motion. Your Lordships are
4 confronted with a situation where the Governor is receiving representations that we have
5 withdrawn support. We want to withdraw support, etc. etc. I'm not repeating. There is a threat
6 of violence. There is in fact violence. Attacks are taking place at the Houses and now My Lords,
7 the submission is that you should have allowed the no confidence route rather than directing
8 a floor test. Please see, page 40 of Convenience Compilation 3.

9

10 **JUSTICE KOHLI:** 3-C?

11

12 **MR. MEHTA:** CC-3, My Lords, Convenience Compilation 3. That is part of rules of
13 Maharashtra Legislative Assembly Rules. Your Lordships have said, please bear in mind that
14 such floor tests cannot brook any delay. And why is this reliance on no confidence motion?
15 Maybe they wanted more time, which the Governor prevented them from doing. Para 90, Rule
16 95. My Lordships have that, Rule 95? My Lords, two things. I will say at the outset and I'll read
17 that. First, I can, any member can move a no confidence motion only when House is in session
18 not otherwise. House was not in session. Number two, it depends upon the discretion of
19 the Speaker whether to allow the motion to be placed or tabled or not. It's not a right. So again,
20 I'll be dependent upon the discretion to be used by the Speaker. If I am the
21 elected representative. This is what therefore, Governor says no, you hold a session. Kindly see
22 My Lord, Rule 95. A member who desires to move by, Your lordship has that? The member
23 who desires to move or leave to make a motion expressing want of confidence in the Council
24 of Ministers or a motion disapproving the policy of the Council of Ministers in a particular
25 respect shall give written notice of such motion. If the motion is admitted by the Speaker leave
26 to make the motion may be asked for. So first he can sit for one week to decide whether to
27 permit this or not. But if he admits, then the members will seek leave to make the motion for
28 on such day, not later than two days after it is admitted. If the Assembly is in session, as
29 the Speaker may appoint, after questions and before the list of business for the day is entered
30 upon. So when the Assembly is in session, this can be done with the Speaker. There is no time
31 limit fixed. He can decide to admit it after a week. And thereafter, if the Assembly is in session
32 we can, the members can say two days. Now My Lord further, provided that, Your Lordships
33 have the next page? Provided that if the notice of such motion is received when the Assembly
34 is not in session, the leave to make the motion may be asked for on a day not later than two
35 days after commencement of the session, as the Speaker may appoint. So next session may be
36 after 15 days, after one month, after five months, we do not know. Your Lordships are deciding
37 this constitutional principle that whether the Governor was right in directing, summoning of

1 the House for floor test and they are saying that no, no confidence motion was the root.
2 Meaning thereby, this threat allurements, violence, etc. etc. continues and the
3 Governor's satisfaction that prima facie as the Government has lost confidence would continue
4 without any legitimacy, borrowing Your Lordship's, very, very pertinent expression. After the
5 member has asked for leave of the Assembly to make the motion, the Speaker shall read the
6 motion to the Assembly and request those members who are in favour, that's the procedure
7 My Lord, how the motion would be passed or failed. This is no remedy, in fact situation like
8 this. Because the test right from the state of Rajasthan till Shivraj Singh Chauhan is, it cannot
9 brook any dealing.

10

11 Last three points. Last page of my proposition. 12, I have already covered. 13. Decision of the
12 Governor to direct floor test is not to be based on aid and advice. Para 28 of my detailed
13 submissions, I have already covered that. What Your Lordships have held in Shivraj Singh
14 Chauhan. After the decision of Shri Uddhav Thackeray not to face the floor test by tendering
15 resignation, the only option for the Governor was to call Eknath Shinde, who could prima facie
16 satisfy the Governor that he can form a stable Government. Another option was 356, which is
17 frowned upon and nobody, that has to be the last resort. And how that happen? Please come
18 to as a last submission. My written documents which I have placed. My Lord, the Governor
19 received two letters. That now Eknath Shinde has the majority. And another very risky
20 argument which Mr. Sibal made, that why did the Governor call Eknath Shinde to form
21 the Government and why not the President of the party was consulted. The Governor knows
22 only the elected leader of the House. He is not concerned with political parties. There are
23 political parties where leader of the House is in fact the leader, and President is not controlling
24 him from somewhere else. Governor has to contact the elected leader of the Legislative Party.
25 When he is shown...I will show those documents. There are two letters, I'll show
26 that document. Because every party has a different structure. Kindly see My Lord mischief in
27 this argument. I'm saying argument not mischief in making of the submission. I'm sorry My
28 Lord. I thought...

29

30 **CHIEF JUSTICE CHANDRACHUD:** We are relieved with your clarification.

31

32 **MR. MEHTA:** No, no, it was not correctly worded. The potential mischief if this argument is
33 accepted, that's what I wanted to convey. Every party has a different party infrastructure, for
34 example, in some parties, the highest authority is the General Secretary, there is a polit bureau
35 in Communist Party, General secretary is the highest authority. In some, there is a body, five
36 people committee or something. In some there is a President. There may be a dispute, who is
37 the President. The Governor would not enter into that. Governor would say that who is the

1 leader of the Legislative Party. The Governor would deal with only leader of the Legislative
2 Party and Mr. Uddhav Thackeray who did not face the confidence and therefore he resigned,
3 is not even a member of the Legislative Assembly.

4

5 Kindly see page 47, PDF 47 of the Governor's compilation. This is the... page 47 of Governor's
6 compilation. The apprehension of MLAs is also fortified by the letter of leader of opposition
7 who has in fact [UNCLEAR] provided links to videos where Mr. So and So has openly stated
8 that dead bodies would come, and I would earnestly urge My Lord not to condone this. My
9 Lord, this is a threat in public platform. Let's not the lesson the gravity of it. It is a very
10 serious thing. I leave it at that. I leave it at that.

11

12 **CHIEF JUSTICE CHANDRACHUD:** It is a law and order situation.

13

14 **MR. MEHTA:** No, My Lord. It can be law and order situation also. But if that law and order
15 situation is being created to bring pressure on the legislative process then it is not just a law
16 and order situation. It is one of the major consideration for the Governor that yes, he seems to
17 have lost majority and now open threats are being administered that you come in our fold or
18 you will be sent to post mortem. It's a threat to death. I would earnestly request Your
19 Lordships it cannot be taken lightly by the Constitution. I leave it at that.

20

21 **CHIEF JUSTICE CHANDRACHUD:** The ground for unseating a government. I mean,
22 Ultimately, that somebody who is subject to section 156-3, is subject to FIR. You can do what
23 you want about [UNCLEAR].

24

25 **MR. MEHTA:** Allow me to put it differently. That's where the perception differs. If I say that
26 because somebody is threatening you face the floor test, then Your Lord ships are right. But
27 when I have the letters that we have...we want to withdraw support and we are being
28 threatened then it is not that reason. That's the ground not the reason

29

30 **CHIEF JUSTICE CHANDRACHUD:** We will hear what Mr. Sibal has to say in rejoinder.

31

32 **MR. MEHTA:** My Lord one clarification. Not on the merits of the case. I checked up the
33 couplet which I started with it's by Dr. Bashir Badra they are contemporaries. Their style of
34 writing is very similar. It's likely to mislead every reader. It's by Dr. Bashir Badra. He is no
35 longer there. Mr. Wasim Bareli sahab.

36

37 **JUSTICE KOHLI:** You are giving credit where it is due.

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MR. MEHTA: Yes Sir when specially when he is not. Dr. Wasim Barelvi is alive and Dr. Badra who passed away recently, but contemporary. Same age group.

CHIEF JUSTICE CHANDRACHUD: Thank You, Mr. Solicitor.

MR. MEHTA: Obligated Your Lordships.

MR. SIBAL: What I've done My Lord I have filed a rejoinder of submissions My Lords, before Your Lordships.

CHIEF JUSTICE CHANDRACHUD: Has it been circulated?

MR. SIBAL: It was circulated, not hard copies, but it's been circulated. It's been circulated for Your Lordships in the morning itself the site.

MR. MEHTA: On the lighter side, the rejoinder submissions given are lengthier than my reply. You need not respond to this.

MR. SIBAL: I have to respond to more weighty things than the pages of my rejoinder. My Lords Your Lordships may just at the moment, My Lord not deal with this document. It will come to you. Let me just broadly tell your Lordships My Lord what we have to meet and what the issues are. My Lords, I think that we seem to have been... We are somewhat innocent of the manner in which people are represented in the House and who their legislator owes his duty to? Your Lordship knows that under the 1950, Representation of People's Act you have a delimitation provision. And in each state, a delimitation takes place and the territorial constituencies are carved out. So the elections takes place with respect to those territorial constituencies in each state and the number is already fixed. So My Lords, under the Representation of People's Act, first under the Constitution, under Article 170, people are directly elected from the territorial constituencies. And there is a process by which they are elected. That process is also elaborately set out in the conduct of Election Rules. First, there's a nomination that takes place, the nomination takes place pursuant to your party nominating you and giving you the symbol on the basis of which you go to the returning officer and say, I am the nominee of the party and this is my symbol, which is represents the party. After which the election takes place. When the election takes place and the votes are counted My Lords, the returning officer, then gives you a certificate saying that you have been elected from this party. A copy of that is sent to the Election Commission. It's all set out here, so Your Lordships,

1 at the moment I'm just broadly.... a copy of that is sent to the Election Commission and the
2 Election Commission conveys that to the Speaker of the Assembly. What is it that I'm trying
3 to say? The only identity of a legislature recognized in the House is that he is a member of the
4 party. He has no other identity. Two members, three members, 20 members, 34 members
5 can't have an identity outside of that. That's the basic constitutional conceptual question. Give
6 Your Lordships, an example, well, let's forget about 34. A small party in Goa has five members,
7 two of them go to the Speaker, to the Governor and say, you know I'm not going to support
8 this Government. And those two actually tilt the balance and the Government can fall. So
9 the Governor will call a floor test?

10

11 **CHIEF JUSTICE CHANDRACHUD:** Sorry?

12

13 **MR. SIBAL:** Will the Governor call a floor test? Forget majority, even the minority
14 cannot topple a Government if this is the procedure in law that we have to follow. We are back
15 to *Aaya Ram, Gaya Ram*. Why? Because you say now your political affiliation doesn't matter,
16 what matters is numbers. Democracy is not about numbers. It is numbers within a
17 constitutional framework. What the Legislators, the Speaker, the Governor,
18 recognizes are political parties and you are a member of a political party. Nothing less, nothing
19 more. You have no other identity. And I will tell Your Lordships, why I'm saying this. How
20 are Governments formed? Sarkaria Commission remember My Lords, largest single party
21 who has a majority on the floor of the House the Governor will call him to form the
22 Government, the Leader to form the Government. If that's not possible, comes the second and
23 that's political party now. Second pre-poll alliance of what? Of political parties. That's the
24 second. If they form the majority. Three, post-poll coalition.

25

26 **CHIEF JUSTICE CHANDRACHUD:** What is the first?

27

28 **MR. SIBAL:** Single largest political party. Second is pre-poll alliance. Of what? Of political
29 parties. It could be two, it could be three.

30

31 **JUSTICE KOHLI:** Which is a third one?

32

33 **MR. SIBAL:** Third is post-poll coalition, which is what the Uddhav Government was. Post-
34 poll coalition of political parties. And the fourth is post-poll alliance of political parties.
35 The Governor under Article 168 of the Constitution is not a member of the Legislative
36 Assembly, but he is part of the legislature. He can't recognize anybody other than political

1 parties. That is the Constitutional fundamental framework within which the House functions.
2 That's why we did away with *Gaya Ram, Aaya Ram*.

3

4 **JUSTICE NARASIMHA:** Lastly, the Governor is not part of the?

5

6 **MR. SIBAL:** He is part of the Legislature, but not a member of the Legislative Assembly.

7

8 **JUSTICE NARASIMHA:** Of course.

9

10 **MR. SIBAL:** So, he only recognizes because he is part of the Legislature, the political parties,
11 the legislature parties. That means my identity is associated with my party in the House. I have
12 no separate identity otherwise 10 from one party, two from another party, three from another
13 party will go to the Governor and make the Government fall. And then my learned friend's
14 argument, see the Governor is fully satisfied that you have lost the confidence of the House
15 because ten, two and three, along with the present dispensation make the majority. So you are
16 back to *Aaya Ram, Gaya Ram* days. The whole purpose of the Tenth Schedule is to get rid of
17 it. Numbers in the House will not make governments fall. It is the alliance of parties in the
18 House that will make the government fall. And that's the application of mind of the Governor
19 when he decides to ask for a trust vote. See the havoc it will cause. All you need to do is to cook
20 up numbers and they will say on public platforms that it is a call of conscience. We know the
21 extent of their conscience. So they will go to the Governor and say, see we give you the
22 numbers now, this is my letter to you, we are now the majority, this Government,
23 this Chief Minister has lost the confidence of the House, see the numbers and it will be argued
24 that look, it's demonstrated that he doesn't have the majority and therefore hold the floor test.
25 You see the consequences of this argument on the democratic polity of this country. That's one
26 issue I will deal with. I just wanted to point out.

27

28 Number two, even more important. Which is something that I mentioned earlier also, and in
29 detail My Lord in my note in which they did not comment on at all. All the Counsel have not
30 commented on the concept of the Whip. In fact, I was really surprised when my learned
31 colleague, Mr. Kaul, gave to Your Lordships a letter of Mr. Sanjay Raut, My
32 Lords will remember that, saying no, actually it is the legislative. It is the leader of the House
33 who appoints. It is the leader of the House who appoints the Whip. My Lord, just kindly have
34 a look at that letter. It is the last page of the submission, that was, I will just hand it to Your
35 Lordships.

36

37 **JUSTICE NARASIMHA:** 6th July, 22.

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MR. SIBAL: Yes. Just see this. Very interesting letter. Now Your Lordships see this. This is to the Speaker of the Lok Sabha. Your Lordships see that? And 13th June 2019, which was handed over.

Kindly now see, what is the last page at page 44. Sanjay Raut writes to the Speaker of the Lok Sabha. That's what he pointed out. It says, "Respected sir, it is to inform you that Shiv Sena Parliamentary Party has nominated Rajan Vichare MP as Chief Whip in Lok Sabha in place of Bhavana Gawali. Bhavana Gawali with immediate effect". Signed Sanjay Raut, Leader of Shiv Sena Parliamentary Party. Correct, My Lords? Now just see the previous page. Sanjay Raut is a member of the Rajya Sabha. Not a member of Lok Sabha. He is appointing the leader in the Lok Sabha. Appointment of Shiv Sena Parliamentary Party leader for both Houses Lok Sabha and Rajya Sabha. Dear sir, Shiv Sena has the strength of so much in the Lok Sabha. Vinayak, Bhaurao Raut is a Shiv Sena group leader in Lok Sabha and Sanjay Raut represents Shiv Sena as group leaders in Rajya Sabha. In addition to the above, I hereby appoint, Sanjay Raut member of Rajya Sabha Shiv Sena Parliamentary Party leader for both the Houses of Parliament. Lok Sabha, Rajya Sabha as the facilitative measure. May I therefore request your esteemed office to take note of the same and communicate accordingly. My Lord I gave to Your Lordships chapter and verse. Erskine May all the authorities merge as to how it is the political party that appoints the Whip in the House. Paksh Pramukh. And this whole argument was jettisoned by showing this document saying, see Sanjay Raut has appointed. He is not even a member of the Lok Sabha. He is empowered by the party. So this whole argument that I sat in Assam, appointed Gogawale as the Whip. Where does that come from in Constitutional terms? 34 of you sitting in Assam in the lap of the BJP will appoint Gogawale as the Whip and then come to court and say, look, we have already removed you. Under what power?

MR. MEHTA: Sorry to interrupt this may not be relevant for the...

MR. SIBAL: Sir, if you don't mind, Sir I really will appreciate you people have... my colleagues have argued for 5 days. I have not uttered a word. throughout. So please allow me to argue in my own way.

MR. MEHTA: My Lord appointment of Rajya Sabha and Lok Sabha will never be over. We curtailed our arguments. In a rejoinder appointment of Whip in Lok Sabha and Rajya Sabha.

1 **MR. SIBAL:** If you want, I can sit down and the court can decide since you are the master of
2 the ceremonies here. So My Lords, because that was an argument made, My Lord, because
3 that justifies what they say, that justifies the fact that Gogawale is the Whip and he issued
4 directions and he has to be obeyed. Till the 4th who was a political party recognized in
5 the Assembly? Shiv Sena. That was the political party. Who was the Whip My Lords? Sunil
6 Prabhu. So the second submission that I wish to make to Your lordships.

7

8 **JUSTICE NARASIMHA:** First and second are more or less both basically saying that Whips
9 are actually appointed only by the political part. It's a simple point.

10

11 **MR. SIBAL:** They're simple, very simple points. Appointed so, a Whip has overheard obeyed.
12 Sunil Prabhu had to be obeyed.

13

14 **JUSTICE NARASIMHA:** You made this point.

15

16 **MR. SIBAL:** Yes. On 3rd, Sunil Prabhu issued a Whip that you cannot vote for the BJP
17 candidate as Speaker. Whip was disobeyed. He cannot appoint himself as a leader because
18 Ajay Chaudhary became the leader on the 21st of June itself when we removed Eknath Shinde.
19 That removal of Eknath Shinde and appointment of Ajay Chaudhary was conveyed to the
20 Speaker of the House. The Speaker of the House recognized it. So how could the Governor call
21 Eknath Shinde? Who is Eknath Shinde? I am talking in constitutional terms. Argument is
22 Eknath Shinde was the group leader. Where was, under which law? Which group? You can't
23 arrogate yourself the powers of the party sitting in Assam, being entertained by another party,
24 publicly saying that another party is fully supporting me and changing the Constitution of the
25 House as if you are the political party. That's the second, I will argue. I won't take too long, it's
26 just so that we reduce the level of controversy.

27

28 Now, number three. My Learned Friend, my colleague, Mr. Kaul, argued that I am the party.
29 He says I am the party. I am the Shiv Sena. On what constitutional basis can people with 34
30 members say they are the Shiv Sena? Are they recognized by the Election Commission as the
31 Shiv Sena? Shiv Sena is a registered political party with a political leadership intimated to the
32 Election Commission under Section 29(A), of the Representation of People's Act. The moment
33 the recognition takes place under Section 29(A), that is the decision of the Election
34 Commission, which is final. That decision was not overturned by anybody when all this
35 happened till the 4th of July. So My Lords, how can Eknath Shinde's group of 34 say I am the
36 political party? It has no constitutional basis. And for five days, we have heard this. I am not

1 saying that I have split. I am not saying that I am the faction. I am saying I am Shiv Sena. So
2 if I say I am Shiv Sena, I am Shiv Sena in constitutional terms. It cannot be.

3

4 Next point, My Lords, which is even more important. Your Lordships will remember that
5 under paragraph three of the Tenth Schedule, which was deleted later by the 91st
6 Constitutional Amendment, the expression is, that if there is a faction in the legislative party,
7 a rising out of a split in the political party and that faction represents one third of the legislative
8 party then that will be a valid defence against a disqualification petition. So what is the
9 expression used there, I am a faction of the legislative party, resulting from a split in
10 the political party. Right My Lords? Now he says that we 34 are the political party. That is his
11 case. He says, I'm not a faction. There's no split. But My Lords when he goes to the Election
12 Commission what does paragraph 15 say? That if there are two factions of a political
13 party, who claim to be that political party. He doesn't use the word split. Then the Commission
14 will decide which is that political party. So before you they say, I am the political party and
15 before the Election Commissions, they say, I am a faction. Because if he is the political
16 party he need not go to the Election Commission. Why is he going to the Election Commission?
17 He says there is no difference between the legislative party and the political party, which is My
18 Lords a mockery of the Tenth Schedule itself. Where the whole purpose of differentiating what
19 that members of the legislative party will not do, acts which amount to voluntarily giving up
20 membership of the party or vote against the Whip which will result in defection. The whole
21 purpose of the Tenth Schedule is to differentiate between the legislative party and the political
22 party. And the whole argument is, there is no difference between the legislative party and the
23 political party, I am the political party. But if you are the political party, why did you move the
24 Election Commission? My Lords take for example, three people out of five belonging to the
25 Congress Party. They are a majority. They go to the Governor of Goa and say, I am the political
26 party. We are the majority, topple this Government. Numbers are stacked
27 against, Government will be toppled. They will never go to the Election Commission. Why?
28 Because there is a Congress party outside. What will the Governor do? Governor, you think My
29 Lords, on their logic Governor will have to call trust vote because the best
30 way Bommai says, the best way is to find out from a trust vote. My Lords all judgments of law
31 are contextual unless there is an underlying basic principle like basic
32 structure, otherwise all judgement are contextual. When Your Lordships decided on
33 Shivraj Chauhan, the context was what? 22 resignations. Context was...

34

35 **CHIEF JUSTICE CHANDRACHUD:** And six were accepted.

36

1 **MR. SIBAL:** Yes. Six accepted. Not only that, 13th of March, Governor tells him to hold the,
2 to call the Assembly. Which is called on 14th March and hold the trust vote on the 14th. The
3 Chief Minister says no, I adjourned it. He didn't put it in the agenda, he adjourned it to 26th
4 of March, if Your Lordships will remember. So he adjourns it to 26th of March. Then the
5 petitions are filed, saying how have you adjourned it to 26th of March? Because the Governor
6 told you, matter comes to this court and Your Lordships says, look, this is the best because all
7 those 22 letters of resignation are with the Governor. Then Your Lordship said another thing,
8 which I will read later to Your Lordships. Your Lordships said, as far as the disqualification is
9 concerned, who stopped you from disqualifying? That's paragraph 82, of Your Lordship's
10 judgment, where Your Lordships have said this. Nothing stops the Speaker to disqualify if he
11 wanted to disqualify. But once people have resigned, so it was in the context of 22 resignations,
12 context of six of them having been accepted on the 14th of March itself, on the advice of the
13 Chief Minister. Speaker accepts them. And Your Lordships asked the question, what's the
14 difference between those six and the other 16? There's no difference. They have come, the
15 signatures are there, they have given to the Governor. What else can we do? And who stopped
16 you from disqualifying? My Lords, what does Shivraj Chauhan got to do with this? This
17 matter? There is no bearing. We are dealing with what? We are dealing with 34 people which
18 is a faction. They cannot now say they're not a party, that they are the party because they can't
19 be the party. It's a faction. How does the Governor recognize the factions? Under what
20 constitutional parameters does the Governor say I recognize you and therefore I'll call a floor
21 test? It's not a game of numbers. So, if you actually hold their submissions to be correct you
22 are bringing back the regime of *Aaya Ram Gaya Ram*, because anybody can collect the
23 numbers in the manner that they are collected nowadays, whisk them away to any other state,
24 keep them in comfort. I don't want to use a stronger word. And then My Lords come back and
25 topple the Government. And you will have no recourse.
26 Next is even more important.

27

28 **JUSTICE NARASIMHA:** You're saying three fourths is also split?

29

30 **MR. SIBAL:** Exactly.

31

32 **JUSTICE NARASIMHA:** Even three fourth will be split.

33

34 **MR. SIBAL:** That's correct. That's still a faction. That's why three was eliminated. You can't
35 have sort of factions moving out because we know how these numbers are collected. And I
36 remember I showed you Kuldeep Nayar's case where all the act was set out. More important
37 they have only on today in court argued that they are the party. Not a single document right

1 from the 21st of June till they filed the petition. Even there, they do not say till the 19th of July.
2 Whole argument is I am the party, where have you said ever that you are the party. Never, not
3 a single document. This is a mockery that's happening in our country. And I said, My Lords, I
4 repeat it. It's not about, it's not about Maharashtra. It's about Meghalaya. It's about Manipur.
5 It is about tomorrow Uttar Pradesh. It is about anything can happen anywhere. If you allow
6 this to happen. It's about our future. They never say that they are the party even if that Your
7 Ladyship will remember that document on the 28th of June that is read. First of all, let me
8 disabuse you of this whole thing about violence, violence, violence. On the 27th, when we
9 moved this court, they moved this court. My learned friend was there. I was not there. On 27th
10 My Lords a statement was made by Mr. Kaushik. Who was it? Mr. Chitnis. Mr. Chitnis Learned
11 Counsel for the State of Maharashtra states that adequate steps have already been taken and
12 the state government has further ensured that no harm is caused to the lives, liberty and
13 properties of the 13 MLAs their families. This on the 27th and the Governor is arguing on the
14 28th, there was a danger, there will be dead body, there will be post mortem. When on 27th
15 the statement has been made by Mr. Chitnis, who represents the Maharashtra government
16 under the supervision of the Supreme Court. Can anybody My Lord says that dead bodies will
17 be sent for post mortem? This is a 27th June order and that was repeated again and again and
18 again. My Lords If I were to go to the newspaper reports and what they have said in Assam
19 that Your Lordships are not going to enter into that. The unfortunate part of it and I see
20 unfortunate My Lords deliberately, the very thing that we wanted to prevent happened. When
21 your Lordships did not grant us stay. Fine. No issue. But we went to the Election Commission.
22 We told the Election Commission that, look, these are the very 39 people whose candidature
23 as a member of the Legislative Assembly is subject to the Supreme Court. So please don't
24 decide this matter till that is this decided. No stay did not mean that you decide no matter what
25 happens. They misinterpreted that order deliberately not the Commission, but the other
26 side and said no, Supreme Court has said no stay you have to decide. And then what did the
27 Election Commission do? On the basis of these 39 they've got the symbol. Only on the basis of
28 these 39. So what are we here today? Today they argue now we are the party because we've got
29 the symbol. So My Lord on 27th of June, we are put in difficulty. 29th of June we are put in
30 difficulty. And then in September, when Your Lordships passed this order they misinterpret
31 it. 27 September.

32

33 The next point My Lordships will have to consider and I'll be very short My Lord's tomorrow
34 so that we can finish this quickly. Next point is My Lords, they have been saying that under
35 the mandatory rules, seven days' notice ought to be given. Correct? How many days' notice
36 have they got now? They've not filed reply till date. Nine months. I asked myself this question
37 when this court said, don't file your reply till the 12th of July. Was it seven days? Is it fair of

1 the court? I'm sorry to say. If that is the mandatory rule then you should have said seven days
2 from the date. Shorter period. 12th date and that also in the interim. And nine months have
3 passed. And then argument is, this is a fait accompli. See the arithmetic. Even if the 16 had
4 been disqualified, you would still be at minority. And I think Mr. Salve was right, that's all
5 speculation. What would have happened, what would not have happened, maybe the others
6 would have voted in our favour. But that's all speculation. Your Lordships are not concerned
7 about that, what the arithmetic is. And see the injustice caused to us in this process. So, they
8 don't file a reply. Now they say, go back to the Speaker. And there is no one fact which is not
9 admitted on both sides. That they have 34 majority in the legislative party, admitted. We don't
10 deny it. That they were sitting in Assam. They admit. That they sent that resolution throwing
11 out Sunil Prabhu, they admit. That they appointed Gogawale, they admit. And what's
12 interesting is in that resolution that they sent where Your Lordships have said that only two
13 prayers that are made are that Gogawale is appointed. But see the language as far as Eknath
14 Shinde is concerned. He continues to be the leader. The word continues, how did they realize
15 that the word continue has to be used. Because we had removed him on 21st. And on 22nd
16 they dated the letter 21st and sent it to the Speaker received by the Speaker on the 22nd at
17 11:30 AM. So they knew that Eknath Shinde had been removed. Otherwise, they would have
18 said that the Eknath Shinde is the leader. But they said no, Eknath Shinde continues to be the
19 leader and they backdated that document. So, that's not disputed? That we call a meeting on
20 the 21st, 22nd, not disputed. We told them if you don't attend, consequences will follow. Not
21 disputed. On 24th, we had a Council meeting. Not disputed. They said, but you are nobody to
22 call the Council meeting. We will hold a parallel meeting of our own. Not disputed. What is
23 disputed? That on the 28th, the Governor receives these documents, which have been placed
24 before Your Lordships, not disputed. That he called for a floor test, not disputed. That he
25 resigned, the Chief Minister, then Chief Minister resigned, not disputed. That he went to the
26 Governor along with Mr. Fadnavis not disputed. That he was sworn in, not disputed. That
27 there was a trust vote and we issued a Whip, not disputed. That they voted against
28 the Whip, not disputed. What is disputed? Nothing is disputed. From the beginning to the end
29 the whole process is clearly political. Clearly political. And My Lords I want to know, Your
30 Lordship knows about it that a Whip is appointed at the instances of political party and
31 conveyed to the Speaker. That's conveyed to the Speaker. How is the Governor talking about
32 the Whip being Gogawale? He is talking about Gogawale being the Whip in his
33 communications. He is not concerned with it. That's a matter of the House.

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35 **JUSTICE NARASIMHA:** Governor spoke of...

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37 **MR. SIBAL:** Gogawale being the Whip.

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JUSTICE NARASIMHA: Spoke of the Leader of the House, right?

MR. SIBAL: That also. How is he?

CHIEF JUSTICE CHANDRACHUD: ...Is the Whip.

MR. SIBAL: I think also Leader of the House.

CHIEF JUSTICE CHANDRACHUD: Leader of the House, Shinde?

MR. SIBAL: Yes. How is he concerned with it? He is not there to appoint the leader of the House or to recognize. He says a purported appointment of Ajay Chaudhary is illegal. How is he concerned with this? See all this, the letter that he is sending to Uddhav Thackeray.

JUSTICE NARASIMHA: Governor's letters.

MR. SIBAL: Yeah, the Governor is saying all this.

JUSTICE KOHLI: You are referring to para three?

MR. SIBAL: Yes, para three.

CHIEF JUSTICE CHANDRACHUD: That is his letter to Uddhav Thackeray.

MR. SIBAL: Yes, yes.

CHIEF JUSTICE CHANDRACHUD: For holding the trust vote.

MR. SIBAL: Why is he...correct. And he is saying all this. How is he concerned? And if they continue to be, I am grateful to Your Lordships, when Your Lordships asked, if he's the Shiv Sena, then where is the loss of confidence? There is no loss of confidence then. What he is doing is, he is recognizing 34 people to be a faction and on the basis of that recognition then determining that there should be a trust vote. That's what he's doing. The fact of the matter is in law, he cannot recognize. And neither Bommai nor Shivraj Chauhan, nor any of those judgments will come in the way.

1 **CHIEF JUSTICE CHANDRACHUD:** The Solicitor argued towards the later part. He said
2 that what they said in their letter was that we wanted to withdraw support from the
3 MVA Government. So he said this in effect, was therefore a withdrawal of support to
4 the Government.

5
6 **MR. SIBAL:** Let's assume My Lords. I will assume that against me. That can happen in any
7 situation. Any two people, four people, seven people, twelve people, 30 people can withdraw
8 support. They may be members of the legislature. That is why the whole purpose of the
9 Constitution Article 170 onwards into only recognize political parties. Whole purpose is that.
10 That's why Kihoto says that you cannot, you don't have any other identity, integrity of the
11 political party in the political process. That's why. I will accept all that My Lords. That's exactly
12 the *Aaya Ram Gaya Ram* test, that anybody can walk out.

13
14 **JUSTICE NARASIMHA:** The difficulty arises in an emerging situation, just putting this is
15 the question that's been troubling. In an emerging situation suddenly, during the process of
16 the existence of the Legislative Assembly there is this kind of a dissension. Take for example,
17 this very case. So what is very apparent so far as the House is concerned, 34 have come on to
18 one side. This doesn't definitely, there's no material that it reflects what happened
19 outside, there's no doubt about that.

20
21 **MR. SIBAL:** Yes.

22
23 **JUSTICE NARASIMHA:** But in a situation, perhaps one, is it possible, how does one, let us
24 say the Speaker when such a thing is placed before him, would he also take into account or
25 merely adjourn the case asking the parties to go back to the Election Commission and get it
26 proved?

27
28 **MR. SIBAL:** Yes, I was going to come to that. My Lord. Let's forget this case. Let's take a case
29 where people... My Lords I don't take for granted what that letter says on the 22nd that the
30 electorate is unhappy. Your Lordship knows My Lords, there's not a single instance of any of
31 them making any statement prior to the 21st of June that anybody is unhappy. This is all their
32 statement made because they are now sitting in Guwahati and they know what the
33 consequence is. They didn't go to Surat and Guwahati on the 21st. This must have been pre-
34 arranged. My Lords these things don't happen overnight. But be that as it may, I don't want to
35 enter into the politics of it. But Your Lordship is right, it is correct that these things will
36 happen. But what is to be done? What is to be done is, if you are a faction and you go to
37 the Governor, the Governor would say, I can't recognize you. You want to say you are the

1 political party, My Lords. Now forget this case. You go to the Election Commission. You say
2 you are a faction, I am the political party. Suppose he had gone to the Election Commission
3 and done that and then attempted to change no problem. First, the Commission would have
4 decided, in the meantime disqualification petitions would have been heard.

5

6 That's the constitution and don't connect one with the other. Then the disqualification would
7 have been decided. Then they wouldn't have been able to go to the Commission because you
8 are deemed to have given up membership of the party. And forget there may be no dispute at
9 all. Why do you say there's a faction of the Legislation Party. There may be if two factions
10 within the political party, each claiming that they are the party. Forget about disqualification.
11 What's the procedure? Go to the Election Commission. Can the procedure ever be that you
12 claim as a faction of the Legislative Party to be the political party, get recognition from the
13 Governor, topple the government, then go to the Commission and say these are the 36 or 38
14 members of the Legislative Party. We are dominant in the Legislature. Now we must get the
15 symbol. Cannot be. By any standards of constitutional law, this cannot happen.

16

17 **JUSTICE NARASIMHA:** What happens in the interregnum?

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19 **MR. SIBAL:** Sorry?

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21 **JUSTICE NARASIMHA:** What happens in the interregnum? Suppose Speaker takes the
22 prima facie view and says that go to the Election Commission and come back to me and tell
23 me who actually is the political party.

24

25 **MR. SIBAL:** No My Lords the Speaker will not do that with great respect.

26

27 **JUSTICE NARASIMHA:** Then he proceeds with Tenth Schedule. Then all the 34 will be
28 disqualified.

29

30 **MR. SIBAL:** Yes. Why not?

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32 **JUSTICE NARASIMHA:** I am just asking you.

33

34 **MR. SIBAL:** Yes they will be.

35

36 **JUSTICE NARASIMHA:** So therefore that is the consequence.

37

1 **MR. SIBAL:** Yes, let me tell you this is also very important aspect of the...

2

3 **JUSTICE NARASIMHA:** With the advent of Tenth Schedule in a situation like this where
4 more than three fourths of the legislators have, let us call it a not a not a split. Let's call it a
5 faction in terms of Symbols Order. Let us call it as three fourths are in one group.

6

7 **MR. SIBAL:** Yes.

8

9 **JUSTICE NARASIMHA:** Then in which case, it is the inevitable consequence, that the
10 faction which is in control of the government would have the Speaker with them and would
11 disqualify them. There is no other alternative according to....

12

13 **MR. SIBAL:** There can't be for the reason the third paragraph has been deleted. The whole
14 purpose of it is that you cannot have...see they will still be disqualified for their acts for having
15 voluntarily giving up membership of the party, even if they are the party.

16

17 **JUSTICE NARASIMHA:** One-fourth Mr. Sibal, that's why I was asking them repeatedly.

18

19 **MR. SIBAL:** One-third, one-third.

20

21 **JUSTICE NARASIMHA:** One third right? You are talking of a three fourth....

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23 **MR. SIBAL:** Doesn't matter, My Lords, because one third could have been two thirds also.

24

25 **JUSTICE NARASIMHA:** Isn't there a difference between split and overwhelming majority
26 of legislature.

27

28 **MR. SIBAL:** That is not recognized by the Tenth Schedule My Lords. Tenth Schedule doesn't
29 recognize it.

30

31 **JUSTICE NARASIMHA:** What does Kihoto say about it?

32

33 **MR. SIBAL:** No, Kihoto doesn't say either. Kihoto doesn't say either.

34

35 **JUSTICE NARASIMHA:** Why don't you just helps us from this?

36

1 **MR. SIBAL:** I will. Tomorrow I'll help you. But just one last thing I just wanted to
2 mention My Lords, that...anyways we will do it tomorrow. It is better.

3

4 **CHIEF JUSTICE CHANDRACHUD:** Sorry?

5

6 **MR. SIBAL:** I will do tomorrow My Lords. It is better we will do it tomorrow.

7

8 **JUSTICE NARASIMHA:** Give a thought.

9

10 **MR. SIBAL:** Yes. I've now given your Lordships the entire argument. Now it won't be take
11 very long. Obligated.

12

13 **JUSTICE NARASIMHA:** That prima facie stand that they have argued that also just tell us
14 about that. Just tell us that work...

15

16 **MR. SIBAL:** Sure. Deeply obliged.

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END OF DAY'S PROCEEDINGS