

CHIEF JUSTICE'S COURT

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

Subhash Desai

v.

Principal Secretary, Governor of Maharashtra and Ors.
W.P.(C) No. 493/2022
Item No. 501

TRANSCRIPT OF HEARING

02-Mar-2023

11:00 AM IST

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MR. KAUL: My Lords as promised to Your Lordships yesterday, I'll now since my time is curtailed to 45 minutes, I'll stick to four judgments. What I have done in the meantime is, I've got three things done. The timeline that I gave to Your Lordships yesterday.

CHIEF JUSTICE CHANDRACHUD: Yes.

MR. KAUL: The timeline I gave to Your Lordships yesterday, I've got a note made.

CHIEF JUSTICE CHANDRACHUD: Yes.

MR. KAUL: The judgments with propositions that I'm relying on, I've got a note made. And the distinguishing note on the judgments relied on by the other side, I've got that note made. So let me just hand it over to Your Lordships, Your Lordship's permit that maybe easier and then proceed with my argument.

CHIEF JUSTICE CHANDRACHUD: Alright.

MR. KAUL: This is My Lords, the list of cases we are relying on. Please give one copy to Mr. Sibal. My Lords, these are the judgments that we are distinguishing. The ones I'm now handing over are the judgments and lastly, what I'm giving to Your Lordships is, the timeline that I relied on My Lord, so that Your Lordships have in place...

CHIEF JUSTICE CHANDRACHUD: They're in one place. You circulated to Mr. Sibal?

MR. KAUL: Yes, yes, My Lord, absolutely. Each of them, as I hand over to Your Lordships. I'm giving him too. And My Lord, this timeline. I have consciously not included, the EC events, because as Your Lordships said, that's not something that Your Lordships are getting into, I pretty much stuck to about the first week of July and stopped to the first week of July as far as these list of events are concerned. So My Lord, these three things are done and I have given now My Lords, let me straight away come to the 3 or 4 cases that I need to cite and that's it. But one argument My Lords, I just wanted to make before I go to the case law, are...my submission yesterday for Your Lordships kind consideration was, that this is an artificial distinction sought to be drawn between a legislature party and political party. It has never been our case at all. In fact, we have right through said that it has the political authority of the political party, their organically and integrally connected, and they are co-joined, and they

1 have to be seen together. That's how the framers of the Constitution always looked at it. And
2 in fact, whenever an attempt is made to segregate, they say, 'No, we must look at both'. Now
3 that is further fortified if Your Lordships were to have Para 4 of Schedule 10, which is a
4 defence. Of course, I am not on the defence argument at all because according to me, I have not
5 incurred 2(1)(a) or 2(1)(b), so I'm not on the defence at all. But please have that why they
6 should be considered together, and one has a bearing on the other. Please have para 4 of the
7 Tenth Schedule.

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9 **CHIEF JUSTICE CHANDRACHUD:** Para 4 of the Tenth Schedule?

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11 **MR. KAUL:** Yes My Lords. May I with Your Lordship's permission?

12

13 **CHIEF JUSTICE CHANDRACHUD:** Yes.

14

15 **MR. KAUL:** A member of a House shall not be disqualified under subparagraph 1 of
16 paragraph 2, where his original political party merges with another political party, and he
17 claims that he and any other members of his original political party, and please have 2, for the
18 purposes of subparagraph 1 of this paragraph, the merger of the original political party of a
19 member of the House shall be deemed to have taken place, if and only if, not less than two-
20 thirds of the members of the Legislature party concerned have agreed to such merger. So even
21 when you come to a defence, the bearing of what happens in a legislature party, in fact, they
22 say it's deeming. It's a deeming friction there as far as the defence of merger is concerned. I'm
23 not for a minute suggesting I'm coming under para 4. I'm just drawing analogy from para 4 to
24 say, what bearing does the two have on each other. So when you come and say that this is only
25 in the legislature party, nothing has happened in the in the political party. My Lords even
26 in Rana, which is one of the judgments I'll read out, when the defence was taken up of
27 whether there is a split or not, the question was, should the split only in Legislature party be
28 seen, or the split in political party be seen? Even there, the Supreme Court said, the Speaker
29 will not embark on an independent inquiry into whether there's a split in the political party,
30 it will just take a prima facie view. So they go hand in hand. And this whole argument that you
31 are only the Legislature party, not the political party, is a completely wrong argument in
32 law and in facts. Now, My Lord, straight away to the judgments. Kindly first have My
33 Lords Balchandra versus BS Yediyurappa judgment compilation 3D Volume 3D pdf page
34 25, starting at 58.

35

36 **JUSTICE SHAH:** You don't want to rely upon notes, straight away...

37

1 **MR. KAUL:** My Lords straightaway... because this is for all the judgments. I will now just...
2 four judgments I want to cite and would request Your Lordships to read with me, because that
3 is important for me.

4

5 **JUSTICE SHAH:** What is that judgement compilation?

6

7 **MR. KAUL:** Volume 3D. Judgment compilation PDF page 58, which is the relevant para 113.

8

9 **JUSTICE KOHLI:** What para did you say Mr. Kaul?

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11 **MR. KAUL:** 113 on page, PDF Page 58. May I with Your Lordship's permission?

12

13 **CHIEF JUSTICE CHANDRACHUD:** Yes.

14

15 **MR. KAUL:** 'The main questions, which emerged from submissions made on behalf of the
16 respective parties and the facts of the case may be summarized as follows –

17 a). Did the appellants voluntarily give up their membership of the Bharatiya Janata Party?

18 b). Since only three days' time was given to the appellants to reply to the show cause notices as
19 against the period of seven days or more prescribed in Rule 7 sub-clause 3 of the
20 disqualification rules, were the said notices vitiated?

21 c). Did the Speaker act in/or haste in disposing of the disqualification application filed by Shri
22 B. S. Yediyurappa introducing a Whip on bias as to the procedure adopted? d). What is the

23 scope of judicial review of an order passed by the Speaker under Para 2(1)(a) of the Tenth
24 Schedule to the Constitution, having regard to the provisions of Article 212 thereof? The facts

25 of the case revealed that the appellant, along with Shri. M.P. Renukacharya and Narasimha
26 Nayak wrote identical letters to the Governor on 6-10-2010 indicating that as MLAs of

27 the Bharatiya Janata Party, they had become disillusioned with the functioning of
28 the Government headed by Shri B. S. Yediyurappa. According to them, there was widespread

29 corruption, nepotism, favouritism, abuse of power, and misuse of Government machinery in
30 the functioning of the Government headed by Chief Minister Shri Yediyurappa and

31 that a situation had arisen when the governance of the State could not be carried on in
32 accordance with the provisions of the Constitution. Accordingly, they were withdrawing their

33 support from the Government headed by Shri Yediyurappa, with a request to the Governor to
34 intervene and to institute the Constitutional process as the Constitutional head of the State.

35 The Speaker took the view that the said letter and the conduct of the appellants in moving
36 from Karnataka to Goa and other places and issuing statements both to the print

37 and electronic media regarding withdrawal of support to the BJP Government led by Shri

1 Yediyurappa and the further fact that the appellants are said to have negotiated with Shri H.
2 D. Kumaraswamy, the leader of the State Janata Dal and its members regarding the formation
3 of an alternative Government, was sufficient to attract the provision of para 2(1)(a) of the
4 Tenth Schedule to the Constitution. It was held by the Speaker that in the absence of any denial
5 to the allegation made by Shri K. S. Eshwarappa, the State President of the BJP, the same had
6 to be accepted as having meant proved against the appellants. In this regard, the Speaker
7 referred to the views expressed by the Constitution mentioned in Kihoto Hollohon, wherein
8 one of the issues which had been raised and decided was the act of voluntarily giving up the
9 membership of a political party may be either expressed or implied. Even greater emphasis
10 was laid on the decision in Ravi S. Naik, wherein it was observed that there was no provision
11 in the Tenth Schedule which indicated that till a petition signed and verified in the manner
12 laid down in the Civil Procedure Code for verification of pleadings was made to the Chairman
13 or a Speaker of the House. He did not get the jurisdiction to give the decision as to whether a
14 member of the House had become subject to disqualification under para 2(1)(a) of the Tenth
15 Schedule or not. The afore said view taken by the Speaker has to be tested in relation to the
16 action of the members concerned of the House, and it has to be seen whether on account of
17 such action a presumption could have been drawn, that they have voluntarily given up their
18 membership of the BJP, thereby attracting the provisions of para 2(1)(a) of the Tenth
19 Schedule. In the instant case, the appellants had in writing informed the Governor on 6-10-
20 2010 that having become disillusioned with the functioning of the Governor...of
21 the Government headed by Shri B. S. Yediyurappa, they had chosen to withdraw support to
22 the Government headed by Shri B. S. Yediyurappa and had requested the Governor to
23 intervene and institute the Constitutional process as the Constitutional head of the State. The
24 said stand was reemphasized in the replies to the show cause notices submitted by the
25 appellants on 9-10-2010, wherein they had inter alia denied that their conduct had attracted
26 the vice of defection within the scope of 2(1)(a) of the Tenth Schedule. In their said replies, the
27 appellants had categorically indicated that nowhere in the letter of 6-10-2010 had they
28 indicated that they would not continue as members of the legislature party of the BJP. On the
29 other hand, they had reiterated that they would continue to support the BJP and any
30 Government formed by the BJP headed by any leader other than Shri BS Yediyurappa, as the
31 Chief Minister of the State. They had also reiterated that they would continue to support any
32 Government headed by a clean and efficient person, who could provide good governance to
33 the people of Karnataka according to the Constitution of India and it was only to save the party
34 and Government and to ensure that the State was rid of a corrupt Chief Minister, that the letter
35 had been submitted to the Governor on 06-10-2010. At this point let us consider the contents
36 of letter dated 06-10-2010, written by the appellants to the Governor, which has been
37 reproduced here and before. The letter clearly indicates that the author thereof, who had been

1 elected as an MLA on a Bhartiya Janata Party ticket, having become disillusioned with the
2 functioning of the Government headed by Shri BS Yediyurappa on account of the widespread
3 corruption, nepotism, favouritism, abuse of power and misuse of government machinery was
4 convinced that a situation had arisen in which the governance of the State could not be carried
5 on in accordance with the provisions of the Constitution and Shri Yediyurappa had forfeited
6 the confidence of the people. The letter further indicates that it was in the interest of the State
7 and the people of Karnataka that the author was expressing his lack of confidence in the
8 Government headed by Shri Yediyurappa and that he was accordingly withdrawing his support
9 to the Government headed by Shri Yediyurappa with a request to the Governor to intervene
10 and institute the constitutional process as the constitutional head of the State. Although Mr.
11 Sorabji was at pains to point out that the language used in the letter was similar to the language
12 used in Article 356 of the Constitution, which according to him was an invitation to the
13 Governor to take action in accordance with the said Article, the same is not as explicit as Mr.
14 Sorabji would have us believe. The constitutional process has hinted at in the said letter did
15 not necessarily mean the constitutional process of proclamation of President Rule, but could
16 also mean the process of removal of the Chief Minister through constitutional means. On
17 account thereof, the Bhartiya Janata Party was not necessarily deprived of a further
18 opportunity of forming a Government after a change in leadership of the legislature party. In
19 fact, the same is evident from the reply given by appellant on 09-10-2010, in reply to the
20 show cause notices issued to them in which they had reemphasized their position that they not
21 only continued to be members of the Bhartiya Janata Party, but would also support
22 any Government formed by the Bharatiya Janata Party headed by any leader other than Shri
23 B. S. Yediyurappa as the Chief Minister of the State. The conclusion arrived at by
24 the Speaker, does not find support from the contents of the said letter of 06-10-2010, so as to
25 empower the Speaker to take such a drastic step as to remove the appellant from the
26 membership of the House.

27 Now kindly have My Lords para 142, page 64. My Lords have para 142?

28

29 **CHIEF JUSTICE CHANDRACHUD:** Yes.

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31 **MR. KAUL:** On the very same day that is 06-10-2010, Shri Yediyurappa as the leader of
32 the Bharatiya Janata Party....Bhartiya Janata Legislature Party, in the Legislative Assembly
33 filed an application before the Speaker under Rule-6, of the Disqualification Rules 1986, being
34 disqualification application number one of 2010, for a declaration that all the 13 MLAs elected
35 on BJP tickets along with two other MLAs had incurred disqualification in view of the Tenth
36 Schedule of the Constitution. Immediately thereafter on 07-10-2010, the Speaker issued
37 show cause notices to the aforesaid MLAs, informing them of the disqualification application

1 filed by Shri BS Yediyurappa and informing them that by submitting letters to the
2 Governor, withdrawing support to the Government led by Shri Yediyurappa, they had violated
3 para 2(1)(a), of the Tenth Schedule to the Constitution and were therefore disqualified from
4 continuing as members of the House. The appellants were given time till 05:00 PM on 10-10-
5 2010 to submit their objections, if any, to the said application. Even if as held by this Court in
6 Dr. Mahachandra Prasad Singh, Rule 6 and 7 of disqualification rules are taken as directory
7 and not mandatory. The appellants were still required to be given a proper opportunity of
8 meeting the allegations mentioned in the show cause notices. The fact that the appellants had
9 not been served with notices directly, but at the same were pasted on the outer doors of their
10 quarters in the MLA complex, and that too without copies of various documents relied upon
11 by Mr. Yediyurappa, giving them three days' time to file the said notice...to file reply to the
12 said notices, justify the appellant's intention that they had not been given sufficient time to
13 give an effective reply to the show cause notices.

14 Please have then para 147, on page PDF 66. 147. May I My Lords?

15

16 **CHIEF JUSTICE CHANDRACHUD:** Yes.

17

18 **MR. KAUL:** The procedure adopted by the Speaker seems to indicate that he was trying to
19 meet the time schedule set by the Governor for the trial of the strength and the Assembly. And
20 to ensure that the appellants and the other independent MLAs stood disqualified prior to
21 the date on which the floor test was to be held. Having concluded the hearing on 1-10-2010 by
22 05:00 p.m., the Speaker passed the detailed order in which various judgments, both of the
23 Indian Courts and Foreign Courts and principles of law from various authorities was referred
24 to on the same day, holding that appellants had voluntarily given up the membership of the
25 Bharatiya Janata Party by their acts and conduct which attracted the provisions
26 of para 2(1)(a) of the Tenth Schedule of the constitution where under they stood disqualified.
27 The vote of confidence took place on 11-10-2010 in which the disqualified members could not
28 participate and in their absence Shri. B.S Yediyurappa was able to prove his majority in the
29 House. Unless it was to ensure that the trust vote did not go against the Chief Minister, there
30 was no conceivable reason for the Speaker to have taken up disqualification application in
31 such a great hurry. Although in Dr. Mahachandra Prasad Singh, this Court held that the
32 disqualification rules were only directory and not mandatory, and that violation thereof
33 amounted to only procedural irregularities and not violation of a constitutional mandate. It
34 was also observed in Ravi S. Naik that such an irregularity should not be such, so as to
35 prejudice any authority who is affected adversely by such breach. In the instant case, it was a
36 matter of survival as far as the appellants were concerned. In such circumstances, they
37 deserved a better opportunity of meeting the allegations made against them, particularly when

1 except for the newspaper cuttings, said to have been filed by Shri Yediyurappa along with the
2 disqualification application, there was no other evidence at all available against the
3 appellants.

4

5 Then please have para 151 at PDF page 67. This is important. My Lords, para 152. We cannot
6 lose sight of the fact that although the same allegations as were made against the appellant
7 Shri Yediyurappa, were also made against the Shri. M. P. Renukacharya and Shri Narasimha
8 Nayak, the retraction was accepted by the speaker despite the views expressed by
9 them submitting... that upon submitting the letter with drawing support to the BJP
10 Government led by Shri Yediyurappa, all the MLAs stood immediately disqualified under para
11 2(1)(a) of the Tenth Schedule to the Constitution, and they were accordingly permitted to
12 participate in the confidence vote for reasons which are not required to be spelled out.

13

14 Then para 154. Having considered all the different aspects of the matter and having examined
15 the various questions which have been raised, we are constrained to hold that the proceedings
16 conducted by the Speaker on the disqualification application filed by Shri BS Yediyurappa do
17 not meet the twin tests of natural justice and fair play. The Speaker, in our view, proceeded in
18 the matter as if he was required to meet the deadline set by the Governor irrespective of
19 whether in the process he was ignoring the constitutional norms set out in the Tenth Schedule
20 to the Constitution, and the Disqualification Rules 1986 and in contravention of the basic
21 principles that go hand in hand with the concept of fair hearing. As we have earlier indicated,
22 even if disqualification rules are only directory in nature, even then sufficient opportunity
23 should have been given to the appellants to meet the allegation levelled against them. And
24 kindly now have My Lords, the last para 157 on same page. The appeals are therefore allowed.
25 The order of the Speaker dated 10-10-2010 disqualifying the appellants on the membership of
26 the House under para 2(1)(a) of the Tenth Schedule of the Constitution, is set aside along with
27 the majority judgment delivered in writ repetition so and so, and the portions of the judgment
28 delivered so and so concurring with the views expressed by Honourable the Chief Justice
29 upholding the decision of the Speaker, so on so, filed by so and so. Consequently, that
30 is disqualification application filed by B. S. Yediyurappa is dismissed. So My Lords, a much
31 worse case, a case where the Chief Minister in question from the same party, they say they
32 have no faith. But they said where have they said that they are leaving the political party, they
33 are forming a new political party? They continue to support the party. Thus, the extreme
34 conclusion drawn to say that this ex facie attracts 2(1)(a) is wrong, because, My Lords, if this
35 is going to become the basis of 2(1)(a) that I express dissent within the party, then internal
36 dissent which is the bedrock of democracy and parliamentary democracy will completely be
37 thrown out of the window. Because at the end of the day, the moment anyone within a party

1 expresses dissent, you say it's a 2(1)(a) case. So in a much worse case, they said, this is not
2 a 2(1)(a) case. And My Lords I'm not for a minute suggesting as My Lord, the Chief Justice
3 said yesterday. My argument is not that the majority within a party cannot attract the Tenth
4 Schedule. The majority within a party can also disobey a Whip or for whatever reasons, floor
5 cross or align with the opposition party, go to the Governor for falling of the government.
6 That's not my case at all. My case is that to determine who is the rival faction under para 15 of
7 the Symbols Order.

8 There is an exclusive jurisdiction in the Election Commission of India, which looks at the
9 parameters as set by Your Lordships on Sadiq Ali downwards to see which is the rival faction
10 within the political party to be recognized. And my case, right through has been that
11 the legislature party and the political party go hand in hand. You are today seeking to draw an
12 artificial distinction between a legislature party and a political party, to say that you have
13 shown nothing in the political party, you've only shown the legislature party, whereas the
14 legislature party definitely reflects the political authority of the political party as well. In any
15 case, as far as a competent body is concerned it has come to a conclusion that we represent
16 within the Shiv Sena the recognized Shiv Sena today. So my case is not that a majority cannot
17 incur under 2(1)(a). My case is in the facts of the case for you to say this is only legislature
18 party and not political party, is without any basis. In any case the Speaker has to decide it. You
19 want to bypass the whole route and come to the Supreme Court in an Article 32 and say the
20 Supreme Court must decide before the Speaker, which is in the teeth of Kihoto. And my
21 coming under a 32 was on Nabam, which was on an entirely different footing. That was the
22 argument.

23

24 Next, My Lord, kindly have Volume 3D, PDF 787 at Page 815.

25

26 **JUSTICE KOHLI:** Same.

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28 **MR. KAUL:** Same, same. Same volume My Ladyship.

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30 **JUSTICE KOHLI:** [UNCLEAR]

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32 **MR. KAUL:** That's right. That's right. 20. But I will only trouble Your Lordships one para,
33 since there's less time. Para 19.

34

35 **CHIEF JUSTICE CHANDRACHUD:** Page?

36

1 **MR. KAUL:** 815. Your Lordship may later see both the paras, 19 and 20, but I'll only read 19.
2 My Lords have 19? 'The Constitution is not a legal document, embodying a set of legal rules
3 for the passing hour. It sets out principles from an expanding future and is intended to endure
4 for ages to come and consequently to be adapted to the various crisis of human affairs.
5 Therefore, a purposive, rather than a strict literal approach to the interpretation, should be
6 adopted. A Constitutional provision must be construed not in a narrow and constricted sense,
7 but in a wide and liberal manner so as to anticipate and take account of changing conditions
8 and purposes so that a Constitutional provision does not get fossilized but remains flexible
9 enough to meet the newly emerging problems and challenges.' The reason I'm citing this
10 judgment, My Lord is in the context of Nabam, where it was said that the Constitution doesn't
11 provide as far as this, when does the notice period start? The Constitution does not provide for
12 it at all. But some provision will have to be looked at. If a situation emerges when
13 the Constitution was drafted and there was no Tenth Schedule to it at that stage, and a
14 problem arises today. Why can the court not interpret in a liberal manner to take care of the
15 fact that the Constitutional values are protected? Right My Lords? Now please have straight
16 away of... 946 at 956.

17

18 **JUSTICE KOHLI:** You're referring to the separate volume?

19

20 **MR. KAUL:** Judgment Compilation, Volume-2, serial number 3.

21

22 **CHIEF JUSTICE CHANDRACHUD:** 946?

23

24 **MR. KAUL:** Yes, which is at 956. Para 14.

25

26 **CHIEF JUSTICE CHANDRACHUD:** Is this Kuldeep Nair?

27

28 **MR. KAUL:** In the meantime, starts with it in the meantime My Lords? Kuldeep Bishnoi,
29 My Lords. Speaker Haryana Vidhan Sabha versus Kuldeep Bishnoi.

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31 **JUSTICE KOHLI:** Volume-2, what page did you say Mr. Kaul?

32

33 **MR. KAUL:** My Lords, 946 the judgment starts, the para starts at 956.

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35 **CHIEF JUSTICE CHANDRACHUD:** Yes.

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37 **JUSTICE KOHLI:** Sorry I have the wrong volume. Judgment compilation Volume 2.

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MR. KAUL: Judgment compilation Volume-two, serial number 3.

CHIEF JUSTICE CHANDRACHUD: This is Kuldeep Bishnoi na?

MR. KAUL: That's right. That's right. 946 it starts.

CHIEF JUSTICE CHANDRACHUD: One second.... given that Davinder Pal Singh Bhullar.

JUSTICE KOHLI: It starts at serial number, it's part two.

MR. KAUL: Bookmark 52.

JUSTICE KOHLI: Bookmark 52. Very well, thank you. Got it. It is 52 in the bookmarking, isn't it? It's at Kuldeep Singh Bishnoi, right. 2015-12, SCC-381.

MR. KAUL: Yes. My Lords, even if I'm not legally sound, I'm trying to take the sound technically correct by pointing out all the bookmarks.

CHIEF JUSTICE CHANDRACHUD: No, that's good.

JUSTICE KOHLI: You're making progress.

MR. KAUL: I'm inviting upon myself Your Lordships. Would Your Lordships be kind enough to have para 14. In the meantime, proceedings before the Speaker continued and since the same were not being concluded in terms of the assurances given, the Division Bench of the High Court directed the Speaker to file an affidavit on or before 11-11-2011. Finally being dissatisfied with the progress the pending disqualification petitions before the Speaker, the Division Bench took upon the letters, patent appeals on 02-12-2011, when the directions were given to the production of the entire records of the matter pending before the Speaker. On 7-12-2011, the relevant records of the proceedings before the Speaker was submitted to the High Court, which adjourned the matter till 19-12-2011 for further consideration. However as alleged on behalf of the appellants, the Bench was not constituted on 19-12-2011. And without any further hearing or giving an opportunity to the Speaker's Counsel to make submissions on the status report, the High Court proceeded to pronounce its judgment on the letters patent appeals, by its judgment which has been impugned in these proceedings. The Division Bench

1 held, the directions, the learned single judge directing the Speaker to decide the
2 disqualification petitions within a period of four months. However, while disposing off the
3 matter, the Division Bench state the operation of the order passed by the Speaker on the
4 merger of the... So, it also declared five MLAs, who have filed separate appeals before this
5 Court has been unattached members of the Assembly with the right to attend the session only.
6 It was directed that they would not be treated either as part of INC, or HJC party, with a further
7 direction that they would not hold any office either. It is aforesaid directions and orders which
8 have resulted in the filing of several special league petitions before this Court by the Speaker
9 and five MLAs. As a consequence of the order of the Speaker pass...The consequence of
10 the order passed by the Division Bench of the High Court, the five
11 independent appellants before us have been prevented from discharging their functions as
12 members of the Haryana Vidhan Sabha even before the disqualification petition filed against
13 them by Shri Kuldeep Bishnoi, could be heard and decided.

14

15 Then para 46 My Lords on page 965. Last para on that page. Para 46. My Lords have that? The
16 appeal filed by the Speaker of the Haryana Vidhan Sabha against the judgment of the Division
17 Bench of the High Court is not therefore capable of being sustained, and the appeals filed by
18 the Speaker is accordingly dismissed. The other appeals preferred by the five
19 disqualified MLAs, are therefore to be allowed to the extent of the directions given by the
20 learned single judge and endorsed by the Division Bench, that five MLAs would
21 stand disqualified from effectively functioning as members of the Haryana Vidhan
22 Sabha, till the Speaker decided the petitions regarding their disqualification within a period of
23 four months. In our view, the High Court has no jurisdiction to pass such an order which was
24 in the domain of the Speaker. The High Court assumed the jurisdiction which it never had in
25 making the interim order, which had the effect of preventing five MLAs in question from
26 effectively functioning as members of the Haryana Vidhan Sabha.

27

28 The direction given by the learned single judge to the Speaker, as endorsed by the division
29 bench, is therefore upheld to the extent that it directs the Speaker to decide the petitions or
30 disqualification of the five MLAs within a period of four months. The set direction shall
31 therefore be given effect to by the Speaker. The remaining portion of the order
32 disqualifying the five MLAs from effectively functioning as members of the Haryana Vidhan
33 Sabha is set aside. The said five MLAs would therefore be entitled to fully function as members
34 of the Haryana Vidhan Sabha without any restrictions, subject to the final decision that may
35 be rendered by the Speaker in the disqualification petitions filed under para 6 of Schedule
36 10 of the Constitution.

1 Now My Lords, this is, of course, the same principle as in continuation with Shivraj Singh
2 Chauhan, which I had read out to Your Lordships, and there was a question that Your
3 Lordships had put to me on the day before yesterday, that could someone say that Shivraj
4 Singh Chauhan was only on resignation? That's why I read out those paragraphs that Shivraj
5 Singh Chauhan... Your Lordships, don't just deal with resignation of MLAs. Your
6 Lordships, categorically in paragraph 78 to 81, talk about disqualification petition under the
7 Tenth Schedule, and say disqualification petitions under the Tenth
8 Schedule are pending, doesn't mean in the meantime they will stop discharging their
9 functions as a member of the House. My next judgment for Your Lordships kind
10 consideration, My Lords is Rajendra Rana.

11

12 **CHIEF JUSTICE CHANDRACHUD:** That would be Judgements Compilation?

13

14 **MR. KAUL:** No, My Lords, now on a point that I'm relying on. Till now I distinguished on
15 what they were relying on. They were relying on it for two purposes - *Ex post facto*, and
16 that Your Lordships as a court of first instance can decide. *Ex post facto*, I explained to
17 your Lordships saying that it was qua the Speaker that the events to be seen by him were on
18 the day when they incurred disqualification, not subsequent events was played. And as far
19 as Your Lordships deciding as the court of first instance was on an issue where it had been
20 there in the High Court for three years, then the High Court remanded it back. When it came
21 to the Supreme Court, the Supreme Court said the assembly elections... the term is to expire
22 by the end of the year. So let's decide the matter. That is quite different from this matter in
23 every which way. Now My Lords kindly have judgment compilation, Volume 1, bookmark
24 19, page 834.

25

26 **JUSTICE KOHLI:** Para?

27

28 **MR. KAUL:** Para 25 on page 855. My Lords, before I start, let me tell Your Lordships, the
29 context why I am citing this judgment. My Lords, the Chief Justice?

30

31 **CHIEF JUSTICE CHANDRACHUD:** Yes.

32

33 **MR. KAUL:** The reason I'm citing this judgment is, that in this... at that time, para 3, as a
34 defence, was available; at that time. Even when para 3 as a defence was available, the Supreme
35 Court said that the Speaker dehors disqualification does not embark on an independent
36 inquiry to find out about splits in the political party. He only takes a limited *prima facie* view
37 of the split within the political party. The reason I'm citing is, even when... a) this is not a

1 question of split, this is not a question of merger. But even where it was a question of split
2 and para 3 was still on the statute book, the court said the Speaker will not embark on an
3 independent inquiry into splits in the political party. Please have para 25 for a minute My
4 Lords, on page 855.

5

6 **JUSTICE NARASIMHA:** Split is only a jurisdictional fact for him to enter to give a finding
7 with respect to disqualification.

8

9 **MR. KAUL:** Grateful! Grateful! That's all. I couldn't have put it better. That's all. My
10 Lords, may I?

11

12 **CHIEF JUSTICE CHANDRACHUD:** Yes.

13

14 **MR. KAUL:** 25. In the context of the introduction of sub-article 2 of Article 102 and
15 Article 191 of the Constitution, a proceeding under the Tenth Schedule of the Constitution is
16 one to decide whether a member has become disqualified to hold his position as a member of
17 the Parliament or of the Assembly on the ground of defection? The Tenth Schedule cannot be
18 read or construed independent of Article 102 and 191 of the Constitution, and the object of
19 those Articles. A defection is added as a disqualification and the Tenth Schedule contains the
20 provisions as to disqualification on the ground of defection A proceeding under the Tenth
21 Schedule gets started before the Speaker only on a complaint being made that certain persons
22 belonging to a political party had incurred disqualification on the ground of defection. To meet
23 the claim so raised the Members of Parliament or Assembly against whom the
24 proceedings have initiated have the right to show that there has been a split in the original
25 political party, and then they form one-third of the members of the legislature party, or that
26 the party has merged with another political party, and hence para 2 is not attracted. On the
27 scheme of Article 102 and 191 of the Tenth Schedule, the determination of the question of split
28 or merger cannot be divorced from the motion before the Speaker seeking a disqualification
29 of a member or members concerned. It is therefore not possible to accede to the argument that
30 under the Tenth Schedule to the Constitution the Speaker has an independent power to decide
31 that there has been a split or merger of a political party, as contemplated by para 3 and 4 of
32 the Tenth Schedule to the Constitution. The power to recognize a separate group in Parliament
33 or Assembly may rest with the Speaker on the basis of the rules of business of the House. But
34 this is different from saying that the power is available to him under the Tenth Schedule to the
35 Constitution independent of a claim being determined by him that a member or a member or
36 a number of members had incurred disqualification by defection. To that extent, the decision
37 of the Speaker, in the case on hand, cannot be considered to be in order in terms of Tenth

1 Schedule of the Constitution. The Speaker has failed to decide the question. He was called
 2 upon to decide by postponing a decision thereon. There is therefore some merit in the
 3 contention of the learned counsel for BSP that the otherthat the order of the Speaker may
 4 not enjoy the full immunity in terms of para 6 sub-clause 1 of the Tenth Schedule to the
 5 Constitution, and that even if it did, the power of judicial review recognized by the
 6 court in the Kihoto Hollohon, is sufficient to warrant interference with the order in
 7 question. In a sense, this aspect may not be of great importance in this case since going by the
 8 stand adopted on behalf of 37 MLAs, the Speaker was justified in keeping the petition
 9 seeking disqualification of 13 MLAs pending, even while he proceeded to accept a case of split
 10 in BSP. The question really is whether the Speaker was justified in doing so. As we have
 11 indicated above, the whole proceeding under the Tenth Schedule to the Constitution is
 12 initiated or gets initiated as a part of disqualification of a member of the House, that
 13 disqualification is by way of defection. The rules prescribed by various legislatures including
 14 the UP Legislature contemplate the making of an application to the Speaker when there is a
 15 complaint that some member or members have voluntarily given up his membership or their
 16 membership in the party. It is only then that in terms of Tenth Schedule, the Speaker is called
 17 upon to decide the question of disqualification raised before him in the context of para 6 of the
 18 Tenth Schedule. Independent of a claim that someone has to be disqualified, the scheme of the
 19 Tenth Schedule or the rules made thereunder, do not contemplate the Speaker embarking
 20 about an independent inquiry so as to... inquiry as to whether there has been a split in the
 21 political party or there has been a merger. Therefore, in the context of 102 and 191 the scheme
 22 of the Tenth Schedule to the Constitution, we have no hesitation in holding that the Speaker
 23 acts under the Tenth Schedule only on a claim of disqualification being made before him in
 24 terms of para 2 of the Tenth Schedule.

25

26 And now My Lords kindly read this with para 37 and then I'll come back to one more para I
 27 need to show. Please first have para 37, PDF page 862 My Lords. My Lords have para 37?

28

29 **JUSTICE KOHLI:** Yes.

30

31 **MR. KAUL:** Thus, in the above decision, it is being clarified that it is not enough that a claim
 32 is made on a split in the original party. In addition to showing that one-third of the members
 33 of the legislature party have become out of the party, but it is necessary to prove it at
 34 least *prima facie*. They say *prima facie* yes. But all the time emphasizing on this whole thing
 35 that the Speaker will embark upon a full-fledged inquiry into the political party, the taluka, the
 36 districts and decide on a split in a political party, is without jurisdiction. Quite apart from the
 37 fact that you are seeking to draw an artificial distinction which does not exist. And I'll come to

1 that judgment. That para of Sadiq Ali. I will show to Your Lordships which is important for
2 this. Now, My Lords kindly have only for that other issue of ex post facto, I'll just sum it
3 up. On para 34 of the same judgment. I just need to show that

4

5 **JUSTICE NARASIMHA:** Here comes the test. The test is here.

6

7 **MR. KAUL:** Yes. 860. 860. Para 34. My Lords have that?

8

9 **JUSTICE NARASIMHA:** Yes.

10

11 **MR. KAUL:** As we see it, the act of disqualification occurs on a member voluntarily giving up
12 his membership of a political party, or at the point of defiance of the Whip issued to him.
13 Therefore, the act that constitutes disqualification, in terms of para 2, of the Tenth Schedule
14 is the act of giving up or defiance of the Whip. The fact that a decision in that regard may be
15 taken in the case of voluntarily giving up by the Speaker at a subsequent point of time cannot
16 and does not postpone the incurring of disqualification by the act of the Legislature. Similarly,
17 the fact that the party could condone the defiance of a Whip within 15 days, or that the Speaker
18 takes decision only thereafter in those cases, cannot also pitch the time of disqualification as
19 anything other than the point at which the Whip is defied. Therefore, in the background of the
20 objects sought to be achieved by the 52nd Amendment of the Constitution and on a true
21 understanding of para 2 of the Tenth Schedule with reference to other paragraphs of the Tenth
22 Schedule, the position that emerges is that Speaker has to decide the question of
23 disqualification with reference to the date on which the member voluntarily gives up his
24 membership or defies the Whip. It is really a decision *ex post facto*. It is in this connection that
25 the observation is made that subsequent facts of split, seeking a defence of split under the
26 Tenth Schedule will not be looked at. You will see on the day you went to meet the Governor,
27 in the facts of this case, some of the MLAs with the opposition party and asked the Samajwadi
28 Party to form the Government was an act which was squarely hit by 2(1)(a). And that is why
29 My Lords, I had respectfully submitted and read out instances of Ravi Nayak of this judgment.
30 They were overt acts under 2(1)(a). Yediyurappa's judgment clearly stays merely because
31 within the party I say I do not support a particular coalition of a Government is not a 2(1)(a)
32 case at all in the matter. In any case,
33 My Lords, who will decide it, whether it's a 2(1)(a) case or 2(1)(b) case? It still has to be
34 the Speaker under para 6, who is the sole and exclusive constitutional authority to decide it.
35 So, (a), I'm not a 2(1)(a) case.
36 (b), Yediyurappa is held merely because you showed support to a Government is not
37 a 2(1)(a) case.

1 And thirdly, My Lord, in facts of these cases, the facts which have to be seen as the facts on
2 that date. The *ex post facto* in that context. *Ex post facto*, doesn't mean that since your
3 disqualification will be decided on the date you incurred it, all your acts as a Members of
4 Parliament or members of the Legislative Assembly get annulled in the process. And that is
5 the deduction sought to be drawn now from the words *ex post facto* in Rana's judgment.

6 Now My Lords kindly have, just last two judgments and I'm done. Kindly have
7 Rameshwar Prasad versus Union of India, same volume bookmark 16, para 165. Relevant
8 para 165 is at page 521.

9

10 **JUSTICE NARASIMHA:** What's the... sorry...page?

11

12 **JUSTICE SHAH:** PDF page?

13

14 **MR. KAUL:** PDF page 521.

15

16 **CHIEF JUSTICE CHANDRACHUD:** Same compilation?

17

18 **MR. KAUL:** Same volume 521. My Lords have para 165? May I My Lords?

19

20 **CHIEF JUSTICE CHANDRACHUD:** Yes.

21

22 **MR. KAUL:** If a political party with the support of other political party or other MLAs, takes
23 a claim to form a Government and satisfies the Governor about its majority to form a
24 stable Government, the Governor cannot refuse formation of the Government and override
25 the majority claim because his subjective assessment that the majority was cobbled by illegal
26 and unethical means. No such power has been vested with the Governor. Such a power would
27 be against the democratic principles of majority rule. Governor is not an autocratic
28 political ombudsman. If such power is vested in the Governor or the President, the
29 consequences can be horrendous. The ground of mal-administration by a state government
30 enjoying majority is not available for invoking power of 356. Remedy for corruption or
31 similar ills, or evil lies elsewhere, and not on Article 356. In the same vein, it has ought to be
32 held that power under Tenth Schedule for defection lies with the Speaker of the House, and
33 not with the Governor. The power exercise by the Speaker under the Tenth Schedule is of
34 judicial nature. Dealing with question where the power of disqualification of members of the
35 House rests exclusively with the House to the exclusion of the judiciary, which in Britain was
36 based on certain practices of the Legislature, as far as concerned, it was said in Kihoto. It is
37 therefore inappropriate to claim that determinative jurisdiction of the Speaker or the

1 Chairman of the Tenth Schedule is not a judicial part, is within the non-justiciable legislative
2 area.

3 So the reason I'm citing this judgment My Lords, is for the fact that for a). of course, we say
4 that the Chief Minister lost his majority, the coalition government could not survive. We within
5 the party, were the overwhelming majority. And even if their argument was to be accepted,
6 which I am not conceding, that, 'Oh, you cobbled it up together in an illegal, mean, etc.', which
7 it is not. It was a perfectly legitimate government which was sworn in. The Governor is not to
8 sit on these matters and make his assessments if a probable, plausible coalition or partnership
9 comes before it and says... because ultimately, at the end of the day, someone has to head a
10 government My Lords. My Lord, the Chief Justice posed a question to me yesterday. After the
11 sitting Chief Minister resigns, someone has to be sworn in? Now, if a set of people come and
12 show that they have a sizeable or an overwhelming majority, he says go and test it on the floor
13 of the House. And what time does he give? Two days to do it. And Your Lordships have
14 normally said, those cases, where you are given a month, two months, and that is that is scope
15 for horse trading, etc. He immediately calls for a floor test in exercise of his Constitutional
16 duties and obligations and says, prove your majority. If you are the new government which is
17 taking its claim within the same political party, now in coalition with another political party
18 who's a pre-poll ally, what is wrong with that decision of the governor? Within two days.

19

20 Now My Lords, kindly have lastly, Sadiq Ali for a completely different proposition. Volume 2,
21 bookmark 39 PDF 85, at 98. Volume 2, bookmark 39 - The judgment starts at
22 page PDF 85, relevant para at PDF 98.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Para?

25

26 **MR. KAUL:** Para 27, page 98. Before I proceed to theMy Lords the Chief Justice, can
27 I.. before I proceed to read the judgment My Lords, the reason I'm citing it is, I right through
28 said, apart from all other arguments that you cannot segregate the two. One of the principal
29 argument for recognition of a political party under 6A and 6B of the Symbols Order... those
30 provisions I have not read... of 6A and 6B for a continued recognition and recognition of a
31 political party, is the number of percentage of votes polled by MLAs, MPs, its strength in the
32 House. These are all relevant factors. So what happens in the Legislature can't be just kept
33 aside. That's a relevant consideration within it. So to say that they're two completely distinct
34 things and political party is distinct and legislature party is distinct, is not correct. And that is
35 what Sadiq Ali also notices in this paragraph, is what I wanted to show it for. The other paras,
36 My Lords. I'm not bothering Your Lordships on all those powers of the EC because we are not
37 getting into that. It may be mentioned that according to para 6 of the Symbols Order, one of

1 the factors which may be taken into account in treating a political party as a recognized
 2 political party, is the number of seats secured by that party in the House of people or the state
 3 legislator assembly, or the number of votes polled by the contesting candidates set up by the
 4 such party. The number of seats secured by a political party or the number of votes cast in
 5 favour of the candidate of a political party, can be a relevant consideration for recognition of a
 6 political party. One is at a loss to understand as to how number of seats in Parliament, state
 7 legislatures held by supporters of a group of political party, can be considered to be irrelevant?
 8 We can consequently discover no error in approach of the Commission in applying the rule of
 9 majority and numerical strength for determining as to which of the two groups of Congress J
 10 and Congress O was the Congress Party for the purpose of para 15 of the Symbols Order. Now
 11 that is a separate matter which Your Lordships are dealing with where this has also become
 12 one of the considerations. And this para on Sadiq Ali that other matter that your Lord shows
 13 are dealing with. That this is one of the indicators, valid indicators available. So, to come and
 14 say that you've only done it in the legislature party, there's nothing in the political party. And
 15 there their entire argument, My Lords was, with great respect, that on 18th, you had a meeting
 16 and you showed the minutes of 27th. It's factually wrong, I'll argue it there in that matter;
 17 they're two separate meetings. There are factually incorrect statements made that you had a
 18 meeting on the 18th, but there are no minutes, there are no signatures. That's not the subject
 19 matter of the reference before Your Lordships at all. And I'll argue it there that there were two
 20 separate meetings, requisite members attended it, and please do not confuse the minutes of
 21 one meeting with the holding of another meeting.

22 My Lords I am very, very grateful. Your Lordships I mean, extremely kind and patient. I'm
 23 extremely grateful My Lords. And the three notes I have given. I am extremely grateful.

24

25 **CHIEF JUSTICE CHANDRACHUD:** Thank you Mr. Kaul. Who will now argue? Mr.
 26 Jethmalani will argue?

27

28 **MR. JETHMALANI:** I am told Mr. Salve has logged in. So he will just give a brief submission
 29 first.

30

31 **MR. SALVE:** Can you hear me now?

32

33 **CHIEF JUSTICE CHANDRACHUD:** Yes Mr. Salve.

34

35 **MR. SALVE:** Yes. My Lord a short submission. I mean, Mr. Kaul has addressed
 36 Your Lordship on issues which perhaps don't arise really, if Your Lordship sit back and
 37 consider. What is it that your court has called to decide today? I mean, we have answered

1 everything on merits, but if Your Lordship take a step back and see what is it that Your
2 Lordships need to decide. The first step in this entire saga was....

3

4 **CHIEF JUSTICE CHANDRACHUD:** Mr. Salve is appearing for whom?

5

6 **JUSTICE KOHLI:** Mr. Salve, who do you appear for?

7

8 **MR. SALVE:** Yes, I'll just give Your Lordships the number.

9

10 **JUSTICE KOHLI:** Sorry. Who are you appearing for?

11

12 **CHIEF JUSTICE CHANDRACHUD:** Same set of arguments.

13

14 **MR. KAUL:** There are many respondents.

15

16 **CHIEF JUSTICE CHANDRACHUD:** There are different respondents.

17

18 **JUSTICE KOHLI:** Another set of petition.

19

20 **CHIEF JUSTICE CHANDRACHUD:** There you have told me to distinguish the case of the
21 Governor because the Governor will be represented by...

22

23 **MR. SALVE:** The Solicitor.

24

25 **SOLICITOR:** Client is not My Lords, in any case....there is no confusion about whom I
26 appeal.

27

28 **CHIEF JUSTICE CHANDRACHUD:** And the rest of Mr. Kaul, Mr. Salve,
29 Mr. Jethmalani...

30

31 **MR. SALVE:** We will give appearances.

32

33 **CHIEF JUSTICE CHANDRACHUD:** For the Individual party.

34

35 **MR. SALVE:** That's right.

36

37 **CHIEF JUSTICE CHANDRACHUD:** No problem.

1
2 **MR. SALVE:** The only thing I wanted to broadly respond to is Mr. Sibal's broad
3 submissions about what role the court should take onto itself to prevent political immorality.
4 This is a very slippery slope and Your Lordships have always resisted the temptation in certain
5 areas to go beyond a particular point. Interpreting the Tenth Schedule undoubtedly will be
6 inspired by the objects of the Tenth Schedule, namely to bring in a degree of political morality
7 in public life. But beyond that My Lord, I would submit for the court to embark on this
8 journey would be extremely perilous because there are very delicate balances between
9 institutions involved here. Mr. Uddhav Thackeray resigned. The Governor called for a floor
10 test of a sitting Chief Minister. There was no floor test held. The submission is if he had not
11 called for the floor test, and if this had happened, and if that had happened, he would have
12 won the floor test. A submission which Your Lordships should not even countenance for the
13 reason we do not know what happens in that part of the world when it comes to defending the
14 majority of a Chief Minister. And My Lords it becomes even more perilous in today's day and
15 today's world of coalition politics. How do you know who would have supported whom on that
16 momentous day? What if one of his coalition partners had said, 'sorry, I can see that you've
17 really lost support of your party. We don't want to support you anymore.' We don't know. And
18 it is not for us to understand, because these are matters beyond our understanding as lawyers.
19 So My Lords this entire submission that Your Lordship must assume a state of facts would
20 have prevailed is extremely hazardous, because this is in the realm not of legal fiction. This is
21 in the realm of the rough and tumble of politics and I'm not suggesting any political
22 immorality. My Lord why can it not be that two coalition partners say, 'We will not support
23 you anymore. We have lost faith in your ability to steer the ship.' We don't know whether that
24 would have happened. Would it have happened? Would it not have happened? How
25 can Your Lordships be invited to hazard that guess that if this had not happened, the but-
26 for test My Lord, which we call in our... in commercial law for bridge the but-for test cannot
27 apply here.

28
29 Yes, if Mr. Thackeray had contested the floor test, if he had lost by 10 and Your Lordships felt
30 16 disqualifications were affected, the court could have said, we need to fix this problem
31 because of our refusal to grant the test. Because Your Lordships said we will not stay the floor
32 test. We will make it subject to our judgment. And Your Lordship should have been in a
33 position to correct what went wrong. My Lord I know it's a much more mundane world
34 in board rooms and in company general meetings. But the principle is the same. Somebody
35 says so and so should not be allowed to vote, Your Lordships said count his vote separately
36 and we'll see what happens to the resolution. And the reason is, suppose he had contested the
37 floor test and lost by 70 votes, all this becomes academic. Yes, if they have defected, is the sin

1 of defection purged? Maybe not. So My Lords that's the first point which I wanted to make. If
2 that has happened and if I am right there that Your Lordship cannot and should not embark
3 on any but-for assumptions here. Because we do not know what would have happened on that
4 fateful afternoon. Please My Lord consider another scenario, I'm only giving this not because
5 I'm saying this would have happened, I'm saying this could have happened. Only to persuade
6 Your Lordships not to go down this road.

7 Let's take another scenario. These 16 were guilty of overt an overt act. They did not show up
8 for a meeting, somebody says that constitutes abandoning your party. Another 20 people may
9 have done something by which you say they have done an overt act. What do you know is
10 lurking in the minds of others. Look at what happened and just to buttress this point look at
11 what happened when Shinde came for his floor test. 13 of hardcore so-called supporters of Mr.
12 Thackeray abstained from voting, which basically meant it strengthened his hands. Now these
13 things happen in public life. How do you know how many more were not harbouring the
14 intention of walking away that day? So My Lords these are all.... All I'm saying is, this is
15 rank speculation as far as we are concerned. The politicians may feel that they knew what was
16 going on. And we've had and I'm just bringing it to Your Lordships' notice, Your Lordships
17 know this. We've had a very strange situation in this very state, in this very formation where
18 one Government was sworn in and within three days that Government fell and
19 another Government had to be sworn in. So My Lords these things happen and the person who
20 got sworn in as the Deputy Minister with another formation became Deputy Chief Minister.
21 These fast moving political waters take different turns at different points My Lords. We are
22 not to speculate about that. Now, if I'm right there then My Lords, that should be the end of
23 the matter. What is the Speaker's Constitutional obligation? The general Bommai principle
24 which Your Lordship has been shown in para 395 of Bommai is, that please, Mr. Speaker, do
25 not do a mathematics. And Mr. Governor, please do not do this mathematics of but-for. Call
26 for the floor test. Let this be decided on the floor. My Lord when Governors
27 have sacked Governments doing head counts, Your Lordships have taken him to tasks saying
28 you're failing in your job. Why? Because it is not for the Governor to count heads. What Mr.
29 Sibal and Dr. Singhvi are trying to do is persuading Your Lordships to count heads.
30 Because unless you do a head count, Your Lordship must then come to the firm conclusion
31 that the but-for these, Uddhav Thackeray would 100% have won. That's head counting. So,
32 what Your Lordships said, the Governor shouldn't embark upon, now the judiciary is being
33 asked to embark down that road. Nothing can be more perilous than that in my submission.
34 Yes, we have a problem.

35

36 We have a problem. We have the Tenth Schedule. Is the Tenth Schedule a perfect
37 solution? No, it's not. It has its leaks. Parliament... when the legislature sometimes tries to fix

1 it, sometimes there are conflicting interests; it is not fixed. My Lord the biggest example we
2 have of criminalization in politics. We've had this problem all the while. We have problems
3 about election donations, we have problem about elections funding, we have problems about
4 election spending. These are all problems My Lord we can't cross beyond a point. So My Lord,
5 first of all, I submit the first set of cases don't arise. Then comes the second situation - what
6 did the Governor do? He is left in Maharashtra without a Chief Minister. If he is left
7 in Maharashtra without Chief Minister, he has to invite somebody to form the government.
8 Now here, then two options - he has invited Mr. Shinde to form the government. Should he
9 have allowed Mr. Shinde to continue without a floor test? That would have been worse than
10 conducting a floor test. So My Lords, where are we in this case? Everything is academic. Yes,
11 the only thing which remains is the 36 pending disqualification petition which the Speaker will
12 decide. And if he gets them wrong, there is the High Courts which will correct
13 them Your Lordships. They are here which will correct them. Yes. Within the parameters of
14 judicial review, Your Lordship have tested and corrected these orders time and again. That
15 is My Lord my first submission.

16

17 My second submission is, what happens pending the disqualification petitions? Your Lordship
18 have been shown the judgments. But let's... Sometimes it helps, let's go back on first principles.
19 Please see two provisions of the Constitution, and whether Your Lordships find the answer
20 there. 190...

21

22 **CHIEF JUSTICE CHANDRACHUD:** We have seen that actually?

23

24 **MR. SALVE:** Your Lordship has seen it.

25

26 **JUSTICE NARASIMHA:** We have seen it.

27

28 **MR. SALVE:** The point which I wanted to make is just show Your Lordships of something in
29 the language of 190, just for two minutes.

30

31 **JUSTICE NARASIMHA:** 190 is Parliament. We are more concerned about 180....

32

33 **MR. SALVE:** The language is identical.

34

35 **JUSTICE NARASIMHA:** Identical, correct.

36

1 **MR. SALVE:** The principle of the two is very important. Let's see... compare the equivalent
2 provision My Lords. First see 173. These are qualifications. Person not qualified to fill a seat. I
3 don't need to trouble Your Lordships with the details. And then we come to 190, which
4 is Houses of the State of Legislature. So we are really concerned with 190, because we are
5 talking about state. And 190, sub-article 2 tells, Your Lordships, 'No person shall be a member
6 of two or more specified then after the expiration of the period, etc.' We are not
7 concerned, because we are really concerned with Sub-Article 3A - 'Becomes subject to any of
8 the disqualifications in one or two of 19... of 191'. So we My Lord, go to 191. 191 applies to at
9 both stages, for being chosen and for being a member.

10 B, C are post occurrence of events.' Unsound mind and stand so declared by competent court.
11 A pendency of a petition in a court to declare somebody incompetent is not good
12 enough.' Impending insolvency is not good enough. Look at E now My Lords. 'If he is not so
13 disqualified by or under any law made by Parliament.' Now today Your Lordship was told
14 eloquently of how terrible it is to allow those hit by Tenth Schedule to continue. My Lord it is
15 not every time that there is corruption because of which there is defection. There may be times
16 or people may defy a Whip. There may be time there may be a split in a political party. Now
17 that sub-article 3 has gone, you have a problem and people may say, 'We will brave
18 disqualification, but this Chief Ministry has to go.' But look at My Lord, the Representation of
19 People Act. You may have a person who's elected which there are allegations of
20 booth capturing, of violence. I remember My Lords once somebody was arguing the case for
21 one of the persons from Bihar My Lord, who was in jail and saying he should be allowed to
22 come. Mr. Tulsi was arguing, and he told Justice Nanavati, he said, 'See, the majority by which
23 my client has won the election.' Justice Nanavati said, 'If your client had had his way, he would
24 have had no opponent. Killed all of them.' So My Lords those kind of cases are
25 pending. A person, a known mafia king against whom there was a murder trial pending for
26 publicly gunning down people, continued in office.

27

28 **CHIEF JUSTICE CHANDRACHUD:** Where does it...?

29

30 **MR. SALVE:** My Lords we have cases and Your Lordships have dealt with these cases in
31 the High Court and sometimes in appeal in this Court. You have cases of the worst kind of
32 electoral offenses pending for trial. What happens to those people? They continue in office. So
33 My Lords there is nothing so shocking that in our system many times people continue in office
34 where there are serious allegations pending against them. That's the bane of our system. Now
35 with that, My Lords see the language of 191(2). 'A person shall not, shall be disqualified for
36 being a member, if he is so disqualified under the Tenth Schedule.' So that disqualification
37 must take place. And that disqualification in the Tenth Schedule does not take place until there

1 is a decision of the Chairman or the Speaker under paragraph 6. Any other view My
2 Lord would be equally or would be far more disastrous because today all you have to do then
3 paralyze.... to paralyze the working of an assembly is to file disqualification petitions.
4

5 **JUSTICE NARASIMHA:** Mr. Salve, till here there is no problem. The position under the
6 Constitution is very clear. And also the judgments of this court concluded with this expression
7 the decision. The problem arises, the time, context and the stage at which Speakers choose to
8 take a decision.
9

10 **MR. SALVE:** Yes. I was going to straightway address....
11

12 **JUSTICE NARASIMHA:** In that context that...
13

14 **MR. SALVE:** ...No My Lord...
15

16 **JUSTICE NARASIMHA:** either that he shows over anxiety to immediately decide violating
17 principles of natural justice or he just doesn't decide for times to come. So in context of...
18

19 **MR. SALVE:** The short answer...
20

21 **JUSTICE NARASIMHA:** Pending Tenth Schedule proceedings....
22

23 **MR. SALVE:** Yes.
24

25 **JUSTICE NARASIMHA:** The powers to be exercised either by the Governor or the political
26 process as it were goes on. So makes the application redundant many a times...
27

28 **MR. SALVE:** My Lords May I respectfully answer?
29

30 **JUSTICE NARASIMHA:** Sure.
31

32 **MR. SALVE:** This has been the biggest problem of appointing a Speaker. Mr. Sibal was right
33 when he said, Your Lordships express hope and faith that the institution of the Speaker will
34 rise above politics, where it comes to the Tenth Schedule. Our experience may not have fully
35 risen up to those expectations. But that's where we have to drop that. The point My
36 Lords is this.
37

1 **CHIEF JUSTICE CHANDRACHUD:** Yes.

2

3 **MR. SALVE:** My Lords, respectfully answering Justice Narasimha's question. If Your
4 Lordships have seen the rules here have in one sense, a constitutional status because the rules
5 are framed as a delegate under paragraph 8. And those rules can and should provide a time
6 frame in which these petitions have to be decided, both giving fair opportunity. So it.... these
7 rules normally say you'll give so much time for giving a reply. One of the reasons why our group
8 came to court is even that time was not given. And equally perhaps it's time has come for the
9 rules to say if a petition is filed, he shall, unless there are compelling reasons to the contrary
10 dispose it off in 90 days or 60 days or something like that. And there My Lord, then judicial
11 review will come in if a Speaker is dragging his feet and the rules say he must decide it, absent
12 compelling reasons within a given frame of time, judicial review will come in. You can go to a
13 High Court and say issue a writ mandamus directing him to dispose off because then you will
14 have a legal right to ask for a decision within a given time. So My Lords, these are the only
15 ways in which Your Lordships can address this lacuna.

16 Now, what is this relating back? Relating back has two dimensions. The event has taken place,
17 so ultimately the subsequent events will not affect it will not efface the wrong which you have
18 committed, the political wrong which you've committed, which disqualifies you. It's over. If
19 you enter into an office of profit you are disqualified. If you resign three months later from
20 that office of profit, it is not saved. You are disqualified on that date. So My Lords that
21 disqualification is based on a set of events. But please consider the consequences which will
22 be contrary to the terms of the Constitution, which says no act of the House shall be declared
23 invalid merely because a member participated, who was not entitled to. Now, first of all, here
24 you are entitled to participate. But even if a wrong person comes in, you cannot go
25 annulling the work being done. Today My Lords, if when the defection petitions are decided, if
26 some of them are allowed, in between laws have been made, resolutions have been passed by
27 the House, all of them can't be revisited. So My Lords, that's the respectful answer to
28 the *ex post facto* point, that as a matter of law, and My Lords, I read since Your Lordships
29 have kept his question back...

30

31 **CHIEF JUSTICE CHANDRACHUD:** What are you saying Mr. Salve? As a matter of law?

32

33 **MR. SALVE:** it's a matter of law My Lord, I read the Nabam Rebia judgment, not as laying
34 down an absence of power, but as laying down a code of conduct. Let me explain what I
35 mean My Lord. The Speaker...

36

1 **CHIEF JUSTICE CHANDRACHUD:** Mr. Salve, in a sentence, can you just summarize
2 your *ex post facto*. On *ex post facto* what is your...? So if you just formulate it, we can take it
3 down then, you know.

4

5 **MR. SALVE:** Yes. My formulation of *ex post facto* is as follows. The disqualification will have
6 to be decided on the basis of the acts and omissions of the allegedly delinquent member on
7 that date. But, subsequent events will not cure that. If on that date, you defied a party Whip
8 which was lawfully issued, that's the end of the matter. The fact that the party
9 collapsed thereafter is neither here nor there, if it is pursued to its logical end. That wrong has
10 been committed. And I give, My Lord, the example of somebody who takes an office of profit.

11

12 **CHIEF JUSTICE CHANDRACHUD:** If you can just continue to sort of complete the
13 formulation? I got that that the disqualification will have to be decided on the basis of the
14 acts of omissions of the allegedly delinquent member on that date, and subsequent
15 (UNCLEAR) will not be, will not... Mr. Kaul also has said.

16

17 **MR. SALVE:** Will not efface.

18

19 **CHIEF JUSTICE CHANDRACHUD:** What is the sequitur? What is the sequitur? How do
20 you formulate it?

21

22 **MR. SALVE:** However, until the date of decision, the person is entitled to participate
23 and Article 189, sub-article 2 makes it clear that his acts, his functioning in the House, in the
24 interregnum does not vitiate any actions of the house. If this is so My Lords, we have no
25 problem in reconciling to the fact that people with the most serious allegations of having been
26 elected by wrongful means such as booth capturing, threatening witnesses or rampant
27 corruption in election, also continue in office. That's one of the banes of our system till such
28 time as a election tribunal declares them to be wrongly elected, disqualified. That's the way it
29 is. So My Lords, my respectful submission is that, yes, the rule should be amended. Speaker
30 should... decision-making should be made time-bound, judicial review will be available
31 where a Speaker is holding back. All those are ways which we can fix this. But My Lords, the
32 legal consequence of the pendency of these proceedings and its ultimate decision, this is the
33 principle of *ex post facto* which must apply. No less, but no more.

34

35 **CHIEF JUSTICE CHANDRACHUD:** Anything else, Mr. Salve? We got the *ex post facto*...

36

1 **MR. SALVE:** Yes. Third point which I wanted to make My Lord is, since the point is still in
2 play - the Nabam Rebia judgment. And I had, My Lords, given a note earlier. I believe
3 Mr. Trivedi had handed it over, Mr. Jethmalani had handed it over.

4

5 **JUSTICE SHAH:** Last time you read also when you appeared.

6

7 **MR. SALVE:** Yes. No, after that I gave a note My Lord. I read the judgment as more, not the
8 absence of power, but the manner of it exercise. So it is by filing a disqualification or rather a
9 removal of Speaker. Because all those provisions are shown to Your Lordship saying
10 the Speaker doesn't, as a matter of law, is not put in suspension. They are right. So there is no
11 absence of power. I was My Lord only saying....

12

13 **CHIEF JUSTICE CHANDRACHUD:** It's about the manner of exercise rather than the
14 absence of power.

15

16 **MR. SALVE:** Correct. Because My Lord abuse of Constitutional power is a head which we
17 now recognize the judicial review. My Lord is Chief justice saying something to me? I can't
18 hear.

19

20 **CHIEF JUSTICE CHANDRACHUD:** You don't read Nabam Rebia as an absolute principle
21 that the Speaker is disabled from exercising his jurisdiction when there is a motion for his
22 removal pending.

23

24 **MR. SALVE:** No.

25

26 **CHIEF JUSTICE CHANDRACHUD:** It's a caution to the Speaker and ultimately, it's for
27 the Speaker to take a call, whether you know, if there's a frontal assault on his continuance,
28 whether he would like to go ahead with the hearing of the disqualification petition.

29

30 **MR. SALVE:** Correct. And as I read that judgment Your Lordships have not said that
31 the Speakers ceases to have power. But...

32

33 **CHIEF JUSTICE CHANDRACHUD:** What you're telling us would be either to sort of
34 restrict it a little bit or put a gloss on the judgment. I mean, if you really read those...

35

36 **MR. SALVE:** My Lord, we always...Judgments are not statutes, and we always learn to
37 understand them. Sometimes when things are written. My Lord, those facts were very stark.

1 So maybe the language used was a little strong. But I read that judgment because please see My
2 Lords the analysis. And Your Lordships have read the judgment. I'm not going to waste your
3 time reading it. The facts were so stark. What really, Your Lordship was doing is that
4 there...are saying it that the Speaker had no business to do this. The actions of the Speaker in
5 that case My Lord were open and shut case of abuse of power. It's the finding. So I don't read
6 that judgment as absence of power. Your Lordship never said that he ceases to have. There are
7 50 other things the Speaker does My Lord. He runs the whole administrative office of the
8 legislature. Surely he's doing all that. It's only in one area that the Speaker should not act. If
9 there is pending consideration of all these rumpus. If there was any other resolution, of course,
10 he would preside and run the House. So once Your Lordships read that judgment that
11 way that what really the court was trying to say is, not an absence of power, but the actions of
12 a Speaker will be tested. A Speaker should have put to caution when there is a notice, when
13 there is a removal. His actions will be testing on well-known principles of abuse of power.
14 Then My Lords the concern which Your Lordships have would go away with that judgment
15 being read as absence of power.

16

17 And finally My Lord if I may just hark back a little to my first opening point. Apart from this
18 understanding of the Nabam Rebia judgment, nothing else really survives. There is a note
19 which I believe is placed at note J.

20 My Lords I believe, I'm sorry, my friend informs me my earlier note saying what I have just
21 formulated for Your Lordship's consideration is in note F, and there is yet another note, note
22 J.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Filed last night.

25

26 **MR. SALVE:** Yes. This is only to show the hazards of the but-for test. I was just told My Lords
27 that it is marked as note J.

28

29 **JUSTICE KOHLI:** It says written submissions. It doesn't say note J.

30

31 **MR. SALVE:** It says brief note on arithmetic for hypothetical trust.

32

33 **CHIEF JUSTICE CHANDRACHUD:** Mathematics.

34

35 **MR. SALVE:** Yeah, it's just the math. My Lords this is only to indicate to Your Lordships that
36 this but-for test is extremely hazardous to guess what would have happened on that
37 fateful day, had a trust vote taken place is inviting rank speculation. F is the earlier one on the

1 Constitution Bench Judgment the Nabam Rebia judgment. And this note J only sets out...I'll
2 quickly tell Your Lordships what we have basically said. I have given different places where in
3 the writ petitions they have mentioned.

4

5 Basically My Lord, please gives you at one place, It's not as, there is no big deal, Your
6 Lordships knows it is there. Basically what we are trying to say is, we've given Your
7 Lordships the para numbers and the page numbers. If Your Lordship sees from paragraph 3,
8 on 23rd June only 16 disqualification petitions were filed. Let's be very clear My Lords of a
9 few dates. On 25th June, Speaker issues notice to 16. The order of Your Lordships on
10 27th June was limited to 16. The suggestion that there was 39 or 40 disqualifications, in
11 fact look at 4-C. There are two of them who are independent. They may have vote one way or
12 the other, their party to decide whether they consider it a breach. No prayer in any of the
13 petition that 39 or 40 should not be allowed to vote. So My Lords these figures which are being
14 given and I have given Your Lordships, the shifting stands in different places. And I again
15 underscore the point. This was only.....

16

17 **CHIEF JUSTICE CHANDRACHUD:** Mr. Salve, Mr. Sibal, all of you. What you are
18 thinking, was that Mr. Salve, roughly...

19

20 **MR. SALVE:** I'm done in five minutes.

21

22 **MR. SIBAL:** That's alright. But it won't finish now. It can't finish. There's no point.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Mr. Salve, you will take about five minutes?

25

26 **MR SALVE:** 5-7 minutes. I'll be done by lunch. 100%.

27

28 **CHIEF JUSTICE CHANDRACHUD:** Mr. Jethmalani, we're not at all rushing anyone of
29 you, because these are important matters at the moment. We are not just.... forget the stats,
30 but this is an important matter at the moment. So, how much would you take?

31

32 **MR. JETHMALANI:** For these circumstances about half an hour, but I could curtail it for
33 20 minutes, 25 minutes.

34

35 **CHIEF JUSTICE CHANDRACHUD:** That's half an hour. Then Mr. Maninder Singh? Half
36 an hour, all right. Mr. Solicitor?

37

1 **MR. SOLICITOR:** Few more minutes My Lord.

2

3 **CHIEF JUSTICE CHANDRACHUD:** Between the two of three of you it will take 2 hours?

4

5 **MR. SOLICITOR:** Realistically speaking, it may not be over.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Alright. Mr. Kaul one more thing. I thought we
8 curbed you unduly, and then you are gracious enough to follow our edict. The idea was to
9 finish today, but we may not be able to wrap up today. It doesn't appear that we will be able to
10 wrap it up today. In which case....

11

12 **MR. SIBAL:** Then let's have it on Tuesday then, My Lord.

13

14 **CHIEF JUSTICE CHANDRACHUD:** Mr. Kaul one more thing, is your conscience
15 clear that you know, are you satisfied that you have argued fully? Is there something which
16 you would have still liked to? Because as a judge who's seen so many seasons...

17

18 **MR. SIBAL:** Never give that opportunity to a lawyer My Lord.

19

20 **JUSTICE CHANDRACHUD SINGH:** You don't want to give the impression that you have
21 not...

22

23 **Mr. KAUL:** I would have like to take Your Lordships through some of the judgments, if
24 I could, which I would have liked to. But, what do I say My Lords to this, I can't... I leave it to
25 Your Lordships. I can't say...

26

27 **CHIEF JUSTICE CHANDRACHUD:** All right? What we will do is this. We will hear Mr.
28 Salve now and just... wrap it up, or we can... *kya karein?*

29

30 **MR. SIBAL:** Let's wrap it up and then have it on Tuesday, My Lord, soon after reopening.
31 That's the only way My Lords, on the reopening.

32

33 **CHIEF JUSTICE CHANDRACHUD:** What we can then do is on Tuesday, after we, after
34 we reopen, the three of you who have to now argue and.... Honestly, if there's something you
35 want to still show us in the morning after Mr. Salve has wrapped up, we'll give you a little
36 time... And anyway, there's no prejudice to Mr. Sibal, because you still have to re-join.

37

1 **MR. SIBAL:** Yes Yes... I'll re-join without the haste.

2

3 **CHIEF JUSTICE CHANDRACHUD:** Would it be all right to assess that on Tuesday in the
4 first session, the three of you will be able to finish?

5

6 **MR. SIBAL:** Yes.

7

8 **CHIEF JUSTICE CHANDRACHUD:** Right. Maybe so if you take...

9

10 **MR. JETHMALANI:** But are we not continuing this afternoon also?

11

12 **MR. SIBAL:** No, no. No need.

13

14 **CHIEF JUSTICE CHANDRACHUD:** They're now going spilling over beyond the...

15

16 **MR. JETHMALANI:** Then we get some more time also, isn't it?

17

18 **CHIEF JUSTICE CHANDRACHUD:** Then what we can do is we can keep it on Tuesday.
19 Mr. Salve, we'll hear you for five minutes on Tuesday?

20

21 **MR. SALVE:** Yes. Yes.

22

23 **CHIEF JUSTICE CHANDRACHUD:** You may want to just...

24

25 **MR. SALVE:** Very well.

26

27 **CHIEF JUSTICE CHANDRACHUD:** And then Mr. Kaul, if you still want to make a few
28 submissions on your judgment, no problem. We'll hear you on that, because let's not go....

29

30 **MR. KAUL:** Yeah, very kind of Your Lordship. Very kind.

31

32 **CHIEF JUSTICE CHANDRACHUD:** Then Mr. Jethmalani and Mr... we'll hear the
33 Governor. And equally Mr. Sibal, we'll give you a full...

34

35 **MR. SIBAL:** That's right. Because there's lots of things that have been said, My Lord,
36 which...

37

1 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sarode, what is that you wanted to
2 say now? Don't say now, don't mention anything as there's no time.

3

4 **MR. SARODE:** No My Lord, I am intervener on behalf of the voters. I may be given some
5 time to narrate...

6

7 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sarode, if we allow interveners, there will be
8 interveners on this side, interveners on that side. Give us a small note of a page or so, we'll look
9 at your notes. No difficulty.

10

11 **MR. SARODE:** No My Lord, I'm supporting... I'm supporting Mr. Sibal sir and the party MY
12 Lord. But My Lord, the voter's side is very important as allowed by the Honourable Court.

13

14 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal, and Dr. Singhvi will be very happy with
15 your support, but I'm not sure they want you to support them in their courts. You can have a
16 word with Mr. Sibal. If you have some specific point, you know, which they have not covered,
17 then you can certainly have a chat with Mr. Sibal and give that point to him. And I'm sure
18 he will place it before us.

19

20 **MR. SARODE:** Yes My Lord, I will do that.

21

22 **MR. SALVE:** Very well then My Lord. On Tuesday I'll take ten minutes.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Justice Narasimha also, we have both been
25 discussing this also earlier. Justice Nariman's judgment on whether there should be a time
26 limit on the Speaker to decide what referred...

27

28 **MR. SIBAL:** Yes My Lord, I was going to cite that.

29

30 **CHIEF JUSTICE CHANDRACHUD:** We can note that and maybe we can....

31

32 **MR. SALVE:** I'll assist Your Lordship on that for 10 minutes on Tuesday.

33

34 **JUSTICE NARASIMHA:** Note the reference order, as you can note. 2016 SCC Online 1875

35

36 **MR. SIBAL:** That's Sampat My Lord. Not this. This is something different.

37

1 **JUSTICE NARASIMHA:** Meghchandra's reference.

2

3 **MR. SIBAL:** The other issue is My Lord where 90 days have been fixed
4 by Justice Nariman for the Speaker to decide.

5

6 **JUSTICE NARASIMHA:** Correct, correct.

7

8 **MR. SIBAL:** That's not that 2016.

9

10 **JUSTICE NARASIMHA:** I just got it from my law club. That must be a separate reference.

11

12 **MR. SIBAL:** That's Right.

13

14 **JUSTICE NARASIMHA:** Considered in that judgement. Please work on it.

15

16 **MR. SIBAL:** Yes.

17

18 **MR. SALVE:** Lordship please.

19

20 **CHIEF JUSTICE CHANDRACHUD:** Tuesday.

21

22 **MR. SALVE:** Tuesday.

23

24 **MR. KAUL:** Very Grateful.

25

26 **MR. SIBAL:** Obligated My Lord.

27

28

29

30

END OF DAY'S PROCEEDINGS