

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

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MR. HARISH SALVE: My Lords, I had made a submission last time about the Speaker's conduct when he is fraught with emotion. And My Lords one of the things Your Lordships have been considering is the problem about whether those were observations of the earlier judgement of Nabam Rebia. Whether they are to be read as a Speaker being denuded of power to act. Whether he is being subject to a code of conduct. My Lords one can perhaps put it more on the manner of exercise of power as I submitted last time, rather than absence of power because there are 50 other functions which a speaker has to do. A Speaker has administrative jobs. He has to run the Assembly. There may be other things going on. Surely My Lord one cannot suggest that the Speaker must sit at home and set it out since his motion is heard. There is some check and balance within the system and Your Lordships have in the statute compilation the Maharashtra Assembly Rules, and I believe there are similar rules in other assemblies too. Your Lordships have Rule 11 which gives the time limit of 15 days. And My Lord my respectful submission is, it might be...it may not be really feasible to say in black and white, in what circumstances the Speaker should or should not act. Normally a person who is under a significant challenge should not act. If My Lord a Speaker... look at our I mean now academic, but the reason why we went to court is the Speaker did not even give the period which we have to give for a reply under the rules. And it could be that the numbers were such that the Speaker may have lost, most probably lost his position. Because My Lord one thing I do want to restate, I said this the other day, we know paragraph 3 about split has been deleted. One of the things which did prevail when Your Lordships upheld this law in Kihoto, has not been an anti-dissent but anti-defection law is that if there is a sizable number of breakaways, then it is not a defection. Then it is <UNCLEAR> because there is one has to balance the right dissent with....

CHIEF JUSTICE CHANDRACHUD: But Mr. Salve then what is the sizable number of..

MR. SALVE: That's not for Your Lordships.

CHIEF JUSTICE CHANDRACHUD: But then <UNCLEAR> be bringing in split by the back door.

MR. SALVE: No, no, I'm sorry. I'm not inviting the court to do that. I'm saying something very different, My Lord. In fact, my respectful submission is Your Lordships has to take it as you find it. There was a provision for a split which has now been deleted.

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?

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7 **MR. SALVE:** Second My Lord.

8

9 **JUSTICE KOHLI:** Second.

10

11 **JUSTICE SHAH:** Second compilation, judgment 2?

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13 **MR. SALVE:** Judgment 2, PDF page 111 for that, at least the page which I have.

14

15 **JUSTICE SHAH:** Volume 1?

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17 **MR. SALVE:** Volume 1.

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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.

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MR. JETHMALANI: There were two grounds in the disqualification petition. And they were both based on this letter.

JUSTICE SHAH: But you can very well say that it is the <UNCLEAR> of Speaker to consider. <UNCLEAR>

MR. JETHMALANI: It can stop there, Your Lordship is absolutely..

JUSTICE SHAH: Don't try to justify whether there was a disqualification or not.

MR. JETHMALANI: I agree.

MR. JETHMALANI: We don't need to go that far. But since those two letters were the very grounds of my disqualification.

JUSTICE NARASIMHA: Okay Mr. Jethmalani.

CHIEF JUSTICE CHANDRACHUD: Alright. What is the next point now Mr. Jethmalani?

MR. JETHMALANI: Now the next one.

JUSTICE KOHLI: Mr. Jethmalani, what was the page number? Since we've got that downloaded, airdropped to us.

MR. JETHMALANI: I'm saying Nabam should be reaffirmed.

JUSTICE KOHLI: No no, the speech... the debate that you referred to at 85. It's been air dropped to us just now. Just indicate the page please for us. What page?

MR. JETHMALANI: Page 38.

CHIEF JUSTICE CHANDRACHUD: 38. All right.

MR. JETHMALANI: Now of the second..

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.

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MR. JETHMALANI: Then My Lord, something very important starts from 25th June. On 25th June, the Deputy Speaker issued summons, now My Lord, all along we are told that there are 39 MLAs. Your Lordship has made all those calculations on 39 MLAs. Now My Lord, there is a serious issue here, the Deputy Speaker on 25th June issued summons to 16 MLAs only, informing them that a disqualification petition had been filed against them, which was served along with all Annexures only on 16 MLAs. Now My Lords for the first time they inform us, now My Lords, this is a very serious issue. First time they inform us is on the 14th of July when a disqualification petition allegedly dated 27th June. Now I will point out the pleading very briefly. I'll just point out.

There has never been any reference, never been any reference to a 27th June disqualification petition. Admittedly they were not served on us. Admittedly. The so-called 27th June petition for disqualification of the remaining 23 MLAs. Apart from 16, Lordship remembers there were 39 MLAs. 16 MLAs has been the theme throughout. Even during the hearings in the Supreme Court which they challenged against, the hearing in the Supreme Court on the 29th and the 29th, when they moved the Supreme Court to challenge the Governor's decision to call for a floor test. Even on that date, the reference was only to 16 MLAs. But in arguments it is being sought to portray that all 39 MLAs received disqualification notices.

Now there is a second aspect here, a legal issue. Your Lordship turns to Page 12 , regarding that notice regarding the disqualification petition. In every pleading Your Lordship will note that contrary to what is being suggested to Your Lordship, in every pleading there is no mention of the remaining 23 MLAs. My Lord that is a matter which has misled this court. I had no idea myself till it was pointed out. I assumed that was always 39 MLAs. But it has through out been... and there is a reason for that. There's a good reason why they only serve these disqualification notices and petitions to 16 because they wanted to split the two cans. 16 still made it possible for them to survive a majority of the floor of the House. 39 most certainly didn't. So till the last minute, till the last minute they only talked about 16. It is only after, it is only after the new Government came into existence. The new Speaker was appointed. The new Government came into existence that they referred to 39 MLAs.

CHIEF JUSTICE CHANDRACHUD: We will just get up for two minutes. The Chief Justice of Kenya has to have other meetings. And we'll come back in two minutes. So it's according to you only after the new Government came ...

MR. JETHMALANI: For the first time in a petition Your Lordship may Note of 14th July, 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.

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34 **CHIEF JUSTICE CHANDRACHUD:** Thank You, Mr. Manindar Singh, Mr. Mehta? How
35 long will you take?

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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.

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End of day's proceedings