

**CHIEF JUSTICE'S COURT**

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

Subhash Desai

v.

Principal Secretary, Governor of Maharashtra and Ors.

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

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TRANSCRIPT OF HEARING

28-Feb-2023  
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Transcript to be read with video recording of hearing.

11:00 AM IST

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**DR. SINGHVI:** I'll probably overkeep my word. Only 20-25 minutes I'll have. I'll be very pointed . It's only residual part.

**JUSTICE NARASIMHA:** So, we take your written submissions that you have, that you were reading earlier?

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

**JUSTICE NARASIMHA:** There's only short portion which was left.

**DR. SINGHVI:** Yes. I'll be reading that part and just oralising the one set of points just to, no repetition. It won't require.

**CHIEF JUSTICE CHANDRACHUD:** What was the number of that?

**DR. SINGHVI:** Well. Your Lordship it would start...

**JUSTICE SHAH:** A3.

**CHIEF JUSTICE CHANDRACHUD:** Your written submissions are on....

**DR. SINGHVI:** Your Lordship, written submission.. last time you were using A3.

**CHIEF JUSTICE CHANDRACHUD:** A3 right?

**DR. SINGHVI:** So as I'll... just about 7, 8 points, they are included in my written submission but I just want to [UNCLEAR] point. Now My Lords, one aspect which Your Lordship has heard in a somewhat diffused manner, I want to itemize it. The question is, would My Lords not want to prevent such consequences by dealing with the law and laying down the law here, that's the proposition. What are those five deleterious, four deleterious consequences for Constitutional Law, for constitutional morality, for the whole system, the entire edifice, which is an interlocking system of My Lords defections, Speaker, Legislative wing, Governors. They are ultimately interlinked into one scheme. I... My submission is these 5-6, 4-5 deleterious consequences should impel Your Lordships to decide it. What are those My Lords?

1 Number one - can you disable the Speaker so easily, thereby sounding the death knell of Tenth  
2 Schedule? My Lord has heard it fully. Nabam Rebia is the main standing obstacle. And we have  
3 argued on that. That's consequence number one.

4 Second - My Lords, is the positive and the negative injunction. I am just tying up the ends  
5 together into a list....which are against Kihoto. It is not only practical effects of this positive  
6 and negative injunctions, but it is juristically against Kihoto.

7 So the second part is My Lords, the positive and negative injunction is not only factually wrong  
8 and has caused the change of Government, that has caused, I made that argument earlier, but  
9 it is juristically wrong. That's the second consequence, Your Lordships should rectify. Only  
10 Supreme Court do the rectification. Nobody else can. It's really futile to have a whole ladder  
11 again starting some High Court, some My Lords, the ladder will go all the way to the Supreme  
12 Court. It's really futile. My Lords, nobody can touch these are all Kihoto, these are Nabam  
13 Rebias. Therefore My Lords....

14 Third, is the consequence of the Governor's direction for a floor test. There is no way in which  
15 the Governor can interfere like this, especially in a case where disqualification is sub-judice or  
16 pending.

17

18 **CHIEF JUSTICE CHANDRACHUD:** The consequence of the Governor's direction for a  
19 floor test.

20

21 **DR. SINGHVI:** Floor test, in a pending disqualification matter sub-judice at two levels. Sub-  
22 judice at Your lordship's level, sub-judice at the Speaker's level. It's a double Sub-judice. These  
23 My Lords after all deciding in a [UNCLEAR] quasi-judicial capacity there as a Tribunal. This  
24 third point....this third aspect can be rephrased juristically in a different way. My lords, Your  
25 Lordships is dealing with a legislative issue primarily. Executive has no role to come into it.  
26 Laterally, sideways, the executive can't enter it. The Governor is, though, a constitutional post  
27 holder, an executive appointee. So this third aspect is really the executive's direct lateral entry  
28 into a no-go area. Totally impermissible. That's a consequence Your Lordship alone can rectify,  
29 should rectify. That applies to all these consequences, somebody else will decide, this will make  
30 a partial decision. Supreme Court for the polity, for the constitutional morality, for the whole  
31 system must decide .

32

33 **JUSTICE NARASIMHA:** This is part of your third point only?

34

35 **DR. SINGHVI:** This is under consequences (C). One, first point is consequences, this is the  
36 third one. The fourth one is My Lord, it is distinct, but it relates to the Governor. The Governor  
37 recognizes the split. My Lords, Your Lordships can't do it, Governor will do it. The Supreme

1 Court with 142, today the judgment is passed on the 141, 142 saying we recognize the split.  
2 Your Lordship would be actively contributing to that, the Governor can do it. Directly  
3 recognizes in writing a split, with great respect. Here there is an in-built double whammy. The  
4 Governor is in error as a constitutional holder and the executive is coming into and  
5 recognizing, the central government executive is coming in and recognizing the split. Now that  
6 letter Your Lordships may not have seen for some time now, maybe in the beginning it was  
7 shown. Just turn to that letter My Lords for a minute, para seven of the PDF, compilation 2,  
8 326. Correct? PDF 326, compilation 2, dated 28th June 2022. This is very important My Lords.  
9 A constitutional amendment promoting the constituent parliamentary intent to do away with  
10 split is collaterally recognized by an executive appointee Governor who has no locus, which  
11 the Supreme Court can't also do.

12

13 **JUSTICE KOHLI:** Compilation of, there are...

14

15 **DR. SINGHVI:** CC-2. CC-2 it is called. CC-2 of the document, it is not the case law. 326,  
16 convenience 2. 326, is the PDF page. It's in the Governor's name on the 28th of June. In that  
17 volume it is serial number 5. in that volume. The Volume is called serial number five. My  
18 apologies.

19

20 **JUSTICE SHAH:** P 4. Annexure P4. Yes sir we got it.

21

22 **DR. SINGHVI:** My Lord doesn't have it. Perhaps....My Ladyship has got it?

23

24 **JUSTICE KOHLI:** Yes please.

25

26 **DR. SINGHVI:** Dear Shri Uddhav ji, the Governor writes to the Chief Minister. writes to the  
27 Governor. I'm going to emphasize para 7, but I'll read two and three also leading up to seven.  
28 It's para 7 I want to read but I just read two and three for backdrop.

29 'I am received of a resolution dated 21-6, signed by 34 members of Shiv Sena legislature party  
30 stating that there is enormous discontent within the Shiv Sena cadre and the electorate on  
31 account of alliance with NCP and INC. The resolution clearly indicates that the majority  
32 members of Shiv Sena legislature party want to exit the alliance with NCP and INC, and to that  
33 end they have reaffirmed the appointment of the leader of the Shiv Sena legislative party. I am  
34 also in receipt of a letter of 21 June, addressed by Mr. Shinde to the Deputy Speaker stating  
35 that the purported appointment of one Ajay Chaudhary is illegal having it made by 16 MLAs  
36 without notice, without quorum. Therefore the same is inappropriate.'

1 So this the Governor is saying. My Lord, the Governor can hardly at all interfere with any of  
2 these subjects, while disqualification is pending at two levels. But that apart leave 2, and 3.  
3 Now come to 7. How can the Governor say this? Kindly read 7. Is it possible? Forget the right  
4 or wrong. Why should the Governor say it, how can he say it constitutionally, is my question  
5 to myself. 'It is thus clear that a majority of the Shiv Sena MLAs have given a clear indication  
6 on behalf of the Shiv Sena legislative party that they intend to exit from the Mahavikas Aghadi  
7 Government and you have been made aware of the same and that you are trying to win over  
8 your MLAs and cadre vis not democratically. I am therefore confident that you and your  
9 Government has lost the trust of the House and the Government is in minority.' I'll just pause  
10 and look at this. My Lords just forget this case for two minutes. Look at the consequences of  
11 this letter in the constitutional jurisdiction. Number one, it is a certification by an executive  
12 nominee that the departing allegedly disqualified members, allegedly by me, are kosher. They  
13 are not disqualified. They are not disqualified is his confidence. Number two, that you, Mr.  
14 Uddhav, is not the Shiv Sena, but those people are. He is writing to Uddhav Thackeray. Three,  
15 he is doing it under the nose of a pending disqualification Tenth Schedule proceeding and a  
16 hotly contested Supreme Court matter. When ordinary mortals are doing it Your Lordships  
17 take a very serious view. I know Your Lordships can't issue directions to the Governor and  
18 content may not lie. But just consider My Lord if anybody else would write a letter like this.  
19 When Your Lordship is hearing this, it's a heavily contested matter and the Speaker is dealing  
20 with it. I don't know My Lords... normally, we'd expect some contempt notice. Then some  
21 appropriate case is to examine how far the arc of immunity applies. Number four, he is My  
22 Lords actually setting up the ground as a precursor. Come to me, I will swear you in. This is an  
23 advanced intimation. This 7th paragraph read as it is can only say come to me, I am ready to  
24 swear you in, because you are kosher. There's no problem with you. There's no stigma. Only  
25 step left is that nothing is left.

26 Therefore My Lords, to the other question My Lord the Honourable Chief Justice asked me on  
27 Thursday, what is it that you want us to do in the event that we agree with you. Your Lordship  
28 put a question like that. One of the simplest level, of course he had asked me for larger  
29 answers... simplest level is to quash this letter. Now suppose Your Lordship quashes this letter,  
30 just for a minute and I do not press, except for one or two things, in any meaningful way, for  
31 other things. Just suppose I am not conceding anything. I'm just giving a supposition. The  
32 status quo ante is automatically restored. Lordship doesn't have to say it? And is that  
33 constitutional morality? Is that fair play? Is that upholding the greatest traditions of  
34 governance? My Lords clearly it is.

35 And certainly My Lords, there can be no bar, immunity, hesitation, legal obstacle,  
36 constitutional bar from quashing this letter if Your Lordships otherwise agrees with me. The  
37 letter is not a non-quash-able document. It's a direct prayer, directly impugned in all the writ

1 petitions and many other writ petitions. Take it My Lords, take it as impugned. Now, this is  
2 the fourth consequence. The fifth is a obvious consequence of this consequence. Next step is  
3 swearing in, which happens on, this is 28th... 30th. In fact the seeds of that are very clear in  
4 para 7. I told Lordships they are advanced intimations. It happens two days later. So that's a  
5 letter saying you are kosher, that is My Lords acting on the letter and giving you a  
6 constitutional status of a Minister. In fact, I am sorry, that's swearing in of a Chief Minister.  
7 30th My Lords is the swearing of Mr. Shinde.

8

9 **[JUTICE NARASIMHA]:** Chief Minister, correct. 30th.

10

11 **DR. SINGHVI:** So, swearing in as a constitutional head of state. And My Lords, the last  
12 consequence is again consequential to the consequences, which is appointment of the Speaker.  
13 Which I may say the new Speaker or the Speaker.

14 Now My Lords, I have given Your Lordships six consequences. I mean one can make probably  
15 seven or eight also, but let's say six. My respectful submission is, (a), that these are serious  
16 consequences, extremely serious for our constitutional polity, b) they are case neutral to the  
17 present case. They are extremely serious for our constitutional polity, b) they are case neutral  
18 from this present case. They are juristic questions and they are bound to recur, unless Your  
19 Lordship plugs the loopholes this way or that way. Third, these are all within Your Lordship's  
20 Judicial domain. None of this is a no go area. Fourth, and this is very important My Lords,  
21 fourth only Your Lordships, I'm not saying Your Lordships may, I'm saying only Your  
22 Lordships can decide and should decide this. I'm not even making it optional. According to  
23 me, this is only the Honourable Supreme Court which can and should decide it here. Not  
24 delegate it to any other authority.

25 Then My Lords, this is the main point. And then of course it follows that Your Lordships could,  
26 as an ancillary because Your Lordships passes ancillary, says...

27

28 **CHIEF JUSTICE CHANDRACHUD:** I have one question, but I don't want to disturb  
29 your....

30

31 **DR. SINGHVI:** My Lords I'll just take around ten minutes more. I'm going to make  
32 some...Your Lordship will therefore restore in the ancillary sense, the position as on 27th or  
33 some such date. That is, ultimately Your Lordship's orders are not going to spurrics. They have  
34 to have an effect. That effects has to be only that restoration.

35

36 **JUSTICE SHAH:** To restore position as on?

37

1 **DR. SINGHVI:** 27th of June. This is 28th, so 27th is one day before. Now coming back to my  
2 notes, and I will be very quick because that's written down. Come to para 12. This is the other  
3 facet, Your Lordships had stopped at 12-13 last time. Just come to para 12 of my Note. A3, A3.  
4 The one Your Lordships are using. Now what are the points and I will be very quick My Lords.  
5 Purposive interpretation in Tenth schedule legislature cases Your Lordship is repeated,  
6 repeated and repeated many times.

7

8 **JUSTICE SHAH:** Which page Dr. Singhvi?

9

10 **DR. SINGHVI:** Para 12 of my note, Page 5. This is at A3 note. It's Page 7. And Your Lordships  
11 it maybe Page 7.

12

13 **JUSTICE KOHLI:** Yes.

14

15 **DR. SINGHVI:** Now My Lords, purposive interpretation, what was this new fashion  
16 approach, now it's old, and everyone calls teleological approach.

17

18 **JUSTICE KOHLI:** Para 12 commences by saying it is further...

19

20 **DR. SINGHVI:** Respectfully submitted that the above course...the next line is purposive  
21 interpretation, My Lordship calls it teleological approach. The most abstract books. Very  
22 difficult to read. Now My Lords just see, what is that purposive interpretation? These are the  
23 principles. Why does Your Lordship talk of the evil of political defections? Next para. Now It'll  
24 be very brief. Kihoto quoted well known to Your Lordships, Kihoto in para 4 cites these  
25 statements of objects and then says this. I'm reading - '*The evil of political defections is a*  
26 *matter of national concern, if it is not combated, it is likely to undermine the very foundations*  
27 *of our democracy and the principles which sustain it. With this object, an assurance was*  
28 *given in the address by the President to Parliament that the government intended to*  
29 *introduce in the current session of Parliament an anti-defection Bill. The Bill is meant for*  
30 *outlawing defection.'* Why Your Lordship is saying all this in Kihoto, which is 20 years ago, 30  
31 years ago? Because this says that when you interpret anything in this area, you must push this  
32 sentiment, this object. That's the object of this.

33 Next Jagjit Singh. Just see this My Lords, Jagjit Singh. All the citations are given, I'll not go  
34 through it. I'll just read it from my notes.' The validity of the orders by the Speaker under 2(2)  
35 disqualifying certain independent MLAs of Haryana, three days prior to the elections of the  
36 Rajya Sabha, fell for consideration.' Lordship knows in the Rajya Sabha the MLAs vote for us.  
37 'This Honourable Court rejected an argument that the Speakers order has been passed in



1 haste. Observing that the disqualified MLAs were interested in prolonging the disqualification  
2 proceedings beyond the date of Rajya Sabha. Critically, it was held that an independent MLA  
3 cannot be avoided permitted to avoid the consequence of defection merely by not completing  
4 the formalities of joining a political party.' So this was not.... My Lords this was only by  
5 purposive interpretation. This was extending and stretching by the use of cruder words  
6 stretching it, but stretching it for the purpose of promoting this object. Of course this is an  
7 irony, there you did it to...they said, we'll prolong the disqualification so he can't vote....so he  
8 can vote in the Rajya Sabha. Here My Lords, the same man is with Chief Minister. If Jagjit  
9 Singh is right, this is a ten time way for sure [UNCLEAR] case for sure we are arguing now.  
10 That was only a Rajya Sabha election.

11 Now 29 is what the Supreme Court says. 'It is also essential to bear in mind the objects' - I am  
12 underlining the word objects - 'for enacting the defection law, namely, to curb the menace for  
13 defection. Despite defection, a member cannot be permitted to get away with it without facing  
14 the consequences of such defection only because of mere technicalities. The substance and  
15 spirit of law is the guiding factor to decide whether elected member has joined or not joined a  
16 political party after his election. It would not be a valid' etc. I'll skip that.

17 Now see Rajendra Rana, Constitution Bench, very well-known case but it was decided on the  
18 basis of purposive interpretation. There were gaps. Your Lordship had to fill the gaps. Your  
19 Lordship resorted to purposive interpretation. Kindly see that.

20 'This Honourable Court rejected and argued that the initial defection by 13.' - So this is a two  
21 part defection. Initial was 13 'followed by subsequent claim by 37 MLAs. There was a split in  
22 the BSP in terms of para 3, meant that there was no disqualification of the initial 13 MLAs.'  
23 Now this is a good old days of a split existing. Even then look at the way Your Lordship has  
24 interpreted it. Your Lordship had the split existing but see how they interpreted it, by  
25 purposive. 'The Court applied the principle of purposive interpretation to hold the  
26 disqualification occurs on the date when the add subtract, disqualification are committed.  
27 Therefore, the question of disqualification, where there had been a split had to be determined  
28 referenced with the initial date, not the subsequent date. Thus, the defence to the plea of  
29 disqualification cannot be a subsequent defence and must have arisen at the time in the Acts  
30 constituting the disqualification of Committee.' I will just read two marked question. I will not  
31 read the whole one.

32 If Your Lordships will permit me. The first six lines of 33 only. It may be the collective descent  
33 is not intended to be stifled by the enactment of 1022, but at the same time it is clear that the  
34 object, mark the word object My Lords, is to discourage defection, which has assumed  
35 menacing proportions undermining the very basis of democracy. The very basis of democracy  
36 comes close to basic structure. Democracy is withheld to be basic structure already, obviously.  
37 Therefore, a purposive interpretation in para 2 in juxtaposition of three and four is called for.



1 Therefore, therefore. Then My Lords one thing is clear, the defection is a ground for  
2 disqualifying a member. He incurs a disqualification who is voluntarily given a membership  
3 of his original political party meaning the party on whose ticket he got elected. In the case of  
4 defence.... I'll skip that to save time.

5

6 Come to the next marked portion, next para, highlighted portion. The fact that a decision in  
7 this regard may be taken in the case of voluntary giving up by the Speaker at a subsequent  
8 point of time, cannot and does not postpone the incurring of disqualification by the act of the  
9 legislator. Similarly, the fact that the party could condone, could theoretically, there is a para  
10 which allows you to condone, the defiance of a Whip within 15 days or that the Speaker takes  
11 the decision only thereafter cannot also pitch the time of disqualifications, anything other than  
12 the point at which the Whip is defined. I am not only arguing relating back. I'm arguing  
13 purposive interpretation, apart from relating back. Relating back has arrived at by adopting  
14 purposive interpretation. Therefore, in the background of the object sought to be achieved by  
15 the 52nd Amendment and on a true understanding of para 2 with reference to other paras, the  
16 position that emerges is that the Speaker has to decide the question of disqualification, with  
17 reference to the date on which a member voluntarily gives up his membership or defies it. That  
18 is arrived at by purposive interpretation, no other way. It is really a decision ex post facto. The  
19 fact that in terms of para 6, a decision in question is to be taken by the Speaker or the  
20 Chairman, cannot lead to a conclusion that the question has to be determined only with  
21 reference to the date of the decision of the Speaker. An interpretation of that nature would  
22 leave the disqualification to an indeterminate point of time to the whims of the decision  
23 making authority, same would defeat the very objective enacting the law. My Lords by  
24 disabling notice to a Speaker, you will achieve the same. By the Speaker... the Governor either  
25 let it achieve the same or all these are nullifying the Tenth Schedule. That's why purposive  
26 interpretation is vital. Your Lordships has separately noted with me, paras 12, 52 and 53 of  
27 Rana. That is done in the early... that is not quoted here.

28 Now My Lords, Shrimant Balaji Patil, Balasaheb Patil in para 89, which is quoted. Just come  
29 to the boldface alone to save time. So I am skipping long paras in between. If we hold that the  
30 disqualification proceedings would become infructuous upon tendering resignation..... Now  
31 this is another technique My Lords, because if you are disqualified then you have to fight an  
32 election again to become a Minister. If you are disqualified, you must fight an election again  
33 to become a minister. So people will just resign and then immediately become a minister. Then  
34 you get six months to be elected, because to become minister now and need not be elected for  
35 a while. So to get around that, this is My Lords, purposive interpretation. If we hold the  
36 disqualification proceeding would become infructuous upon tendering resignation any  
37 member who is on the verge of being disqualified would immediately resign and would escape

1 the sanctions provided under 751, 164, and 361. These are remuneration consequences and  
2 also most importantly that you have to... you can be a minister but be elected within six months  
3 after that. That is not available if you are disqualified. Such an interpretation would therefore  
4 not only be against the intent behind the introduction of Tenth Schedule but also defeat the  
5 spirit of the 91st Amendment.

6 Then DTC an inhibition under the consequence, this is of course not a defection case but on  
7 the principle of purposive. An inhibition under the constitution must be interpreted. So as to  
8 give a wider interpretation to cure the existing evils. Now this is important, even though it is  
9 not highlighted, just read this para, 180. Legislation both statutory and Constitutional,  
10 connected and true from experience of evils but in general language should not therefore be  
11 confined to the form that evil had taken. Time works changes, brings it to existence, new  
12 conditions and purposes and new awareness of limitations. Therefore a principle to be valid  
13 must be capable of wider application in the mischief, which gave it birth. It was born for reason  
14 X, today Your Lordships will expand it to Y, tomorrow to Z, because we learn from experiences  
15 My Lords. As they said it's not spirit of law, not logic, but experience. The famous words of Mr.  
16 Wendell Holmes.

17 This is therefore a principle to be valid must be given wider application of mischief it gave it  
18 birth. This is particularly true of constitutional constructions. Constitutions are not ephemeral  
19 enactments designed to meet passing occasions. They are to use the words of Chief Justice  
20 Marshall designed to approach immortality as nearly as human institutions can approach it.  
21 The last 2 lines above Para 91 in my.... in my note which is Para 16. At the end of...' in the  
22 application of a constitutional limitation and inhibition our interpretation cannot be only of  
23 what has been, but of what may be." My Lords, got that para?

24

25 **JUSTICE SHAH:** What is here?

26

27 **DR. SINGHVI:** Within 16, I have quoted judgements. In the quotation there is a Para 91.  
28 Two lines above 91. Then My Lords, next 91, I will not read Your Lordships has it but it's  
29 coming out of Your Lordship's ears, this judgement, Your Lordship heard this. Only one  
30 sentence I'll be emphasizing which was not relevant to the other case. I mean, I didn't argue  
31 there. This is a quotation. Last line of 284. 'The Courts must adopt such an interpretation  
32 which glorifies the democratic spirit of the Constitution.' I'll skip My Lords. All of 17 I'll skip.  
33 18 is a very important paragraph, but I have in a different way covered it factually. It includes  
34 an overlap with consequences happened. All the facts are itemized there. So I'll skip it to save  
35 time. 18. My Lords seen My 18? Your Lordships can keep it as a factual summary.

36 Now come to 20 - 'Allowing the disqualification petition to be decided by a person who has  
37 been appointed as a Speaker with the active support of Respondents and who is conducted

1 himself in a bias in mala fide manner, would result in incentivizing the constitutional scene of  
2 defection. ' That's the phrase I want to comment for Lordship's consideration. 'incentivizing  
3 the constitutional scene of defection and would be against the spirit and intent behind the  
4 Tenth Schedule. The same would be the teeth of constitutional morality. Thus, the principle of  
5 purposive interpretation demand that the present Speaker not being entrusted.' This My Lords  
6 ends the purposive part.

7 Then Para 22 is an interesting point and not merger. Just see the irony here. Your Lordships  
8 has only one defence, apart from condonation, of merger. Merger, this is a supreme irony in  
9 this case. Merger is not even alleged by them, claimed by them, raised by them. In case of a  
10 merger, suppose, 8 out of 10, 6 out of 10, 9 out of 10 leave, the remaining chap left behind is  
11 protected, under Tenth Schedule he is protected. he...otherwise he is a loner, he himself is  
12 protected. Here My Lords, but from Your Lordship's interim order, which we argued just a few  
13 days ago. I'm not protected. Without claiming merger, I mean, today they are issuing letters  
14 and Whips which, I'm not talking Your Lordship's protection. The Whip is being issued as we  
15 speak My Lords in various....they are entitled to if the EC has recognized them. But for  
16 Lordship's of protection I would be liable to be disqualified for not following his Whip, because  
17 without invoking merger, there is no protection. They become the party. These are My Lords  
18 consequences. These are consequences I add in my six consequences . These are a very weird  
19 consequences. It's a very weird consequence. If you have the defence of a Constitution, you  
20 have worse off. If you don't take the defence of Constitution, you are better off. I should have  
21 mentioned in the consequences' the list, Your Lordship might consider putting it there. It's an  
22 absolutely absurd weird consequence. Then I have extracted Para 4 in Para 23, that is Para 4  
23 of the Tenth Schedule and I made this point in Para 24 again. And therefore, I have ended with  
24 this. I'm ending my submissions with one judgment, which I have to cite, that's an absolute  
25 end. That's an interesting judgement on compilations of judgments Volume 3F. It is a  
26 judgement called Indore Development Authority 2020 8 SCC 129. constitutional Bench.

27

28 **JUSTICE SHAH:** On restitution.

29

30 **DR. SINGHVI:** Yes. Your Lordship is a party to it.

31

32 **JUSTICE SHAH:** Restitution

33

34 **DR. SINGHVI:** Restitution. Because that's the 5th facet or 6th facet of setting right a wrong.  
35 You call it Actus Curiae. Your Lordship will not allow Your Lordship's acts or judgments to  
36 harm a party. Your Lordships calls it a situation created by Your Lordships' order etc. Another  
37 facet of saying the same thing is Restitution. My Lord is absolutely right.

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**JUSTICE SHAH:** Which page you want to read?

**DR. SINGHVI:** This is in this Volume 3F at PDF Page 33. 33, is the PDF Page of Volume 3F. And the citation of Indore Development is 2020, 8 SCC 129. So the first para I wish to read is far away from the beginning. It's Para 335 at Page... PDF Page 275. May I read it My Lords? The page of the PDF is 275. My Lords have got it? 'The principle of restitution is founded on the ideal of doing complete justice at the end of the litigation,' - I emphasize the word complete justice and I emphasize the word restitution. - 'And parties have to be placed in the same position but for, I said that as but for test, but for the litigation and the interim order. These are very, very important words for the Constitution Bench. But for, that's the test. But for the litigation and interim order if any passed in the matter. In South Eastern Coal Fields, it was held that no party to take advantage of litigation, it has to disgorge the advantage gained due to delay in case the list is lost, the interim order passed by the court merges into a final decision. The validity of an interim order passed in favour of a party stands reversed in the event of a final order going against the party successful at the interim stage. Section 144 of the CPC, is not the fontal source of restitution. It is rather a statutory recognition of the rule of justice, equity and fair play. The Court has inherent jurisdiction to order restitution so as to do complete justice. This is also on the principle that a wrong doer should not be perpetuated by a wrong order, not wrong doer, wrong order should not be perpetuated by keeping it alive and respecting it. In exercise of such power, the courts have applied the principle of restitution to myriad situations, not falling in the terms of 144. What attracts applicability of restitution is not the act of the court being wrongful of mischief. So, this is apart from Actus Curiae, or an error committed by the court. The test is, whether on accountable act of the party persuading the court to pass an order held at the end is not sustainable resulting in one party gaining an advantage which it would not have otherwise earned or the other party having suffered an impoverishment retribute. Very well put for as I would commend each word of this. Litigation cannot be permitted to be productive industry. That is only a fond hope. It is a productive industry. Litigation cannot be reduced to gaming, where there is an element of chance in every case. If the concept of restitution is excluded from application to interim orders then the litigant would stand to gain by swallowing the benefits yielding out of the interim order. Then the court... I will not read the quotation. Just pause here for 5 seconds. I get an interim order, the interim order is obviously not confirmed, if the interim order is confirmed the matter doesn't arise. It is the other way round. But every consequence of the interim order is enjoyed, gorged, eaten and then you piddle your thumb and say tough luck, now the final order has come too late, you can't ask for restitution. That is what Your Lordship seek to address by this passage. It's rather well put, for saving of time I'm not reading I would request My Lords reads

1 Eastern Coal Fields. From where it draws strengths, it's a Constitution Bench and this is the  
2 essence of Justice. It's the essence of Justice in a constitutional matter with such grave  
3 consequences, it is even My Lords afore sure. I am very deeply obliged.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Mr. Singhvi, one question I have and it's a faux pas.  
6 You said, and both Mr. Sibal also said the same thing that, it's not a case where a trust vote is  
7 solved when the house is constituted for the first time. It was the Governor's powers, of course  
8 the Governor has the power to call for a trust vote when there is no clear majority on the floor.

9

10 **DR. SINGHVI:** My Lords, after election, when you have it for the first time.

11

12 **CHIEF JUSTICE CHANDRACHUD:** It's not after election because here the Government  
13 is formed, pretty valid point, you know this is post formation of Government. What is the  
14 power of the Governor if he calls for a trust vote post formation of the Government? What is  
15 the circumstance in which he can?

16

17 **Dr. SINGHVI:** That means a running government.

18

19 **CHIEF JUSTICE CHANDRACHUD:** Running Government.

20

21 **Dr. SINGHVI:** Correct. My Lords, let me answer on the first principle then we can of course,  
22 we can add some materials and give Your Lordships, specifically a note only on this. But My  
23 Lords, on first principles. The first answer, is that zero, where because Your Lordship will  
24 decide abstract, zero. Answer to Your Lordship's, direct question, direct answer. Zero power,  
25 where there are pending disqualification issues in a running Government. Because Your  
26 Lordships should not mix up the two. One is a normal vanilla runner Government with no  
27 issue of disqualification, one is a disqualification pending at two levels. My candid clear answer  
28 to Your Lordship's direct question is zero. Number two, the reason is, what I have given My  
29 Lords. It is a lateral entry of the executive in an area where there cannot be any jurisdiction,  
30 there is no locus for this. In either Tenth Schedule or Your Lordship's jurisdiction. Number  
31 three, if Your Lordship's question is premised, has to be premised and rightly premised on the  
32 assumption that the Governor, what he does in the question posed by the Honourable Chief  
33 Justice, what is he doing My Lords? He is recognizing ABC as the "majority". There is no  
34 relevance to Your Lordship's query unless Governor does that otherwise Your Lordship's query  
35 would not be relevant. Obviously, it is supposed, that he is giving some imparting legitimacy,  
36 recognition, or some status. My Lords, how is it that possible? In constitutional law, it's not  
37 possible.

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**CHIEF JUSTICE CHANDRACHUD:** These are not [UNCLEAR] perspective. On the facts, that the letter of the 28th June 2022 the Governor [UNCLEAR] You said what the Governor did to essentially to recognize the split. [UNCLEAR]

**DR. SINGHVI:** With all due [UNCLEAR] split is a full recognition is my submission.

**CHIEF JUSTICE CHANDRACHUD:** He can't do recognition of a split.

**DR. SIGNHVI:** Yes. Correct.

**CHIEF JUSTICE CHANDRACHUD:** Now your answer to that is that the Governor so long as the disqualification petitions are pending, he cannot call for a trust vote for the simple reason that, you are still a part then of a government which is supported when the house was formed.

**DR. SINGHVI:** Except in one case, where for some freak reason which I cannot think of that will never happen, that nobody decides to seek to disqualify the other. Now My Lords, suppose....

**CHIEF JUSTICE CHANDRACHUD:** The Speaker what he may do is not disqualifying you at all. [UNCLEAR]

**Dr. SINGHVI:** I am going to give the juristic answer to Your Lordship's query. It can arise in practice. I am going to give the juristic answer. That will have to be a situation where there is no caveat and dispute. I mean, it is virtually by consent of everybody but with that answer comes the caveat. It goes back to the origin and object of the Tenth Schedule. Why was it enacted? It was enacted not to encourage these trust vote situations by defections. Unless that is so it will arise every week, every two weeks.

**CHIEF JUSTICE CHANDRACHUD:** One of the last point. May be it can take only two minutes, let me put it to the other side also. There is no clear answer.

**DR. SINGHVI:** My Lords, I am very grateful. It helps us to clarify in our own minds also.

**CHIEF JUSTICE CHANDRACHUD:** There is in assessing the strength of a ruling party in a House, whether it is a Legislative Assembly or Parliament, you have a numerator and you

1 have a denominator. The numerator represents the strength of the party when the House was  
2 formed. The denominator represents the strength of the House. Now by calling the trust vote  
3 on 20th June 2022, the Governor according to you, your argument is that the Governor  
4 therefore recognizes that the part of the numerator has evaporated or has been taken out.

5

6 **DR. SINGHVI:** Rather nice way of putting in numerator.

7

8 **CHIEF JUSTICE CHANDRACHUD:** The numerator has been taken away. Therefore how  
9 I feel that there is loss of confidence of the House. According to you that is not permissible  
10 because of disqualification which was pending.

11

12 **DR. SINGHVI:** And he recognizes and gives legitimacy to the numerator. In Your Lordship's  
13 example he is recognizing and giving legitimacy to the numerator.

14

15 **CHIEF JUSTICE CHANDRACHUD:** The only problem which I think you know which is  
16 kind of not...which is worrying is, does the Governor not also recognize that the very act by  
17 which the numerator may or may not be affected. For instance the numerator would be  
18 affected even if you don't treat it as a split and it is a clear disqualification. Then the numerator  
19 is reduced by X 'the strength of the ruling party in the House' minus Y the people who have  
20 effected from. Who have therefore attain disqualification. But will that same act affect the  
21 denominator also?

22

23 **DR. SINGHVI:** Because it reduces the total strength.

24

25 **CHIEF JUSTICE CHANDRACHUD:** The total strength of the house. So though the  
26 Governor cannot therefore say, the governor cannot legitimately say that - Look, these people  
27 have left you that's why I want the trust vote. But can the Governor not then say that - Look  
28 assuming that they have... there is no recognizable concept of the split now under the Tenth  
29 Schedule. The effect of all this is that these people have to be reduced both from the numerator  
30 and denominator.

31

32 **DR. SINGHVI:** I will take it straightaway My Lords, straightaway. There are many answers.  
33 First this exercise cannot be done by the Governor because there is no....

34

35 **CHIEF JUSTICE CHANDRACHUD:** You have been arguing that he can't assume to  
36 himself to take a decision.

37



1 **DR. SINGHVI:** First Your Lordships, 3 or 4 answers. Lordships will note down they are very  
2 specific answers. This is a exercise itself is very which he cannot embark upon. The Governor  
3 has no such jurisdiction to embark upon when there is a running government. Now second  
4 answer...

5

6 **CHIEF JUSTICE CHANDRACHUD:** No. He can't embark. But can he not therefore then  
7 say I want this exercise to be demonstrated on the floor of the House.

8

9 **DR. SINGHVI:** No, no. I'll say that exercise he cannot embark. Let me answer.

10

11 **CHIEF JUSTICE CHANDRACHUD:** Second option..

12

13 **JUSTICE NARASIMHA:** He has argued that. He won't have

14

15 **CHIEF JUSTICE CHANDRACHUD:** It has to be.

16

17 **DR. SINGHVI:** My Lords numerator denominator you can't start because your Lordships  
18 has to premise a direction by me to him. I am the Governor, I am him directions, please have  
19 the, you can't give a direction.

20

21 **CHIEF JUSTICE CHANDRACHUD:** Got your point. Therefore to...

22

23 **DR. SINGHVI:** The legislature, the Speaker or the Chief Minister can say sorry, I don't want  
24 these directions.

25

26 **CHIEF JUSTICE CHANDRACHUD:** You finish your arguments therefore, until the  
27 outcome of the disqualification petitions is known to the Governor, he cannot then call for the  
28 trust vote. Possibly, possibly using your line of arguments, we are just trying to understand,  
29 [UNCLEAR] to its conclusion. After the disqualification petitions are decided by the Speaker  
30 then there is a clarity in the mind of the Governor on what is the extent of the numerator which  
31 has been affected...?

32

33 **Dr. SINGHVI:** I am very grateful, I was going answer, I am not conceding but I am going to  
34 answer because that question doesn't arise, Your Lordships will be very careful about the  
35 hypothetical situation but possibly work [UNCLEAR] because a constitutional, designated,  
36 judicial or quasi-judicial Tribunal has given a verdict. After that there is something, as Your  
37 Lordships puts it, that verdict unless disturbed by the High Court or the Supreme Court is

1 binding or operated. But here, Your Lordship's query answers the first part. You are doing it  
2 well before.

3

4 **CHIEF JUSTICE CHANDRACHUD:** There is another point in your favour actually, which  
5 is that the very same unit which affects the numerator affects the denominator also.

6

7 **Dr. SINGHVI:** Yes, yes. Of course.

8

9 **CHIEF JUSTICE CHANDRACHUD:** Right? So, if the Governor cannot postulate until the  
10 disqualification petitions are there, then the numerator has been affected. Then he cannot say  
11 that the denominator is affected.

12

13 **Dr. SINGHVI:** No, no he cannot. The very arithmetic, it has to be both. It is a very selective  
14 otherwise.

15

16 **CHIEF JUSTICE CHANDRACHUD:** Right. Because the same act of defection which  
17 reduces the strength of the ruling party, which also then affects the strength of the House..

18

19 **Dr. SINGHVI:** And My Lords, can you start doing this is as a...This is the word premature  
20 tells Your Lordships in the face. Constitution says this body will decide. This body is yet to  
21 decide, you go and give your decision virtually. I will reduce the denominator, I will reduce the  
22 numerator, My Lords that will create chaos. And Your Lordships has to see the....

23

24 **JUSTICE NARASIMHA:** You are saying that he can't take cognizance of the existence of  
25 the Tenth Schedule proceedings, he can take only upon an order passed by...

26

27 **Dr. SINGHVI:** Consequence of the tenth schedule proceedings.

28

29 **JUSTICE NARASIMHA:** After the determination by the Tenth Schedule.

30

31 **DR. SINGHVI:** [UNCLEAR] summary the consequences of the Tenth Schedule can be some  
32 basis unless disturbed by the High Court or the Supreme Court to act.

33

34 **JUSTICE NARASIMHA:** And till then they continue to be members of the...

35

36 **DR. SINGHVI:** It would be in REM, once they said they...

37

1 **CHIEF JUSTICE CHANDRACHUD:** Otherwise this would be really a method of...

2

3 **DR. SINGHVI:** Then there will be chaos, and My Lords, not that it should come into Your  
4 Lordships, Your Lordships cannot ignore the reality. Around the country also, Governors are  
5 no more angels.

6

7 **MR. SIBAL:** [UNCLEAR] Just two cents. Number one My Lords, Tenth Schedule doesn't  
8 recognize majority, minority.

9

10 **CHIEF JUSTICE CHANDRACHUD:** Absolutely, No question on that.

11

12 **MR. SIBAL:** Tenth Schedule postulates that even if there is a split of a majority, it can't be  
13 recognized. The Governor knows that. The Governor knows that. And Tenth Schedule also,  
14 para three also says there must be a split in the original political party. Tenth Schedule, para  
15 three said original political party. We know that there was no split, Governor knows there was  
16 no split in the original political party. So on what basis will he have a recognized? And your  
17 answer to Your Lordship's question, how and the Governor call, supposing one of the parties  
18 moves away from the coalition and goes to the Governor along with the BJP and says, now we  
19 are so.

20

21 **CHIEF JUSTICE CHANDRACHUD:** That's not an individual act of the [UNCLEAR].

22

23 **MR. SIBAL:** Yes, that right. So, this is an individual act. It has to be the act of a party. Now  
24 you have recognized the majority as the party and writing a letter to the Chief Minister. This  
25 is unheard of.

26

27 **CHIEF JUSTICE CHANDRACHUD:** If a party says we don't support the Government  
28 anymore, that's not a disqualification.

29

30 **MR. SIBAL:** That's right. Correct.

31

32 **CHIEF JUSTICE CHANDRACHUD:** Governor says we have lost one of your constituents

33

34 **MR. SIBAL:** That's fine. I am sorry.

35

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

37

1 **MR. KAMAT:** I will be very brief My Lords. Just for 15-20 minutes.

2

3 **CHIEF JUSTICE CHANDRACHUD:** Okay.

4

5 **MR. KAMAT:** Some point have not been covered.

6

7 **CHIEF JUSTICE CHANDRACHUD:** What are your Point?

8

9 **MR. KAMAT:** Yes My Lords, straight away. I've made a brief written note. But before I come  
10 to the note, I made a chart of all the prayers for Your Lordships, and one or two areas which  
11 have not been addressed, if Your Lordships have that chart which has the list of four writ  
12 petitions on this side and two writ petitions on that side, is document eight, My Lords.

13

14 **CHIEF JUSTICE CHANDRACHUD:** Document 8?

15

16 **MR. KAMAT:** Yes My Lords. Chart, document eight, consolidated prayers. [NO AUDIO]  
17 Serial number one and two, are writ petitions filed by my learned friends, challenging the  
18 Notice issued by the Speaker. The first two, but that was the subject matter of 27th order. Now  
19 My Lords, Item number three is a writ petition challenging the action of the Governor calling  
20 for the trust vote. Now that has also been addressed at length. That is Item Number 3. Now  
21 Serial Number 5 at Page 5 is a writ petition by us challenging a decision of the Speaker on 3rd  
22 July, 2022 after his election changing the recognition of the Whip from Sunil Prabhu to Mr.  
23 Gogawale. But this is an area which has not been addressed, which I am going to briefly touch  
24 up. Serial Number 6 My Lord, relates to the actions of the Governor in administering oath to  
25 Shinde and also whether Your Lordships should decide the disqualification petitions here. And  
26 lastly My Lords Serial Number 7 challenges notices of disqualification issued to us. Now I will  
27 limit myself to the challenge of 3rd July 2022 and this challenge My Lord is an independent  
28 challenge irrespective of a view, which Your Lordship will ultimately take as far as  
29 disqualification is concerned or Governor's actions are concerned. Now kindly have a look at  
30 the writ repetition itself. The writ petition, starts.

31

32 **JUSTICE SHAH:** What is the writ petition number?

33

34 **MR. KAMAT:** Yes My Lord, that writ petition is 479 of 2022. Starts at My Lords, 470 PDF,  
35 common compilation 1....406. My Lord, I am sorry... 406. If I can just quickly My Lord point  
36 out my prayer there which is My Lord...

37

1 **CHIEF JUSTICE CHANDRACHUD:** One minute.

2

3 **MR. KAMAT:** I'm sorry.

4

5 **JUSTICE KOHLI:** Trying to pull out there. Which common compilation did you say?

6

7 **MR. KAMAT:** Common compilation 1.

8

9 **JUSTICE KOHLI:** Convenience compilation ?

10

11 **MR. KAMAT:** Serial Number 4. convenience compilation.

12

13 **JUSTICE SHAH:** It is convenience compilation, not common compilation.

14

15 **MR. KAMAT:** Of documents My Lord. Kindly see my prayer.

16

17 **CHIEF JUSTICE CHANDRACHUD:** Page?

18

19 **MR. KAMAT:** Page My Lord. PDF Page 408. This is to quash and set aside the  
20 communication of 3rd July 2022 and the grounds taken are that the Speaker could not have  
21 acted on the request of the legislature party. The Speaker is obliged only to act on the directions  
22 of a political party as far as Para 2(1)(b) is concerned. The decision of the Speaker itself..

23

24 **CHIEF JUSTICE CHANDRACHUD:** Speaker could not have acted on the...

25

26 **MR. KAMAT:** Your Lordship need not take that in note.... that is in my note.

27

28 **CHIEF JUSTICE CHANDRACHUD:** On the advice of the legislature party.

29

30 **MR. KAMAT:** That's right. I'll just show the documents and straightaway come to the note.  
31 If Your Lordships have the decision of the Speaker which is of 3rd July at PDF 382 of the same  
32 volume . I'm sorry of CC-2.

33

34 **JUSTICE NARASIMHA:** Which one?

35

1 **MR. KAMAT:** My Lord, CC2, Pages 382 of the Convenience volume. Running Page 369, PDF  
2 Page 382. Your Lordships are aware this decision is taken after the election of the Speaker, on  
3 3rd, on the late night of 3rd. Kindly see, what it says My Lord.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Just one second. I'm just trying to track it down.  
6 Convenience compilation 2 right? Page?

7

8 **MR. KAMAT:** Page 382. I am sorry My Lord. 'With reference to your above mentioned letter  
9 I have been ordered to inform you that you have been replaced from the post of legislature  
10 party by nominating the name of Ajay Choudhary. In this regard you have raised the objection  
11 by addressing a letter on 22nd June. In this regard, after deliberation on provision in the law,  
12 Honourable Speaker Maharashtra Legislative Assembly has cancelled the approval granted to  
13 Ajay Choudhary as the leader, Shiv Sena Legislature Party, and kindly see the next My Lords,  
14 and approves the recognition, recognized the nomination of Eknath Shinde, the leader Shiv  
15 Sena Legislature Party. Similarly the proposal to nominate Sunil Prabhu as a Chief of Shiv  
16 Sena Legislature Party, is to be cancelled and to recognize the nomination of Bharat Gogawale  
17 as Chief Whip of Shiv Sena Legislature Party has been approved and recorded in the registry.  
18 So, my argument is limited to the second part of the decision. As far as, replacement of Sunil  
19 Prabhu by Bharat Gogawale by the action of the Speaker on the 3rd. And the only material  
20 which was there before the Speaker, was that letter of 22nd of June of Mr. Shinde, which Your  
21 Lordships have seen. PDF page 67, Lordships have seen that, which encloses that resolution  
22 of 21st, appointing Sunil Prabhu.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Can you give us a cross reference?

25

26 **MR. KAMAT:** Yes My Lords, that is page, the letter of Mr. Shinde to the Honourable Deputy  
27 Speaker is at page 67. If Your Lordships just have a look at that.

28

29 **CHIEF JUSTICE CHANDRACHUD:** It's 67, of the same compilation?

30

31 **MR. KAMAT:** Yes My Lords, kindly see the heading. It is not by a political party, Shiv Sena  
32 Vidhimandal Paksh Karyalay. Clear My Lord, that the letter was addressed by the Shiv Sena  
33 Legislature Party at best. And this is based on the resolution which was passed in Guwahati.  
34 Which is that resolution at page 49, at PDF page 62. Again Shiv Sena Vidhimandal Paksh  
35 Karyalay. Sorry sir, PDF page 55, Shiv Sena Vidhimandal Paksh Karyalay. Now, the defence to  
36 this in the reply, there are only two defences taken which Your Lordships have to consider.  
37 One, they said this is an issue which is covered by 212. Court should not get into it. And second,

1 in any event, it is the Legislature Party which decides the Whip. Straightaway if I can place the  
2 reply itself, the two issues which have been raised in the reply. Kindly turn to PDF page 475 of  
3 Convenience Volume-one. If Your Lordships, have page 475?  
4

5 **JUSTICE KOHLI:** Sorry. Which convenience compilation please?  
6

7 **MR. KAMAT:** Convenience Volume-one. I have to call this in the notes, it may not trouble  
8 My Lords.  
9

10 **JUSTICE NARASIMHA:** Why don't you take us run through that note Mr. Kamat?  
11

12 **MR. KAMAT:** Yes, yes My Lords. I will just point out the pages and straight away....  
13

14 **JUSTICE NARASIMHA:** While you read it, you can advocate.  
15

16 **MR. KAMAT:** Yes sir, I will sir. Now if Your Lordships have page 475 PDF? They are replying  
17 to this writ petition. The second column from the top. This is the answer to 479. Writ petition  
18 is not maintainable in view of 212 and in any event Speaker has no discretion in the matter  
19 and has to notify the will of a majority of the legislature parties. Your Lordships would have  
20 made a note. Similar averments are made at PDF 492, at paragraph 34, 35 and 36. These are  
21 the documents which I wanted to show. Now straightaway if Your Lordships come to my note.  
22

23 **JUSTICE SHAH:** Your notice?  
24

25 **MR. KAMAT:** My Lord that is A2. It's called additional WS.  
26

27 **CHIEF JUSTICE CHANDRACHUD:** Devdutt, your A1 is about the Seven judge issue, I  
28 think.  
29

30 **MR. KAMAT:** Yes My Lord.  
31

32 **CHIEF JUSTICE CHANDRACHUD:** A2.  
33

34 **MR. KAMAT:** At PDF Page 2 My Lords. The first point that as far as validity of this decision  
35 is concerned it's only Your Lordships who can take a view on this and if Your Lordships kindly  
36 see Paragraph 8 and 9, this issue on whether the Whip is to be issued by the political party or  
37 legislature party... My senior colleagues have already made submissions, I will not repeat it.



1 Paragraph 8, I have extracted 2B and 9 My Lords I have given the reference to Mr. Sibal's  
2 submission [UNCLEAR] etc. My Lord, It's clear that the Whip has to be issued by the political  
3 party and not by the legislature party.

4 Now My Lords coming to the defences raised in the writ petition. If Your Lordships have  
5 Paragraph 12. Paragraph 12, I have extracted 212. If Your Lordships, see 212.

6

7 **JUSTICE KOHLI:** Just a minute.

8

9 **Mr. KAMAT:** I'm sorry I'm sorry. Due to the paucity of time, I am trying to hurry up.

10

11 **JUSTICE KOHLI:** Yes please.

12

13 **Mr. KAMAT:** My Lords Paragraph 12, 212 I have extracted. The first criteria for 212 to kick  
14 in is that the validity of any proceedings in the Legislature of a State shall not be called in  
15 question. So my submission is My Lord, that the decision of the Speaker of 3rd July 2022, is  
16 not a proceeding in the Legislature of the State. And I am 45 My Lord by Muhammad  
17 Siddiqui's case, which I have extracted in the next paragraph, Paragraph 34. 'The above  
18 proposition makes it clear that the finality of the decision of the Speaker and the proceedings  
19 of the State Legislature being important privilege of the State Legislature, etc. The proceedings  
20 of the Legislature include everything said or done in the House in the transaction of  
21 Parliamentary business.' Now My Lords deciding a Whip or giving recognition to a Whip has  
22 nothing to do with Parliamentary business. Therefore, the primary ingredient of 212 is not  
23 satisfied. Second My Lord is a more fundamental argument that this is not a mere case of  
24 procedural irregularity but a case of substantive illegality and unconstitutionality. Your  
25 Lordships from time and again said that 212 will not help the Speakers decision to be immune  
26 from judicial review if it suffers from substantive illegality or unconstitutionality even if it is  
27 proceeding in the House. The latest judgment here extracts the Constitutional Bench judgment  
28 in Raja Rampal and if I can just place My Lord, Paragraph 431 of Raja Rampal which is  
29 extracted at Page 6, PDF 6, Conclusion S, bottom of that page. 'The proceeding, which may be  
30 tainted on account of substantive or gross illegality or unconstitutionality are not protected  
31 from judicial scrutiny.' And similarly My Lord You an ouster clause attaching finality to a  
32 determination does not oust the power of judicial review but not on grounds of lack of  
33 jurisdiction, or it being nullity for some such reason as gross illegality, irrationality, violation  
34 of constitutional mandates.'

35

36 **CHIEF JUSTICE CHANDRACHUD:** Yes.

37

1 **MR. KAMAT:** Now My Lords, as far as the decision is concerned. That this is not a procedural  
2 irregularity, but a substantive illegality or unconstitutionality is born by a plain reading of  
3 paragraph two of the Tenth Schedule. And all the authorities and material which has already  
4 been relied upon, that references I have given if Your Lordships have paragraph nine, I've  
5 given the references page 70 to 96, paragraph 9, page 4 of this note. And I will not repeat it.  
6 Now My Lords the second point, third heading in my note. What is the meaning of a political  
7 party, Your Lordships asked during the course of our submission, what does it mean? Now,  
8 My Lords, I have tried to explain, because ultimately decisions of a political party, which I will  
9 demonstrate, are ultimately decisions of the political party expressed through it's leadership.  
10 And when 2 (b), talks about directions of the political party, it means decisions of the political  
11 party as are communicated, the Speaker.

12 Now, kindly have paragraph 19 of my note. The Tenth Schedule of the Constitution, prescribes  
13 the court of prohibited conduct of our legislatures within and outside of House, any  
14 Commission of the prohibited conduct by a legislature envisages penalty of disqualification.  
15 Now My Lords, there are two categories of prohibited conduct, which Your Lordships have  
16 seen. And the footnote will show, I'm not going to repeat it. What is prohibited conduct for the  
17 purpose of para 2-1 (a)? I have given the references also. Resignation need not be explicit, it  
18 can be inferred, giving a letter to the Governor, going to the Governor with the opposition  
19 party, constitutes para 2-1 (a). All the references are there.

20 Now the substantive submission on the term "political party", if Your Lordships have  
21 paragraph 21. The term Political Party, occurring in the Tenth Schedule is not a nebulous  
22 concept for the term which has a definite connotation. The term Political Party referred to in  
23 the Tenth Schedule is the association/body of persons which has a definite leadership  
24 structure, which is recognized by the Election Commission of India under Section 29A of the  
25 RP Act. A political party is not synonymous with it's legislators. A political party, includes in  
26 it's ambit the entire organizational structure, which is spread at several levels, block levels,  
27 taluka, district and state level, apart from the primary members holding those posts. Your  
28 Lordships have seen, as far as Shiv Sena was concerned, organizational elections were held in  
29 2018 and the leadership structure was communicated in January of 2018. The documents  
30 Your Lordships have seen, I'm not going to point it out again, but those documents  
31 unequivocally show who is the leadership of the political party. That is page-one, of the  
32 convenience compilation-two. Now, how this concept of political party was included, what is  
33 the history? I will not trouble Your Lordships with that. If Your Lordships straight away have  
34 now have 29-A, which is extracted in para 28. Why this is important is that political party is  
35 not something which is anomalous. It is very clear, who are the members, what is the  
36 leadership structure? So when the Tenth Schedule says directions of the political party, it  
37 means the directions of the political party as is expressed through the political leadership of

1 that party. Paragraph 28 My Lords, 29-A is extracted. If Your Lordships have PDF page 12,  
2 sub-section four, of 29A, clearly states that the application shall contain the details of the  
3 President, Secretary, Treasures and other office bearers. So the leadership structure has to be  
4 intimated to the Election Commission. Now My Lords, detailed guidelines have been made in  
5 the Article 324, under section 29A, and that also My Lords is a part of this very written  
6 submission. If Your Lordships My Lord just have PDF Page 21. It requires the following  
7 documents to be submitted, which includes office that My Lord may kindly make a note in at  
8 Page 22 and also affidavits to be given by the President and Secretary, which is My Lord, Pdf  
9 Page 34. So therefore My Lords coming back to my note, Paragraph 30. The fact that Shri  
10 Uddhav Thackeray is the President of the party as per the Constitution of the Party, was  
11 intimated to the Election Commission from time to time. 'Thus the terminus or scope for  
12 deciding at disqualification petition under the Tenth Schedule in regards to the prohibited  
13 conduct of a legislature has to be with reference to the state of affair of that political party as  
14 it existed on the date of alleged action of disqualification. The term political party in the Tenth  
15 Schedule is referable to the political party as registered and recognized with the ECI under  
16 Section 29A.'

17 Now My Lords the next section that the Tenth Schedule is intended to maintain the integrity  
18 of the political party Your Lordships have been taken through it. I will not trouble Your  
19 Lordship with that.

20 If Your Lordships now have Serial Number V , My Lords. The submission here is....

21

22 **CHIEF JUSTICE CHANDRACHUD:** Hiatus.

23

24 **MR. KAMAT:** No My Lord. it's (V)at Page 15. 'The Correct Constitutional conduct for  
25 legislators who claim that they represent the original political party is to first get that claim  
26 resolved before indulging into prohibited conduct under Tenth Schedule.'

27 The core question My Lord which arises for consideration of the Lordships in this case is that  
28 when there is an intra-party dispute, can certain MLAs take the defence that look here I am  
29 the political party and I will indulge into prohibited conduct under the Tenth Schedule and  
30 after indulging into prohibited conduct, toppling Government, forming the Government, file  
31 proceedings on 19th of July before the Election Commission for My Lords validating that  
32 claim. And the defence taken is look here I am the political party. So Your Lordships are called  
33 upon to decide what is the correct course of conduct in this situation.

34 Para 36 - 'It is respectfully submitted that in the event of a dispute within the political party  
35 the correct constitutional conduct for the legislators who claim that they represent the original  
36 political party is to first get their claim resolved before indulging into prohibited conduct under  
37 the Tenth Schedule. It is submitted if a legislator or a group of a legislators have a claim that

1 they represent original political party then it is imperative that such a claim has to be resolved  
2 or adjudicated upon and decided in accordance with. Brahmananda Reddy' - My Lord, which  
3 is already cited.- 'It is no defence in a disqualification petition to say that the defectors have a  
4 claim of constituting the original political party. Till such claims of MLAs that they represent  
5 original political party attain submission by a process known to law. Such MLAS are governed  
6 by the code of conduct prescribed in Tenth Schedule. Any other interpretations would make  
7 the working of the Tenth schedule untenable. In the fact of the present case, Shri Eknath  
8 Shinde and his faction resorted to prohibited conduct of violating the Whip, indulging into  
9 antiparty activities instead of getting that claim adjudicated or resolved at first instance and  
10 then indulging into political activity.'

11 So what the question is whether you undertake political activity contrary to the Tenth  
12 Schedule, indulge into prohibited conduct or first get your claim resolved. 'Any other  
13 interpretation would lead to Tenth Schedule being rendered unworkable. This can be  
14 demonstrated by a simple example. A Legislative Assembly has 40 Members. Political Party A  
15 headed by Mr X has 5 MLAs. Party A forms a coalition Government, Mr. X is the Chief  
16 Minister, subsequently three MLAs out of five, claim that they are the real political party. The  
17 said three MLAs go to the Governor along with the opposition parties to form the Government.  
18 If the disqualification petitions are filed against those three MLAs, writ petitions will have to  
19 be decided with reference the state of affair as it existed on the date of prohibited conduct.  
20 This is in line with Rana, of relating back. Thus the faction of three MLAs, should first get that  
21 claim of being the real political party adjudicated and determined and then take a political  
22 decision instead of putting the cart before the horse. This is the only interpretation which  
23 harmonizes the provisions of Tenth Schedule and the Symbols Order. This interpretation will  
24 harmonize various competing interests and objects and ensure that the integrity of the political  
25 party is maintained, at the same time giving individual MLAs, or a group or a faction, the  
26 opportunity to get the political leadership changed in a manner known to law.

27 My Lords, the next submission, that if this...if the contention of my learned friend's is accepted,  
28 that moment there is a dispute within a political party, there can't be a disqualification  
29 petition, will lead to a complete constitutional hiatus as far as Tenth Schedule is concerned.  
30 That My Lord in paragraph 40, it is respectfully submitted that there cannot be any hiatus in  
31 the working of the Constitution. It is the contention of the Respondent...if the contention of  
32 the Respondent is accepted that the Tenth Schedule proceedings are hinged on a future  
33 declaration of their status and/or their claim of being the political party, then it would result  
34 in a situation where in every case of disqualification a defence would be taken where the  
35 defectors represent the political party, and therefore no action of disqualification can be taken.  
36 Taking the argument to its logical conclusion it would only mean that till such claim of the  
37 defections...defecting faction that they represent the political party is decided by competent

1 forum, the Tenth Scheduled proceedings cannot be proceeded with. This would result in a  
2 constitutional hiatus. My Lords, then I have cited Supreme Court of Canada that on  
3 Constitutional interpretation and also Your Lordship's judgment in the Advocates on Record  
4 Association.

5 Then My Lords, serial number seven. I respectfully submit that ultimately Your Lordships will  
6 have to lay down the batting order as Justice Narasimha put it, My Lords that is paragraph...  
7 serial number seven. It is imperative for this Honourable Court to lay down a constitutional  
8 sequence in order to harmonize the Tenth Schedule 179-C, as well as para 15. As it's evident  
9 from the facts to present case, the Respondent MLAs, instead of first resolving that claim in a  
10 manner known to law, have resorted to prohibited conduct. The proceedings before the  
11 Election Commission were initiated only on 19th July, that is much after the disqualification  
12 petitions were filed on 23rd June 2022. Then paragraph 44 is the submission. Thus, it is  
13 imperative that this Honourable Court lays down the constitutional sequence and the legal  
14 permissibility of three distinct constitutional/statutory procedures, namely, one proceeding of  
15 disqualification under the Tenth Schedule, that is one. Second is 179-C, My Lords, which has  
16 already been argued. And then paragraph 15 of the Symbol's Order. It is respectful submission  
17 of the petitioners that the Tenth Schedule proceedings necessarily have a constitutional  
18 precedence over 2 and 3 above. Second My Lords, para 15 proceedings which are based on the  
19 majority test cannot be undertaken or proceeded with, without final adjudication of the Tenth  
20 Schedule. And third is the Nabam Rebia argument. Then last two submissions are on the  
21 Symbol's Order and I have submitted that the reason is My Lords, that decision so defence....

22

23 **CHIEF JUSTICE CHANDRACHUD:** That is not an issue which falls here.

24

25 **MR. KAMAT:** Yes My Lords. One of the questions which you have referred to Your Lordships  
26 in the reference order, relates to the power of the Election Commission. My Lords the only  
27 defence which is taken My Lord...

28

29 **CHIEF JUSTICE CHANDRACHUD:** That is a separate.

30

31 **MR. KAMAT:** Yes My Lords. The reason is, the defence which is going to come, which Your  
32 Lordships will probably hear, is that look here we are now being adjudicated as the party. So  
33 therefore the disqualification petition are anyway not maintainable, because it is given by a  
34 person who is not a political party. So, just two submissions on that. If Your Lordships have  
35 paragraph 47. I have submitted that as far as para 15 is concerned, it cannot be undertaken  
36 without determination of the Tenth Schedule which Your Lordships will examine in another  
37 matter. And last Paragraph 49 and 50 is that the decision of the Election Commission is a

1 declaration of status that who is the political party pursuant to a split which has arisen. That  
2 can only have a prospective My Lord effect. It can't relate that. Kindly have My Lords  
3 Paragraph 49. It is submitted that under Paragraph 15 of the Symbols Order.... 'It is submitted  
4 that a decision under Paragraph 15 of the Symbols Order is a decision which can only have a  
5 prospective effect.' Then My Lords I have quoted Paragraph 15 of the Symbols Order.

6 It is a quasi-judicial adjudication under the Symbols Order. That My Lords, adjudication of  
7 the dispute results in an order declaring XYZ as representing the political party. And this  
8 submission is My Lord, that can only have a prospective effect. Now My Lords kindly see the  
9 consequence. If it is held otherwise that it relates back, it would have My Lord in our respectful  
10 submission, complete disastrous consequences as far as the Tenth Schedule is concerned.  
11 Because when the decision comes, for instance, in this case it has come in February My Lords.  
12 Petition moved on 19th of July and today to say that in view of this decision now in February,  
13 2023 all the actions of prohibited conduct get defaced My Lord, would be to destroy the  
14 complete intent, letter and spirit of the Tenth Schedule. My Lords all the other submissions  
15 and judgments are there... I am grateful for a very patient hearing. Grateful My Lords.

16

17 **CHIEF JUSTICE CHANDRACHUD:** We will start after lunch, but just before we rise, Mr.  
18 Kaul will first argue, thereafter Mr. Jethmalani. And then this Mr. Maninder Singh. Mr. Kaul,  
19 how will you space out your submissions? How long would you take? Will you take the rest of  
20 the day today?

21

22 **MR. KAUL:** My Lords, the Solicitor General, would of course also appear. My Lords, I would  
23 definitely take today, whatever time and tomorrow.

24

25 **CHIEF JUSTICE CHANDRACHUD:** Today. And tomorrow is Wednesday.

26

27 **MR. KAUL:** Yes My Lord.

28

29 **JUSTICE NARASIMHA:** Entire?

30

31 **MR. KAUL:** Yes My Lords. I have three and a half days of arguments or four days of  
32 arguments.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Right. So we want to wrap up the matter by the end  
35 of this week.

36

37 **MR. KAUL:** Right. but I....

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**CHIEF JUSTICE CHANDRACHUD:** So you know what we would suggest is that you know, you can begin... of course you will take the whole of the day today. If you can sort of complete, say 1 hour after lunch tomorrow, say by 3 o' clock, that would ensure that then, Mr. Jethmalani and Mr. Maninder Singh can conclude, say by tomorrow evening. And then the Solicitor can get a little time day after and then the rejoinder.

**MR. KAUL:** I'll try my best....

**CHIEF JUSTICE CHANDRACHUD:** Alright. Let's do it this way. Mr. Sibal, between you and Dr. Singhvi, how long would you anticipate for a rejoinder? I mean....

**MR. SIBAL:** My Lords, if it's 02:00 in the afternoon on Thursday, we will finish by 4:00.

**CHIEF JUSTICE CHANDRACHUD:** So if we can...

**MR. JETHMALANI:** We can finish by 4:00....

**MR. MEHTA:** On Thursday I may not take more than 1 hour, one and half hour My Lord, maximum.

**CHIEF JUSTICE CHANDRACHUD:** Alright.

**MR. JETHMALANI:** We will endeavour to finish by 2 o' clock on Thursday.

**MR. SIBAL:** That's right, that's fine.

**CHIEF JUSTICE CHANDRACHUD:** So then what we were suggesting was if you can between the three of you, you can finish by tomorrow, ideally. Then you know, the solicitor says he will take about one hour or one and a half hours on Thursday. So if he begins by 11:00 by 12:30 he'll be done. Then we still have a little bit of a half an hour margin. He said one, one and a half hours. So you know, we'll just....

**MR. KAUL:** Try our best My Lords. That is all I can say.



1 **CHIEF JUSTICE CHANDRACHUD:** Between the three of you and the Solicitor, if you can  
2 finish complete by Thursday, 02:00 PM you know, then they have the rejoinder after lunch on  
3 Thursday.

4

5 **Mr. SIBAL:** That's enough for us.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Then maybe the three of you and just MR. Solicitor  
8 can also have a word so that, you know, you space your arguments and you know what you're  
9 going to argue. So that saves a lot of time.

10

11 **MR. JETHMALANI:** Your Lordships are sitting at 3:15 for a bail matter we are told so.....

12

13 **CHIEF JUSTICE CHANDRACHUD:** 3:50.

14

15 **MR. JETHMALANI:** We will only be sitting in the bench till....

16

17 **CHIEF JUSTICE CHANDRACHUD:** 3:50.

18

19 **MR. JETHMALANI:** 3:50.

20

21 **CHIEF JUSTICE CHANDRACHUD:** We thought because 3:15 then we'll really eat into  
22 your time. It might continue beyond 4 o' clock, but we'll ...

23

24 <<LUNCH BREAK>>

25

26 **MR. KAUL:** I will address to Your Lordship's questions referred. Your Lordships because my  
27 respectful submission is going to be, that a large number of arguments have gone far beyond  
28 the questions referred.

29

30 My Lords, I am respectfully submitting, according to us large number of arguments are far  
31 beyond the questions referred and really are not relevant to the issues at hand. Be that as it  
32 may, what is the basic premise of the case of the petitioners over the last three and a half days?  
33 That because there was a split in the legislature party, we the Respondents stand per se  
34 disqualified, and because we stand per se disqualified, ex facie disqualified, under para 2-1 (a)  
35 and 2-1 (b), of the Tenth Schedule, the Supreme Court of India should bypass all coordinate  
36 constitutional authorities and decide itself whether we are disqualified or what in fact,  
37 effectively saying we are disqualified on that.

1 Secondly, till that disqualification is decided, neither should the floor test have happened nor  
2 should the Governor have taken a decision, nor could the ECI have taken a decision, because  
3 if ultimately they are to be disqualified, it will have a bearing on the decision made by any of  
4 these authorities.

5 And thirdly, and thirdly because it is Your Lordship's order of 27th of June 2022, which led to  
6 the toppling of a Government, only Your Lordships can correct that wrong and restore status  
7 quo at that. Now My Lords, this fundamental premise, on which the entire edifice of this case  
8 is based suffers from some basic problems before I come to the issues in hand.

9 Your Lordships have time and again held, that we will not act as the court of first instance  
10 especially where coordinating Constitutional authorities have been specifically vested under  
11 the Constitution with the requisite powers to decide an issue. There is also a presumption that  
12 you are per se disqualified so you are the jury you are the judge to decide it yourself without  
13 any constitutional authority till date, having given any finding on our disqualification. You  
14 decided, you presumed it so. But more importantly and I, before I get into the issues, I want  
15 to touch the issues of the Governor. It is of some concern. There were emphatic assertions  
16 made, that My Lords when the Chief Justice and Your Lordships put a question, that what  
17 should the Governor do, in a case where not before the Government is formed, but after the  
18 Government is formed, there is a problem should the floor test ordered or not. What is the  
19 course of action that the Governor should adopt? And the answer given was that floor test  
20 ought not to take place. Only a no confidence motion could be moved in such a situation. And  
21 Dr. Singhvi said where disqualification petition is pending, my answer is zero as far as holding  
22 off of floor test is concerned. My Lord with utmost respect, these submissions of the petitioner  
23 are in the teeth of nine judges of this court in Bommai are in the teeth. We are told that the  
24 concern in this matter is not about who wins and who loses but maintaining constitutional  
25 propriety and institutions. And I think the arguments sought to be now forwarded before you  
26 are constructive of the entire constitutional scheme as settled by Your Lordships in a patina  
27 of decisions including the nine Judges in Bommai. Also reiterated in Shivraj Chauhan's case  
28 where Your Lordship's relying on Bommai said that it is incorrect to say that a floor test can  
29 only be directed to be ordered by the Governor before a Ministry formation and not after. In  
30 fact, Your Lordship words in Bommai

31 and Shivraj were - 'It is the duty of the Governor to hold a floor test. The only constitutionally  
32 ordained forum is the Assembly of Parliament and no Governor and individual in his own  
33 opinion can form a view whether a majority has been won or lost and the only way forward is  
34 a floor test. And the Court frowned upon the pendency because there used to be a huge misuse  
35 of Article 356 to dismiss Governments and dissolve Houses. There was the Court frowned  
36 upon it and said that the first instance the Governor must call for the floor test in such a case.  
37 Now My Lords what happens in this case? In this case from the 27 and in my earlier submission

1 before Your Lordships of Nabam Rebia, I had even then said that I'm not for a minute  
2 suggesting that when we filed our 32, Nabam was not one of our case. That is not our  
3 contention at all. Nabam was [UNCLEAR] important arguments. The other was equally  
4 important was violation of principles of natural justice and the third was imminent,  
5 immediate danger to the lives of the MLAs whose houses were being burnt and relatives being  
6 threatened. That is why we came in a 32 and that is hugely different and does not bought by  
7 Kihoto at all. Because our contention was what that Your Lordship will decide on  
8 disqualification petitions as they are claiming. That was not the prayer in our writ petition.  
9 Our contention was that Nabam even as it stands today has held the judicial field. It is a  
10 Constitution Bench decision, and the Speaker had no jurisdiction to proceed with the matter  
11 at all apart from the principles of matter in justice being violated. The court keeping of this in  
12 mind, only on the issue of natural justice on that day extended the time, did not injunct the  
13 Speaker, extended the time. Now extension is interpreted to say because extension was  
14 granted till 12th of July, it effectively meant an injunction, I don't see how If you violate a  
15 provision of the rule which says adequate notice should be given, the Speaker doesn't give that  
16 notice. The Honourable Court says give them more time.

17 Now after that My Lords what does the Governor do? The Governor in his letter writes to say  
18 that seven independent MLAs who were supporting the Ministry have withdrawn support. The  
19 leader of the opposition has written to me to say that they have no confidence, the ministry  
20 Within the Ministry, a large section of the Legislative Party had moved a resolution saying that  
21 they do not support the MVA Ministry and government. Given these facts, I think it prudent  
22 and call upon the then Chief Minister Mr. Thackeray to come and prove his majority on the  
23 floor of the House. My Lords, I put a question to myself what else is the Speaker.... the  
24 Governor expected to do. Your Lordships words again in Bommai are by whatever process or  
25 means the words used by Your Lordships in Bommai are by whatever process or means, the  
26 Governor can gather the information that was required which raises a credible as to the  
27 majority of a government in power.

28 The only course open is, the floor test. And that is what the Governor goes ahead with. You  
29 refused to face that floor test and your only answer to that is, it was a *fait accompli*. So, My  
30 Lords, if legislative, if democracy, it has to be tested on the floor of the House are going to be  
31 decided on, if my *fait accompli* so I won't face a floor test. And yet want to continue in  
32 government, is that acceptable? Is that constitutionally acceptable? The only mechanism  
33 known is a floor test and you evade that. And then you cast aspersions on a constitutional  
34 authority to say, which in any case today is the norm, you can cast any aspersion on anyone  
35 you want to. And you say that the Governor in question, failed to discharge his duties, acted  
36 with bias and in a mala fide manner. My Lords, what was he expected to do? Seven

1 independent MLAs say, we've lost confidence. The leader of the opposition writes, 34 of the 55  
2 MLAs pass the resolution saying we have no faith in the ministry any longer.

3 Now, before I proceed further, before I proceed issue wise, I want to show these two  
4 judgments. It was so much time has been spent on the powers of the Governor and that he  
5 acted with mala fide intent and the solutions that Your Lordships asked for what could have  
6 been done by the Governor? It was said, he definitely could not have asked for a floor test. And  
7 the only way to get out of all this judgments is to say that those cases did not evolve a  
8 disqualification petition pending.

9 Now My Lords, the moment Your Lordships in Shivraj Singh Chauhan, Kuldeep Bishnoi, and  
10 any number of judgements have said that...And Shivraj Singh Chauhan especially, that  
11 proceedings under the Tenth Schedule, which concern disqualification can a trust vote operate  
12 an entirely different fields. In the meantime, the right of an MLA to participate in the  
13 proceedings of the House continues and it continues to participate and vote. Now, if their  
14 submission is taken to be correct, firstly it is wrong because in the teeth of what Bommai and  
15 Shivraj Singh Chauhan says. Then when Your Lordships ask them what could be done? They  
16 say zero definitely, if disqualification petitions are pending. Which is in the teeth again in  
17 Shivraj Singh Chauhan, which says the irrespective of disqualification pending, irrespective of  
18 resignation letters pending, they will participate in the House. And that comes back to the  
19 same question, that if an MLA is permitted to participate in the floor of the House, the legality  
20 as far as those proceedings are concerned, it can't be questioned. You can't say that all the  
21 proceedings, budgets, decisions, bills passed will all be annulled. And we will restore status  
22 quo ante. And when I come to Rana, I will point out My Lords, Rana is completely misread.  
23 Rana was in the context, where the Speaker's power, the Supreme Court held that when the  
24 Speaker decides the disqualification issue, he sees the events as on that date. Because there a  
25 set of MLAs have gone and shown support to a rival faction and gone to Governor. The split  
26 took place later. They sought to seek the defence of the Tenth Schedule, as then existed. The  
27 Supreme Court, ultimately said no, as far as the Governor is concerned, the facts will be seen  
28 on the day when they approach the Government. The Supreme Court never said that the MLAs  
29 who participated in the trust votes, the MLAs who have taken decisions, proceedings which  
30 have been legally conducted, will all stand annulled. Because ultimately it  
31 comes around to the argument being that if ultimately Your Lordships were hold them to be  
32 disqualified, the EC proceedings couldn't have gone on, the trust vote could not have happened  
33 and thus restoration of *status quo ante*, which would mean annulled everything that has  
34 happened. That is effectively the argument being laid before Your Lordships.

35 To state a EC proceedings, four arms of arguments were addressed. That EC should not go on  
36 with the same argument. That if EC goes ahead with that and then later on it found that these  
37 people are disqualified. They have no right to approach the EC. And a question was put by

1 Your Lordships even on that day, what about his right as a member of political party? In any  
2 case who will decide this, whether there has been a split in the political party, and then you  
3 presume as if I have argued that there is only a split in the legislature party and not in the  
4 political party? We have consistently said so including in our resolution dated 21st of June  
5 2022, that a Legislature Party is integral and organically connected and co-joined to a political  
6 party. What is said in the Legislature Party is a reflection of what is happening amongst  
7 millions and thousands of cadres of the Shiv Sena across the country because there was a huge  
8 discontent of aligning in the MVA with people who you are ideologically opposed to the right  
9 through your political careers in existence. That was where the discontent arose from that you  
10 fought in an relation with another party after that suddenly went along with another party.  
11 That was the political discontent. So we were conscious and it rightly talked about the political  
12 party discontent. But who will determine this? Who is the Whip? There are two Whips we are  
13 talking about they say your Whip is only appointed by the Legislature party. We say no. To say  
14 that our Whip appointed by the Legislature party does not represent the authority of the  
15 political party is wrong. Ultimately, right or wrong the EC today is taken a decision that's the  
16 subject matter of another petition which Your Lordships will decide. But even on that day  
17 when a stay was asked for, our respectful submission was how can the Supreme Court today  
18 without the concerned constitutional authority at all deciding on the issue, at all deciding on  
19 the issue take a call in these matters just because you say so and you presume we are per se  
20 disqualified. Now please have My Lord's Bommai and Shivraj Singh Chauhan only on the  
21 powers of the Governor before I proceed because that's one of the most glaring submissions  
22 made in the teeth of the settled law of the land. Please for the..... judgment...

23

24 **JUSTICE NARASIMHA:** Mr. Kaul, so you are submission starts with the primary principle  
25 that proceedings under the Tenth Schedule operate independent of the power of the Governor.  
26 Irrespective of the pendency of the Tenth Schedule proceedings at any point of time, the  
27 Governor can ask a floor test. Number one. And if he asks then are there any limitations with  
28 respect to the fact that the Tenth Schedule proceedings are pending? Should he wait? Not wait?  
29 Because the primary question will depend upon....

30

31 **MR. KAUL:** Yes. I bow down. My Lords I bow down, Your Lordships have summed it up very  
32 well. May I just add to what Your Lordships are saying? In addition to what Your Lordships  
33 summarized, is my second limb of the argument that Your Lordships have already held in any  
34 number of judgments that an MLA during pendency of a disqualification petition is fully  
35 entitled to participate and vote. If that were so, then what is the hindrance for floor test being  
36 conducted? And in all those matters the issue arose the same. During pendency of  
37 disqualification petition, should the floor test take place or not, I'll show those paras. And Your

1 Lordships answered by saying, why should the floor test not take place in the meantime. You  
2 can't without the decision of the Speaker, say that a person is disqualified.

3

4 **JUSTICE NARASIMHA:** There is a little catch there. See, there is a catch there.

5

6 **CHIEF JUSTICE CHANDRACHUD:** So the problem really is this that the antecedent  
7 circumstances which give rise to the necessity of a floor test are based on an alleged defection.  
8 So why is the floor test necessary? The need for a floor test arises because of the fact that a  
9 group of legislators maybe disqualified as a result of their having formed a split from the party.  
10 This may or may not...

11

12 **MR. KAUL:** Not from. Within there is a rival....

13

14 **CHIEF JUSTICE CHANDRACHUD:** ...there is a legislature party. Now if the validity or  
15 the legitimacy of the split is itself in question, then holding or directing the holding of a floor  
16 test before the disqualification issue is resolved would result in this that are you not then  
17 putting a premium on the very circumstances which gave rise to the disqualification?

18

19 **MR. KAUL:** So My Lords, a) Your Lordships have answered that, have answered that. And  
20 I'll show those judgments where this very question arose that can those MLAs against whom  
21 a disqualification petition is pending participate in a floor test?

22

23 **CHIEF JUSTICE CHANDRACHUD:** There you are right.

24

25 **MR. KAUL:** Look at the reverse.

26

27 **CHIEF JUSTICE CHANDRACHUD:** Because the law is very well settled that the mere  
28 pendency of a disqualification petition does not preclude a Member of Parliament or the  
29 Legislature in the State from exercising all rights and performing all functions of a legislature.  
30 Undoubtedly. But equally, we have to be cognizant of a situation where the reason why he or  
31 she can exercise all the functions as a legislature is because the Speaker has been not permitted  
32 to decide the disqualification.

33

34 **Mr. KAUL:** May I with respect say My Lords, as far as that goes....

35

36 **CHIEF JUSTICE CHANDRACHUD:** Step one, the step one, the speaker is told to defer a  
37 decision on the disqualification issue. So, the disqualification issue cannot be decided.

1 Therefore, why can the legislature not be restrained from exercising all rights from the floor  
2 of the House? Because of the judicial edict, that you shall not hear the disqualification until  
3 the 12th of July. Step one.

4

5 Step two, why is the trust vote required to be held? Up to, up to the 21st of June there was  
6 never any requirement of a trust vote. What is the requirement of a trust vote? The  
7 requirement of a trust vote arises because the seven independent MLAs, then you know, the  
8 34, they all start clamouring and they say well, there is a disquiet within. We don't owe  
9 allegiance and our Chief Minister has lost the, lost the confidence of the party. Now the point  
10 of the matter is this that if that is the reason for the unsettling of the Government in the House,  
11 then the antecedent basis of that itself is the allegation of disqualification. So if you allow a  
12 Government to be toppled then in circumstance...

13

14 **MR. KAUL:** May I with respect say, firstly, if I may say that I've just begun.

15

16 **CHIEF JUSTICE CHANDRACHUD:** We are just flagging it.

17

18 **MR. KAUL:** No, no, I am very grateful. I am very grateful.

19

20 **CHIEF JUSTICE CHANDRACHUD:** These are the concerns.

21

22 **MR. KAUL:** Yes, yes.

23

24 **CHIEF JUSTICE CHANDRACHUD:** This is not a case where, say, there is a three party or  
25 four party coalition in a state. Two parties say we are pulling the rug and entitled to that there's  
26 no disqualification. You have four party which have come together in an Aghadi and those two  
27 parties say we are pulling the rug and we want to get out of this Government. It doesn't have  
28 the mandate of why we came together. Governor can tell you, say the two of your constituents  
29 have pulled out, now please show me that you have established, you owe...You have the  
30 allegiance of the House. Because there there is no...The problem arises in cases like this where  
31 the reason for the trust vote is so intrinsically related to the alleged disqualification itself. You  
32 are right. My judgment in Shivraj says that well, these are two independent issues. But there  
33 is a...

34

35 **MR. KAUL:** No My Lords, let me....

36



1 **JUSTICE SHAH:** Mr. Kaul, one another thing. In addition to this, what is, what are their  
2 submissions? There is no difficulty that both are independent. There is no difficulty that both  
3 can go together simultaneously. But their submission is that if those persons who are to be  
4 against whom the disqualification proceedings are pending, are permitted to cast their votes  
5 in the, on the floor test, in the no confidence motion. If ultimately, after some time the Speaker  
6 takes a decision and they are disqualified, they are disqualified from day one from the date of  
7 their conduct. Correct? Then what will happen to that? So their case is that it is better, that the  
8 disqualification proceedings are initiated first, that is what their submission. You have to  
9 answer that also.

10

11 **MR. KAUL:** Yes My Lords, I will.

12

13 **JUSTICE SHAH:** That is the crux of their main submissions.

14

15 **MR. KAUL:** My Lords may I?

16

17 **JUSTICE SHAH:** You can argue on that, this was only warm up.

18

19 **CHIEF JUSTICE CHANDRACHUD:** Let's start with Bommai.

20

21 **MR. KAUL:** I thought, let me start with that and then I will come and I am conscious what  
22 My Lords have said. I'm very grateful. I'll address those questions.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Anything more than five in that sense is gospel for  
25 us, which was in a way we are bound by law, absolutely.

26

27 **MR. KAUL:** Not only that My Lords, of course you are right that way but even I want to show  
28 two paras, even as far as Bommai is concerned, on how Shivraj deals with it? It's important for  
29 Your Lordships to see that.

30

31 **CHIEF JUSTICE CHANDRACHUD:** Fair enough. So we'll see Bommai and then...

32

33 **MR. KAUL:** Yes, first, please see Bommai, and then see...Yes, yes. Kindly have para 119.

34

35 **CHIEF JUSTICE CHANDRACHUD:** Where is it? Your convenience compilation?

36

37 **MR. KAUL:** Volume 2 My Lords. Judgment Compilation Volume 2, PDF page 368.

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**JUSTICE SHAH:** PDF page?

**MR. KAUL:** 368.

**CHIEF JUSTICE CHANDRACHUD:** Which paragraph?

**MR. KAUL:** 119. My Lords May I?

**CHIEF JUSTICE CHANDRACHUD:** Yes.

**MR. KAUL:** 'Now in this connection it is necessary to stress that in all cases where the support of the Ministry is claimed to have been withdrawn by some legislators, the proper course for testing the strength of the Ministry is holding the test on the floor of the house. That alone is the constitutionally ordained forum for seeking openly and objectively the claims and counterclaims in that behalf. The assessment of the strength of the Ministry is not a matter of private opinion of any individual, be he the Governor or the President. It is capable of being demonstrated and ascertained publicly in the House. Hence, when such demonstration is possible, it is not open to bypassing and instead depend on the subjective satisfaction of the Governor or the President. Such private assessment is an anathema to the democratic principle apart from being open to serious objections of personal mala fide. It is possible that on some rare occasions the floor test may be impossible, although it is difficult to envisage such a situation. Even assuming that there arises one, it should be obligatory on the Governor in such circumstances to state in writing the reasons for not holding the floor test. The High Court was therefore wrong in holding that the floor test was neither compulsory nor obligatory, or that it was not a prerequisite to sending the report to the President recommending action under 356 (1). Since we have already referred to the recommendations of the Sarkaria Commission in this connection, it is not necessary to repeat them here.'

Now, kindly have para 121 same page. 'We may on this subject refer to the unanimous report of the five member Committee of Governors, which recommended as follows -

The test of confidence in the Ministry should normally be left to a vote in the assembly. Where the Governor is satisfied by whatever process or means that the Ministry no longer enjoys majority support, he should ask the Chief Minister to face the assembly and prove his majority within the shortest possible time. If the Chief Minister shirks this primary responsibility and fails to comply the Governor would be in duty bound to initiate steps to form an alternative Ministry. A Chief Minister's refusal to test his strength on the floor of the assembly can well be interpreted as prima facie proof of is no longer enjoying the confidence of the legislature. If

1 then an alternative Ministry can be formed which in the Governor's view, is able to command  
2 the majority of in the assembly, he must dismiss the Ministry in power and install the  
3 alternative Ministry in office. On the other hand, if no such Ministry is possible, the Governor  
4 will be left with no alternative but to make a report to the President under article 356.'

5 Now kindly have para 391 on PDF page 517. 391. My Lords have Page 391?

6

7 **CHIEF JUSTICE CHANDRACHUD:** Yes.

8

9 **MR. KAUL:** 'We must also say that the observations under point 7 is equally misplaced. It is  
10 true that action under Article 356 is taken on the basis of satisfaction of the Union Council of  
11 Ministers. But on that score it cannot be said that legal mala fides of the Governor is irrelevant.  
12 When the article speaks of the satisfaction being formed on the basis of the Governor's report  
13 the legal mala fides if any of the Governor cannot be said to be irrelevant. The Governor's  
14 report may not be conclusive, but it's relevance is undeniable. Action under 356 can be based  
15 only and exclusively upon such report. Governor is a very high constitutional functionary. He  
16 is supposed to act fairly and honestly consistent with his oath. He is actually reporting against  
17 his own Government. It is for this reason that the Article 356 places such implicit faith in his  
18 report. If however in a given case his report is vitiated by legal mala fides, it is bound to vitiate  
19 the President's action as well. Regarding the other points made in the judgement of the High  
20 Court, we must say that the High Court went wrong in law in approving and upholding the  
21 Governor's report in the action of the President under Article 356. The Governor's report is  
22 vitiated by more than one assumption totally and sustainable in law. Constitution does not  
23 create an obligation that the political party forming the Ministry should necessarily have a  
24 majority in the legislature. Minority governments are not unknown. What is necessary is that  
25 the government should enjoy the confidence of the house. This aspect does not appear to have  
26 been kept in mind by the Governor. Secondly, and more importantly, whether the Council of  
27 Ministers has lost the confidence of the House is not a matter to be determined by the  
28 Governor, or for that matter anywhere else except the floor of the House.

29 The principle of democracy underlying the Constitution necessarily means that any such  
30 question should be decided on the floor of the House. The House is the place where democracy  
31 is in action. It is not for the Governor to determine the said question on his own or on his own  
32 verification. This is not a matter within a subjective satisfaction. It is an objective fact capable  
33 of being established on the floor of the House. it is gratifying to note that Shri, the former  
34 President of India, has affirmed this view in his Rajaji Memorial lecture.

35 And now kindly have para 395 on page 518. 395. The High Court in our opinion erred in  
36 holding that a floor test is not obligatory. If only one keeps in mind the democratic principle  
37 underlying the constitution and the fact that it is legislative assembly that represents the will

1 of the people, and not the Governor, the position would be clear beyond any doubt. In this  
2 case, it may be remembered that the Council of Ministers not only decided on April 20th, 1989  
3 to convene the assembly on 27th of that very month that is within 7 days, but also offered to  
4 prepone the assembly if the Governor so desired. It pains us to know that the Governor did  
5 not choose to act upon the said offer. Indeed, it was his duty to summon the assembly and call  
6 upon the Chief Minister to establish that he enjoyed the confidence of the House. Not only did  
7 he not do it, but when the Council of Ministers offered to do the same, he demand and chose  
8 instead to submit the report to the President. In the circumstances it cannot be said that the  
9 Governor's report contained what was based upon relevant material. There could be no  
10 question of the Governor making an assessment of his own. The loss of confidence of the  
11 House was an objective fact which, could have been demonstrated one way or the other on the  
12 floor of the house. In our opinion wherever a doubt arises whether the Council of Ministers  
13 has lost the confidence of the House, the only way of testing it was on the floor of the House,  
14 except in an extraordinary situation where because of all pervasive violence, the Governor  
15 comes to the conclusion and records the same in his report, that for reasons mentioned by  
16 name of free vote is not possible in that case.

17

18 Now kindly have My Lords, Shivraj Chauhan, which follows....

19

20 **CHIEF JUSTICE CHANDRACHUD:** Para 396 also.

21

22 **MR. KAUL:** Yes My Lords. I was just give me a minute. 396, We make it clear that what we  
23 have said above is confined to a situation where the incumbent Chief Minister is alleged to  
24 have lost the majority support or the confidence of the House. It is not relevant to a situation  
25 arising after a general election where the governor has to invite leader of the party  
26 commanding the majority of the single largest group to form the government. We need express  
27 no opinion regarding such a situation.

28

29 **CHIEF JUSTICE CHANDRACHUD:** Now see para 397.

30

31 **MR. KAUL:** Yes. We are equally of the opinion that the High Court was in error in holding  
32 that the enactment edition of Tenth Schedule of the Constitution does not make any difference.  
33 The very object of the Tenth Schedule is to prevent and discourage floor crossing and  
34 defections which at one time had assumed alarming proportions.... personal edifications.  
35 A legislature elected on the ticket of a party is bound to support that party in case of a division  
36 or vote of confidence in the House, unless he is prepared to forgo his membership of the House.  
37 The Tenth Schedule was designed precisely to counteract horse trading. Except in the case of

1 a split a legislature has to support his party willy-nilly. This is the difference between the  
2 position obtained prior to and after the Tenth Schedule. Prior to the said amendment, a  
3 legislature could shift his loyalty from one party to the other, and any number of times without  
4 imperilling his membership of the House. It was if he had a property in the office.

5

6 **CHIEF JUSTICE CHANDRACHUD:** So here they say actually, Bommai deals with a  
7 completely different situation. Bommai was a case where the Council of Ministers had offered  
8 to summon the House the session of the Legislative Assembly within a period of one week.  
9 Governor says so sorry, I am convinced that you have lost the confidence of the House.  
10 Therefore you send the report to the President under Article 356. There the court holds that  
11 this course was not open to the governor. The only way to establish whether they had lost the  
12 majority of the Assembly was to order a floor test. And therefore the Governor couldn't on his  
13 own personal opinion that they had lost the majority say that well I'm going to send a report  
14 to the sovereign under 356. Second, they also make it clear that with an introduction of the  
15 Tenth Schedule, unless it's a case of a split which was a position prior to the deletion of the  
16 split in 2004, the only case where you cannot vote for your party is a split. Otherwise you are  
17 bound. You are bound by the forte of the party which is [UNCLEAR] power.

18

19 **MR. KAUL:** No difficulty. No difficulty.

20

21 **CHIEF JUSTICE CHANDRACHUD:** So now post 2004, the split having gone away as a  
22 defence, the only other available exception is a case of a merger.

23

24 **MR. KAUL:** Right, right.

25

26 **CHIEF JUSTICE CHANDRACHUD:** Save and except the case of a merger, you are bound  
27 to go to a party....

28

29 **MR. KAUL:** Right, right, no difficulty. But My Lords, two things. Firstly, no doubt as the facts  
30 My Lord Chief Justice summed up on Bommai , but Bommai doesn't just restrict itself to those  
31 type of....What Bommai says is the moment a support for Ministry is withdrawn, the  
32 moment....The fact is that in that case the Chief Minister... face a floor test. The Governor  
33 dissolved the House and sent the report to the President. But what Para 119 says is, the  
34 moment the support to a Ministry is withdrawn, the only option left to the Governor is to  
35 conduct a floor test.

36

1 **CHIEF JUSTICE CHANDRACHUD:** You know if we accept this extreme proposition very  
2 radical results will result. On the one hand you have the Tenth Schedule, which is to prevent  
3 you know, the sin, the constitutional sin of defections. On the one hand you say that well,  
4 somebody who defects or causes a split is liable to a disqualification. At the same time, we say  
5 that look, even if that person is liable to be disqualified, in the meantime you must hold a trust  
6 vote on the floor of the House. That is why if the antecedent reason for a floor test is based on  
7 a violation of the prescription in the Tenth Schedule, then holding a floor test at that stage will  
8 defeat the whole basis and purpose of the Tenth Schedule there.

9  
10 **MR. KAUL:** No My Lords may I with respect say, when Your Lordships first see...

11  
12 **CHIEF JUSTICE CHANDRACHUD:** And you are legitimizing, then a defection which is  
13 otherwise not permissible under the Tenth Schedule. That is what is happening actually.

14  
15 **MR. KAUL:** Firstly, our case is not a case of a split at all. I am not relying on any defence at  
16 all. I am neither relying on fee which in any case does not exist or on merger. That's not been  
17 my case. I have right through argued that we are talking about a rival faction within the party,  
18 which is decent and essence of democracy within a party. And we claim that we are the Shiv  
19 Sena and that is what comes to be decided. I'm not for a minute either, relying on the defence  
20 or merger or on the split of 1/3rd. That's their contention. My case has never been...

21  
22 **CHIEF JUSTICE CHANDRACHUD:** But whether you are the Shiv Sena or not.... Whether  
23 you are a Shiv Sena or not can't be decided...can't be decided on the floor of [UNCLEAR].

24  
25 **MR. KAUL:** Will be...will be...of course not. Your Lordships are right who is the political party  
26 will be decided by the Election Commission of India and that power is vested in the ECI and  
27 Your Lordships in judgment after judgement from Sadiq Ali downwards had said that  
28 exclusive jurisdiction and there's a presumption of validity as far as the decision of the ECI are  
29 concerned. I will come to those decisions.

30  
31 **CHIEF JUSTICE CHANDRACHUD:** On the 30th of June there was no decision of the ECI.

32  
33 **MR. KAUL:** No My Lords on 30th there was no decision of the ECI for the simple reason that  
34 if the decision will come when someone raises that issue, it will only be when a party approach  
35 the ECI. That can't be a decision of the ECI de hors a party approaching the ECI.

36

1 **JUSTICE KOHLI:** Mr. Kaul where is the question of the party approaching the ECI? For our  
2 understanding on 30th there was only one party. You are part of the party.

3

4 **MR. KAUL:** Yes.

5

6 **JUSTICE KOHLI:** There is a faction within or without. You contested the election on the  
7 strength of a ticket given by the party which was the original party. Then?

8

9 **MR. KAUL:** And I still say I am the original party. They are the over whelming minority.

10

11 **JUSTICE KOHLI:** [UNCLEAR] say you are as we understand, you show it within the party....

12

13 **MR. KAUL:** And yes absolutely right. My lady is right.

14

15 **JUSTICE KOHLI:** ...do it in the House.

16

17 **MR. KAUL:** No, no, I'm not saying I will do it in the House that's why I say floor test and  
18 majority in a political party are completely different issues.

19

20 **JUSTICE KOHLI:** When you go back to the party members, you say okay, here is a faction  
21 that we claim are actually the Shiv Sena. So we are going to the party as if not the just the  
22 organization, but each one counts in the party that makes the party to say now we are.

23

24 **Mr. KAUL:** So let me, let me answer that, let me answer that. One is which is the rival faction  
25 within the party who should be recognized as the party under the Symbols Order. That is what  
26 the Symbols Order provides for. That can only be decided by the Election Commission and no  
27 one else, who represents the party and is the recognized, which faction is the recognized  
28 political party? That is one part. In the meantime a Ministry which has lost the confidence of  
29 the House cannot continue. It's a completely different issue for which the floor test is meant.  
30 I'm not going for a floor test in this matter to show that I am the majority in the Shiv Sena  
31 political party. That has never been my case. Has never been my case at all. I'm going to the  
32 floor of the House show that you Mr. Thackeray and the NDA government, coalition  
33 government you lead has lost the majority because 7 independent MLAs and 34 of the 55 MLAs  
34 have no faith in you. Now they are presuming, they are presuming that this is only a rival  
35 faction within the legislature party, and not a rival faction within the political party. Whereas  
36 Your Lordships have time and again said you can't segregate the two. A Legislature Party is  
37 also an extension of the political party. In fact, for the continued recognition of a political



1 party, the legislative presence of its MLAs, and the percentage of vote it polls, is a necessary  
2 ingredient for continuing recognition under 6A and 6B of the Symbols Order. And Sadiq Ali  
3 took note of it. They said, for a party's continued recognition as a political party, its performance  
4 in the electoral hustings, its vote percentage, its MLA and MPs are equally important. These  
5 are their arguments. And that is what I've been saying to yourself. You're the judge or the jury  
6 you say per se disqualified. There was a split only in the legislature party and thus nothing else  
7 needs to be done. My whole case is being it's a case of interned and dissent. We are the faction  
8 which represents the Shiv Sena. That issue can only be decided by the Election Commission  
9 where Your Lordships refuse to stay those proceedings. The same argument was made.

10

11 As far as the floor test is concerned, it is only restricted to the issue whether the Chief Minister  
12 or the Ministry has the confidence of the House or not. And what does the Governor do? The  
13 Governor says come and face of floor test and you resign. Now, that was a pertinent question  
14 that day, which was put by Your Lordship and My Lord the Chief Justice saying that- Had this  
15 Chief Minister not resigned, one could have possibly seen what is the effect of those 39 plus 4  
16 votes or three votes. Now two answers to that. You remove those 39 plus 3 or 4, 42 votes. We  
17 are still through by a 9. And I have prepared those charts and I'll show. You remove each of  
18 those 39 plus 3 votes whose 42 and all, whose disqualification was pending, We are still  
19 through. In that case that's one. Secondly, my first contention would still be why should those  
20 42 be deleted at all because let's face it on that day, Nabam held the field. If Nabam held the  
21 field, Nabam said that as far as the Speaker is concerned, he should not proceed with his  
22 disqualification till its own case is decided. But let's take it, let's take it they should have been  
23 excluded. A Chief Minister does not go through even with the deletion of 39 plus 3 or 39 plus  
24 4, votes for the election of the Speaker and the election of the Chief Minister. He fails in both  
25 cases. I have prepared those charts with 42, without 42, because as Your Lordships rightly said  
26 that those 42 goes then the total strength also comes down. It can't be that you remove them  
27 and you don't remove them from the strength of the House. So whichever way you look at it,  
28 whichever way you look at it, presuming it for a minute, the trust vote was directly related,  
29 according to me, no. My Lord, every disqualification is only a Tenth Schedule case. There can  
30 either be a 191(1) or a 192(2). These are only two cases of disqualification. One can either be  
31 for the grounds provided in 191(1) or 192(2), it's Tenth Schedule. In 191(1) there is a procedure  
32 provided for the President, Speaker etc. in consultation with Election Commission, you get  
33 disqualified. Under 191(2), when it comes to that, that's where the Tenth Schedule is kicked  
34 in. Now, all those judgments that Your Lordship have dealt with are all cases that if a  
35 disqualification is pending the trust vote will still go through. In each of those cases it could  
36 have been argued that if this disqualification petition had been decided, the trust vote would  
37 have been differently affected. It could have been the same argument in every case.

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**JUSTICE NARASIMHA:** Bommai lays down a normative principle that floor test is the actual test.

**MR. KAUL:** Yes.

**JUSTICE NARASIMHA:** It hasn't really taken into account the sequence in which the power of the Governor has to be exercised in the case of defections. Bommai therefore goes only that far. In its application, in the subsequent judgment of Shivraj Singh Chauhan, has the court given an exposition of how Bommai operates in the context of Shivraj Singh Chauhan?

**MR. KAUL:** So should I go to that matter?

**JUSTICE NARASIMHA:** I am asking you that question.

**MR. KAUL:** Yes, because I wanted to. I wanted to actually go to....

**JUSTICE NARASIMHA:** Because it just flags it here, Bommai in 396 and 397. And it says that the situation that would arise so far as the principle of Bommai is concerned in the context of Tenth Schedule, stands at a slightly different footing. It says that far and then doesn't say anything further. The thing which needs to be seen with the advent of the Tenth Schedule is that power of the Governor to ask for a floor test in the context of Tenth Schedule when it should be exercised? Because the fundamental difference is the floor test will be determined by this decision because the composition of the House will change. For which your answer is that it makes no difference on facts and we are more on the principle.

**MR. KAUL:** Yes. Your Lordships are absolutely right. Even on the principles My Lords, when Your Lordships said that a floor test must go on in other judgments, leave aside our case, must go on irrespective of the pendency of disqualification petition, that was not in vacuum, Your Lordships said it in the context that mere pendency of a disqualification petition cannot impact a trust vote being conducted. That's what Your Lordships said, because in every case where a MLA is disqualified, his vote one way or the other, whether in absentia or actual voting would have had an impact on the trust vote. So my question is, My Lord to myself, how and in what ways? The individual facts of every case will vary on what day the letter went, what happened? But the principle, as Your Lordships have rightly said is that you cannot merely because a disqualification petition is pending prevent an MLA from voting in a trust vote. Now to say that you had the trust vote done because in the meantime, your disqualification petition was

1 pending. These are all hypothetical questions. Now then, questioning the Governor to say,  
2 Government should not have called the floor test. What else would the Governor have done  
3 My Lords?

4

5 **JUSTICE NARASIMHA:** Okay, Shivraj Singh Chauhan.

6

7 **MR. KAUL:** Yes, Shivraj Singh Chauhan. Judgment compilation, Volume-1, PDF 1360.

8

9 **CHIEF JUSTICE CHANDRACHUD:** Which volume? Sorry. Page 13...?

10

11 **MR. KAUL:** On 1359, Para 16. Mr. Maninder Singh, Learned Senior Counsel

12

13 **CHIEF JUSTICE CHANDRACHUD:** Yes.

14

15 **MR. KAUL:** Yes, Mr. Maninder Singh, Learned Senior Counsel appearing, appeared in an  
16 application for impeachment movement on behalf of 16 members who tendered their  
17 resignation to the Speaker, but whose resignation have not been accepted. On their behalf Mr.  
18 Singh submitted that an elected member of a Legislative Assembly has an absolute right to  
19 resign by virtue of provisions of Article 190 of the Constitution, the Speaker of the Madhya  
20 Pradesh Legislative Assembly accepted the resignations tendered by 6 members who are part  
21 of the same group of 22 members within the span of one day, and in doing so has chosen not  
22 to make any inquiry in regard to the remaining 16 letters of resignation. Resignations and  
23 disqualifications are distinct concepts. The exercise of judicial review in regard to advice  
24 tendered by the Governor to the Chief Minister to convene a trust vote is not warranted.

25

26 16.5. - in urging submission, Mr. Singh placed reliance <UNCLEAR> decision of 3 judge bench  
27 in Shrimant Balasaheb versus Karnataka Legislative Assembly.

28

29 Then 17 - Dr. Abhishek Manu Singhvi Learned Senior Council, appearing on behalf of the  
30 Speaker of the Madhya Pradesh Legislative Assembly, submitted that and kindly have 17.8 My  
31 Lords, the precedence of this court in regard to convening of a trust vote have arisen in the  
32 context of fresh elections held to the Legislature and not in the context of a running assembly.  
33 This was the same contention raised there.

34

35 Now kindly have Para 65 and 66.

36

37 **JUSTICE NARASIMHA:** You're right. Same contention.

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**MR. KAUL:** 65 and 66 PDF Page 1380, para 65. My Lords Chief Justice has para 65?

**CHIEF JUSTICE CHANDRACHUD:** Yes.

**MR. KAUL:** 'In analysing the observations made by the nine judge bench in SR Bommai, it is pertinent to remember that the Governor in that case did not call for a floor test. Rather, the Governor of Karnataka sent a report to the President, based on which the proclamation was issued under Article 356. The observation in SR Bommai can be relied on in determining whether the Governor possesses the power to call for a floor test. Discerning the subsequent question of when the exercise of such power is appropriate is the distinct issue. On a perusal of the above observations in SR Bommai it is evident that whether or not the Council of Ministers has lost the confidence of the House must be determined only on the floor of the House and not by the Governor conducting an independent verification. Where the Governor has reasons to believe that the incumbent Government does not possess the support of the majority in the Legislative Assembly, the correct course of action would be for the Governor to call upon the Chief Minister to face the assembly and to establish the majority of the incumbent Government within the shortest possible time. An exception to the invariable rule of testing whether the Government has the assembly's confidence on the floor of the House is envisaged only in extra ordinary situations where, because of existence of all pervasive violence of free vote is not possible in the House.'

Then 66 - 'As a matter of constitutional law, it would not be correct to proceed on the basis that constitutional authority entrusted to the Governor to require the Council of Ministers to prove their majority on the floor of the house can only be exercised at the very first inception after general elections are held and not when the Governor has objective reasons to believe that the incumbent Government does not command the confidence of the House. The Governor is not denuded of the power to honour a floor test, where on the basis of the material available to the Governor, it becomes evident that the issue as to whether the Government commands the confidence of the House requires to be assessed on the basis of a floor test. Undoubtedly the purpose of entrusting such a function to the Governor is not to destabilize an existing Government. When the satisfaction on the basis of which Governor has ordered a floor test is called into question the decision of the Governor is not immune from judicial review. The Court would be justified in scrutinizing whether the Governor prima facie had relevant and germane material to order a floor test to be conducted. It must be noted that the Governor does not decide whether the incumbent Government commands the confidence of the House. The purpose of holding a floor test in the Legislative Assembly is precisely to enable their elected representatives to determine whether the Council of Ministers commands the

1 confidence of the House that verification is not conducted by the Governor. The decision in SR  
2 Bommai, in fact held the recourse to the power under 356 was not warranted in a situation  
3 where the issue of confidence would yet be decided on the floor of the House by calling for a  
4 trust vote. Undoubtedly in that case, it was the Chief Minister who had suggested following a  
5 meeting of the Cabinet that the House should be convened for the purpose of testing the  
6 majority of the Council of Ministers. The significance of the decision lies in the fact that the  
7 decision of the Governor to submit a report under 356, was faulted on the ground at the floor  
8 test would have been an appropriate course of action.

9 My lords, so whether in Bommai the Chief Minister offered to face a floor test and the Governor  
10 declined to do so, maybe the peculiar facts the larger principle in Bommai or in Shivaraj Singh  
11 Chauhan that Your Lordships have laid down...that Your Lordships have...

12

13 **JUSTICE NARASIMHA:** The first half of 66 exposition is that it's untravelled, to that  
14 extent.

15

16 **MR. KAUL:** Please My Lords?

17

18 **JUSTICE NARASIMHA:** The first half of 66, para 66 is Governor's power is untraveled not  
19 confined to the inception.

20

21 **MR. KAUL:** Right. And that was the specific question posed.

22

23 **CHIEF JUSTICE CHANDRACHUD:** See para 71. Come further.

24

25 **MR. KAUL:** Very well. Yes.

26

27 **CHIEF JUSTICE CHANDRACHUD:** The powers of the Governor.

28

29 **MR. KAUL:** Yes, yes. The powers which are entrusted to constitutional functionaries are not  
30 beyond the pane of Judicial Review. Where the exercise of the discretion by the Governor to  
31 call a floor test is challenged before the court, it is not immune from judicial review. The court  
32 is entitled to determine whether in calling for the floor test, the Governor did so on the basis  
33 of objective material and reasons which were relevant and germane to the exercise of the  
34 power. The exercise of such power is not intended to destabilize or displace a democratically  
35 elected government accountable to the Legislative Assembly and collectively responsible to it.  
36 The exercise of the power to call for a trust vote must be guided by the overarching

1 consideration that the formation of satisfaction by the Governor is not based on extraneous  
2 considerations.

3 So My Lords, please read this with the observations in Bommai that no independent view of  
4 any person, including the Governor. At the end of the day he must take recourse for a floor test  
5 because these are not his individual opinions. His individual opinions are only meant that  
6 prima facie it appears that the majority has been lost by the ministry in power. And after that,  
7 how does he determine? The court says you can't determine it on your own and say you've lost  
8 majority that's why I am dissolving the House. The best way to do it is ask the Chief Minister  
9 concerned to face the floor test and that Chief Minister in this matter, refuses to face the floor  
10 test and resigns before that. And the only argument being made is, because it could have been  
11 an empty formality and disqualification petitions are pending. Firstly, My Lords there can be  
12 no argument in law, but here I go a step further, you exclude those 42. What happens? You  
13 still lose.

14

15 **JUSTICE NARASIMHA:** Para 72, also.

16

17 **MR. KAUL:** 72 and 73, My Lords?

18

19 **JUSTICE NARASIMHA:** Yes.

20

21 **MR. KAUL:** While the Constitution recognizes that the Governor does not possess a  
22 power....I am so sorry. While the Constitution recognizes that the Governor does possess a  
23 power in hearing-in the office to monitor that the elected Government continues to possess  
24 the confidence of the Legislative Assembly. This entrustment ought not to override or displace  
25 the basic responsibility of the executive to the legislature or the ability of the legislature to  
26 demand accountability of the executive arm of the state. Dr. Singhvi's submission that the  
27 Governor cannot demand a trust vote, except at the initial Constitution of the Legislative  
28 Assembly following an election would be to unduly constrain the constitutional entrustment  
29 authority to the Governor. Undoubtedly the largest number of precedence emanating from  
30 this court have dealt with the situations where a trust vote was called at the time of the initial  
31 formation of the Government following an election. One of the reasons for this may well be in  
32 the prevalence of disputes at the time of the initial formation of the Government in the states.  
33 But this line of precedence would not exhaust the power of the Governor, nor does it suggest  
34 that the authority which is entrusted to the Governor cannot be exercised once a Government  
35 has been formed. Mr. so-and-so, on the other hand, accepted that there may be situations  
36 where the House is not in session having been pro, and there arrives circumstances leading

1 the Governor to a reasonable belief that the Government has ceased to command a majority  
2 in the legislative assembly.

3

4 This in our view would certainly be one of the situations where the Governor would be justified  
5 in calling for a special session in the course of which being incumbent Government may be  
6 required to establish that it continues to hold the confidence of the House. In a situation where  
7 the House has been summoned following the aid and advice of the Council of Ministers, the  
8 position would be more nuanced in the sense that the remedy of a no confidence motion would  
9 be available to any segment of the legislature seeking to espouse the view that the Government  
10 has ceased to command the confidence of the House. In exercising the constitutional authority  
11 to demand a trust vote, the Governor must do so with circumspection in a manner that ensures  
12 the authority of the House to determine the existence or loss of confidence in the Government  
13 is not undermined. Absent, exigent and compelling circumstances, there is no reason for the  
14 Government.... for the Governor to prevent ordinary legislative process of a no-confidence  
15 motion from running its due course. The Governor is an appointee of the President but does  
16 not represent either a political ideology or a political view. The Governor is expected to  
17 discharge the role of a constitutional statesman. The authority of the Governor is not one to  
18 be exercised in aid of political dispensation, which considers an elected government of the day  
19 to be political opponents. The precise reason underlying entrustment of the authority to the  
20 Governor is the ability to stand above political conflicts and with the experience of  
21 statesmanship to wield the authority in a manner which sub-serves and does not detract from  
22 the strength and resilience of democratically elected Legislature and the Government in the  
23 States who are accountable to them. To act contrary to this mandate would result in the  
24 realization of the worst fears of the constitutional framers who are cognizant that the office of  
25 the Governor, would potentially derailed democratically elected Governments but nonetheless  
26 place trust in future generations to ensure that the Government of the people, by the people  
27 and for the people would not be denuded by those who are designed to act as its sentinels.

28

29 **JUSTICE NARASIMHA:** Para 74 also. First 4 lines.

30

31 **MR. KAUL:** In discharging this crucial role It is necessary that the Governor bear in mind  
32 that the purpose underlying the entrustment of the authority to require a trust vote is not to  
33 display duly elected governments, but to intervene with caution when the circumstances which  
34 are drawn to the attention of the governor indicate a loss of majority. And that is exactly what  
35 the Governor did in this case. Seven independent MLAs write to him to say we are withdrawing  
36 support. The leader of the opposition writes, 34 of the 55 MLAs now, of course, 40 say that  
37 within the party that's another thing of split merger, that no one's that's never our case. That



1 is their case. To say that since there is no merger since para 3 is not available, you have per se  
2 incurred the disqualification. And our case right through has been that whether we represent  
3 the political party, the Shiv Sena is the recognized political party or you do, is a matter which  
4 the Election Commission will decide. The speaker My Lords, if Your Lordships will recollect....

5

6 **CHIEF JUSTICE CHANDRACHUD:** In the present case, when the leader of the  
7 opposition, writes to the governor, the Governor could have advice the leader of the opposition  
8 about the motion of no-confidence.....

9

10 **MR. KAUL:** Right. But my lords, nothing stops the Governor. Today we are testing the bona  
11 fides of a decision. My Lords to say that the Governor opted for one option instead of...

12

13 **CHIEF JUSTICE CHANDRACHUD:** The Election Commission cannot duck the  
14 responsibility of summoning or placing a motion of no-confidence by getting the Governor to  
15 direct the convening of a trust....

16

17 **MR. KAUL:** My Lords, may I with respect say that the leader of the opposition did not get  
18 the Governor to do anything. The leader of the opposition brought it to the notice of the  
19 Governor. 7 independent MLAs also brought it to the notice of the Governor. 34 MLAs within  
20 the party wrote to the Governor to say that we will not support this Ministry and that Governor  
21 in exercise of his discretion after amplifying his mind, satisfying himself that the conditions  
22 accepted followed Bommai, followed Shivraj Singh Chauhan to say that the best course of  
23 action available would be a floor test. Now My Lords, if Your Lordships in a nine judges and  
24 Shivraj Singh Chauhan has said that that is the first course, you must follow that. And if the  
25 Governor says I'm following it, the only line of attack is because a disqualification petition is  
26 pending.

27

28 **CHIEF JUSTICE CHANDRACHUD:** But what is the objective material the Governor in  
29 this case?

30

31 **MR. KAUL:** My Lord, the objective material was the moment, firstly 7 independent MLAs,  
32 the Leader of the opposition, and 34 out of the 55 MLAs say you do not enjoy...

33

34 **CHIEF JUSTICE CHANDRACHUD:** Independent MLAs have nothing to do with the  
35 strength of the government in the House.

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37 **MR. KAUL:** They were part of the Government.

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**CHIEF JUSTICE CHANDRACHUD:** There was absolutely no word because that applies when the government was formed.

**MR. KAUL:** No, no My Lords. They continued to support the government. Those seven are part of the..... They withdrew support to the Government My Lords. Those 7 withdrew support to the government.

**JUSTICE NARASIMHA:** Were they holding Ministerial posts?

**MR. JETHMALANI:** Two of them.

**MR. KAUL:** Two of them were. My Lords they were part of the Government. They were part of... let's test it. When Your Lordships in para 121, of Bommai says...

**JUSTICE NARASIMHA:** Did the remaining gave letters of support to the Government during its formation?

**MR. KAUL:** Please My Lords?

**JUSTICE NARASIMHA:** The remaining apart from the two who became ministers, did they... just check it up later. Check it out.

**MR. KAUL:** We'll check it up. My Lords, please see, MLAs who are part of the Government say we are withdrawing support. The leader of the opposition says he has lost support. 34 of the 55 ruling party MLAs say that we represent the real Shiv Sena, we have no faith in this coalition continuing. What is wrong.... [NO AUDIO] called for a floor test. My Lords, if he had dissolved the House, if he had called someone else to form the Government, dismissed the Government. He has not done any of it. He just said you come and prove the majority on the floor of the House. Their entire argument is that because of disqualification is pending, test that proposition My Lords. According to us because we passed a resolution, they gave a disqualification notice to us. That's our case. Reverse the proposition, suppose you want to defeat any bill, any decision on the floor of the House, the easiest thing is give disqualification notices to parties.

**CHIEF JUSTICE CHANDRACHUD:** Now in this context, if you see para 75 of Shivraj Singh, the court there held that there was objective material before the Governor.

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**Mr. KAUL:** Yes.

**CHIEF JUSTICE CHANDRACHUD:** That's the kind of, just see that para 75 and 76 in the first case. We then get some flavour of what are the circumstances in which a Governor can call for a....?

**MR. KAUL:** Yes, in the present case the facts which have come on record indicate that the budget session of the Legislative Assembly had been convened on the aid and advice of the Council of Ministers to commence from 16-03-2020. The Governor was intimated that 22 members, owing allegiance to the INC has tendered their resignation to the Speaker of the assembly. Copies of the resignation letters were forwarded to the Governor. At this stage the validity of these resignations had not been discerned, and no decision had been made by the Speaker as to whether the resignations were voluntary or genuine. The Chief Minister subsequently tendered the advice to the Governor for the removal of the six ministers who were ministers in the State government. On 13-03-2020, the Speaker of the Legislative Assembly issued notices of disqualification. However, on 14-03-2020 resignations of six members who are ministers of incumbent government were accepted by the Speaker, acting in exercise of the constitutional authority under the proviso to Article 193B. The Chief Minister adverting to the turmoil in the State addressed a communication to the Governor, 13-03-2020, stating that the convening of the floor test would be a sure basis for resolving the conundrum. This is a strong indication that the Chief Minister himself was of the opinion that the situation in the State had cast his government's majority in doubt. However, upon the convening of the Legislative Assembly, no floor test was conducted and the House was adjourned till 26-08-2020. These facts form the bases on which the Governor advised that a floor test be conducted. Based on the resignation of the six ministers of the incumbent government accepted by the Speaker, the purported designation of 16 more members belonging to the INC, and the refusal of the Chief Minister to conduct a floor test despite the House having been convened on 16-03-2020, the exercise of power by the Governor to convene the floor test cannot be regarded as Constitutionally improper.

Now My Lords, applies to the facts of our case. The Governor notes, there is violence. They're being attacked. 34 of 55 do not support the Ministry. Seven supporting independents have also withdrawn. The leader of the opposition is also written to the same extent. He doesn't dissolve. He doesn't swear in another government in power. He says, you come and prove your majority. And Your Lordships, they have right through said it is your duty to summon the House and said that no Governor or any other individual should form an independent opinion.

1 In Bommai Your Lordships has said at the moment the Governor starts coming in these  
2 matters and substituting his opinion to dissolve the House instead of a floor test being ordered,  
3 it would be dangerous for democracy. I'm just testing the proposition of the other side My  
4 Lords, because it is being said or not. This material in my respectful submission is more than  
5 sufficient to meet the test of judicial review because Your Lordships are not substituting your  
6 view for that of the Governor. All that Your Lordships are seeing is whether the decision  
7 making process was apt. It was not accentuated by mala fides or bias in the matter or any  
8 extraneous consideration was not taken into account. And in the given circumstances, My  
9 Lords, the Governor, taking the requisite facts into account, the surrounding circumstances  
10 into account, comes to an informed decision, that floor test should be conducted. And he  
11 orders a floor test. Now because you feel the floor test would have led to a situation where you  
12 are unable to face the majority then that should be the end of your Government. Which  
13 Government should be allowed to continue, which cannot face a floor test My Lords?  
14 Irrespective of disqualification pending or not pending, can any elected representative ever  
15 say that I want to continue in the Ministry as an elected Government without facing a floor  
16 test?

17

18 **CHIEF JUSTICE CHANDRACHUD:** Just look at the Governor.... [UNCLEAR] Look at  
19 Para 1 and Para 2. What does he say? Is that convenience compilation number 2. Page 326.  
20 Just read that..

21

22 **Mr. KAUL:** Yes. My Lords. I will read the whole thing. I'll read the whole letter.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Dear Shri Uddhavji.

25

26 **Mr. KAUL:** Yes. I'm in receipt of two letters dated 28-6-2022, which have been received at  
27 the Raj Bhavan, Mumbai. The first letter has been given by 7 independent MLAs stating that  
28 you have lost the majority of the floor of the Vidhan Sabha and requesting me to call for a  
29 special session of the Maharashtra Legislative Assembly and to direct you to prove your  
30 majority on the floor of the House. A similar letter dated so and so has been received from the  
31 Leader of the Opposition stating that you have lost the majority in the Maharashtra Legislative  
32 Assembly and a floor test for proving your majority in the with Vidhan Sabha is urgently  
33 required. I'm in receipt of a resolution dated 21-6-2022 signed by 34 members of Shiv Sena  
34 legislature party stating that there is a enormous discontent within the Shiv Sena cadre and  
35 electorate on account of the alliance of the NCP and INC. The resolution clearly indicates that  
36 the majority members of Shiv Sena Legislature Party want to exit the alliance with NCP and  
37 INC and to that end they have reaffirmed the appointment of the leader of the Shiv Sena

1 legislature party. I'm also in receipt of a later dated 21-6-2022 addressed by Eknathrao Shinde  
2 to the Deputy Speaker stating that the purported appointment of one Mr. Ajay Chaudhary is  
3 illegal, having been made by 16 MLAs without notice and without quorum, and therefore the  
4 same is inoperative. A letter dated 25-6-2022 was also received by me, whereby 38 members  
5 of the Shiv Sena legislature party have alleged that the security provided by the State  
6 Government to them and their family members have been illegally withdrawn. It is stated in  
7 the letter that various leaders of the State Government are instigating the cadre to initiate  
8 violence against 38 MLAs as a result of which the offices of some of these MLAs were  
9 vandalized. I have also been made aware that there have been grave threat to life of these 38  
10 members and also their families. I've seen the developments through electronic and  
11 print media very clear closely which substantiates the above facts. The apprehension of the  
12 MLAs is also fortified by the letter of the leader of the opposition who has in fact provided links  
13 to videos where Mr. Sanjay Raut has openly stated that dead bodies of the MLAs will come to  
14 Mumbai and will be sent for post mortem. Mr. Sanjay Raut in an interview given to the  
15 National TV has also said that ongoing violence is not even a trailer, but it's just the warming  
16 up. Certain news articles reporting open and rather disturbing threats to 39 MLAs of Shiv Sena  
17 have also been enclosed with the letter issued by the leader of the opposition. In response to  
18 the aforesaid letter dated 25-06-2022 received by me on behalf of MLAs of the Shiv Sena, I  
19 had vide communication dated 25-06-22 directed, 1). The Home Secretary, Ministry of Home  
20 Affairs Government of India. 2). The Chief Secretary to the Government of Maharashtra and  
21 3). The Additional Chief Secretary Home Department Government of Maharashtra, Director  
22 General of Police Maharashtra State and the Commissioner of Police, Mumbai, to provide  
23 adequate police protection to the MLAs and their families on the immediate basis. It is thus  
24 clear that a majority of Shiv Sena MLAs have given a clear indication on behalf of the Shiv  
25 Sena legislature party that they intend to exit from the Maharashtra Vikas Aghadi Government  
26 and that you have been made aware of the same and that you are trying to win over your MLAs  
27 and cadre by means which are not democratic. I am therefore confident that you and your  
28 Government had lost the trust of the House and the Government is in minority. The  
29 Honourable Supreme Court of India in a range of decisions has time and again held that the  
30 Governor possesses a power to monitor that the elected Government continues to enjoy the  
31 confidence of the Legislative Assembly. It is therefore within my power and discretion to call  
32 for special session of the Maharashtra Legislative Assembly and direct a floor tes  
33 t to ascertain as to whether you enjoy the confidence of the majority in the House. My  
34 discussion is guided by the aforesaid facts. Please refer to Shivraj Singh Chauhan vs. Speaker  
35 Madhya Pradesh Legislative Assembly. Further with the view to obviate any undemocratic  
36 method being employed, such as violence, illegitimate and unseemly political bargaining and  
37 horse trading in a quest for political power, the Honourable Supreme Court of India has

1 consistently insisted upon convening a trust vote at the earliest date. In the aforesaid of Shivraj  
2 Singh Chauhan the Honourable Supreme Court has held that a trust vote in the ultimate  
3 analysis is to uphold the political accountability of the elected Governments. Some of the other  
4 judgments of the Honourable Supreme Court of India, which require the immediate holding  
5 of the aforesaid so and so.

6 As per the judgement of Shivraj Singh Chauhan, where the circumstances of violence and  
7 coercion exists that would undermine a free and fair vote in the assembly, the Governor must  
8 take measures to ensure that the sanctity of the trust vote is maintained. In the present case,  
9 use a one democratic means such as violence and coercion to influence the vote cannot be  
10 ruled out. The Maharashtra Legislative Assembly rules contemplate voting by a division, by  
11 asking members to rise in their seats for the purpose of countering the vote. Such procedure  
12 for voting would according to me, ensures that the members are allowed a free and fair vote  
13 in the present case. This is in line with a series of judgments delivered by the Honourable  
14 Supreme Court. Therefore, in keeping with the constitutional and democratic values and  
15 principles, as also the law laid down by Honourable Supreme Court of Indian and in pursuance  
16 of the powers conferred by Article 174 read with 175(2) the Constitution. I hear by issue the  
17 following direction. A special session of the Maharashtra Vidhan Sabha be summoned on 30-  
18 06-2022 at 11:00 A.M. with the only agenda of a trust vote against the Government. The  
19 business over the House shall be conducted in such a way that the speeches, if any are  
20 concluded in a short period of time and the trust vote is concluded on 30-06 by 5:00 P. M. The  
21 voting will be conducted by members to rise in their seats for the purpose of...

22  
23 **CHIEF JUSTICE CHANDRACHUD:** So the only reason really, a lot of this is completely  
24 constitutionally extraneous. The fact that some MLAs have said that, well, you know, their  
25 safety is in peril, that I directed as a Governor that their safety should be provided. This has  
26 nothing to do on whether the Government should be asked to face a trust vote. The only point  
27 which he says, really is this two points. One, 7 MLAs have said that they don't owe allegiance  
28 to the Government and more importantly, the 34 say, 34 MLAs have indicated that they want  
29 Shiv Sena to exit from the alliance of the INC and the Maharashtra Vikas Aghadi.

30  
31 **MR. KAUL:** Yes. Not from the party but from the coalition Government. My Lords, the  
32 resolution of 21-06-2022, as also this letter categorically says that there is a huge discontent  
33 within the party.

34  
35 **CHIEF JUSTICE CHANDRACHUD:** Mr. Kaul what happens is, that you know, once  
36 Governor starts this process of intervening in a sitting House, that only sort of gives a....

37



1 **Mr. KAUL:** My Lords may I with respect say, when...

2

3 **CHIEF JUSTICE CHANDRACHUD:** Why not ask, whoever wants to move a no confidence  
4 motion. [UNCLEAR] motion of no-confidence.

5

6 **MR. KAUL:** With respect, My Lord, Your Lordships have said...

7

8 **CHIEF JUSTICE CHANDRACHUD:** Why should a Government which has been formed  
9 and in respect of which there was absolutely no disquiet, just a month earlier, he asked to  
10 suddenly face the trust vote, on the basis of these....

11

12 **MR. KAUL:** My Lords may I with respect say, for a Government to lose a majority there  
13 cannot be a cutoff date? That event in politics can occur at any time. Whether it enjoyed  
14 majority a month earlier or it loses majority a month later with utmost humility I submit, is  
15 inconsequential. What is important is on the date when the Governor applies his mind, was  
16 there a representation by the requisite number of members of the legislative assembly to say  
17 that we no longer have any faith in this Government. Consciously on 21st of June 2022, 34 or  
18 35 MLAs wrote to so, that there is a huge discontent and discord within the party of an MVA  
19 alliance continuing. They don't say we are merging with someone else or we are splitting. They  
20 say within the party and we do not want this Government to continue. Seven independent  
21 MLAs who are part of the Government write. Now My Lords, I put a question to myself when  
22 from nine judges to Shivraj Chauhan, Your Lordships have said the first duty is to summon  
23 the House. Why should that Governor ask anyone to move a vote of no-confidence? When  
24 Your Lordships have guided the Governor, time in again and in various situations to say that  
25 the first right you must exercise as a constitutional authority is to summon the House and call  
26 for a floor test and ask the Chief Minister to prove his majority. Why should that Governor  
27 exercise and discretion and say that no, no because one month earlier there was no disquiet,  
28 today a vote of no confidence should be moved and not a floor test? My Lords, ultimately, as I  
29 respectfully submitted, Your Lordships are not sitting as a court of appeal. Even if Your  
30 Lordships feel that another course of action may have been a more appropriate course of  
31 action, the fact is, as long as what the Governor does is within the constitutional principles as  
32 laid down in Bommai and Shivraj Singh Chauhan, that is good enough.

33 Now for a minute, leave this aside. What fell from My Lord, the violence, what was happening  
34 to MLAs, exclude that. What is required is the essential ingredient for a floor test. The need  
35 for a floor test arises when there is a representation that the concerned Chief Minister of  
36 Government has lost the confidence of the House. Now, as far as the confidence of the House  
37 is concerned, what material will the government look at... the Governor look at? The Governor



1 will naturally look at the representations of various MLAs in the assembly to say that they are  
2 no longer supporting. What other material can you look at? And that is why Your Lordships.....

3

4 **CHIEF JUSTICE CHANDRACHUD:** The head of the political party had not informed the  
5 Governor that we have withdrawing from the alliance. The alliance still continued between the  
6 three parties. There was no intimation by the head of the political party,

7

8 **Mr. KAUL:** Who was also the Chief Minister

9

10 **CHIEF JUSTICE CHANDRACHUD:** He had not intimated the Governor.

11

12 **MR. KAUL:** He had not intimated.

13

14 **CHIEF JUSTICE CHANDRACHUD:** That he is withdrawing from this alliance.

15

16 **MR. KAUL:** My Lords he need not. But if 34 out of 55 write to him to say... My Lords again  
17 as I'm saying he is not dealing with Tenth Schedule. That's a separate argument I will come to.  
18 He is dealing with 34 out of the 55 MLAs writing into him to say we have no faith in this  
19 Government, in this Chief Minister. Seven independent MLAs were part of the Government  
20 said we have no faith in this Government. Leave aside the leader of opposition for a minute.  
21 Now, My Lords when a Governor takes the decision to conduct a floor test, what is the most  
22 important consideration in his mind? The most important consideration in his mind...

23

24 **JUSTICE SHAH:** Mr. Kaul, read Para 78 of the judgment.

25

26 **MR. KAUL:** My Lords, of?

27

28 **JUSTICE NARASIMHA:** Shivraj Singh Chauhan. The focus what you are saying.

29

30 **MR. KAUL:** 78 - 'The idea underlying that trust' My Lord, the Chief Justice has it? 'The idea  
31 underlying the trust vote in the ultimate analysis is to uphold the political accountability of the  
32 elected Government to the State Legislature. Assertion of accountability is a mirror image of  
33 the collective responsibility of the Government to the Legislature. The requirement of the trust  
34 vote fulfils that purpose in the present case. The present controversy has on allied on the often  
35 fluid allegiances of democratically elected representatives. This is a matter of there for their  
36 conscience and the Court expresses no opinion on the matter. However, it is important to note  
37 that in directing a trust vote, the Governor does not favour a particular political party. It is

1 inevitable that the specific timing of a trust vote, may tilt the balance towards the party  
2 possessing a majority at the time of the trust vote is directed. All political parties are equally  
3 at risk of losing the support of their elected legislators, just as the legislators are at the risk of  
4 losing the vote of the electorate. This is how the system of parliamentary governance operates  
5 and the Learned Senior Council on both the sides of the disputes congenially admitted that the  
6 outcome of the trust vote is the ultimate litmus test for the legitimate to govern. However, we  
7 know that where the evidence indicates that the circumstances of violence and coercion exists  
8 that would undermine a free and fair vote in the assembly. The Governor and the Court must  
9 take measures to ensure that the sanctity of the trust vote is maintained in the circumstances  
10 as they have emerged in the case, the exercise of authority by the Governor, who was based on  
11 circumstances which were legitimate for the purpose of ensuring that the norm of collective  
12 responsibilities duly preserved, there existed no extraordinary circumstance with the  
13 Governor to determine that a trust vote was not appropriate course of action on 16-3-2020.  
14 Now My Lords all that I am respectfully submitting today is that merely because it will turn  
15 the in favour of one or the other, Your Lordships deal with those issues. Let's, let's... I put  
16 myself in the Governor's position. Now suppose he had not held a trust vote. One of the first  
17 challenges would have been despite a nine judges bench, despite Shivaraj Singh Chauhan,  
18 despite MLA's writing to him, why did he not hold a floor test? Where is the requirement in  
19 law My Lords that if a Governor, after due application of mind comes to a conclusion that a  
20 trust vote ought to be held, he should nonetheless, have a vote of confidence moved on the  
21 floor of the House and not go in for a floor test? Where is that requirement in law? And  
22 presuming for a minute both options are available, can he opt for one instead of the other?  
23 Would that be enough for Your Lordships in exercise of Your Lordships' extraordinary  
24 jurisdiction to strike down the decision of the governor in a matter like this? That this is a  
25 decision so influenced by extraneous consideration or so biased or unfair accentuated by mala  
26 fides that you will strike it down as a decision? It's a decision based on due representation  
27 made by MLAs.

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29 **CHIEF JUSTICE CHANDRACHUD:** Yes.

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31 **MR. KAUL:** And naturally, My Lords, when these MLA's make representations, these are on  
32 political considerations.

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34 **JUSTICE NARASIMHA:** Mr. Kaul, as your claim is not either a split or a merger, your claim  
35 is on the ground that you are the political party.

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37 **MR. KAUL:** Right, right.

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**JUSTICE NARASIMHA:** Now in the information given to the Governor, to what extent the information available as to you have garnered the political...

**MR. KAUL:** Yes My Lords....

**JUSTICE NARASIMHA:** Garnered political, not the legislative majority. Where is that kind of material?

**Mr. KAUL:** I'll just come to it My Lords, I'll just come to it.

**JUSTICE NARASIMHA:** No. Take your own time.

**MR. KAUL:** Tomorrow if Your Lordships permit. No, I'm very grateful. I'm very grateful that Your Lordships indicated.

**JUSTICE NARASIMHA:** In so far as the Governor's decision is concerned, go by Bommai. The principle of the judicial review is confined to the question as indicated therein material is available to him. Relevant material. Then judicial review is available. The relevant material available for him to direct the floor test must be in relation to that kind of a decision that you have now garnered the political, not the legislative but political power with respect to the parties. That material is available or not?

**MR. KAUL:** I'll address Your Lordships tomorrow on that.

**JUSTICE NARASHIMHA:** No, in your own time.

**MR. KAUL:** Tenth Schedule is where this whole argument of legislature, political party, is political party co-joined with legislature party. Was it only within the political party or within the legislature party is one part. As far as the Governor in exercising his powers for a floor test is concerned, his only consideration is whether on the floor of the House the members enjoy the requisite majority or not? And my respectful submission there to Your Lordships would be, that there all that he has to see is that the elected representatives who constitute the composition, total composition of the House, is there a substantial challenge to say that a large number of them are withdrawing their support to the Ministry, which raises a genuine doubt in his mind to say that the majority of the Ministry must be proved on the floor of the House. And which material was here? He doesn't have to embark on that exercise which is a part of

1 Tenth Schedule. Political party, legislature party. All that he has to see is elected  
2 representatives 34 of 55, seven independent who were supporting and as I said exclude the  
3 leader of the opposition completely.

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5 **CHIEF JUSTICE CHANDRACHUD:** But Mr. Kaul, once a Government is formed, it is not  
6 open to any group of Members of Parliament or of the Legislative Assembly to say that look,  
7 we don't want to go with this alliance. You have an alliance of five parties, it is not open to say  
8 a group of persons who owe allegiance to the dominant political party in the alliance, as in this  
9 case the Shiv Sena was, right? Shiv Sena had 55 as opposed to 44 of the Congress and 53 of the  
10 NCP. It's not open to any one segment of any political party, whether it was a Shiv Sena, or the  
11 NCP or the Congress to say we don't want to go along with this. That would ipso facto attract  
12 the disqualification provisions. You are bound by the Whip and you are bound to vote with  
13 your party so long as you are a legislature or say that's a merger.

14

15 **MR. KAUL:** That's why My Lords, as I say...

16

17 **CHIEF JUSTICE CHANDRACHUD:** On one hand none of them, either 15 or 20 or 25 or  
18 30, and say the Governor, that look, we don't want to go along with the alliance. Answer is very  
19 simple. You don't want to go along with the alliance, vote your leader out in the political party,  
20 or you take a decision on the political party outside. So long as you are a member of the House,  
21 you are bound by the discipline of the Act. You have to go with your political party.

22

23 **MR. KAUL:** So just to answer what My Lord....

24

25 **CHIEF JUSTICE CHANDRACHUD:** So what they were essentially telling the Governor  
26 was this. We don't want our political party to continue with this three party alliance of the  
27 MVA. Right? We want to exit from that. Governor takes cognizance of it. Now what he is  
28 essentially taking cognizance of is that there is a breakaway segment of this particular party.  
29 In that letter of the Governor, one thing which is completely absent is your argument that we  
30 are the Shiv Sena. The entire letter is postulated on the fact that there was out of 55 there are  
31 30 more people who want to break away from this alliance. And what is this but not a split?

32

33 **MR. KAUL:** My Lords, may I....

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35 **CHIEF JUSTICE CHANDRACHUD:** The governor, at least was not allied to this argument  
36 at all that you know you represented the Shiv Sena.

37

1 **MR. KAUL:** My Lords, may I with respect say that is not....

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3 **CHIEF JUSTICE CHANDRACHUD:** The material before.

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5 **MR. KAUL:** That, of course, the governor's counsel....

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7 **CHIEF JUSTICE CHANDRACHUD:** Therefore very careful in those two paragraphs to say  
8 22 members had resigned. They didn't defect. They said we quit the Assembly. Out of them six  
9 resignations were accepted by the Speaker. 22 were in the same batch. The Speaker went and  
10 accepted the 6, he kept quiet over the 16. And Dr. Singhvi's argument was that you are trying  
11 to prevent the Speaker. The plot essentially is to buff the Speaker's decision. So to which we  
12 said that look, they were all 22 sailing together. Why did the Speaker accept only six and leave  
13 the 16 intact? That is not the case that they split. They said we will leave the House.

14

15 **MR. KAUL:** My Lords, as I said, I haven't....

16

17 **CHIEF JUSTICE CHANDRACHUD:** ....consequence to vacate the House.

18

19 **MR. KAUL:** I haven't even come to the legislature party versus political party argument  
20 because where my contention will be:

21 (a), there are two political Whips appointed on the same day. As per us we are following the  
22 mandate of the party. My Lords, the Chief Justice put a question to say that suddenly you  
23 decide to do what you want. That's not our case. On 21st of June 2022, a political Whip was  
24 appointed. The question is whether my political Whip or their political Whip, is the actual  
25 political Whip. Because if my political Whip is the Whip, then I have not disobeyed any order  
26 at all. So when My Lord, the Chief Justice said that by just saying that you don't agree with the  
27 Government you ex facie, we've not done that. Our Whip, and that is the question when this  
28 argument was raised Your Lordships said is this the rival faction whose Whip was appointed.  
29 That first for the EC to say which was the party, which was the faction, which was the  
30 recognized political party with it. Because according to us the faction within the party which  
31 is the recognized faction today, was the faction which represents the political party and had  
32 appointed duly the Whip. And the Whip argument when I'll come to, I'll show to Your Lordship  
33 right through the convention of the Shiv Sena, has been that the legislative party, with the  
34 requisite authority of the political party appoints the Whip, communicates it to the Speaker.  
35 And even when the Tenth Schedule existed, when Para 3 existed, Your Lordship said that the  
36 limited jurisdiction under Tenth Schedule of the Speaker is to only see a prima facie split in  
37 the party, not embark on an independent inquiry. As far as the political party is concerned,

1 that's the domain of the Election Commission. Today it has been presumed as if I did not have  
2 the requisite political Whip in my favour, that I did not represent the requisite majority within  
3 the party, and thus I ex facie incurred. I incurred the disqualification under the Act, under the  
4 Constitution. And my respectful submission right through as being says, who just because you  
5 say doesn't mean I'm disqualified. That has to be decided by an appropriate Constitutional  
6 Authority, which in this case My Lord has decided in my favour in this matter. But be that as  
7 it may, you can't presume and say that you have incurred ex facie the disqualification, and thus  
8 you are not entitled to write. After all, the concerned body has to decide that. According to me  
9 I represent within it the view of the political party. Our resolution also when My Lord just put  
10 a question to me to say that this part that we are the Shiv Sena was not something which gets  
11 reflected in the Speaker's letter.

12

13 **CHIEF JUSTICE CHANDRACHUD:** Governor's letter.

14

15 **MR. KAUL:** I am so sorry, I am so sorry. The Governor's letter. That very letter of the  
16 Governor refers to the resolution of 21st June 2022, which I'll read out tomorrow to Your  
17 Lordships which says there's an overwhelming discontent in the cadres of the party. The party  
18 does not want to continue. So it's not as if the Governor just dealt with. And this is my  
19 argument which I just presented before Your Lordships. The Governor was cognizant of the  
20 fact that the resolution on the basis of which 34 MLAs wrote to him, in turn referred to the  
21 large discord and discontent within the political party which was because of continuing with  
22 MVA. The cause is not important. The reason is not important. The reason could be anything.  
23 There it was corruption and it was MVA. Could be anything. The fact remains is they were  
24 discontent. The fact remains is that an overwhelming part of the political party did not want  
25 to go along. Now whether your Whip represents the right wing then my learned friend started  
26 going into when was the committee meeting held? Those are not the....that is not within the  
27 purview of the Constitution Bench today. That will be decided and is being decided by the EC  
28 that who represents within the party, the actual recognized political party. I will even touch on  
29 those 18 (7), and 27 (7), which are not the subject matter of this reference to Your Lordships.

30

31 **CHIEF JUSTICE CHANDRACHUD:** We will continue. We will see the other resolution  
32 which you said you want.

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34 **MR. KAUL:** Yes, I will read My Lords. I'm very, very grateful My Lords. I will continue  
35 tomorrow.

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37 **CHIEF JUSTICE CHANDRACHUD:** We will continue tomorrow morning.