

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

23-Feb-2023

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

11:00 AM IST

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MR. SIBAL: Come back to My Lords on the issue of the Governor that I had raised.

CHIEF JUSTICE CHANDRACHUD: Yes.

MR. SIBAL: And I was at PDF Page 100, Paragraph 237. That is petitioner's written submissions A.

JUSTICE NARASIMHA: You are at Chapter 9?

MR. SIBAL: Yes I was and I said, the action of the Governor..

JUSTICE NARASIMHA: Sorry. Which page number?

MR. SIBAL: PDF Page 100, Paragraph 237. Justice Shah doesn't have it at the moment. PDF Page 100, Paragraph 237. Justice Narasimha has it?

'The President of Shiv Sena, Uddhav Thackeray had publicly and admittedly not aligned supported the BJP. These circumstances are the satisfaction of the Governor for the purpose of calling respondent for to be the Chief Minister of 39 rebel MLAs of the Shiv Sena, which is endorsed by the Shiv Sena political party is by itself ex facie unconstitutional. The Constitution prohibits recognition of rebel MLAs of political party under the Tenth Schedule and the action of the Governor legitimizes what is expressly prohibited by the Constitution. The Governor has sought to recognize what the Constitution prohibits. The Governor is also not empowered under the law to recognize who is the Shiv Sena. That is the domain of the Election Commission. Admittedly recognition of the Shiv Sena and its leadership by Uddhav Thackeray has been endorsed by the Election Commission and there was no dispute, whatever or challenge before the appropriate authority on the 30th June.' There was petition before the Election Commission on the 30th June. That was filed only on the 19th of July . The Uddhav Thackeray was the Chief Minister of the Shiv Sena. So in what capacity is a Governor My Lords give an audience to Eknath Shinde and administer the oath of office to him? How is that the discretion of the Governor to do that? Which party was the Governor recognizing for the purposes of forming the government with the support of the BJP? That is the heart of the matter and that's nothing to do with the power of Speaker now My Lords. This is an independent challenge on the appointment of Eknath Shinde as Chief Minister by the Governor and the act of the Governor is subject to judicial review.

1 'In this circumstances, the Governor, in his ipse dixit , guided by his political Masters in
2 mala fide and in the teeth of the provisions of the Constitution, granted a *de facto*.'

3 What is.. what it does My Lords, what Paragraph 3... when Paragraph 3 is deleted. The
4 Governor by his action recognizes Paragraph 3. He recognizes the split. This is not a stage
5 where My Lords a Government is to be formed. This is a stage when an elected Government is
6 running. So Your Lordships for the first time will have to decide what are the discretionary
7 powers of the Governor in that context and can his discretion be used to topple a Government
8 with respect to a set of people who say they are split from the Shiv Sena when a Shiv Sena Chief
9 Minister is already in place, and the Governor does not ask the Shiv Sena Leader as to whether
10 you are endorsing this or not. By not asking the Shiv Sena, he is recognizing a split. My
11 Lords, there is no discretion after the elected Government is formed. The Government then
12 will fall, on the floor of the House. Then the question of the discretion of the Governor will
13 come in. If there's a no confidence motion, Government falls, then the question will come in
14 as to who the Governor will call. But the Governor cannot by his act topple the Government .
15

16 The question is not that. When My Lords the Governor was approached, when the Governor
17 was approached by BJP as well as Eknath Shinde and the Governor told us to have a
18 trust vote, on what basis did he ask us to do that? He obviously recognize the 39. Otherwise he
19 wouldn't have asked us for the trust vote. There was no occasion to because they continue
20 to be in the Shiv Sena. That's their own case. That they did not move away from the Shiv Sena.
21 So if they did not move away from Shiv Sena, which is their own case, on what bases does the
22 Governor say, you have a trust vote unless he recognizes that the 39 members are rebels, they
23 have a split from Shiv Sena and therefore they and the BJP, have a majority, therefore you go
24 and show your majority in the House and have a trust vote. That is My Lords logical. That's
25 the only way to look at it. And the Governor must act consistent with Constitutional morality.
26 What's the morals foundation of such an act? I've already said deletion of Paragraph 3. I don't
27 have to repeat. Of course, it's a principle of constitutional morality.

28 My Lords, just note the page in Nabam Rebia at Page 1145...1144. Paragraph 210. Just note
29 that. Para 210, don't take the book, but just note that. I'll just read it, last four lines of that
30 paragraph. 'Admittedly the Governor never called for a floor test, nor did he ever require the
31 Chief Minister to establish his majority in the House. The Governor's actions based on
32 feuds and wrangles of a breakaway group which is not recognized under the Tenth Schedule,
33 cannot be constitutionally condoned.'

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35 **CHIEF JUSTICE CHANDRACHUD:** What was the last sentence? The Governor...

36

1 **MR. SIBAL:** I will just read it again. 'Admittedly the Governor never called for a floor test
2 nor did he ever require the Chief Minister to establish his majority in the House. The
3 Governor's actions based on feuds and wrangles of a breakaway group which is not recognized
4 under the Tenth Schedule, cannot be constitutionally condescended.' It is directly on
5 point, because the Governor, by asking me to go for a floor test, having a trust vote has
6 condescended to recognize as breakaway group. Express the prohibited as the Governor's
7 action struck down in Nabam Rebia. So we don't have to go into the issue whether the matter
8 should be sent back to the Speaker or not. If you decide this issue, the matter is, nothing else
9 is required to be decided. So we challenge the trust vote. We challenge the action of
10 the Governor to swear in as a Chief Minister. If that goes then everything else goes, then we
11 don't have to go into the problematic issue of sending disqualifications back to the Speaker.
12 And ultimately My Lord, I mean...the facts are so crystal clear that there can't be the subject
13 of yet another interpretation. There can't be My Lords. The Constitution doesn't give him that
14 power. The Tenth Schedule he is far away, far removed from him. Para-three has been deleted,
15 breakaway groups can't be recognized. That way My Lords everyday a breakaway group will
16 be recognized by the Governor and governments will fall. I don't think the Republic
17 extracted this. And our Constitution ever envisaged a situation that, that can happen in a
18 constitutional democracy. The whole integrity of the political process comes to naught. And
19 My Lords Nabam says that three areas in which the Governor has discretion beyond
20 that none. 371, Article 200 and My Lords, forming a Government at the initial stage after
21 election. There is no discretion with the Governor. He acts otherwise on the aid and advise of
22 the Council of Ministers. That is settled law. And of course, 356, sending a report to the
23 Central Government. That's not something on the aid and advice. So 356, 200 and 371, these
24 are three areas.

25

26 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal, once a person incurs a
27 disqualification under the Tenth Schedule, then the consequence in the Article 193 (3), is
28 that his seat shall thereupon become vacant.

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30 **MR. SIBAL:** Vacant. Yes.

31

32 **CHIEF JUSTICE CHANDRACHUD:** Yes, because 193 in turn refers to 191 (2).

33

34 **MR. SIBAL:** Yes.

35

36 **CHIEF JUSTICE CHANDRACHUD:** Which refers to the Tenth Schedule.

37

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

2

3 **CHIEF JUSTICE CHANDRACHUD:** So the seat shall there upon become vacant. So
4 suppose a group of MLAs, forget this case. Suppose a group of MLAs incurs a disqualification
5 by being a split, which otherwise is not recognized by the Tenth Schedule.

6

7 **MR. SIBAL:** Correct, that's correct.

8

9 **CHIEF JUSTICE CHANDRACHUD:** So the strength of the House therefore comes falls by
10 the extent of the disqualification.

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12 **MR. SIBAL:** Absolutely.

13

14 **CHIEF JUSTICE CHANDRACHUD:** In which case the majority required for a motion of
15 confidence would also be altered. So suppose that the House of 200 members, 20 have become
16 disqualified, then it would be 90 instead of a 100 for the vote of confidence.

17

18 **MR. SIBAL:** Correct.

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20 **CHIEF JUSTICE CHANDRACHUD:** So would the Governor, in such a case, be justified in
21 saying that, well, I still without, I still want a vote of confidence because assuming that these
22 people now are disqualified. I still want to test the legitimacy of the Government after
23 excluding these persons. Can he do that?

24

25 **MR. SIBAL:** If the arithmetic is so stacked, he can. But nothing more than that. If the
26 arithmetic is so stacked, he can.

27

28 **CHIEF JUSTICE CHANDRACHUD:** Because the consequences that those people have to
29 be excluded from the house.

30

31 **MR. SIBAL:** I agree.

32

33 **CHIEF JUSTICE CHANDRACHUD:** Number comes down and then he can say, Well, I
34 want [UNCLEAR] minus these people who are disqualified to establish...

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36 **MR. SIBAL:** No dispute on that proposition. But that the arithmetic will decide.

37

1 **CHIEF JUSTICE CHANDRACHUD:** That the arithmetic will decide.

2

3 **MR. SIBAL:** Here that question doesn't arrive. We know he is made Chief Minister. You
4 think, by now the judges don't know he is been made the Chief Minister. Your Lordship is
5 right. But that the arithmetic will decide. There is no discretion there. He'll call the Chief
6 Minister. He'll say - these people are excluded. This is the arithmetic. This is what the numbers
7 are. Prove your majority.

8

9 **CHIEF JUSTICE CHANDRACHUD:** No. But then look at it this way for a moment. I
10 mean, we are not at all on the facts here, but just to test the position, which is that say the
11 or...we can just for the sake of clarity the Shiv Sena has 56? Or had 56 when the Government
12 was formed, right?

13

14 **MR. SIBAL:** 55 My Lord.

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16 **CHIEF JUSTICE CHANDRACHUD:** Sorry? 55. Now disqualification notices were issued
17 to 22 plus 16, 38.

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

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21 **CHIEF JUSTICE CHANDRACHUD:** So for a moment for the argument to proceed with
22 your hypothesis that this a split and therefore they are disqualified, right? Then the Shiv
23 Sena is left with 17, if these people are to be disqualified. So it comes down to then 17
24 plus NCP has how many... 44 of.. How much?

25

26 **MR. SIBAL:** 54.

27

28 **JUSTICE NARASIMHA:** 53.

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30 **CHIEF JUSTICE CHANDRACHUD:** 53 plus 17. 70. And Congress has 44, right?

31

32 **MR. SIBAL:** Yes, yes. 44.

33

34 **MR. SIBAL:** BJP has 106. Even then it will be fine.

35

36 **CHIEF JUSTICE CHANDRACHUD:** Right. So in such a situation would the Governor be
37 justified in saying that - look, assuming that these people have incurred a

1 disqualification, I still call for a trust vote. Because the impact of these 39, at that stage he is
2 not deciding the disqualification. At that stage, the Governor says, Well, according to me, as a
3 constitutional, as a constitutional head, it appears that these people have now they're split. I'm
4 not deciding that they are split because that's the discretion of the Speaker. Can the Governor
5 now not say in a given case that look these facts now stare at me. I postulate that these people
6 have incurred a disqualification. I don't treat these as members of the House at all. But
7 therefore, because these people stand excluded and the strength of the ruling of the
8 Government, then falls down to the extent of the split. I want a trust vote.

9

10 **MR. SIBAL:** My Lords, just let me, just let me analyse that in two ways. Number one, you
11 can't then administer an oath of office to one of those who are disqualified.

12

13 **CHIEF JUSTICE CHANDRACHUD:** That's right. Absolutely correct. Your line of thinking
14 and line of argument on this is...That we'll keep aside not that.

15

16 **MR. SIBAL:** Let's forget that. Somebody should tell the Governor that constitutionally what
17 happens, with my little experience. The numbers if stacked against the Government will go to
18 the Governor and say that the Leader of the House has lost the confidence of the House.
19 Then he will analyse that and call. But Governor will not do this. That's not his job. There is
20 a sitting Chief Minister. It's an elected Government.

21

22 **CHIEF JUSTICE CHANDRACHUD:** You're right. At that stage, the Governor is not really
23 calling upon someone else to form Government but what he can certainly do is that - well,
24 according to me, you have a ruling party with say, which is supported in a coalition with say,
25 60 members. Out of the 60, 40, which is a split, the Governor says, well, this is a split. And this
26 is a split which is not recognized now by the Tenth Schedule. The Speaker is going to take his
27 own time to decide on the disqualification. But as a Constitutional Head of State, I do believe
28 that with these 40 having, contrary to Constitution, moved away at least I was as a Head of
29 a State, I require a trust vote in the floor of the Legislative Assembly. That I don't believe the
30 Governor will be wrong in calling for a trust vote.

31

32 **MR. SIBAL:** My Lord, I'll say it's wrong and I'll constitutionally provide an answer.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Why would that...

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36 **MR. SIBAL:** The moment the Governor does that My Lords, take Maharashtra there are any
37 number of parties. Any number of parties apart from Shiv Sena, apart from NCP, apart from

1 Congress, there are so many small parties. Now those small parties at the moment supporting
2 the whoever there is in power. The moment the Governor raise that, the buying and selling will
3 start. In fact, the Governor will be inviting by his unilateral act of saying prove your majority.
4 There's no question of proving majority. He is the Chief Minister. Somebody else has to tell
5 the Governor that there is no majority. These are the signatures. These are the people who are
6 with us. He doesn't have majority. If you allow that as a constitutional principal, it will be
7 disastrous for democracy.

8

9 **CHIEF JUSTICE CHANDRACHUD:** No. But that very fact that the disqualification notice
10 has been issued initially to 16 and 22. This is not a case whether the Governor is sort of, you
11 know, finding facts, you know, in the political spectrum. The Governor is informed. The
12 Governor knows that well disqualification notices have been issued to 16 plus 22 or a group of
13 person. Which disqualification, the wrath of disqualification the moment it attaches to a very
14 sizable portion of the MLAs who are part of the ruling, the ruling coalition, can the Governor
15 be said to be not justified in saying that - well, I'm not deciding the disqualification, but now
16 please establish that you have a majority in the House and I'll decide whether your majority
17 depends on these 39 or your majority is safe, irrespective of these 39.

18

19 **MR. SIBAL:** Even otherwise the arithmetic, the numbers are that time on favour of...

20

21 **CHIEF JUSTICE CHANDRACHUD:** Because you know Mr. Sibal, you are also right. For
22 the present purpose, because you still have to hear them on the on that aspect. So as a
23 hypothesis, we proceed on the basis that you are right. That these 39, they had really split, that
24 too a split is not recognized by the Tenth Schedule. Therefore, they necessarily have to go
25 out. Asking Mr. Eknath Shinde to form the Government that's a separate issue. We keep that
26 aside for a moment. Maybe we'll have to hear them on that. But as an abstract constitutional
27 principle for the Governor, what else does he do?

28

29 **MR. SIBAL:** Let's analyse the numbers now My Lords. He still has a numbers. He still has
30 the numbers. They are only 106. There are independents. There are other parties.

31

32 **CHIEF JUSTICE CHANDRACHUD:** Point is Mr. Sibal, that is again, you know, because,
33 can we say that then the Governor, the governor is, you see a lot of times what happens is that
34 the Governor may have done something which is absolutely within his power, something
35 which may run afoul of constitutional principle. But we have to shift, we have to separate the
36 grain from the chaff. Per se, when there is a Disqualification Notice moved to the Speaker in
37 respect of a sizable group of MLAs belonging to the ruling party, how can we say that

1 the Governor is not justified and they are going to the Government sake. Come on now prove
2 your...

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4 **MR. SIBAL:** When does a Governor, My Lords we have to go into that question. And when
5 does a Governor call for a floor test? Then we have to go into that question. Has ever a
6 Governor called for a floor test on his own, when there is a Government in power? Never.
7 Never in the Constitution history of India. Never. My Lords, the reason is simple. There is an
8 elected Government. He has proved his confidence on the floor of that House. There may be
9 disqualification.

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11 **CHIEF JUSTICE CHANDRACHUD:** You see, because the defection has two
12 consequences. At one level, the defection results in persons who have defected by virtue of a
13 split ceasing to be members of the House but that very defection, which operates to exclude
14 them from the membership of the House also affects the legitimacy of the Government.
15 Legitimacy in the sense, the strength of the Government on the floor of the House. So can
16 therefore the very same Act which is unlawful of a group of persons forming a split and going
17 out of the party fold. They incur the wrath of disqualification.

18

19 **MR. SIBAL:** That stage would have arisen if the disqualification petitions had been decided.
20 Let's assume that Your Lordship's example is right. But that stage will arise if the
21 disqualification petitions are decided and they are out of the House.

22

23 **CHIEF JUSTICE CHANDRACHUD:** No. But for that purpose, can the
24 Government, Governor not say, well I assume that they will be disqualified, therefore I need a
25 show of strength on the floor of the House.

26

27 **MR. SIBAL:** My Lord, the Governor has to... the debate is, are the constitutional process, the
28 outcome of constitutional process. Governor cannot say I'll assume this, I'll assume that. My
29 Lords, I am sorry, this is a proposition of constitutional law. With the greatest respect that will
30 ultimately encourage, encourage the kind of things that are happening today and we
31 see all around. Toppling of the Government should be the [INAUDIBLE] priority as far as the
32 Governor is concerned.

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34 **JUSTICE NARASIMHA:** Mr. Sibal, you are saying that constitutionally it's
35 impermissible for the Governor to take cognizance of any of those events which are all over.

36

37 **MR. SIBAL:** Correct.

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2 **JUSTICE NARASIMHA:** Nevertheless, he has no power to take cognizance of either
3 the Tenth Schedule Notices, or even the earlier Notices with respect to the Speaker, or
4 even those representations of violation of the Whip and all that that has happened in the
5 papers all over. He cannot by himself take cognizance of anything like that and ask the
6 legislator or the Chief Minister to prove his strength in the in the floor of the House.

7

8 **MR. SIBAL:** Correct. Because they are part of the Shiv Sena. They themselves say...

9

10 **JUSTICE NARASIMHA:** We are not on Shiv Sena, we are on the power of the Government.

11

12 **MR. SIBAL:** That's right. Even then. Even then. My Lords when an elected Government
13 is running the constitutional principle. My Lords, I humbly submitted the following.

14

15 **JUSTICE NARASIMHA:** [INAUDIBLE]

16

17 **MR. SIBAL:** If the numbers are stacked against the elected Government for whatever reason
18 they can go to the Governor and say these are our numbers, these are how they are stacked.
19 Governor verifies that issue. Verify the signatures, normally My Lords that's a practice that
20 used to happen. But Governor, now says we don't want to enter into the political thicket.
21 But be that as it may. That may be a possibility then for the Governor to say, look, I feel that
22 you have lost majority because these people have come to us. But Governor, on his own can't
23 do that. This is not the power in the Governor to help in toppling an elected Government. My
24 Lords Governor... You assume Governors will act constitutionally. But how many
25 times have you struck down actions of the Governor who have acted unconstitutionally?
26 And once that happens, then everybody else will get into the act. All this independents and all
27 those people belonging to small parties. I don't want to say anything more. So My
28 Lords please, please don't play down a constitutional principle. That will create havoc.

29

30 **JUSTICE SHAH:** Mr. Sibal, suppose in a given case, not in this case, the majority of the
31 people in power. Correct? So we are part of the Government. They along with the other
32 party goes to the Governor and says that, sir, the present Government has lost the confidence,
33 we are the persons. In that case, the Government...

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35 **MR. SIBAL:** Cannot, cannot.

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37 **JUSTICE SHAH:** Governor can. Why? Because the Governor has to settle...

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MR. SIBAL: No, they are still in the party My Lord. They are still in the party, it is against paragraph three. But paragraph three doesn't recognize majority, minority.

CHIEF JUSTICE CHANDRACHUD: Apropos what my learned brother has said, and I remember when we were much younger, there would be that parade of MLAs before the Governor in the 90s.

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

CHIEF JUSTICE CHANDRACHUD: We don't see that now. That used to happen in 1980s and [UNCLEAR].

MR. SIBAL: But that's why My Lords is the right question. But majority is now prohibited under three.

CHIEF JUSTICE CHANDRACHUD: No can, but just taken the line of the reasoning which my learned brother put forth, could the Governor not say that, well, I want you to demonstrate that you have your majority in the House, all that I exclude 20 people who have in a 80 Member House. I exclude the 20. I learned that there are disqualification petitions against 20 out of an 80 member House. Come before me, or, demonstrate to me that you still have 40 MLAs before you.

MR. SIBAL: But we could have demonstrated and we could have won. If those 40 are, even if they are excluded.

CHIEF JUSTICE CHANDRACHUD: So therefore Mr. Sibal, the Governor can, even you say that...

MR. SIBAL: No, but I don't agree to that proposition.

CHIEF JUSTICE CHANDRACHUD: No, but the Governor can certainly say that demonstrate to me that you have 40 out of 80 MLAs in the 80 member House.

MR. SIBAL: Nobody for that. This is not for the Governor to say that. It's for those people in the House to go to the Governor and say they have lost majority. It's not for the Governor to enter into political thicket.

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CHIEF JUSTICE CHANDRACHUD: Fair enough. But suppose those people therefore, obviously the opposition in the House would say, well, they've lost their 40. In which case what does the Governor do? Had a primary level, the Governor says, well, now I have learned from the opposition that you have, you cease to have 40 out of 80, which you had originally or say 45 out of 80, because 20 I have now been issued this disqualification Notices. So then your strength comes from 45 to 25. Now please prima facie demonstrate to me that you still have 40.

MR. SIBAL: Okay, let me try and answer that.

CHIEF JUSTICE CHANDRACHUD: How does the Governor then proceed, what does the Governor do in a situation like this?

MR. SIBAL: Let me try and answer that. My Lords One, Governor prima facie on the arithmetic of the House must first come to the conclusion that the leader of the House has lost the confidence of the House.

CHIEF JUSTICE CHANDRACHUD: Absolutely correct.

MR. SIBAL: How will he decides that? If somebody goes to him. My Lords somebody goes him and says, This Chief Minister has lost the majority, lost the confidence of the House because these are the numbers.

CHIEF JUSTICE CHANDRACHUD: Now two sets of people could go, either the opposition would go, or even the defecting MLAs would go. I mean, they have.

MR. SIBAL: No, they can't.

CHIEF JUSTICE CHANDRACHUD: Why? They will say that well....

[NO AUDIO]

MR. SIBAL: Hypothetical examples ultimately, when and if it comes to Your Lordships, because we are not dealing with that situation, we're dealing with a person who has been recognized by the Governor who happens to be part of the 39, and who has given oath of office. We're only dealing with that issue as and when that issue...some hypothetical stage comes in, we can debate that constitutional issue provided...

1 **CHIEF JUSTICE CHANDRACHUD:** But it's not hypothetically here at all. It's a live issue
2 here, for the reason that once the Governor is in possession of facts, which indicates that very
3 substantial...

4

5 **MR. SIBAL:** Which is a fact that indicates that he has lost the majority of the House?

6

7 **CHIEF JUSTICE CHANDRACHUD:** No, but that out of 55, out of 55 MLAs, 38, their
8 Disqualification Notices issued by the ruling, by the ruling coalition.

9

10 **MR. SIBAL:** Show, 50 plus 53 plus....We have the ex facie My Lords. These are the, Please
11 My Lords...why go into the number. Just see the facts.

12

13 **CHIEF JUSTICE CHANDRACHUD:** Alright let's have the arithmetic. Shiv Sena had 55.
14 Shiv Sena had 55, Congress had 44,

15

16 **MR. SIBAL:** PDF page 62.

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18 **CHIEF JUSTICE CHANDRACHUD:** Congress *kitna tha*? 44 is Congress, NCP is 53.

19

20 **MR. SIBAL:** My Lords, my request to Your Lordships, please call for the records of
21 the Governor whether he has gone through this exercise or not?

22

23 **JUSTICE NARSIMHA:** Yeah, that's the point we are making.

24

25 **MR. SIBAL:** Please call for the records, if that's the case.

26

27 **CHIEF JUSTICE CHANDRACHUD:** And how much was the BJP? 106.

28

29 **MR. SIBAL:** 106.

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31 **CHIEF JUSTICE CHANDRACHUD:** And Independents and other parties?

32

33 **MR. SIBAL:** We would have been...

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35 **CHIEF JUSTICE CHANDRACHUD:** That would be about 20 or no? 20.

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37 **MR. SIBAL:** They would be 123 My Lords. Halfway back is 124, 120...

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CHIEF JUSTICE CHANDRACHUD: So as a result of, say that disqualification notices, which are given to 39. Out of 152. The ruling coalition comes down to 113.

MR. SIBAL: My Lord, First of all, only 34 dissidents are written to the Governor. Not 39, only 34.

CHIEF JUSTICE CHANDRACHUD: 34 dissidents ..

MR. SIBAL: Only 34 wrote to the Governor.

CHIEF JUSTICE CHANDRACHUD: Right.

MR. SIBAL: Let's My Lords, get the arithmetic now.

JUSTICE NARASIMHA: 246 is the house. Half of it will be 123. Correct?

MR. SIBAL: Yes. Then they will become 126.

CHIEF JUSTICE CHANDRACHUD: How much do they have? 164?

MR JETHMALANI: Page 59 PDF 62.

CHIEF JUSTICE CHANDRACHUD: We have now got Mr. Sibal. 55 SS, 44 C, 53 NCP.

MR. SIBAL: That's correct.

CHIEF JUSTICE CHANDRACHUD: Comes to 152. Now 288 is the number.

MR. SIBAL: -34 went to the Governor.

CHIEF JUSTICE CHANDRACHUD: -34. But there were 39 disqualifications.

MR. SIBAL: No. No. But what went to the Governor, if the Governor has to look at it then he has to look at 34 My Lord.

CHIEF JUSTICE CHANDRACHUD: Certainly. So 288 minus 34. So 254.

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MR. SIBAL: 287-34 [UNCLEAR]

CHIEF JUSTICE CHANDRACHUD: 288 right?

MR. MAHESH JETHMALANI: 287. One passed away. So 288 was 287. One passed away.

MR. SIBAL: One passed away. So 287.

CHIEF JUSTICE CHANDRACHUD: So 287-34 is 253. So 253 divided by 2.

MR. SIBAL: 2 My Lords. 127.

CHIEF JUSTICE CHANDRACHUD: 127, yes,

MR. SIBAL: They don't have 127.

CHIEF JUSTICE CHANDRACHUD: No but the point is the Governor will say, if you exclude the people in respect of whom there is an allegation of defection from your side.

MR. SIBAL: We have 127 My Lords. And that's arithmetic.

CHIEF JUSTICE CHANDRACHUD: How do you have 127?

MR. SIBAL: I have been telling you My Lord. 54, 44 and 15 is 113 plus 14 MLAs. Independent MLAs and small parties, it's 14. In fact Shiv Sena will be 21.

CHIEF JUSTICE CHANDRACHUD: Mr. Sibal, look at it this way. 55 plus 44 plus 53 is 152. 152 was your strength, of the basic three parties who formed the Government. From that instead of exclude...

MR. SIBAL: That is 14 who are supporting us. Why are you excluding? They are independent Supporting us.

CHIEF JUSTICE CHANDRACHUD: Fair enough. Now 152 -34 also if you take, you are down to 118 right?

1 **MR. SIBAL:** Yes.

2

3 **CHIEF JUSTICE CHANDRACHUD:** Which is below the, below the 125 Mark, right? Now
4 127 Mark. Below the 127 mark. Now you say you have some independents who are supporting,
5 right?

6

7 **MR. SIBAL:** All independents supporting us.

8

9 **CHIEF JUSTICE CHANDRACHUD:** There are some independents who are supporting
10 you.

11

12 **MR. JETHMALANI:** Both sides had independents supporting them.

13

14 **CHIEF JUSTICE CHANDRACHUD:** One second. We are just trying to... Look, these
15 examples are only to see what the Governor should in a situation...

16

17 **MR. SIBAL:** My Lords How...My Lords it's not just what. Did he apply his minds to
18 this issue? This is all very well happening in a Court of Law. But did he apply his minds to this
19 issue?

20

21 **CHIEF JUSTICE CHANDRACHUD:** But Mr. Sibal one thing which we
22 cannot therefore discount. The Governor has two responsibilities. One, the Governor cannot
23 enter into the thicket of disqualification. Two, the Governor cannot do anything which seems
24 to protect those who have incurred a wrath of disqualification. There we are with you
25 completely. Equally, what is of concern to us is that the Governor in all these political
26 wranglings and you know, whatever goes on in the polity, there is a very high constitutional
27 principle, which is that whoever is sworn in as a Chief Minister must ultimately have
28 accountability to Parliament and therefore to the people. Otherwise, what we will be doing is
29 that the defections have two consequences. The defectors have a personal consequence that
30 they get out of the house, that their seat become vacant. But equally, we cannot gloss over the
31 fact that the defection affects the stability of the Government itself.

32

33 **CHIEF JUSTICE CHANDRACHUD:** And how does a Governor, as an elected, as a head of
34 the state, ignore the consequence of...

35

36 **MR. SIBAL:** Where is that question that arises here My Lords? Where is that question?
37 Please. How does it arise here? How did the Governor, Governor did not look at all this, what

1 Your Lordships are putting to me. Ask for the records. Why go into a hypothetical situation?
2 With the greatest respect, My Lordships have so much experience. Let's not tread into areas
3 which we are not called upon to tread upon. We are here as to how 39 or whatever 34, go to
4 the Governor and the Governor recognizes the 34, knowing that they are in the Shiv
5 Sena. There is the leader of the Shiv Sena recognizes, Uddhav Thackeray, he recognizes the
6 split and administer an oath of office. How does all this enter into this...into the reckoning
7 here?

8

9 **JUSTICE NARASIMHA:** As a principle, you are saying that the Governor could not have
10 got into it has not got into it.

11

12 **MR. SIBAL:** Yeah, yes he has not.

13

14 **JUSTICE NARASIMHA:** Number one, and the premise for that is that the Governor cannot
15 do it constitutionally.

16

17 **MR. SIBAL:** That's right. That's all that Your Lordships needs to consider and I can
18 understand a situation. There can be another hypothetical. I am sorry.

19

20 **CHIEF JUSTICE CHANDRACHUD:** So once there is an existing Government according
21 to you, which this was. This is not the Government formation for the first time, then
22 the Governor short of a no confidence vote, which is brought in the floor of the House. The
23 Governor must ensure that the existing position continues until somebody brings a no
24 confidence.

25

26 **MR. SIBAL:** That's the only way. Now, Your Lordships have laid that down.
27 No longer parading, no longer comparing signatures. All that is over. So, if they think, if the
28 BJP thought that we had lost confidence, they should have moved a motion.

29

30 **JUSTICE NARASIMHA:** That is because of Bommai which said that it's only the floor of
31 the House.

32

33 **MR. SIBAL:** That's correct. So you move a no confidence. How do these issues come in at all?
34 There is no discussion.

35

36 **CHIEF JUSTICE CHANDRACHUD:** So according to you, as a matter of principle, absent
37 a motion of no confidence, the Governor must continue with the existing position.

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MR. SIBAL: That's right. That's correct. Because there is an elected Government that we have already got.

CHIEF JUSTICE CHANDRACHUD: Alright. I understand what you mean.

MR. SIBAL: This is much worse, that he recognizes the slit and administer an oath of office.

JUSTICE SHAH: And thereafter the floor test was subsequently?

MR. SIBAL: Yes.

JUSTICE SHAH: On 4th?

MR. SIBAL: Yes, on 4th.

JUSTICE SHAH: 3rd or 4th?

MR. SIBAL: Including those 39.

JUSTICE SHAH: But there, so far as speaking about myself. Can the Governor correct, because the...under the Tenth Schedule, it is for the Speaker to take a decision, correct?

MR. SIBAL: Right.

JUSTICE SHAH: Can the Governor on his own without any disqualified, the Speaker can take cognizance that they are disqualified?

MR. SIBAL: Your Lordship is right. Absolutely right, but they are still the Shiv Sena. That question will still have to be answered. What is that, what are the 39? They are still the Shiv Sena. So then he recognizes the split. That's the problem My Lord. That's why the Tenth Schedule, that's why the whole paragraph. This is the whole, the issue when three was eliminated, it was only for the purposes, deleted only for the purposes. Majority of minority, you can't de-stabilized an elected Government. And Constitutional morality was a linchpin. And that's why I told Your Lordships, ideally the Governor should have said, no further action, get your disqualifications decided, then I will see. I told that to Your Lordships earlier.

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JUSTICE SHAH: Well, suppose the Speaker doesn't decide.

MR. SIBAL: Now, My Lords...

JUSTICE SHAH: Listen, listen. Suppose disqualifications are not decided at all. In the meantime, the Governor is satisfied. Correct?

MR. SIBAL: He can't be.

JUSTICE SHAH: No, no. He might...on the basis of the material of...

MR. SIBAL: He can't. That's not his job. It's the no confidence motion in the House. That is the Government. Government satisfaction after election doesn't arise, My Lord, I am sorry, as a constitutional principle, it doesn't arise. Don't give that discretion to the Governor. You'll have toppling governments every other day. First the ED will go. Then the CBI will go, then the Governor will exercise discretion and Governments will be toppled. How is the discussion here?

JUSTICE NARASIMHA: So, Speaker versus Governor. Speaker versus Governor as I had said. So now the flip side of it is that, without any chance for all that to be panned out the Speaker shows over anxiety to take up the matter and immediately disqualify all those who are intending to...

MR. SIBAL: The speaker should decide. Your Lordships have now said within three months. This is the judgment of this court that within three months Speaker must decide. Normally earlier, but latest within three months. Justice Nariman's judgment, My Lords.

JUSTICE NARASIMHA: No, no. I was telling you about the flip side of it is.. On the one hand, yes. Governors over anxiety saying that - Okay, you prove the majority. On the other hand, we have a Speaker exercising that discretion and says - now, come on, you immediately show. I will disqualify all of you. So these are the two constant [UNCLEAR].

MR. SIBAL: But My Lord, there is difference, one is subject to judicial review and the other is not. Difference is one is subject to judicial review and the other is not.

JUSTICE NARASIMHA: All are subject to judicial review.

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MR. SIBAL: No My Lord. But once the new Government is formed My Lords, if he calls for a trust. The new government is formed. what judicial review?

JUSTICE NARASIMHA: True. Remedy is a different matter. I agree with you. There is a remedy. But really speaking, it's that what we need to interpret is the scope of the jurisdiction of the Governor and the scope of the jurisdiction of the Speaker also.

MR. SIBAL: No. The speaker. Of course, the scope of jurisdiction is clear. He has to decide the matter and My Lords...

JUSTICE KOHLI: So really, the Governor keeps his hands off [MUTED].

MR. SIBAL: The second [UNCLEAR] of it is, how does he call Eknath Shinde to administer oath of office? Now My Lords, now kindly just come to Para..

MR. JETHMALANI: My Lord, I don't say anything right now but factually..

JUSTICE SHAH: Mr. Jethmalani will you please [UNCLEAR]

MR. JETHMALANI: All right. But factually he made the incorrect statement, that there was no input given to the Governor. There were two letters sent to the Governor, which the Governor has referred to in a letter to Mr. Uddhav Thackeray before he called for a floor test.

MR. SIBAL: Correct Absolutely.

MR. JETHMALANI: There was enough material for the Governor to decide that this Government is weak.

MR. SIBAL: I think my learned friend's...

CHIEF JUSTICE CHANDRACHUD: What was the material before the Governor on the basis of which he asked Mr. Shinde to form Government? One and particularly when he knew that this was really a breakaway faction obviously.

1 **MR. SIBAL:** Yes. How does he justify that? The question is, how do you
2 administer an oath of office to Eknath Shinde? Now My Lords I can understand. There is
3 another situation, there are multi parties, not just in this case. In several states we have a multi
4 party system. Several parties come together. And suddenly, suddenly a no confidence is
5 moved. Or somebody seeks. And in the meantime, some disqualification petitions are
6 pending. At that stage, the Governor doesn't bother about the
7 disqualification petitions. There's a no confidence. These fellows will vote. Kindly see the
8 consequences. We will take the 39 to be validly members to the House, not
9 disqualified, disqualification petitions pending. Move a no confidence motion.

10

11 **MR. SIBAL:** Now, they can't move the no-confidence motion because the 39, would be
12 subject to the Whip. So they know that they don't have majority. Therefore, what do they do?
13 39, go to the Governor and say that now recognize me. So please appreciate, the way to ensure
14 that the Government falls is to move the no confidence. Why did they not move it? They could
15 have, the 39 could have voted. They are members of the legislature. They did not move it
16 because they knew that they are part of the Shiv Sena, subject to the Whip. The Government
17 will sustain, will not fall so the only way out was this conspiracy. And that was hatched much
18 earlier. That's how they want to Gujarat and Assam. Having done that, they wrote that later,
19 which I read to Your Lordships. I read that letter that, you know this present Government, the
20 party members are very unhappy with it. We have been not following the ideology of
21 Balasaheb. All that, letter I read to Your Lordships. And then they go to the Speaker. So
22 whether it's majority, minority really doesn't matter. So how could the trust vote be called?
23 Trust vote means that you have, prima facie has lost confidence. Governor knows that this
24 Government is not got.... why we go into the matter that the Governor will presume that these
25 people will be disqualified. Why do we even presume that? They are qualified till such time as
26 they are disqualified. So move a no confidence. So, Your Lordships must ask the question why
27 he didn't do that? And My Lords, let me put it this way, if they were so concerned, they should
28 have voted against the Whip. They should have voted against the Whip. And if they had voted...

29

30 **CHIEF JUSTICE CHANDRACHUD:** This part we are over with.

31

32 **MR. SIBAL:** I am sorry. This part we are over with. Now, My Lords I just wanted to point
33 out, para 240. The Sarkaria Commission, is quoted, I just want to deal with that. Para 4.11.04
34 of the Sarkaria, Lordship has that? Page 101 of the Sarkaria Commission report specifically
35 deals with the situation where there is no single party obtains absolute majority and provides
36 the order of preference the Governor should follow in the selecting of a Chief Minister. The
37 order of preference suggested is an Alliance of parties that was formed prior to the elections.

1 Kindly just mark the word Alliance. The largest single party is taking a claim to form
2 the Government with the support of others, including independents. Then a post
3 electoral coalition of parties with all the partners in the coalition joining the Government.
4 Kindly mark the word coalition of parties, post electoral, electoral coalition of parties. And
5 then a post electoral alliance of parties with some of the parties in the alliance forming
6 a Government and the remaining parties including independents supporting the Government
7 from outside. No other exception is there. Now, kindly mark this, that there has to be a party
8 supporting for the purposes of the floor test. There has to be an alliance as a matter of law.
9 Therefore, the Governor cannot exercise any discretion. He must ask what party you belong
10 to.

11

12 **MR. SIBAL:** I'm done with this issue, My Lords. Now just two more issues then I am finished
13 with. Number one, Your Lordship, have now noticed that Gogawale was appointed as
14 the Whip from Assam. If Your Lordships agree with me as a proposition of law that the
15 Whips cannot be appointed in this fashion. Ultimately, the Speaker once that Government is
16 formed on the 3rd recognizes Gogawale. Right My Lords? And then I am issued, our
17 legislators are issued the notice for disqualification on the 8th July. If Your Lordship agree
18 with my proposition of law that Whips cannot be appointed in this fashion. Then
19 our notices should be quashed by this court.

20

21 **JUSTICE NARASIMHA:** Subsequent notices. Under 2(1)(b) or 2(1)(a)?

22

23 **MR. SIBAL:** Yes. Against us. Notices against us.

24

25 **JUSTICE NARASIMHA:** Correct. Correct.

26

27 **MR. SIBAL:** 2(1)(B).

28

29 **JUSTICE NARASIMHA:** But they are virtually a nonissue, right?

30

31 **MR. SIBAL:** No It's not a nonissue. My Lord, there are these notice of disqualification
32 against me. Because they say Gogawale gave a Whip.

33

34 **JUSTICE NARASIMHA:** You are right.

35

36 **MR. SIBAL:** So My Lords, it's a live issue for us.

37

1 **JUSTICE NARASIMHA:** Legislator's Whip not the political party.

2

3 **MR. SIBAL:** Yes yes. Legislature's Whip. So My Lords therefore, my
4 request to Your Lordships is that notice for disqualification must be struck down by Your
5 Lordships. If Your Lordships of course agree that you cannot appoint a Whip from outside.

6

7 **JUSTICE NARASIMHA:** But that's the direct challenge also.

8

9 **MR. SIBAL:** Yes. We have challenge that. I have challenged that. Now one
10 more point My Lords. In September when a whole petition was argued that
11 the Election Commission should not proceed. Your Lordship said - no stay. Fine My
12 Lords, No stay. We went back. My Lords what happened was, we thought and this
13 is my...we interpreted that order to mean that the proceeding before the Commission shall go
14 on. Fine My Lords let them go on. The problem arose that we told the Commission that if you
15 take this test of organization and representation in the legislature, you necessarily will have to
16 include 38 or 39. And therefore if you take that into account, your outcome, your
17 result well may be that they get the symbol. But that very matter is pending before the
18 Supreme Court over the disqualification of these 39. So please stay your hands and let the
19 Supreme Court decide. Now I personally feel that was not countered. It was not antithetical to
20 Your Lordships order of stay. After all Election Commission has also to decide on accordance
21 with law. The result was...I mean this is again sad part of it. The result was the Commission
22 says I am not going to bother about the organization. These 39 members are majority therefore
23 they get the symbol. In fact Your Lordships order was misused.

24

25 **JUSTICE SHAH:** But we are not considering the validity of the order passed for
26 the Election Commission .

27

28 **MR. SIBAL:** No. I am not asking My Lords, I am merely saying - the
29 Commissioner said, the High Court said, Supreme Court has said - No Stay. So they have to
30 decide.

31

32 **JUSTICE SHAH:** That has to be tested in those proceedings no?

33

34 **MR. SIBAL:** That's right. But kindly see the consequences. Kindly see how we are hurt. That
35 is why the reference what is the scope of powers of the Election Commission in respect of
36 determination split within the party. I'm not... in Your Lordships passed rightly so according
37 to me that let the Commission -- but the Commission doesn't have to, can't disregard basic

1 principles that you are giving symbol to a party on the strength of those 39 whose
2 disqualifications are pending.

3

4 **CHIEF JUSTICE CHANDRACHUD:** And that issue spending before this..

5

6 **MR. SIBAL:** That's pending and I said to them please stay your hands. They said no
7 but Supreme Court has said, we have to go on. That's how the Symbol is given. See that
8 injustice caused to us. I just make the point My Lords and not to move further. And then the
9 last thing. My Lords, kindly read now paragraph 115, then I'm done.

10

11 **CHIEF JUSTICE CHANDRACHUD:** Para?

12

13 **MR. SIBAL:** 115 of the Symbol's Order. 15 of the Symbol's Order. I am sorry, 15, Statute
14 compilation. Sorry. Page 91, it starts, and paragraph 15, is at page
15 103. PDF 103. It says, when...Lordships have it? Where the Commission is satisfied on
16 information in its possession that there are rival sections or groups of a recognized political
17 party each of whom claims to be that party. I will just stop here. So the jurisdiction of the
18 Commission starts when there is a claim that there are rival groups within the party. And it
19 has, it must have evidence in its possession, information in its possession, and must be
20 satisfied with the information that is in their possession that they are rival groups.
21 Now Your Lordships have seen the correspondence 21st June onwards. There is not a whisper
22 of any rival group, not a whisper. It's only the 39 sitting there.

23

24 **CHIEF JUSTICE CHANDRACHUD:** So, this, just to rephrase it. According to you there
25 was no information in the possession of the EC to show that there are rival groups and it has
26 to be satisfied.

27

28 **MR. SIBAL:** Yes. Now My Lords the petition...

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30 **CHIEF JUSTICE CHANDRACHUD:** Can you rephrase your submissions Mr. Sibal, again
31 on this point?

32

33 **MR. SIBAL:** I am saying My Lords, the jurisdiction of that Commission will commence when
34 the Commission has in it's possession information on which it is satisfied that there are two
35 rival factions within a political party.

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37 **CHIEF JUSTICE CHANDRACHUD:** Right. And in this case what is the...

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MR. SIBAL: Now My Lords kindly see, therefore in that context of this Tenth Schedule, now just that proposition, in the context of the Tenth Schedule the only way you can get a Symbol is when there are two rival factions within the party. It has nothing to do with the Tenth Schedule.

CHIEF JUSTICE CHANDRACHUD: No, this has nothing to do with the Tenth Schedule.

JUSTICE NARASIMHA: Correct.

MR. SIBAL: Right? So, there has to be a faction emerging, take for example majority of the people in the Tenth schedule, let's ask with Thackeray. Let's assume all 55 are with Thackeray. Then also para 15, can be invoked.

JUSTICE NARASIMHA: Why somebody making an application?

CHIEF JUSTICE CHANDRACHUD: Because 15 refers to the party.

MR. SIBAL: That's right. So, the split has to...

CHIEF JUSTICE CHANDRACHUD: [UNCLEAR]

MR. SIBAL: I am agreeing. I saying exactly, the split has to take place within the party.

CHIEF JUSTICE CHANDRACHUD: Correct.

MR. SIBAL: That split did not take place on 21st June or immediately thereafter. Never took place. A petition is filed on the 19th of July.

JUSTICE NARASIMHA: Correct, correct. 19th of July.

MR. SIBAL: Just note that My Lords.

JUSTICE NARASIMHA: 19th of July. Absolutely.

MR. SIBAL: Correct? And on the 18th of July, it is alleged what is submitted along with the petition is minutes of meetings.

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MR. SIBAL: Minutes of Meetings. Will My Lords allow me to just place before Your Lordships. Just give it to My Lord please. We will give you the copy. This is on 18th July. The matter was fixed in this court on 20th July. The petitions, all petitions were to come up for direction. So from 21st June to the 18th July nothing happened. No faction, no claim for faction. Just give it to My Lords, please. Now My Lords, on 18th July, just kindly come to Page 7 of this compilation.

JUSTICE NARASIMHA: What is this Mr. Sibal? Minutes of meeting of?

MR. SIBAL: Minutes of meeting. Translation of the Pratinidhi Sabha. Page 7.

CHIEF JUSTICE CHANDRACHUD: Where is the Marathi start? Just I can read to English.

MR. SIBAL: Reverse to that is Marathi My Lords.

CHIEF JUSTICE CHANDRACHUD: What page?

MR. SIBAL: It says on top page 48. Three pages before that My Lords, the English version. Now, what do you have here? Your Lordships must take it there is no summons for any meeting. No venue for any meeting. No time for any meeting. No signatures obtained of at the meeting. Nothing. Just note that My Lords. No time, no place, no... date is given 18th July, no summons. I suppose this is a meeting of the Pratinidhi Sabha of the Shiv Sena. So it must be known to everybody where the meeting is going to be. Summons must be sent like we sent to them, right? What they do is they give a translation of the minutes of the Pratinidhi Sabha, and in the minutes they show some resolutions have been passed. Minutes as Your Lordships will know is the after meeting. It can't be before the meeting. Right? It has to be after the meeting.

So the minutes of the Pratinidhi Sabha and there are also minutes of the Karyakarini. That Your Lordship will see at Page 10. Again minutes. Again when it is held, what time is it, where it is held? Yes, they say it happened. It is held in Bombay. I guess My Lords some place in Bombay, they must have known. Now My Lords, so two minutes are placed before the Election Commission. These two minutes.

JUSTICE KOHLI: Subsequent minutes also of what date?

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MR. SIBAL: 27th July. That's even more interesting. My Lord just note 27th July. And then go back to the petition My Lords that they filed. It's very interesting. These are the two documents that they placed, nothing more. Plus, of course, appointment of people, we are not into that. Convenience Volume two. Yes. Kindly see PDF Page 699, Paragraph.... sorry, 698. 698 (XXVI)

CHIEF JUSTICE CHANDRACHUD: PDF Page?

MR. SIBAL: PDF page 698, this petition is filed on the 19th of July. Just mark that My Lords. This averment is made, while the petition is filed on 19th July.

JUSTICE SHAH: What is the page number?

MR. SIBAL: 698. PDF 698. And just above that (xxv), at 697, the last two lines of that page, if Your Lordship has that?

JUSTICE KOHLI: What is this document that you have pointed out?

MR. SIBAL: It says, further a meeting of the Pratinidhi Sabha, was convened on 18th of July, Your Lordship has that sentence? Where by the petitioner Eknath Shinde was appointed a senior leader. And Shiv Sena Mukhya Neta main leader. Minutes of the meeting of the Pratinidhi Sabha. So they say minutes of the meeting are there. No meeting, no place where it was held, who was some...nothing, nothing. Right. Then come to the next para. A meeting of the Rashtriya Karyakarini was also convened, whereby the Rashtriya Karyakarini has affirmed, now please note this, has affirmed the election of the petitioner as the Shiv Sena senior leader and Shiv Sena Mukhya Neta. Now, this is on 19th July and the minutes of that are 27th July. I showed that to Your Lordships. This petition is filed on 19th of July, it says that the petitioner was elected as a senior leader and senior Mukhya Neta, the minutes are dated 27th of July. This has what they filed My Lords. So, 19th July they could not have known, what would happen on 27th of July. And that also in the minutes of meeting. These are the only two documents with the Commission. That's why I read paragraph 15. These are the two documents with the Commission, in respect of to prove that there are two factions arising. And second document was submitted during the course of hearing. But please My Lords, I just don't want to go into that. I'm just interpreting 15. This is the documents in their possession, information on the basis of which the

1 Election Commission is satisfied that there are two factions within the party. So minutes of
2 meeting.

3

4 **CHIEF JUSTICE CHANDRACHUD:** Where are the minutes of meeting here in this
5 compilation, PDF page?

6

7 **MR. SIBAL:** Yes, we've just shown that. Here it's not there. That's why we...

8

9 **JUSTICE KOHLI:** No, it's not have annexure.

10

11 **MR. SIBAL:** That's why we gave that to Your Lordships.

12

13 **JUSTICE KOHLI:** Mr. Sibal, but that's not an annexure with the petition. Are we right?

14

15 **MR. SIBAL:** Not here. It's not here My Lords, that's why I gave Your Lordships.

16

17 **JUSTICE KOHLI:** No, no.

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19 **MR. SIBAL:** Let me hear My Lord.

20

21 **JUSTICE KOHLI:** What you have read of this para 26. Para 25 refers to annexure P-5, which
22 is the minutes of the meeting of the petition.

23

24 **MR. SIBAL:** I will put it My Lords, that's why...

25

26 **JUSTICE KOHLI:** We don't have. But the petition also doesn't enclose it as what we are
27 trying to understand.

28

29 **MR. SIBAL:** Yes, yes. That was handed over My Lords. It doesn't say. That's why I, we gave
30 it to Your Lordships. Now it says the 27th. This petition was filed on 29th. P-5 they enclosed.
31 So My Lords these are the two documents with the Commission. Now if you read read
32 paragraph 15, this represents a two factions in the party. The minutes of meeting. That's how
33 the Elections Commission, has got the jurisdiction. According to them. And this is the final
34 order. This is, kindly just look at it. I can understand if the Commission says lead evidence, I
35 can understand please prove your case, on this basis a final order is passed. Which is the
36 subject matter of challenge in the other proceeding. That's how they got the Symbol. So what
37 does the Governor do? What does the Election Commission do? And this is the evidence and

1 then we have to, we must ensure, we must trust that all institutional authorities function in
2 accordance with the law. And if this kind of manipulation takes place in the processes of
3 institutional decision making, where we go, where we will go, I don't know.

4
5 **MR. SIBAL:** I am done My Lords. I just want to make one statement I stand here. Not for
6 this case. I may lose it, I may win it. That's another matter. But I stand here My Lords for the
7 protection of what we so....what is so close to our heart. Institutional integrity and to ensure
8 that processes of constitutional processes survive. Otherwise if Your Lordships endorse such
9 a position it will be the death-knell of what we have cherished since 1950. Thank you.

10
11 **CHIEF JUSTICE CHANDRACHUD:** Thank you Mr. Sibal. Yes Dr. Singhvi.

12
13 **DR. SINGHVI:** I would, we should take Your Lordships principally to some very interesting
14 underlying juristic principles. Your Lordships have now seen the facts for two days. I'm not
15 going to repeat. Juristic principles which should impel Your Lordships to decide this matter
16 here and not consider the various options or suggestions of sending it back to the Speaker.
17 That's going to be the bulk of my argument. But My Lords I want to start with where we are
18 ending up with. I was here the whole morning and I heard -- the very important question which
19 fell from the bench and the Honourable Chief Justice in particular about the role of the
20 Governor. And I'm not going to repeat anything. I'm going to try and give a different facet. My
21 Lords this is a very unique and a strange case and I would say, from this side, a sorry case
22 where Your Lordships has double whammies and triple whammies. Let me explain how. My
23 Lords put the question of the Governor's role. And in one sentence the question is that if Your
24 Lordships found....if the Governor found that there is something to be decided by way of
25 unstable majorities, even if you exclude 39 why can't he go and have a trust vote etc. or a
26 decision on the true majorities in the confidence of the House. My Lords, the first thing when
27 you start on that query has been perhaps for us not given sufficient weight. And the first thing
28 is that Your Lordships fundamental rock solid principle of interpretation of Constitution and
29 statutes is that is intentionally a constituent assembly in its amending power of the
30 Constitution deletes something, Your Lordship gives full effect and scope to the intendment
31 behind that deletion. That is My Lord axiomatic. It is obvious that a contract, or a statute,
32 much less a constitutional amendment, where Your Lordship's intention is to give effect to
33 that intention.

34
35 **CHIEF JUSTICE CHANDRACHUD:** So Para 3 has been deleted.

1 **DR. SINGHVI:** Now My Lords, Para 3 deletion is not a small thing. There are debates, there
2 is a SOR. The constituent Assembly.... the constituent Parliament in its constituent capacity
3 said, look, we must delete it. Why this case is bizarre is that there are My Lords three, at least
4 two circumventions of the deletion directly by high constitutional authorities. Circumvention,
5 one is clearly this way or that way. Whether the Governor can do it or not do it Your Lordship
6 will decide separately. But clearly and specifically, the Governor is acting on a presumption of
7 a split in whatever way he is acting. Now as the Governor most of all is supposed to know the
8 Constitution. All of us are supposed to know the Constitution and ignorance in the law is no
9 excuse much less ignorance of the Constitution. There is no system and I'm not talking of Your
10 Lordships' narrower question of trust vote, non-trust vote. There is no basis on
11 which Your Lordships can reconcile and harmonize the factual invitation and oath giving on
12 the one hand with the legal deletion of Para 3. That's my proposition.

13

14 **DR. SINGHVI:** The two are irreconcilable. And My Lords, that is a very major constitutional
15 sin underlying this whole supposition and context.

16 The second makes this even more bizarre. There is no counterpart to curious and curiouser. It
17 can't be bizarre and bizarre. My Lords there is a direct finding in not one but many paras of
18 the EC order that this is a split. I'm not asking Your Lordships, Justice Shah is right. We have
19 not done an appeal on that. That's not the point that I am arguing. I am on the context My
20 Lords. People are here going around merely on the assumption of split then Your Lordship
21 might have as well wind up the Tenth Schedule, the Constitutional Amendment, the deletion.
22 What's the point of it? I'll give the paras, more than four paras or the three paras in the EC.
23 Now My Lords therefore, Your Lordships and those cases don't have to be given to Your
24 Lordships of elementary forms of interpretation that if I delete something, Your Lordship will
25 effect to that deletion. I'll supply them, not necessary to do it. The second answer or the second
26 response in the larger context of that query. So this is the first response. The second is Your
27 Lordships decides cases not that your Lordships decides the narrowest of narrow issue, Your
28 Lordships decides on the whole context but Your Lordships doesn't decide beyond the context
29 of a case. Your Lordships must be very careful, otherwise, the things of [UNCLEAR] and all
30 that will come in and Your Lordships doesn't have time to spend on hypothetical questions.
31 But let us see the context. The context of this case can be divided into broadly two or three,
32 three or four categories. And that context makes it clear that Your Lordships need not be
33 bothered about the Governor coming into the picture at all. The first phase of this context is,
34 the expedient of giving a disabling Notice. I call it a Disabling Notice before I intend it to defect,
35 now that will be awaiting Your Lordships decision on Nabam. So phase one or part one of this
36 context is Disabling Notice, Your Lordship must decide on Nabam. That's the whole argument
37 we made for two days. But clearly the context is that step one. And if that is wrong then a lot

1 of things fall down. And that is wrong in case Your Lordships doesn't agree with the literal text
 2 of Nabam. The second part is that we are also forgetting repeatedly the object of the Tenth
 3 Schedule. More than any other jurisprudence in this part subject of Constitutional law is our
 4 cases again and again talking of two things. The evil prior to 84, the object of plugging that evil,
 5 the mischief rule. And what Your Lordship is doing for the Tenth Schedule?

6 The third is that if Your Lordships accepts that the basic object of the Tenth Schedule is a
 7 constitutional sin being precluded or stopped or reduced, then 2-1 (A) or 2-1 (B), as the case
 8 may be, has to be decided first. It's logically prior to everything. Not only is it prior in terms of
 9 serial number but conceptually it has to be logically prior to any decision of any kind in any
 10 case. I'm talking of concept. I'm not talking of a delay by an individual Speaker. My Lords
 11 a Kerala Speaker will decide tomorrow, Nagaland Speaker may take six months
 12 or Manipur Speaker will take, that's it not the point. Conceptually the logically prior decision
 13 has to be Para 2, not a Governor's intervention collaterally in any which way. That's the
 14 structure of the Tenth Schedule and that scheme and structure must be endorsed and
 15 strengthened by Your Lordships *inter alia* by not accepting any collateral incursion
 16 horizontally, sideways by a Governor. While that 2 (1), is still pending.

17

18 **DR. SINGHVI:** The other aspect of this My Lords, which has to be given a lot of weight is
 19 apart from what we just talked about the trust vote, people tend to forget that in every almost
 20 every assembly there is very interesting rule. You cannot bring repetitive no-confidence
 21 motions also. Your Lordships knows six months. So I bring a no-confidence against you. I
 22 loose it. I can't come after next and say - I have no-confidence against you. So what is the next
 23 facet of this is the processes within the Parliament and assembly have to be allowed to work
 24 themselves out first before external intervention and one of the important processes is to
 25 notify a confidence or a lack of confidence. If Your Lordship is so careful about not even
 26 allowing repetitive bites at the apple to destabilize the Government, Your Lordship will allow
 27 an external incursion without even a single no-confidence motion. I'm not repeating well, as
 28 I'm giving in addition, larger context. Not even a attempt. As they say the proof of the pudding
 29 is in the eating. If you have the confidence, move the no-confidence. It is your lack of
 30 confidence which makes you not move the no confidence. Because you know how the no-
 31 confidence will be met. And may the best man win. If you have the guts and the courage do it.
 32 Whatever will happen, will happen. That's the process of democracy on the floor. Incidentally
 33 My Lord, I have done the math. That chart I mean is it not that Your Lordship will only ask
 34 them to show the material. We are having a preliminary objection that the Governor doesn't
 35 come into irrespective of the material, even if he has seen the material. I am now on concept.
 36 I'm on juristic principle. There is no role of the Governor till now till whatever I've said 2(1)
 37 etc. Process. No confidence, no role for the Governor. It's a second separate question on facts,

1 what the Governor saw or did not see. But he had no locus to see or not to see. So what's the
2 point of going into that down that path. The Governor had no locus at that stage to see or not
3 to see. It would really amount to a very strange thing. Governors are My Lords
4 now...obviously [UNCLEAR] debates of Mr. Ambedkar and now this is a vast difference. But
5 Governors are also creatures of political connection. The Governor would say, Well, I see a
6 group of people here. Why are you bothered about moving a no confidence. Come to me. We
7 will see something. There's no need for us. The assembly gets substituted. You will be
8 circumventing and short circuiting the entire process with no confidence on the floor. Now
9 just having given that answer, let me turn to my larger point on which I was really going to
10 address Your Lordships. I'll give Your Lordships just bullet facets. And then I will give Your
11 Lordship the material underlying. The juristic principles as to why Your Lordship should deal
12 with the matter here. Now I understand that it is easier not to deal with it here. It is also equally
13 possible not to deal with it here. There is a Speaker. My Lord have heard enough facts.
14 So Lordship we'll take those facts are given. I will touch upon the facts here and there but
15 mostly know. In the event that the facts in the context suit Your Lordships discretion on this
16 issue should Your Lordships in law juristically refer it or should you hear it. Is my respectful
17 submission. There are four or five legal facets, there I will give the case law. The first is
18 My Lords that there were two.

19

20 **DR. SINGHVI:** One negative and one positive order by this Hon'ble Supreme court that
21 should be remembered. In whichever way it is worded, the negative, I'll call it injunction on
22 27-06-2022, was that by the expedient of extending time, the Speaker was effectively de facto
23 could not pronounce on disqualification. It is nothing but an injunction in substance.

24

25 **CHIEF JUSTICE CHANDRACHUD:** Till 12th.

26

27 **DR. SINGHVI:** Till 12th, correct. Then events took over My Lords, the events took over but
28 My Lords is right, till 12th. Therefore, My lords, let us look at it because Your Lordship is
29 always a court of substance. We can camouflage in so many forms. But Your
30 Lordships ultimately see this. In substance it's a judicial injunctive interim
31 relief qua a Speaker's future action under the Tenth Schedule. That is the correct way of
32 putting it. It is a Judicial Interim intervention. It's a negative injunction. And the second was
33 a positive injunction, if I may call it or an order of 29th, allowing the trust vote to be held. So
34 not injuncting the second day, injuncting the first day. So there is a negative judicial
35 intervention, followed by an affirmative judicial intervention. My Lords I am not making any
36 value judgment. Your Lordships would have heard it next week, two weeks later. Who knows,
37 everything could have been reversed. I mean, I'm not saying that at all. I'm not saying right or

1 wrong. But I'm saying one thing is clear that the formation of a Government...I'm making a
2 neutral statement. I'm not as allocating... is clearly the direct and inevitable result of the
3 combination of these two orders. Your Lordships would have heard it next week and upheld
4 it, so Your Lordships will be right. If Your Lordships will reversed it, Your Lordships will be
5 wrong in the interim then. That's not the point, the point is, let us not see this case as the
6 abstract in an ivory tower unrealistic approach. Let us see it in reality. We have to smell the
7 constitutional coffee, if I may say so. The reality is this My Lords. That absent these two
8 negative and positive orders, Your Lordships can not have this consequence of a change or a
9 new Government. This will have correctly an effect on Your Lordship's needing to decide this
10 here.

11

12 Then My lords the second aspect, I am only giving the legal bullets, I cite the case law later.
13 The second legal aspect, the juristic principle is, the language of that order. Now, we all say
14 this casually, sometimes Your Lordships is also made to say it casually but these are terms of
15 art. Your Lordships have used them for decades and centuries in law. And these common law
16 terms of art have to be given effect to. Don't go to the page just note Your Lordship's order and
17 29th read like this one line, "subject to the final outcome of the instant writ petition as well as
18 the writ petitions refer to above".

19

20 That's Your Lordship's order. This is my second facet. subject to the final outcome of the
21 instant writ petition as well as the writ petitions referred to above which means the whole
22 batch of writ petitions. By then many petitions had come.

23

24 What is the meaning of this frequently used phrase? And normally the phrase doesn't come
25 up. Your Lordships has some very, forget this case for just one minute. Your Lordships
26 will notice some very interesting examples in building law and construction. My Lords the first
27 time Your Lordships ordered demolition. The first time, not now, of a 20 story structure was,
28 almost 15 years ago. Ironically, I think the second was also from Lucknow. Both are Lucknow
29 examples which came here. Your Lordships had passed only subject to, construction will go
30 on, ultimately Your Lordships held against. Your Lordships ordered demolition. Demolition
31 in that sense, with people living and concrete and mortar in the building is much more
32 irreversible than merely a political thicket or a scrambled political egg created from 22 to now.
33 Now I come to what subject to means. The object of this phrase. Subject to, are two and three
34 folds of this. One, if Your Lordships well as speaks in REM not just bilaterally between the
35 parties, Your Lordships speaks to the whole system, to the whole world. And second, Your
36 Lordships is giving a fair warning that everything which is happening after this is subject to,
37 but on your risk and cost. And thirdly your risk and cost means all consequences, equities,

1 vested right, all status quo you create each day after that, is at your risk and cost. We are
2 warning you. Don't blame us later. That's the meaning of this. And I'll cite a case presently on
3 that. Therefore the moment, either Lordship doesn't say it, the moment Your Lordship says
4 that, no one can come and plead equities, vested rights, event, scrambled egg, irreversibly, etc.,
5 etc. Because Your Lordships takes into account this in advance. If Your Lordships passes
6 subject to, today it is different from passing in 2022 June.

7 The fourth facet of law, which I will develop in a moment is...

8

9 **JUSTICE KOHLI:** Third.

10

11 **DR. SINGHVI:** Third. I'm sorry. This is now it is called pointillism. It's not a bad technique,
12 it makes it for specificity and certain amount of clarity. It may not always be, it is liable for
13 some intellectual property protection also My Lords.

14

15 **JUSTICE NARASIMHA:** [UNCLEAR] anything you know you are going.

16

17 **DR. SINGHVI:** Now My Lords the third one, is Para 110 of Kihoto, which Your Lordships
18 has seen right at the beginning of the Nabam Rebia argument, but Your Lordships may kindly
19 be reminded of that. Just turn to 110. The first compilation PDF Page
20 74, judgment compilation. Basically the very strong Constitution Bench injunction when the
21 jurisprudence of Tenth Schedule was starting,. Kihoto is virtually the first, I mean there are
22 some cases, certainly the first Constitution Bench. And the most important Tenth Schedule
23 judgment is that time is. They started this jurisprudence with this great warning and
24 mandate. 74, the Kihoto starts at 134. At 134. Para 110. In view of the limited scope of judicial
25 review...May I read it?

26

27 **CHIEF JUSTICE CHANDRACHUD:** Yes.

28

29 **DR. SINGHVI:** 'In view of the limited scope of judicial review that is available on account of
30 the finality Clause in Para 6.' So Your Lordship gives a basis for it - finality clause in Para
31 6. 'and also having regard to the constitutional intendment and the status of the repository of
32 the adjudicatory power Speaker Chairman, judicial Review cannot be available' - mark these
33 words 'cannot'. Constitute mentioned saying - 'cannot be available at a stage prior to the
34 making of a decision by the Speaker Chairman and a qui tam action would not be permissible
35 juristically threshold nor would interference be permissible at an interlocutory stage of the
36 proceedings. Exception will however, have to be made in respect of cases where
37 disqualification or suspension is imposed during the pendency of the proceedings and such

1 disqualification or suspension is likely to have grave immediate and irreversible repercussions
2 and consequences.'

3 I will just pause here. It has some very startling consequences. Your Lordship should read this,
4 it's a Constitution Bench. It makes only one exception when I, the Speaker by an interim order
5 disqualify you. That has happened hardly ever. My Lords this happened once or twice, but it
6 is not really happening in the Tenth Schedule. Maybe that will be a new technique adopted in
7 the future. I don't know, but today hardly any case.

8

9 **JUSTICE SHAH** : You are giving the idea.

10

11 **DR. SINGHVI**: Kihoto gave that idea. Kihoto has given the idea already, but that's why I am
12 saying from 92 till now it has not happened despite Kihoto's idea. I mean, may have happened
13 one or two cases, but hardly ever happens. Yes. Kuldeep Bishnoi Case et cetera. But in that
14 exception apart it is per se jurisdictionally bad. So therefore a perceived error of the Speaker's
15 conduct will not justify your interlocutory application. That's important. Let us assume that
16 the Speaker is wrong. Nobody is conceding that. Let us assume that the Speaker is grievously
17 wrong. That will not justify circumventing of a Constitution Bench by saying, normally, we will
18 not interfere, but here, by a matter of degree I opine that he is grievously wrong,
19 therefore we will interfere. Let us take an example. Your Lordship have applied that example
20 for decades. There is not something strange at all. Kihoto was occurring to be saying the
21 obvious in a much more important category. Your Lordship [UNCLEAR] for lesser category.
22 Your Lordship finds genuine problems in a election process. When an election process starts.
23 Your Lordships find genuine cases. My nomination rejected badly. I was stopped at the door
24 by a guard. I couldn't enter. Somebody obstructed me. I couldn't file in time. This man is
25 rejected on a comma. Full stop, wrong ink. They are very compelling argument. Your Lordship
26 says - come after the election in 99% cases, unless there's a special statute because you don't
27 interdict an autonomous self-contained scheme of a code there to let elections go on. Here a
28 much higher constitutional authority to allow unfettered proceeding further. There are many
29 more examples Your Lordship has. Therefore My Lords the position which by a combination
30 of the positive and the negative order inevitably led to the change of Government. Possibly was
31 also constitutionally wrong. Had Your Lordships had occasion to discuss it in the two weeks
32 following that, Your Lordships would have rectified it. Today My Lords it cannot be a bar
33 merely because of passage of time, because this is on the face of it contrary to Your Lordships'
34 Constitution Bench. And My Lords, error of the Speakers was irrelevant. In fact, he hardly
35 had opportunity to commit many errors, except perhaps as a two day notice that would have
36 been decided. I've cited My Lords, in two cases. I cited in the Nabam Rebia, where three day
37 notices were sufficient. Yediyurappa and...Sorry Yediyurappa was the other was Nayak and

1 Balasasaheb Patil. Sorry, Shrimant Patil. Three judges, three days. Sufficient. When the rule
 2 said 7 days. I hope My Lord remembers that was in Nabam Rebia I had cited those
 3 cases to Your Lordship. Rules said seven days, three days' notice. Two judge bench
 4 in Ravi Nayak said okay. Two judge Bench in Yediyurappa doubted it. Three judge bench
 5 subsequently affirmed the Nayak principle despite noting and citing Yediyurappa. Then My
 6 Lords, the fourth facet is that.

7

8 **DR. SINGHVI:** The more important and the more general principle, but equally important,
 9 that Your Lordships respects coequal organs. There is a whole other line of cases. When I come
 10 to that My lords, I will cite some of them, where Your Lordships is very careful because Your
 11 Lordships now doesn't think of an individual Speaker, but of the institution. Where Your
 12 Lordships doesn't enter into coequal branches unless there are compelling reasons. So respect
 13 between and mutual balance between judicial and legislative organs is the other legal principle
 14 which has to be kept in mind. And all this goes towards making the non-interference principle
 15 at that interlocutory stage.

16

17 Then My Lords, the other facet which Your Lordships in case law has used is, there may be a
 18 rare, rarest of rare exceptional situation where Your Lordships passes interim order. Not in
 19 this case. No case. I am saying generally. Now, I am not going to Tenth Schedule. To maintain
 20 a *status quo*. But Your lordship is very, very sensitive and cautious and careful to create a new
 21 status quo by an interim order. Maintaining a *status quo* and leading to the creation of a new
 22 status quo are two My Lords, different principles of law looked at and dealt with differently by
 23 case law. Here clearly a new status quo was created. The fifth principal My Lords is *Actus*
 24 *Curiae*. Obviously *actus curiae* arises in the event that Your Lordships find that I am partially
 25 right or fully right. Not otherwise. But if Your Lordship finds then My Lords, Your Lordships
 26 reverses the most intertwined situations because Your Lordship never allows the act of court
 27 to do any harm. *Actus Curiae Neminem Gravabit*. The 6th facet is My Lords...

28

29 **JUSTICE KOHLI:** Seven.

30

31 **DR. SINGHVI:**that if there is a right made out. I am sorry. My apologies.

32

33 **CHIEF JUSTICE CHANDRACHUD:** No, no, six, six. Next.

34

35 **DR. SINGHVI:** Actually I dictated this later on, so my numbering is also in a, b, c, d, e, f, g.
 36 Because the main submissions are below in 1, 2, 3 so I don't have those numbers. But My
 37 Lords, Your Lordships is right. I'll say next, Your Lordships will have your own numbering.

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JUSTICE NARASIMHA: Yes.

DR. SINGHVI: What Your Lordships, I am sorry. This is not the way I do using Latin, Your Lordships has warned us in recent judgments against using Latin, but these are basic principles. The other one My Lords is *Ubi Jus Ibi Remedium*. If Your Lordship finds that I have a right in this case, a constitutional right, made out by all this which we have been arguing then My Lords, at the end of that right to say that I am remedy-less. The remedy, which is effective and real, is only a reversal of the status quo ante, as would stand immediately prior to the consequence of those two orders in June. The consequence being there change of status quo on 4th July. 30th June is the swearing in. 30th June is the swearing in, I'm sorry. Not 4th July, 30th June. So it must be a status quo ante, in the event that Your Lordship applies the principle, obviously, *Ubi Jus Ibi Remidium* does not arrive unless there is *Ubi Jus* used. If I don't have the use, I don't have the remedium. But on the assumptions that I have then My Lords, Your Lordship will not be told it's a fait accompli.

CHIEF JUSTICE CHANDRACHUD: So what would then be the consequence, Dr. Singhvi. What does the court then...logically what should be the directions of the court?

DR. SINGHVI: Logically the direction is that that particular act of swearing in is wrong and Your Lordships will have the whole thing done again. Your Lordships could then give you a substantive answer straightaway.

CHIEF JUSTICE CHANDRACHUD: Yes, what will be a substantive direction there? Just to...

DR. SINGHVI: I'll give Your Lordships a substantive direction. Of course My Lords, I will develop the law, which has yet to come. In the event that is correct, and that is the majesty of the Law. That is what Your Lordship means when our Lordship demolishes 25 floor buildings and the message goes with Your Lordship is ultimately establishing the supremacy of the law. Supremacy of the law by no other means except by result. By actual *de facto* on the ground result. The rest remains My Lords, paper, and words. It would be My Lords a reversal of that oath. I'm being very My Lords formal and constitutionally proper. A direction.

JUSTICE SHAH: Oath is on third.

1 **DR. SINGHVI:** No that's.... I thought 3rd My Lords, it is 30th. I also thought 3rd, that's why
2 I said 3rd. Apparently, it's on 30th.

3

4 **JUSTICE SHAH:** Because on 29th I did....

5

6 **DR. SINGHVI:** That's right. That's correct.

7

8 **JUSTICE SHAH:** [UNCLEAR] 29th evening.

9

10 **DR. SINGHVI:** That's correct. Doesn't matter 3rd or 30th, but reversal of the day before that.
11 Second My Lords, for the purity of the process Your Lordships will.... there is still a Deputy
12 Speaker should decide what he would have decided, but for Your Lordships injunction.
13 Because Your Lordship is now counting the *status quo ante* on the but-for test. But for these
14 two orders, what would have happened. Obviously, only this would have happened. There
15 would have been no swearing in, and there would be a decision. My Lords, it sounds sometimes
16 difficult, but imagine.

17

18 **JUSTICE SHAH:** When you are on the interim injunction not granting interim injunction
19 on 29th and to see that the status quo ante is maintained, it is only with respect to the floor
20 test on 30th....

21

22 **DR. SINGHVI:** And he resigned. That's what Your Lordship is asking. No, no....

23

24 **JUSTICE SHAH:** No, no, one minute. You can read the... On 30th... On 29th he resigned.
25 The order dated 29th not granting injunction was very clear that the floor test on so and so to
26 be subject to the... floor test on 30th would be subject to the ultimate outcome. Correct? Now,
27 in that case, correct, where is the question of status quo ante?

28

29 **DR. SINGHVI:** Yes. I am very grateful.

30

31 **JUSTICE SHAH:** On the basis of the 29th injunction on not granting injunction.

32

33 **DR. SINGHVI:** I'm very grateful for your query. Your Lordship's put in a different way
34 earlier. I must answer it again. It's very opportune at this moment. My Lords, there are two
35 answers. One answer I gave three minutes ago. My Lords, Your Lordships, Court is a court
36 of substance. Always. Not a form. Let me develop it. I'm answering only My Lord's query.
37 Paramount is substance. The heart of the matter. It is true that on that day on 29th nobody

1 would know what would politically happen on 30th. And it is true that the technical word used
2 is trust vote. But My Lords what was allowed to go on was a test on the floor which is inevitable
3 if 39 vote against the one and only foregone conclusion instead of suffering the humiliation of
4 a vote is to give up in advance. I mean My Lords we are in a real world. There is no
5 arithmetic, no science, no physics, which can change the result on 30th. If these people who
6 comprise this so the floor the well, I argued the matter on 29th and in the earlier dates. One of
7 the main arguments was that the moment Your Lordship permits these people to vote... we
8 were seeking an injunction. Where how can there be a trust vote with a tainted... how can you
9 have a swimming pool with some part of it tainted with poison?

10

11 **JUSTICE SHAH:** No, therefore your submission seems to be...

12

13 **DR. SINGHVI:** That is not accepted.

14

15 **JUSTICE SHAH:** That not granting the injunction, correct, in fact had facilitated those 39.

16

17 **DR. SINGHVI:** No, it was an additional argument My Lord. I am very grateful. One
18 argument was that this trust vote is My Lords completely unreal and futile, because you have
19 not excluded the tainted fruit.

20

21 **CHIEF JUSTICE CHANDRACHUD:** On the other hand...

22

23 **DR. SINGHVI:** The other argument was My Lords, that if Your Lordship has
24 stayed that, stay this also. That is a more important argument.

25

26 **CHIEF JUSTICE CHANDRACHUD:** The flip side would have been...

27

28 **DR. SINGHVI:** Stay both.

29

30 **CHIEF JUSTICE CHANDRACHUD:** Dr. Singhvi, if you had faced the trust vote on the
31 30th, these are open votes.

32

33 **DR. SINGHVI:** Yes, yes.

34

35 **CHIEF JUSTICE CHANDRACHUD:** Right? Because you have to because that is the whole
36 principle of the Whip. If you had faced the trust vote and lost then it would have been clear as

1 to whether these 39 people made a difference, how they voted, and whether that made a
2 difference to the ultimate trust vote.

3

4 **DR. SINGHVI:** So we did not do it. It's a given fact. I can't change it.

5

6 **CHIEF JUSTICE CHANDRACHUD:** Right, right.

7

8 **DR. SINGHVI:** Right My Lords?

9

10 **CHIEF JUSTICE CHANDRACHUD:** Right.

11

12 **DR. SINGHVI:** I'm answering My Lords, let me answer this also. Let me....

13

14 **CHIEF JUSTICE CHANDRACHUD:** And the voting pattern would then determine as to
15 whether these 39 who are otherwise facing disqualification motions, whether they affected the
16 trust vote or otherwise.

17

18 **DR. SINGHVI:** I appreciate.

19

20 **CHIEF JUSTICE CHANDRACHUD:** If you had lost the trust vote only because of these 39
21 then you have absolutely a plausible point that look, these disqualification... if they get if they
22 get disqualified, then I win the trust vote. Isn't it?

23

24 **DR. SINGHVI:** Therefore My Lords, let me... so the first part is the conceptual.

25

26 **CHIEF JUSTICE CHANDRACHUD:** I mean the area, the area is not free from doubt. The
27 reason I am putting it to you is because there is a constitutional question in our mind. That's
28 the...

29

30 **DR. SINGHVI:** No, no, I understand. I hear Your Lordships loud and clear. Because certain
31 given facts My Lords, we can't argue about. The fact of the matter is nothing happened on
32 30th . The man did not My Lords go to the trust vote. No doubt about it. Now My Lords, the
33 first conceptual answer is we are now My Lords on, what I have been saying and Mr. Sibal has
34 been saying earlier, were legal errors, whether they were or not Your Lordship will decide on
35 22nd, 23rd orders. But the argument regarding 29th order was that either you should not have
36 stayed that. But if you stayed that stay both. You can't stay that and allow this vote to go on.

37

1 **CHIEF JUSTICE CHANDRACHUD:** Right.

2

3 **DR. SINGHVI:** That's the first point to be remembered.

4

5 **CHIEF JUSTICE CHANDRACHUD:** If you have stayed the disqualification then stay the
6 trust vote also.

7

8 **DR. SINGHVI:** It's very unfair and uneven and non-level. My Lords, if Your Lordships is
9 hearing the matter next week, I believe it is on a Monday next it will stayed, then My Lords
10 both could have been end afterwards. Your Lordships in the Karnataka late night matter we
11 did your Lordships said, not today, next morning. It will happen at so time. The reverse is also
12 true. Don't have it there have it after four days.

13

14 **CHIEF JUSTICE CHANDRACHUD:** So your argument to therefore restate your...

15

16 **DR. SINGHVI:** All this is [UNCLEAR]

17

18 **CHIEF JUSTICE CHANDRACHUD:** To restate your argument, what you are really
19 arguing is this that once you stayed effectively the Speaker from deciding the
20 disqualification petition, then you should have stayed the trust vote also. Because one was
21 linked to the other at the least.

22

23 **DR. SINGHVI:** See My Lords, the word linked inextricably intertwined, absolutely And that
24 is the answer, the first answer from the conceptual query raised by My Lord Justice Shah. It is
25 true. Technically My Lords one is one is a trust vote. One is a floor test. One is nobody comes.

26

27 **CHIEF JUSTICE CHANDRACHUD:** But you're right. I mean, because at the trust
28 vote those people were going to vote.

29

30 **DR. SINGHVI:** So that's the first. Now My Lords second, I will go further since Your
31 Lordship has put a different question.

32

33 **CHIEF JUSTICE CHANDRACHUD:** But still Dr. Singhvi, the problem still in your path. I
34 mean the problem still arises that...

35

36 **DR. SINGHVI:** It would have been shown on that....

37

1 **CHIEF JUSTICE CHANDRACHUD:** The consequence of these 39 would have really....

2

3 **DR. SINGHVI:** No, no, so let me...therefore My Lords, therefore, therefore. That will not
4 affect this question. Let me be conceptually clear. My Lord's query is right. But that may not
5 affect the question I'm arguing now. That will affect as and when Your Lordship takes up the
6 disqualification and says that we find that no disqualification occurs because we don't have
7 sufficient proof to disqualify. That's all that will mean My Lords. It will only mean that
8 I have insufficient evidence and I will tell Your Lordships why Your Lordships...

9

10 **CHIEF JUSTICE CHANDRACHUD:** Nabam says applying Nabam here the Speaker could
11 not have decided and I'm just... I'm not putting that against you. But I'm just trying to analyse.

12

13 **DR. SINGHVI:** As the principle today stands.

14

15 **CHIEF JUSTICE CHANDRACHUD:** As a principle today stands.

16

17 **DR. SINGHVI:** Correct. Correct My Lord.

18

19 **CHIEF JUSTICE CHANDRACHUD:** Nabam says that where emotion for the removal of
20 the Speaker is pending he cannot decide the issue of disqualification. You say refer Nabam to
21 a larger bench. But suppose you take this that well, these 39 that Nabam therefore should not
22 be construed to prevent the Speaker from deciding disqualification, and these 39 were
23 therefore liable to be excluded because the Speaker would have been justified in hearing the
24 disqualification notwithstanding the pendency of the motion to remove him that the Speaker
25 would have disqualified these 39 because, as Mr. Sibal says, it is a per se disqualification, it's
26 a clear split. What is the ultimate consequence that these 39 have to be taken out of reckoning
27 on their trust vote which takes place.

28

29 **DR. SINGHVI:** My Lord is back to that chart figure.

30

31 **CHIEF JUSTICE CHANDRACHUD:** With these 39 have to be taken out of...

32

33 **DR. SINGHVI:** [UNCLEAR] Governor point. Your Lordships is not coming to the Governor.
34 Governor is constitutionally barred. I'll deal with the chart in a minute. My Lords today
35 can Your Lordships proceed on hypothesis upon hypothesis. What would have happened had
36 this happened? But I will satisfy that conscience also the first part of My Lord.....

37

1 **CHIEF JUSTICE CHANDRACHUD:** Did you not really...

2

3 **DR. SINGHVI:** Governor could have acted on that.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Did you not? Did you not preclude a consideration of
6 this argument by your own [UNCLEAR]

7

8 **DR. SINGHVI:** I'm very grateful.

9

10 **CHIEF JUSTICE CHANDRACHUD:** Face the Legislative Assembly.

11

12 **DR. SINGHVI:** So there are two or three answers,

13

14 **CHIEF JUSTICE CHANDRACHUD:** Because I'll tell you why. And we will rise then, and
15 we can reflect on this at lunch. Because today what you are really asking for, and we're not
16 saying that you are wrong in asking for it because first principle, the court said, subject to the
17 outcome so therefore we have to now treat it. If we come to the conclusion that you are right,
18 then ignore all outcomes

19

20 **DR. SINGHVI:** And My Lords have done it twice. Tenth Schedule cases of big
21 moment, twice?

22

23 **CHIEF JUSTICE CHANDRACHUD:** Fair enough. But before a Constitutional Court does
24 that, namely, to set back a *status quo ante* constitutionally we must be in a position to say that,
25 Well, there is an arguable outcome which would matter.

26

27 **DR. SINGHVI:** Absolutely.

28

29 **CHIEF JUSTICE CHANDRACHUD:** Which would make a difference.

30

31 **DR. SINGHVI:** Absolutely.

32

33 **CHIEF JUSTICE CHANDRACHUD:** If whether there would be a difference or not is
34 really foreclosed, by virtue of the fact that you prevented that difference from emerging before
35 the...

36

37 **DR. SINGHVI:** It is not foreclosed. I understand My Lords...

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CHIEF JUSTICE CHANDRACHUD: We will come back at lunch.

<< LUNCH BREAK >>

DR. SINGHVI: Now My Lords, Your Lordship put that question just on rising. So let me answer ABCD...that particular question I'll continue with my sequence after that. But Your Lordship put that question that had you allowed possibly the 30th vote to have worked itself out or other things, then Your Lordship would have had so to say an actual test. So therefore, you should have allowed that to happen. Then we would have had some idea is what Your Lordship put in a nutshell. My Lords, there are five very interesting answers to it. directly to Your Lordships very important query and well as a related query by Justice Shah at that time.

A. This act was followed on 30th by the swearing in, along with BJP persons. Just note My Lords I'll make the point in a minute. Just note, 30th June was the swearing in along with My Lords, senior members of the BJP. 3rd of July, 3 days later the direct answer to My Lord's query. Not on 30th. I agree. Nothing happened on 30th in terms of the vote, but exactly the same trust vote if Your Lordship will call it or a vote of a virtually identical nature happened at the Speaker's election. Now clearly My Lords there is a Whip. There is a direction. You can't vote for the Speaker. You are my party. You cannot vote. Voting was done. These 39 odd voted the other way. No proof is required. Well, this is a 2(1)(b) without going into a single fact. I'll give Your Lordships a judgements.

Each of these acts already held in judgment to be a direct violation of Tenth Schedule without any facts required. My Lords if I vote for a Speaker and I am under a dispute of my party, you can't vote for him. You won't require anything else. You only need to see the voting, did I press that button or not, nothing else is required to be seen. That is on 3rd. So what My Lords is saying nothing could change between 30th and 3rd. Three days My Lords, no majority would change, no numbers would change.

Then the third answer is the 4th of July. Again, an identical trust vote took place for Mr. Shinde. Again you were told not to vote? Again you voted. Same people, same vote, same system, same everything. 4th of July a trust vote in the affirmative for Mr. Shinde. So My Lord has ample proof. My Lord rightly said how will we know, we'll have to go into something. This

1 is a very, very interesting case where 2(1)(b) requires nothing, 2(1)(a) also
2 requires nothing. Normally Your Lordship 2(1)(b) can be a per se completely, but something
3 may be required for 2(1)(a). Here is a case where both 2(1)(a) and 2(1)(b) are per se. Very rare
4 combination.

5

6 Fourth reason, so swearing in with the BJP. It's on cameras. Everybody sees you. 3rd July
7 Speaker's election, 4th July trust vote of Mr. Shinde. Now My Lords, the fourth reason. Even
8 the acts, if Your Lordship were to go back. Now My Lords, these are enough. I'm only giving
9 by addition. I don't need to go back. I am now giving your Lordship the seemingly contentious
10 issue, seemingly, which is not actually contentious. The seemingly contentious issue, which is
11 not contentious, is that on 21st and 22nd of June you did not attend a meeting despite a
12 direction in writing - please attend the meeting. The direction is on record. Your non-
13 attendance is on record admitted. My Lord will now look at it in demurrer. I'm trying to make
14 it as simple as possible. No investigation, no inquiry, no evidence. Just look at it on demurrer.
15 Second event is that you went with the BJP and others to meet the Governor on 30th June.
16 That's also admitted. It's on record, in the press, on photographs, on press reports... admitted,
17 no evidence required. As Your Lordship noted, this visit on 30th led to the swearing in which
18 I have already mentioned. Now which of these will not fall foul of 2(1)(a), forget, 2(1)(b) My
19 Lords. 2(1)(b) is more per se. My Lords what can be the defence? I'm asking myself
20 hypothetically. Your Lordships will also see the practical. I mean, what can be the defence that
21 these photographs are forged. All the media is forged. I was in Timbuktu, I never went to
22 the Governor's House. That can be a valid defence. Nobody has taken the defence you can't.
23 Now note two more interesting things My Lords. Rana, Para 48. Lordship knows Rana very
24 well. The Constitution Bench. Specifically says that the act and conduct of going to a Governor
25 would constitute disqualification. That is Constitution Bench. 2007 4 SCC 270. PDF Page 834
26 of the first compilation.

27

28 **JUSTICE SHAH:** It was read yesterday.

29

30 **DR. SINGHVI:** Read. Only My Lords, Para 48. So...

31

32 **JUSTICE SHAH:** Rajendra Singh Rana.

33

34 **DR. SINGHVI:** Yeah correct. Rajendra Singh Rana. So My Lords, it's very interesting. again.
35 The fact is admitted and the law is covered. What is it that Your Lordship has to do by way of
36 an exercise is my question to myself. With great respect nothing My Lords. Fact is undeniable
37 admitted and the Law is covered and covered too by a Constitution Bench. We are not saying.

1 I can even My Lords bow down with great respect in a very contentious issue, Your Lordship
2 says, why should we not send it back. There is no issue here. Now note the second judgment.
3 Shrimant Patil is a citation. Shrimant Patil is Para 174 and 176. The citation
4 is (2020) Volume 2 SCC 595. Three learned judges.

5

6 **CHIEF JUSTICE CHANDRACHUD: 2020?**

7

8 **DR. SINGHVI:** 2020 2SCC 595. The PDF Page in the First Law compilation is 1249. It's
9 starting page. Starting page. I'm sorry. The relevant para is 174 and 176 at PDF page 130-7 and
10 130-8. This holds the second point. Not attending meetings is culpable This is inception, 21st
11 June and 22nd June, you didn't attend meetings. This judgment holds that not attending
12 meetings is sufficient to disqualify. So My Lords in this five sets of facts, facts are admitted,
13 law is covered. Now you can always say that we want to do this, we want to that. But My Lords,
14 if there is a purity and a social and a political evil to be controlled by Tenth Schedule, then this
15 requires no adjudication of any kind except the formality of a notice and looking into it. And
16 what is it, even till today what can be the defence of this? I am prepared to accept a new defence
17 today. There cannot be a defence to this. This My Lords is the light of, but I was My Lords, I
18 had finished on subject to, putting to you notice and risk, on your own risk and cost, telling
19 you in advance, warning you. Now My Lords, kindly consider why is this principle? It is for
20 what, the phrase is used time and again, the Majesty of the Law. It is not an empty rhetoric.
21 Imagine how much strengthened the rule of law is when Your Lordships in a rightful case,
22 does not one but two or three things. One, Your Lordships accepts fallibility. There is a line of
23 cases of *Actus Curiae* that we were wrong. Justice Bhagwati, in a case My lords, thank Mr.
24 Sibal to point it out, said to accept fallibility is no act of heroism. So My Lords, then the
25 consequence of accepting fallibility must follow. Otherwise, accepting of fallibility is empty. So
26 Your Lordships is now coalescing these principles *Actus Curiae*, *Ubi Jus*, etc. Imagine the
27 strengthening of the rule of law when Your Lordships says demolished this building, even
28 though we believe it's going to cause a lot of misery. My Lords the last one Your Lordships did
29 took almost six months under Your Lordship's supervision because three dates were extended.
30 I believe My Lord Chief Justice was on the Bench. But My Lords it happened because Your
31 Lordships had a finding had a view of the merits and Your Lordships said restitution.
32 Restoration of status quo ante is vital for the necessity for the majesty of law. Now, My
33 Lords just see two striking examples in the Tenth Schedule when Your Lordships did this. We
34 have said, talked about but we haven't shown that actual para. It will tell Your
35 Lordships against what odds. Your Lordships still said no. We must uphold the law. Nabam
36 Rebia first and Rajendra Singh Rana second. And My Lords, this is not at all the upholding of
37 Nabam Rebia. We are challenging Nabam Rebia on the sole point of disabling. The fact that

1 I ran Nabam Rebia for this doesn't at all... I'm entitled My Lords not to be hit by estoppel on
2 that at all.

3

4 Now kindly turn to My Lords, Nabam Rebia. Just go to the paras. 214.1, 214.3 and 214.4. My
5 Lords, this was the case as Your Lordship remembers, Governor, Speaker preponing
6 date. Your Lordship knows My Lords. We have argued for three days. Your Lordship knows
7 the fact. But see what the court did at the end. It could have found a number of reasons to
8 avoid doing this or not giving the answer of postponing it. Deciding not to decide is also a form
9 of adjudication. But because when Your Lordship is convinced of the merits, Your Lordship
10 decides to decide how so ever severe the consequence is. My Lords, kindly see this now. 214.1,
11 is at My Lords, iPad... Sorry PDF page 1158. 1158, first Volume. The compilation
12 first Volume. My Lord has seen, but this part My Lord has not seen. My Lords, this alone
13 vindicates the rule of law. This alone indicates the strength of the court system not only
14 the apex court. And this sends a clear message that My Lords, howsoever high or whatever the
15 consequences, the consequence must flow if Your Lordship is convinced.

16

17 Now My Lords, there could be no more scrambled egg in the context of
18 Tenth Schedule the Nabam Rebia. Your Lordships unscrambled it. Please see 214.1. 'The
19 Order of the Governor of 9th December 2015 preponing the 6th Session of
20 the Arunachal Legislative Assembly from 14th January to 16th December of previous year
21 2015 is violative of Article 163, read with 174 and as such is liable to be quashed. The same is
22 accordingly hereby quashed.'

23

24 I'll skip the next one. Come to the next after next. 214.3. Now this is even more important. My
25 Lords remember time had elapsed in between. Nabam Rebia was decided on... this is
26 important. The date is important 13th July 2016 is the decision. 13th July 2016. These events
27 related to almost eight months earlier. New Government had come in. It was very easy to say
28 so many things and not do this. But the court My Lords, if I may say , did the right thing in
29 terms of consequence.

30

31 'All steps and decisions taken by the Arunachal Pradesh Legislative Assembly, pursuant to the
32 Governor's Order and Message of 9-12-15 are unsustainable in view of the decisions at 214.1
33 and 214.2, the same are accordingly set aside.' It was argued, as is argued frequently, that even
34 if Your Lordship holds it illegal, the intervening decisions will not be set aside. Your Lordships
35 hears those arguments every day from this side of the bar or whatever. But, My Lords, if this
36 is a great, if I may say, it is the constitutional walking of the talk in case My Lords,
37 once Your Lordship is convinced.

1 Next, 'In view of the decision at Paras 0.1 and 0.3 above the *status quo ante*, as it prevailed on
2 15-12-15, is ordered to be restored.' That's My Lords eight months earlier. That's why the date
3 of 13th July versus the date of December 15. There's a hiatus of 8 months. A lot has happened
4 in eight months. Most of all a Government is changed. Otherwise all these principles etc. will
5 remain paper principles My Lords.

6

7 Now in Rajendra Singh Rana, the matter was more directly addressed as a juristic principle
8 about you decide or send it back to the Speaker. So that's my next case. Rana
9 is (2007) 4 SCC 270, first bunch of compilation of Case Law PDF Page 834. And I will
10 read with Your Lordship's permission, Paras 12, 44, 45 and 52, 53. It has nothing do with the
11 law. It is to do with once Your Lordship is convinced what is the consequence? It's *Ubi Jus Ibi*
12 *Remidium*, it is *Actus Curiae*. It is consequence. It is subject to. It is warning. All that is the
13 point I'm reading on.

14

15 **JUSTICE KOHLI:** What page did you say was that please?

16

17 **DR. SINGHVI:** The page starts, the judgment starts Para 12 is at PDF Page
18 849. 834, the case starts. Here the argument was made squarely that kindly decide and the
19 rival argument was - don't decide, let the Speaker decide.

20 'The Respondents in the writ petition the MLAs constituting 37 BSP members who left the
21 party are the appellants with all the appeals except the appeal arising out of the special leave
22 petition filed by the writ petitioner Maurya. Whereas the respondents in the writ petition
23 challenging the decision of the majority of the bench remitting the matter to the Speaker.
24 The writ petitioner in his appeal challenges the order of remand to the Speaker.' -
25 sorry - 'the writ petitioner...remand made by the majority on a plea that on the pleadings in
26 the material available the High Court ought to have straight away allowed the petition filed by
27 the writ petitioner of a disqualification of 13 MLAs.'

28

29 So squarely the issue is joined. Now come to 43. Sorry 44, I think. 44, at Page 865. Now My
30 Lords if I may say so the contentious issues in this case would be far, far more than the
31 contentious issues in my case. Far, far more. Normally, this court might not proceed to take a
32 decision for the first time where the authority concerned has not taken a decision in the eye of
33 the law, and this court would normally remit the matter to the authority for taking a proper
34 decision in accordance with law. And the decision of this court itself takes on the relevant
35 aspects. What is urged on behalf of the Bahujan Samaj Party is that these 37 MLAs except a
36 few have all been made ministers. And if they are guilty of defection with reference to the date
37 of defection, they have been holding office without authority in defiance of democratic

1 principles. And in such a situation, this court must take a decision on the question of
2 disqualification immediately. My Lords, my case has one Chief Minister, forget ministers. One
3 amongst them is a Chief Minister, many are ministers. It is also submitted that the term of the
4 assembly is coming to an end and expeditionary decisions issued by this court warranted for
5 protection of the constitutional scheme and constitutional values. We find considerable force
6 in this submission. This is what the Constitutional Bench is saying. Here the alleged act of
7 disqualification of 13 MLAs took place on 27th of August and this is only 13. We are 39 in this
8 case, 42 actually. My Lords there are three independents also. When they met the Governor
9 and requested him to call the leader of the opposition to form the Government. The petition
10 seeking disqualification of these 13 members based on that action of theirs had been allowed
11 to drag on till now. It is not necessary for us to consider or comment on who was responsible
12 for such delay. But the fact remains that the term of the legislative assembly that was
13 constituted after the election in February 2002, is coming to an end on the expiry of five years.
14 A remand of the proceeding of to the Speaker or are affirming the order of remand passed by
15 the High Court would mean that the proceeding itself may become infructuous. My Lords, it
16 may not become infructuous, but it could be with great delay. Great delay and fruits would be
17 enjoyed for even one more second is bad enough. Here fruits would have been enjoyed for
18 months and years. We may notice that the question of interpretation of Tenth Schedule, the
19 question of disqualification raised earlier with regards to the members of the prior assembly of
20 this very state which led to difference of opinion between two learned judges of this court and
21 which could refer to a Constitution Bench, was disposed off on the ground that it had become
22 infructuous in view of the expiry of the term, the Assembly. They My Lords, cite that judgment
23 earlier in the footnote. Para three of the Tenth Schedule has also been deleted by Parliament.
24 Though for the purpose of this case, the scope of that paragraph is involved. So My Lords, this
25 case involved para 3. In my case, Your Lordship doesn't even have Para 3. What adjudication
26 is required? Rana involved the pre-existing non-deleted 3. With great respect My Lord
27 considering that if the 13 members are found to be disqualified their continuous in the
28 assembly even for a day would be illegal and unconstitutional and their holding of the
29 office as Ministers would also be illegal at least after the expiry of six months from the date of
30 their taking charge of the office of Ministers. We think that the court is bound to protect the
31 Constitution and its values and the principles of democracy, which is a basic feature of the
32 Constitution. This court has to take a decision. Now this is important. This court has to take
33 a decision one way or the other on the question of disqualification of the 13 MLAs based on
34 that action in August 2003. Lastly, my lords, para 52 and 53 where they conclude finally on
35 the result, on the factual result and the result of the case. As we have indicated para 52 above
36 para 52 is My Lords 869. As we've indicated, nothing is produced to show that there was a split
37 in the original political party on 26th August. As belatedly put forward or put forward in alter

1 point of time. But still the plea of split was on 26(8). Now that question Your Lordship does
2 not have headache about. No problem. On the materials the only possible inference in the
3 circumstance of the case is that it has not been proved, even prima facie by the MLAs, sought
4 to be disqualified, that there was any split in the original political party of August 2003 as
5 claimed by them. The necessary consequence would be that the 24 members who later joined
6 the 13 could also not establish a split in the original political party as having taken place on 26
7 August. In fact, even a split involving 37 MLAs is not established. There it was in two
8 batches, two batches there. That was also the inference rightly drawn by the Learned Chief
9 Justice. In view of our conclusion. Not necessary. Sorry, in view of our conclusion, it is
10 necessary not only to show the 37 MLAs that separated, but it is also necessary to show that
11 there was a split the original political party. The above finding necessarily leads to the
12 conclusion that the 13 MLAs sought to be disqualified had not established a defence or answer
13 to the charge of deletion, a defection under Para 2, on the basis of Para 3. The
14 13 MLAs therefore stand disqualified with effect from August 2003.'
15 Supreme Court finding directly My Lords at placitum E.

16

17 'The very giving of a letter to the Governor requesting him to call the leader of the opposition
18 to form a Government by them itself would amount to their voluntarily giving up the
19 membership of their party.' Here they went ahead, they gave.... they event with the BJP to the
20 Governor in my case today.

21

22 'If so, the conclusion is irresistible that the 13 members of the BSP who met the Governor at
23 August 03, who are Respondent so and so in the writ petition filed by Maurya,
24 stand disqualified in terms of 191 read with Para 2, with the effect from 27 August. If so, the
25 appeal filed by the writ petitioner has to be allowed even while dismissing the appeals filed by
26 the 37 MLAs by modifying the issue of the majority of the division bench. Hence
27 the writ petition filed will stand aloud with a declaration that the 13 members who met the
28 Governor on so and so being Respondents so and so in the writ petition stand disqualified
29 from the UP Assembly with effect from August 2003. The appeals are dismissed.'

30

31 My Lords this is really if I may say so with great respect the right approach for the very
32 existence and raison d'etre of Tenth Schedule and for the Majesty of the Law. And My
33 Lords no other court can have more powers in this regard than Your Lordship's court.

34 Now My Lords let me turn to the some of the quotations. Now it will be more focused in terms
35 of just quoting from some judgments. Kindly, take a note which I will go to
36 note now. Kindly take a note I have filed. A-3.

37

1 **CHIEF JUSTICE CHANDRACHUD:** Already circulated?

2

3 **DR. SINGHVI:** A-3. It has been sent in the night. Serial Number A-3. A-3. It says - brief
4 written submissions. My name is there.

5

6 **JUSTICE KOHLI:** Yes, it is there.

7

8 **DR. SINGHVI:** My Lords. I have put date for today because there are earlier
9 submissions. This date is today's date although filed last night I believe.

10

11 **CHIEF JUSTICE CHANDRACHUD:** You have mailed today?

12

13 **DR. SINGHVI:** Yes. Except My Lords, I am going to add one or two cases as I have got only
14 two cases. That Your Lordships will write in the note itself because problem is it is ever
15 incoming wisdom every minute. May I read My Lords?

16

17 **JUSTICE KOHLI:** Just a moment.

18

19 **DR. SINGHVI:** I apologize for the numbering because they were actually a separate note
20 added on the top. So therefore there is some numbering issue, but otherwise Your
21 Lordship will be able to follow it.

22

23 'Short factual Conspectus the formation of.' I will be very quick in the first part, second part I'll
24 deal with it more slowly. 'The formation of a new Government on 30th June was a direct,
25 inevitable result of two orders of the court. A negative injunction of 27th June, not
26 allowing the Deputy Speaker, a positive order of 29th June, allowing the trust vote to be held.
27 Order dated 29/6 made the following' - I have read that quotation - 'subject to. Subject to
28 necessarily and only means that (a) the Court issuing is acting in REM warning that all those
29 who act after the subject to order do so at their own risk in cost. Any
30 consequence, equities, rights or new status quo.' - This is important one -
31 'consequence, equities, rights or status quo created after the subject to order will be liable to
32 be reversed in status quo ante restored since the Court is fairly put everybody on notice in
33 advance.'

34

35 My Lord, I'll just read this case. This is important along with a couple of other cases. But first,
36 let me read on this section first. I'll read this Indore case. It's important. It's a
37 Constitution Bench. 'The consequence of change of Government happened fundamentally

1 because the Speaker was disabled, fettered in the interim from discharging its constitutional
2 duties. The aforesaid disabling with the order of 27th June was clearly contrary to
3 a Five Judge Bench in Kihoto.' I have read that Para. Lordship will remember that, 110. 'It
4 disturbed the coequal and mutual balance between judicial legislative organs, the latter
5 represented by the Honourable Deputy Speaker. Contrary to detailed Supreme Court
6 judgments,' - I have quoted them below they are coming. These are only the bullets first
7 giving Your Lordships a proposition. The orders of 27-06, and 29-06, cumulatively and
8 conjointly were not orders where we could...

9

10 **CHIEF JUSTICE CHANDRACHUD:** Dr. Singhvi, if you had warned us, foreword that you
11 are going to put it down in writing, I wouldn't have been trying my typing skills. I've typed
12 exactly all this that you have mentioned.

13

14 **DR. SINGHVI:** But My Lords some of this is not going to be there in terms of answer to My
15 Lord's query. The answers to Your Lordship's query would have been oral My Lords. Anyway,
16 I'll skip, now there are two principles here which I have not mentioned orally. I'll skip till J.
17 Then come to K, My Lords then I skip again L and M. K is important, I'm sorry J and K both
18 are important. J also. If in fact, in the illegality has occurred and especially after fair warning
19 through subject to orders, the Court's powers and arms are always long enough to unravel any
20 situation and fait accompli cannot be a defence. That's the point. Then K is extremely
21 important, for the purposive of interpretation, Your Lordships have interpreted Tenth
22 Schedule purposively to plug all collateral and subsidiary loopholes also. Directly it is not said,
23 but we find 20 ways of circumventing Tenth Schedule Your Lordships says I will interpret
24 purposively to prevent that circumvention. That judgement will come out also My Lords. The
25 principle of purposive in light of repeated and comprehensive exhortations by diverse
26 Constitution Benches. And the legislative *travaux preparatoires* underlying the object behind
27 the Tenth Schedule and the mischief it sought to remedy necessitates a purposive
28 interpretation in a holistic perspective, to fulfil the true objectives per the Tenth Schedule, and
29 not allow it to be rendered a dead letter or an exercise in futility. Then my lord L is Nabam, M
30 is Rana right My Lords? Now just you can skip Para one in Chauhan's case the first line of the
31 bold face Your Lordship may note. It is struck law that neither the Governor nor for that
32 matter, this court has the power to impinge upon the authority of the speaker to take a
33 decision. This is My Lords the coequal aspect apart from the Kihoto no injunction aspect. So
34 this judgment Your Lordship will note. Justice Chandrachud and Justice Gupta's judgement.
35 Thus the principle of respecting the field of functioning of each constitutional functionary
36 requires a court not to interdict either the disqualification proceeding before the Speaker

1 or the proceedings in the House. However, in the present case that I'll skip My Lords.
2 Then Kihoto My Lords, 125 and 126. This is not that 110. 125 My Lords, just turn to for a
3 minute My Lords, it's in PDF 140 of the first compilation.

4

5 **CHIEF JUSTICE CHANDRACHUD:** That's okay, we can read it from here.

6

7 **DR. SINGHVI:** Yes, yes.

8

9 **JUSTICE NARASIMHA:** You can read it out and then go to 120.

10

11 **DR. SINGHVI:** Yes. This is 126. Your Lordships just add in hand. 125 is important also, I
12 forgot to put that. Just note that. The purpose of interlocutory orders to preserve in status quo
13 the rights of the party so the proceedings do not become infructuous by any unilateral over
14 tax by one side or the other. Then My Lords, Sameer Bhojwani a judgment to which My Lords
15 the Honourable Chief Justice was a party though authored by Justice Khandwilkar, 2018.
16 Distinction between molding of relief and granting a mandatory relief held that interim relief
17 can be granted only to restore the status quo and not to establish a new set of things different
18 from the state which existed at the date when the suit was instituted. You have created a new
19 status quo. That is very different from maintaining a status quo.

20

21 **CHIEF JUSTICE CHANDRACHUD:** Yes.

22

23 **DR. SINGHVI:** Then My Lords Bommai, in para eight, Para 115. It has, however, to be made
24 clear. This is one of three judges out of the seven and is part of the concurring. It is however to
25 be made clear that the interlocutory relief that will be granted on such challenge to prevent
26 the frustration of the constitutional remedy. It is not to prevent the constitutional authority
27 from exercising its power that's discharging its function. This is even more important
28 than Kihoto. This is the origin of Kihoto in the Tenth Schedule. Bommai was
29 not Tenth Schedule, but the principle is important and this is one of seven judges... nine
30 judges. Nine judges and this is the principle which Kihoto applied to the Tenth Schedule. Our
31 conclusion that Justice Sawant is part of the majority My Lords, core majority. Our
32 conclusions, therefore, will be summarized as under. If the proclamation issued is held invalid,
33 then, notwithstanding the fact that it is approved by both Houses of Parliament,
34 kindly note this My Lords. It will be open to the Court to restore the status quo ante to the
35 issuance of the proclamation, and hence to restore the Assembly and the Ministry. In
36 appropriate cases, the Court will have power by an interim injunction to restrain the holding
37 of fresh elections to the Assembly pending the final disposal of the challenge to the validity of

1 the proclamation to avoid fait accompli and the remedy of judicial review being rendered
2 fruitless. My Lords Mr. Hegde never saw to live to see this benefit because Governments
3 changed twice over by the time Bommai was delivered. But subsequent to that Your Lordships
4 will notice that the exercise of 356 is decreased a lot because Your Lordship have been very
5 prompt from the Bihars, the Rameshwarnaths, the Uttarakhands, the Jharkhands to the
6 Karnatakas. It's the promptitude of the Court which has reduced the use and abuse of such
7 articles because My Lords retribution, this way or that way in terms of judiciary deciding it is
8 quick. In the old days it used to take time.

9

10 Now My Lords is Kavita Trehan is the Actus Curiae principle. I will not go to it. Just read the
11 quotation - 'in regard to the law of restoration of loss or damage caused pursuant to judicial
12 orders,' - they quote the privy council - 'one of the first and highest duties of the court is to
13 take care that the Act of Court does no injury to any of the suitors. And when the expression
14 the act of Court is used, it does not mean merely the act of the primary court or intermediate
15 court of appeal but the act of the Court as a whole, from the lowest which entertains to the
16 highest which finally disposes of the case.'

17

18 Then they cite My Lords, this Kedarnath under 144 My Lords. This is the but-for test. 'Restore
19 the parties to the position in which they would have occupied but for such decree or part
20 thereof.' -The but-for test it is called My Lords.- 'nor indeed, that this duty of jurisdiction
21 arisen merely under the said section. It is inherent in the general jurisdiction of the court to
22 act rightly and fairly according to circumstances.' Then My Lords, they consider a submission.
23 I'll skip that. Come to the end Para 23, it's a long para.

24

25 The gold face is sufficient - 'that such a thing was achieved by an ex parte order tends to shake
26 the litigant's space in the jurisdiction process.' That will not apply. Nabam Rebia I will skip.

27

28 Now My Lords here. Before Your lordship comes to the object that is Para 13 onwards there
29 are two important judgments Your Lordship will note. One is Bhullar. This is not there. My
30 Lordship may note it down to the side. These three judgements. This is not there My Lords.
31 No, no. But my proposition is not there. It's not cited here. My Lords first is Bhullar.
32 Devender Bhullar. That death convict case (2011) 14 SCC 770. It's the PDF 926 and the
33 relevant paras are 107 and 108. Please turn to that. My Lords, if there is an initial wrong,
34 the court says...

35

36 **JUSTICE NARASIMHA:** Para?

37

1 **DR. SINGHVI:** I'm sorry 107, and 108. It's a very important principle. Kindly turn
2 to PDF page 967 in the first compilation. Right. First compilation 966.

3

4 **JUSTICE NARASIMHA:** What's the proposition?

5

6 **DR. SINGHVI:** If the initial wrong is found, then all consequential things must be
7 adjusted so as to rectify that initial wrong. And second sentence is very important. This
8 principle applies equally to judicial orders. This is very important. Please turn to 107, 108
9 para number. 107 is at page 966. It is a settled legal proposition that if the initial action is not
10 in consonance with law all I am sorry My Lords, does My Lord, have it? My Lord doesn't
11 have it. It's on substantial and consequential action. My Lords the page is 966, bottom. 'It is a
12 settled proposition of law that a variation action is not in consonance with law. All
13 subsequent and consequential proceedings would fall through for the reason that illegality
14 strikes at the root of the order. In such a situation, the legal maxims' - it is given there -
15 'meaning, thereby that the foundation has been removed. Structure, work falls comes into play
16 and applies on all scores.' Now next para is more important My Lords. Next para. 'In
17 Badrinath and Kerala, this court observed that once the basis of a proceeding is gone all
18 consequential acts, actions, orders would fall to the ground automatically, and this principle
19 will apply to judicial, quasi-judicial, and administrative proceedings equally.' This is
20 the meaning of Majesty of the Law My Lords. I will just take little bit of time on Tuesday. I
21 won't take very long.

22

23 **CHIEF JUSTICE CHANDRACHUD:** We continue on Tuesday.

24

25 **DR. SINGHVI:** Very deeply obliged.

26

27

28

29

30

END OF DAY'S PROCEEDINGS