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IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

DR. DHANANJAYA Y. CHANDRACHUD; CJI., M.R. SHAH; J., KRISHNA MURARI; J., HIMA KOHLI; J., PAMIDIGHANTAM SRI NARASIMHA; J.

Writ Petition (C) No. 493, 469, 468, 470, 479 & 538 of 2022; May 11, 2023

Subhash Desai *versus* **Principal Secretary, Governor of Maharashtra & Ors.**

Constitution of India, 1950 - It is the "political party" which has the power to appoint a whip and the leader and not the "legislature party".

Election Law - Test of legislative majority will be futile in assessing which faction is the real.

Constitution of India, 1950 - Shiv Sena rift – The Court cannot order the restoration of the Uddhav Thackeray government as he resigned without facing floor test. Since Thackeray voluntarily resigned, the Governor was right in inviting Ekanth Shinde form the government with the support of BJP. Had Mr. Thackeray refrained from resigning from the post of the Chief Minister, this court could have considered the grant of the remedy of reinstating the government headed by him. The Court cannot quash a resignation which was voluntarily tendered. The Governor's earlier decision to order floor test for the Maha Vikas Aghadi government as well as the Speaker's decision to appoint the whip nominated by Shinde group were incorrect. The correctness of the decision in *Nabam Rebia* is referred to a larger Bench of seven judges.

Constitution of India, 1950 - Shiv Sena rift – Floor Test - the decision taken by the Governor to call for a floor test based on the rebellion of Eknath Shinde-led faction and to direct then CM Uddhav Thackeray to prove his majority on the floor of the House, was wrong. The Governor had no objective material on the basis of which he could doubt the confidence of the incumbent government. The resolution on which the Governor relied did not contain any indication that the MLAs wished to exit from the MVA government. The communication expressing discontent on the part of some MLAs is not sufficient for the Governor to call for a floor test. The Governor ought to apply his mind to the communication (or any other material) before him to assess whether the Government seemed to have lost the confidence of the House.

Constitution of India, 1950 – Governor - The power of the Governor to act without the aid and advice of the Council of Ministers is of an extraordinary nature. The exercise of such power has ramifications on parliamentary democracy. Hence, the ambit of the exercise of such power by the Governor must be calibrated to meet the exigencies of situations where the Governor is satisfied on the basis of objective material that there is sufficient cause to warrant the exercise of their extraordinary power. The discretion to call for a floor test is not an unfettered discretion but one that must be exercised with circumspection, in accordance with the limits placed on it by law.

Constitution of India, 1950 – Governor - The discretion vested in the Governor to call for a floor test is not unfettered, and must be exercised with circumspection, in accordance with the limits placed on it by law. The Governor is a constitutional functionary who derives his authority from the Constitution. This being the case, the Governor must be cognizant of the constitutional bounds of the power vested

in him. He cannot exercise a power that is not conferred on him by the Constitution or a law made under it.

Constitution of India, 1950 – Floor Test - the decision to call for a floor test should be based on objective material and reasons which are relevant and germane to the exercise of discretion, and not extraneous to it. The Governor should not use their discretionary power to destabilise or displace democratically elected governments. *Relied on Shivraj Singh Chouhan v. Union of India, (2020) 17 SCC 1*

Constitution of India, 1950 - Shiv Sena rift – Floor Test - Neither the Constitution nor the laws enacted by Parliament provide for a mechanism by which disputes amongst members of a particular political party can be settled. They certainly do not empower the Governor to enter the political arena and play a role (however minute) either in inter-party disputes or in intra-party disputes. It follows from this that the Governor cannot act upon an inference that he has drawn that a section of the Shiv Sena wished to withdraw their support to the Government on the floor of the House.

Constitution of India, 1950 - Shiv Sena rift – Floor Test - Governor cannot enter political arena, floor test not to decide intra-party disputes - The Governor could not have entered the internal party dispute by ordering the floor test, particularly in absence of any "objective material" to dislodge the presumption of confidence of House ingrained in a democratically elected government. The letters by some MLAs (or even by then Leader of Opposition in this case) for a direction to the Chief Minister to prove his majority does not, taken alone, amount to a relevant reason to call for a floor test

Constitution of India, 1950 - Shiv Sena rift – At the highest, the various communications expressed the fact that a faction of MLAs disagreed with some policy decisions of the party. The course of action they wished to adopt in order to air their grievances and redress them was, at the time the floor test was directed to be conducted, uncertain. Whether they would choose to enter deliberations with their colleagues in the House or in the political party, or mobilise the cadres, or resign from the Assembly in protest, or opt to merge with another party, was uncertain. Therefore, the Governor erred in relying upon the resolution signed by a faction of the SSLP (Shiv Sena Legislature Party) MLAs to conclude that Mr. Thackeray had lost the support of the majority of the House.

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J U D G M E N T

Dr. Dhananjaya Y Chandrachud, CJI

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1. The Writ Petitions instituted before this Court under Article 32 of the Constitution arise from the political imbroglio in the State Legislature of Maharashtra. A coalition consisting of the Shiv Sena, the Nationalist Congress Party,[1] the Indian National Congress,[2] and certain independent Members of the Legislative Assembly[3] formed the government in the State of Maharashtra with Mr. Uddhav Thackeray of the Shiv Sena as the Chief Minister. Certain events transpired in mid-2022 which led to the formation of a new government by a coalition consisting of a faction of the Shiv Sena (which claimed to the "real" Shiv Sena), the Bharatiya Janata Party,[4] and certain independent MLAs. Mr. Eknath Shinde of the Shiv Sena helmed the second government as its Chief Minister. The change in the composition of the government in the State of Maharashtra was precipitated by the emergence of two factions within the Shiv Sena. Various issues arising from these events fall to be determined by this Court in these proceedings. A detailed narration of the factual background follows.

A. Factual Background

i. A change in the government of the State of Maharashtra

2. The Shiv Sena was founded in 1966 in Maharashtra. The Election Commission of India[5] recognizes the Shiv Sena as a state political party. The organizational election of the party for the term extending from January 2018 to January 2023 was held on 23 January 2018 and Mr. Uddhav Thackeray was elected as the Party President or the 'Paksh Pramukh.'

3. The elections to the 14th Legislative Assembly of Maharashtra were held in October 2019. Of a total of two hundred and eighty-eight seats, the BJP returned candidates in one hundred and six seats, the Shiv Sena in fifty-six seats, the NCP in fifty-three seats, and the INC in forty-four seats. Independent candidates were returned in thirteen constituencies and the remaining constituencies returned candidates from various other parties. In November 2019, the Shiv Sena, the NCP, and the INC formed a post-poll alliance which came to be known as the Maha Vikas Aghadi.[6] The MVA successfully staked a claim to form the government in Maharashtra and Mr. Uddhav Thackeray was sworn in as the Chief Minister. On 25 November 2019, pursuant to a meeting chaired by Mr. Uddhav Thackeray, all fifty-six MLAs of the Shiv Sena issued a communication to the Speaker of the Maharashtra Legislative Assembly intimating him that Mr. Eknath Shinde was appointed as the Group Leader of the Shiv Sena Legislature Party[7] and that Mr. Sunil Prabhu was appointed as the Chief Whip of the SSLP.

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[1] "NCP"
[2] "INC"
[3] "MLA"
[4] "BJP"
[5] "ECI"
[6] "MVA"
[7] "SSLP"

4. The MVA continued to govern the State of Maharashtra until June 2022, when news reports revealed that some MLAs who belonged to the Shiv Sena were meeting with leaders of the BJP. At this time, the office of the Speaker lay vacant, and the functions of the Speaker were being discharged by the Deputy Speaker, Mr. Narhari Zirwal.

5. The events which followed indicate that the SSLP fractured into two factions: one led by the then Chief Minister, Mr. Uddhav Thackeray, and the other led by the Group Leader of the SSLP, Mr. Eknath Shinde. Each faction claimed to represent the "real" political party and passed various resolutions pertaining to the affairs of the SSLP. For ease of reference, we refer to the faction led by Mr. Thackeray as the petitioners and the faction led by Mr. Shinde as the respondents.

6. On 21 June 2022, the Chief Whip of the Shiv Sena, Mr. Sunil Prabhu, issued a whip directing all MLAs of the Shiv Sena to attend a meeting at Mr. Thackeray's residence on the same day. Many MLAs, including the Group Leader Mr. Eknath Shinde, did not attend this meeting. The MLAs who were in attendance passed a resolution removing Mr. Eknath Shinde from the position of the Group Leader of the SSLP and appointing one Mr. Ajay Choudhari in his place. The decisions taken by way of this resolution were communicated to the Deputy Speaker on the same day, i.e., 21 June 2022. Also on the same day, the Deputy Speaker communicated his acceptance of the change in the Group Leader of the SSLP.

7. Concurrently, thirty-four MLAs of the Shiv Sena (i.e., the respondents) organized a separate meeting and passed a resolution reaffirming that Mr. Eknath Shinde "*continues to be*" the Group Leader of the SSLP. It was further resolved that the appointment of Mr. Sunil Prabhu as the Chief Whip was cancelled, and that Mr. Bharat Gogawale was appointed in his place. The resolution is dated 21 June 2022 and was purportedly passed in Guwahati, Assam. The petitioners claim that it was received by the Deputy Speaker only on 22 June 2022 while the respondents claim that it was sent on 21 June 2022.

8. Mr. Eknath Shinde wrote to the Deputy Speaker communicating the details of the resolution passed by the thirty-four MLAs of the Shiv Sena, by which his appointment as the Group Leader of the SSLP was reaffirmed. He requested the Deputy Speaker not to recognize Mr. Ajay Choudhari as the Group Leader in view of the resolution reaffirming his appointment. Once again, the petitioners claim that the Deputy Speaker received this communication on 22 June 2022 and the respondents aver that it was sent on 21 June 2022.

9. The same thirty-four MLAs also issued a notice to Mr. Narhari Zirwal, the Deputy Speaker, stating that he no longer enjoyed their support and calling upon him to move a motion for his removal from office. The notice was issued under Article 179(c) of the Constitution read with Rule 11 of the Maharashtra Legislative Assembly Rules 2019. The petitioners claim that this notice, too, was received by the Deputy Speaker on 22 June 2022. The respondents maintain that it was sent on the preceding day, 21 June 2022.

10. On 22 June 2022, Mr. Sunil Prabhu issued individual communications to all MLAs of the Shiv Sena, calling upon them to attend a meeting of the SSLP scheduled to take place that evening at Mr. Thackeray's residence. The communication stated as follows:

"…failure to participate in the meeting without providing valid and adequate reasons in writing, communicated in advance to the undersigned, will result in consequential action against you under the relevant provisions of the Constitution of India."

The meeting on 22 June 2022, too, was not attended by many MLAs of the Shiv Sena including Mr. Eknath Shinde.

11. Mr. Eknath Shinde addressed a letter to Mr. Sunil Prabhu on 22 June 2022 accusing him of misusing the letterhead of the SSLP. The letter stated that:

a. A meeting of forty-five MLAs of the Shiv Sena was held under the chairmanship of Mr. Eknath Shinde;

b. Mr. Sunil Prabhu was removed from the position of Chief Whip of the Shiv Sena;

c. Mr. Bharat Gogawale was appointed as the Chief Whip of the Shiv Sena in place of Mr. Sunil Prabhu; and

d. Mr. Sunil Prabhu did not have the authority to sign the communication dated 22 June 2022 (issued by him to all MLAs of the Shiv Sena). It was therefore not binding upon Mr. Eknath Shinde to attend the meeting scheduled to take place at Mr. Thackeray's residence.

12. On 23 June 2022, Mr. Sunil Prabhu filed petitions under Paragraph 2(1)(a) of the Tenth Schedule to the Constitution for the disqualification of Mr. Eknath Shinde and fifteen other MLAs of the Shiv Sena. The Deputy Speaker issued notices in these disqualification petitions on 25 June 2022. The relevant portion of the order issuing notice is reproduced below:

"You are instructed to submit written submissions as per the procedure laid in the Members of Maharashtra Legislative Assembly (Disqualification on Ground of Defection) Rules 1986 by Monday, 27th June 2022 by 5.30 pm to Deputy Speaker."

13. On 27 June 2022, the jurisdiction of this Court under Article 32 was invoked by the respondents challenging the notice issued in the disqualification petitions. This Court passed an interim order on the same day in the following terms, extending the time to respond to the disqualification petitions from 27 June 2022 to 12 July 2022:

"Meanwhile as an interim measure, the time granted by the Deputy Speaker of the Assembly to the petitioners or other similarly placed Members of the Legislative Assembly to submit their written submissions up to today by 5.30P.M., is extended till 12.07.2022."

14. Separately, Mr. Sunil Prabhu filed petitions for the disqualification of two independent MLAs as well as one MLA of the Prahar Janshakti Party on 25 June 2022 and against twenty-two MLAs of the Shiv Sena on 27 June 2022.

15. On 28 June 2022, the then Leader of Opposition Mr. Devendra Fadnavis addressed a letter to the Governor *inter alia* conveying that he believed that the then Chief Minister, Mr. Thackeray, did not enjoy a majority on the floor of the House. He called upon the Governor to direct Mr. Thackeray to prove his majority on the floor of the House. Seven MLAs who were elected as independent candidates penned a similar letter to the Governor on the same day. They too requested the Governor to direct Mr. Thackeray to prove his majority on the floor of the House.

16. The Governor issued a letter to the then Chief Minister, Mr. Uddhav Thackeray on 28 June 2022, calling upon him to face a floor test on 30 June 2022. The communication specified the manner in which the trust vote was to be conducted in the following terms:

"(i) A Special session of the Maharashtra Vidhan Sabha be summoned on 30.06.2022 at 11:00 AM with the only agenda of a trust vote against the Government.

(ii) The business of the house shall be conducted in such a way that the speeches, if any, are concluded in a short period of time and the trust vote is concluded on 30.06.2022 by 5:00 PM.

(iii) The voting will be conducted by asking Members to rise in their seats for the purpose of counting votes as contemplated under the Maharashtra Legislative Assembly Rules.

(iv) The Proceedings have to be live telecast, and appropriate arrangements are to be made to ensure the same.

(v) The entire proceedings of the trust vote shall be videographed by the Vidhan Sabha Secretariat through an independent agency and shall be submitted to me.

(vi) The aforesaid proceedings shall be started on 30.06.2022 at 11:00 AM and no case shall be same be adjourned, delayed or suspended.

(vii) Adequate arrangements shall be made for the security of the Members both outside and inside the Vidhan Bhavan to ensure smooth conducting of the floor test."

The Governor also issued a communication dated 28 June 2022 to the Secretary, Maharashtra Legislative Assembly calling upon him to make necessary arrangements for the session of the Maharashtra Legislative Assembly at which the floor test was to be conducted.

17. On the very next day (29 June 2022), Mr. Sunil Prabhu instituted a Writ Petition before this Court for setting aside the communications dated 28 June 2022 issued by the Governor to the Chief Minister as also to the Secretary, Maharashtra Legislative Assembly, on the ground that disqualification petitions against forty-two MLAs of the Shiv Sena were pending consideration before the Deputy Speaker. This Court declined to stay the trust vote. The relevant portion of the order dated 29 June 2022 passed by this Court is reproduced below:

"8 …

(i) We do not find any ground to stay convening of the Special Session of the Maharashtra Vidhan Sabha on 30-6-2022, i.e, tomorrow at 11.00 a.m. with the only agenda of a trust vote;

(ii) The proceedings of the trust vote to be convened on 30-6-2022 shall be subject to the final outcome of the instant Writ Petition as well the Writ Petitions referred to above;

(iii) the Special Session of the Maharashtra Vidha Sabha shall be conducted in accordance with the directions as contained in the communication dated 28-6-2022 of the Governor of Maharashtra."

Mr. Thackeray, resigned on the same day.

18. On 30 June 2022, Mr. Devendra Fadnavis wrote a letter to the Governor stating that one hundred and six MLAs from BJP and eight independent and other MLAs were extending support to Mr. Eknath Shinde to form the government. On the same day, Mr. Shinde submitted a letter to the Governor along with a resolution by thirty-nine MLAs from the SSLP unanimously resolving to authorise Mr. Shinde to initiate proceedings to form the government in the State. In said letter, Mr. Shinde claimed the support of one hundred and six BJP MLAs and seventeen independent and other MLAs. Moreover, Mr. Shinde claimed that he had the support of the majority and requested the Governor to invite him to take oath as the Chief Minister. On 30 June 2022, sixteen MLAs who were independent candidates or belonged to parties other than the Shiv Sena, BJP, INC, and NCP wrote to the Governor expressing their support for a government led by Mr. Shinde. On the same day, the Governor issued a communication to Mr. Shinde inviting him to take oath as the Chief Minister and requesting him to prove that he enjoyed the confidence of the Assembly within a period of seven days of taking over as the Chief Minister.

19. The Governor administered the oath of office to Mr. Shinde and Mr. Fadnavis on 30 June 2022 and they assumed the roles of Chief Minister and Deputy Chief Minister of Maharashtra, respectively. On the same day, Mr. Thackeray issued a letter to Mr. Shinde stating that he had been removed from the post of 'Shiv Sena Leader' in the organisational

structure of the party. Mr. Thackeray similarly removed other MLAs of the Shiv Sena from their roles as office-bearers of the party.

ii. The election of the Speaker

20. Later that week, the Principal Secretary of the Maharashtra Legislative Assembly circulated the working order for the session which was scheduled to take place on 3 July 2022. The fifth item on the agenda reflected that the election for the post of the Speaker was to be conducted. An MLA belonging to the BJP nominated Mr. Rahul Narwekar of the BJP for this position while an MLA of the Shiv Sena (ostensibly from Mr. Thackeray's faction) nominated Mr. Rajan Salvi of the Shiv Sena. Further, a motion of confidence for the Council of Ministers headed by the Chief Minister, Mr. Shinde, was scheduled to be moved in a session of the Assembly on 4 July 2022.

21. In view of the agenda for the sessions of the Assembly, Mr. Sunil Prabhu issued two whips on 2 July 2022. The first whip directed all MLAs of the Shiv Sena to attend the session of the Maharashtra Legislative Assembly on 4 July 2022 and vote against the motion of confidence for the Council of Ministers headed by the Chief Minister, Mr. Shinde. The second whip directed all MLAs of the Shiv Sena to attend the session of the Maharashtra Legislative Assembly on 3 July 2022 and vote for the Shiv Sena's candidate, Mr. Rajan Salvi, in the election for the post of the Speaker.

22. The election for the post of the Speaker was conducted as scheduled and Mr. Rahul Narwekar of the BJP emerged victorious, with a total of one hundred and sixty-four votes cast in his favour. Thirty-nine MLAs of the Shiv Sena (led by Mr. Shinde) voted in favour of Mr. Rahul Narwekar's candidature. Consequently, Mr. Sunil Prabhu instituted fresh disqualification proceedings against these MLAs under Paragraph 2(1)(b) of the Tenth Schedule to the Constitution for violating the whip issued by him.

23. After assuming office as the Speaker of the House, Mr. Rahul Narwekar cancelled the approval granted to Mr. Ajay Choudhari as the Leader of the SSLP and approved the appointment of Mr. Eknath Shinde in his place. Further, he recognized Mr. Bharat Gogawale as the Chief Whip of the Shiv Sena in place of Mr. Sunil Prabhu. These decisions of the Speaker were recorded in a communication dated 3 July 2022 issued by the Deputy Secretary of the Maharashtra Legislative Assembly, the relevant portion of which is extracted below:

"…after deliberation … Hon'ble Speaker, Maharashtra Legislative Assembly has cancelled the approval granted to Shri Ajay Choudhari as leader, Shiv Sena Legislative Party and approves & recognizes the nomination of Shri Eknath Shinde as Leader, Shiv Sena Legislative Party as per the letter dated 31st October 2019. Similarly, the proposal to nominate Shri Sunil Prabhu as Chief Whip of Shiv Sena Legislative Party is to be cancelled and to recognize the nomination of Shri Bharat Gogawale as Chief Whip of ShivSena Legislative Party has been approved and recorded in the registry."

Mr. Bharat Gogawale issued a whip on 3 July 2022 directing all MLAs of the Shiv Sena to attend the session of the Maharashtra Legislative Assembly on 4 July 2022 and vote in favour of the motion of confidence for the Council of Ministers headed by the Chief Minister, Mr. Shinde.

24. To summarize – in June 2022, Mr. Thackeray was the Chief Minister, Mr. Shinde was the Leader of the SSLP, and Mr. Sunil Prabhu was the Chief Whip of the Shiv Sena. However, by 3 July 2022, Mr. Thackeray had resigned from the position of Chief Minister and Mr. Shinde was the Chief Minister, Mr. Ajay Choudhari was recognized as the Leader of the SSLP and subsequently replaced by Mr. Shinde, and Mr. Bharat Gogawale was recognized as the Chief Whip in place of Mr. Sunil Prabhu. Each faction continued to claim

that the appointments made by them and communicated to the Speaker or the Deputy Speaker, as the case may be, were legal and valid, and that the appointments made by the opposite faction were illegal and invalid. Time and again, the question of who the "real" Shiv Sena was, arose.

25. Soon after the election of the Speaker, some MLAs of the Shiv Sena who belonged to Mr. Thackeray's faction issued (on two different occasions) notices of intention to move a resolution for the removal of Mr. Rahul Narwekar from the office of the Speaker under Article 179(c) of the Constitution read with Rule 11 of the Maharashtra Legislative Assembly Rules 2019.

26. On 4 July 2022, a motion of confidence was moved on the floor of the Maharashtra Legislative Assembly. The House expressed its confidence in Mr. Shinde. As a consequence, Mr. Sunil Prabhu filed fresh petitions for the disqualification of thirty-nine MLAs (led by Mr. Shinde) under Paragraph 2(1)(b) of the Tenth Schedule for violating the whip issued by him on 2 July 2022. Similarly, Mr. Bharat Gogawale filed petitions for the disqualification of fourteen MLAs of the Shiv Sena (led by Mr. Thackeray) under Paragraphs 2(1)(a) and 2(1)(b) of the Tenth Schedule for violating the whip issued by him on 3 July 2022. On 8 July 2022, Mr. Rahul Narwekar issued notices in the latter set of disqualification petitions.

iii. <u>The proceedings before the Election Commission of India</u>

27. On 19 July 2022, Mr. Eknath Shinde filed a petition before the ECI under Paragraph 15 of the Election Symbols (Reservation and Allotment) Order 1968[8] for the allotment of the symbol of the Shiv Sena, i.e., the 'bow and arrow,' to the faction led by him. The ECI directed the groups led by Mr. Shinde and Mr. Thackeray to furnish their written submissions and any documents in favour of their claims.

28. Thereafter, the petitioners filed two interlocutory applications for the impleadment of the ECI in WP(C) 493 of 2022 and for a stay on the proceedings before the ECI. The first of these (for impleadment of the ECI) was allowed by this Court by its order dated 27 September 2022. The interlocutory application seeking a stay was dismissed by the same order.

29. On 17 October 2022, the ECI passed an order granting the 'bow and arrow' symbol to the group led by Mr. Shinde.

B. Overview of the reliefs sought in the present proceedings

30. These proceedings arise from six Writ Petitions filed by members of the groups led by both Mr. Thackeray as well as Mr. Shinde. The reliefs sought in each of these petitions are captured in the table below, for ease of reference:

Case details	Relief sought
WP(C) 493 of 2022	a. Quash the decision of the Governor dated 30 June 2022 inviting Mr. Eknath Shinde to take oath as the Chief Minister of Maharashtra, and form the Government; and/or Quash the proceedings of the Maharashtra Legislative Assembly held on 3 July 2022, and consequently the election of the Speaker; and/or

[8] "Symbols Order"

	Quash the proceedings of the Maharashtra Legislative Assembly held on 4 July 2022, and consequently the Confidence Motion in favour of Mr. Eknath Shinde; and/or Call for the records of all pending disqualification petitions filed against Eknath Shinde and the other MLAs led by him pending before the Speaker and the Deputy Speaker under Paragraph 2(1)(a) and Paragraph 2(1)(b) of the Tenth Schedule and transfer these petitions to this Court under Article 142 of the Constitution and decide them.
WP(C) 469 of 2022	a. Direct the Deputy Speaker to not take any action in the petition for disqualification of Mr. Eknath Shinde under Paragraph 2(1)(a) of the Tenth Schedule until the resolution for the removal of the Deputy Speaker is decided; b. In the interim, stay the effect and operation of the notice dated 25 June 2022 issued by the Deputy Speaker to Eknath Shinde; c. Quash the letter / order dated 21 June 2022 passed by the Deputy Speaker accepting the appointment of Mr. Ajay Choudhari as the Leader of Shiv Sena Legislature Party; d. In the interim, stay the effect and operation of the letter/order dated 21 June 2022 passed by the Deputy Speaker recognising the appointment of Mr. Ajay Choudhari as the Leader of the Shiv Sena Legislature Party; Direct the Union of India and the Director General of Police, Maharashtra to provide security to the family of Mr. Eknath Shinde and all his supporters within the Shiv Sena Legislature Party.
WP(C) 468 of 2022	a. Direct the Deputy Speaker to not take any action in the petitions for disqualification of the petitioners in this petition under Paragraph 2(1)(a) of the Tenth Schedule until the resolution for the removal of the Deputy Speaker is decided; b. In the interim, to stay the effect and operation of the notice dated 25 June 2022 issued to the Petitioners by the Deputy Speaker; Direct the DGP, Maharashtra to ensure that there shall be no hindrance to any of the MLAs taking recourse to their rights and liberties as citizens and arrange for security to be provided to all the MLAs and their families.
WP(C) 479 of 2022	a. Quash the communication dated 3 July 2022 issued by the Speaker of the Maharashtra Legislative Assembly.
WP(C) 470 of 2022	a. Set aside the communication dated 28 June 2022 sent by the Governor to Mr. Uddhav Thackeray as well as to the Secretary, Maharashtra Legislative Assembly.
WP(C) 538 of 2022	a. Quash the summons dated 8 July 2022 issued by the Speaker to the petitioners in this petition, under the Tenth Schedule; b. Quash the disqualification proceedings initiated by Mr. Bharat Gogawale against the petitioners in this petition.

C. The reference

31. The Writ Petitions described in the previous segment of this judgment were listed before a three-Judge Bench of this Court on 4 August 2022, when Mr. Kapil Sibal and Dr. Abhishek Manu Singhvi, learned senior counsel appearing on behalf of the petitioners and Mr. Harish Salve, learned senior counsel appearing on behalf of the respondents

advanced arguments on whether the issues raised in these petitions required reference to a five-judge Bench of this Court.

32. By its order dated 23 August 2022, this Court accepted the submission that this batch of Writ Petitions ought to be referred to a five-Judge Bench under Article 145(3) of the Constitution as substantial questions of law remained to be decided. It accordingly referred the matter. The following questions were framed for consideration:

a. Whether a notice for removal of a Speaker restricts them from continuing with disqualification proceedings under Tenth Schedule of the Constitution, as held by this Court in **Nabam Rebia & Bamang Felix** v. **Deputy Speaker, Arunachal Pradesh Legislative Assembly**;[9]

b. Whether a petition under Article 226 or Article 32 lies, inviting a decision on a disqualification petition by the High Courts or the Supreme Court, as the case may be;

c. Can a court hold that a member is "deemed" to be disqualified, by virtue of his/her actions, absent a decision by the Speaker;

d. What is the status of proceedings in the House during the pendency of disqualification petitions against the members;

e. If the decision of a Speaker that a member has incurred disqualification under the Tenth Schedule relates back to the date of the action complained of, then what is the status of proceedings that took place during the pendency of a disqualification petition;

f. What is the impact of the removal of Paragraph 3 of the Tenth Schedule;

g. What is the scope of the power of the Speaker to determine the Whip and the leader of the house legislature party? What is the interplay of the same with respect to the provisions of the Tenth Schedule;

h. Are intra-party decisions amenable to judicial review? What is the scope of the same;

i. What is the extent of discretion and power of the Governor to invite a person to form the Government, and whether the same is amenable to judicial review; and

j. What is the scope of the powers of the Election Commission of India with respect to the determination of a split within a party.

D. Submissions

i. Submissions on whether **Nabam Rebia's case** ought to be referred to a larger Bench

33. Learned senior counsel appearing on behalf of the parties addressed this Court on the first of the issues specified in the preceding paragraph, that is, on whether a notice of intention to move a resolution for the removal of a Speaker restricts them from continuing with disqualification proceedings under the Tenth Schedule of the Constitution, as held by this Court in **Nabam Rebia** (supra).

34. Mr. Kapil Sibal, Dr. Abhishek Manu Singhvi and Mr. Devadatt Kamat, learned senior counsel advanced submissions on behalf of the petitioners. Their submissions were opposed by Mr. Harish Salve, Mr. Neeraj Kishan Kaul, Mr. Mahesh Jethmalani, Mr. Maninder Singh and Mr. Siddharth Bhatnagar, learned senior counsel appearing for the respondents. Mr. Tushar Mehta, learned Solicitor General, appeared on behalf of the Governor of the State of Maharashtra.

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[9] (2016) 8 SCC 1

35. In **Nabam Rebia** (supra), a Constitution Bench of this Court *inter alia* ruled that it is impermissible for a Speaker to adjudicate upon disqualification petitions under the Tenth Schedule after a notice of intention to move a resolution for their removal from the office of the Speaker is issued. The petitioners have urged that this aspect of the decision in **Nabam Rebia** (supra) ought to be referred to a Bench of seven Judges of this Court because:

a. In **Kihoto Hollohan** v. **Zachillhu**,[10] a Constitution Bench of this Court held that the Court cannot interfere in disqualification proceedings under Paragraph 6 of the Tenth Schedule at an interlocutory stage save in exceptional circumstances. In terms of the decision in **Nabam Rebia** (supra), the proceedings under the Tenth Schedule would be interdicted upon the issuance of a notice of intention to move a resolution for the removal of the Speaker. This amounts to interference in disqualification proceedings at the interlocutory stage. The decisions in **Kihoto Hollohan** (supra) and **Nabam Rebia** (supra), therefore, conflict with one another;

b. The decision in **Nabam Rebia** (supra) is prone to be misused by defecting MLAs, whose consequent disqualification under the Tenth Schedule can be avoided by disabling the Speaker from proceeding with disqualification proceedings by issuing a notice of intention to move a resolution for their removal under Article 179 of the Constitution. The Speaker is left without a remedy in case of their improper removal, while a disqualified member may access the remedy of judicial review if they have been unlawfully disqualified;

c. By holding that the Speaker is disabled from proceeding with disqualification proceedings under the Tenth Schedule when a notice of intention to move a resolution for their removal is issued, **Nabam Rebia** (supra) has the effect of:

i. Effacing the distinction between the role of the Speaker as a Tribunal under the Tenth Schedule and the role of the Speaker as an Officer of the State Legislature;

ii. Disrupting the continuity in the functioning of the Tribunal under Paragraph 6 of the Tenth Schedule; and

iii. Creating a constitutional hiatus in the operation of the Tenth Schedule.

d. The decision in **Nabam Rebia** (supra) is based on the interpretation of the phrase “all the then Members of the Assembly” in Article 179(c) of the Constitution to mean that the composition and strength of the House cannot be altered once a notice of intention to move a resolution for the removal of the Speaker is issued. This interpretation is contrary to:

i. The plain language of Article 179;

ii. The import of Article 181; and

iii. The deliberations in the Constituent Assembly Debates.

e. In terms of the decision of this Court in **Rajendra Singh Rana** v. **Swami Prasad Maurya**,[11] the disqualification of an MLA relates back to the date on which they engaged in the conduct proscribed under the Tenth Schedule. The scheme of the Constitution does not envisage the possibility of disqualified MLAs issuing a notice of intention to move a resolution for the removal of the Speaker after the date on which they engaged in the proscribed conduct.

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[10] (1992) Supp (2) SCC 651
[11] (2007) 4 SCC 270

36. The respondents opposed the submissions urged on behalf of the petitioners. They submitted that the decision in **Nabam Rebia** (supra) is not required to be referred to a Bench of seven Judges of this Court for the following reasons:

a. The decision in **Nabam Rebia** (supra) is based on ethical and constitutional considerations. If an MLA is unjustly disqualified by the Speaker and their disqualification is set aside by the courts, they would have been deprived of the opportunity to vote on the resolution for the removal of the Speaker as well as the opportunity to participate in other proceedings of the House. On the other hand, if the Speaker is unjustly removed from office, they do not lose membership of the House and consequently retain the right to participate in the proceedings of the House. They may also be re-elected as the Speaker;

b. The Speaker may act as a Tribunal under the Tenth Schedule only when they enjoy the confidence of the House;

c. Article 181(1) provides that the Speaker cannot preside in the Legislative Assembly when a motion for their removal is pending;

d. The decision in **Kihoto Hollohan** (supra) is an exception and not a general rule. Disabling the Speaker from deciding disqualification petitions upon the issuance of a notice of intention to move a resolution for their removal does not conflict with the ruling in **Kihoto Hollohan** (supra) because the disablement of the Speaker does not amount to interference at the interlocutory stage; and

e. In **Nabam Rebia** (supra), the Constitution Bench addressed the issue pertaining to the role of the Speaker when disqualification proceedings are initiated against MLAs. The issue has ceased to be a "substantial question of law" and cannot be referred to a larger bench under Article 145(3) of the Constitution.

37. Mr. Tushar Mehta, the learned Solicitor General, appeared for the Governor of the State of Maharashtra and urged that **Nabam Rebia** (supra) did not warrant a reference to a larger Bench for the following reasons:

a. It is not the case of the petitioners that **Nabam Rebia** (supra) is *per incuriam*. It considers all the relevant aspects, precedent, and constitutional provisions;

b. **Nabam Rebia** (supra) considers the possibility of the misuse of the temporary disablement of the Speaker;

c. The assertion that **Nabam Rebia** (supra) protects a member of a House from disqualification is incorrect because members can always be subjected to disqualification proceedings by a Speaker whose majority in the House is not under a cloud of suspicion;

d. Although the Speaker performs different functions as a "Tribunal" under the Tenth Schedule and as an "officer of the State Legislature" under the rules of the House, their authority to perform both functions is derived from the same source which is the confidence of the majority of the House; and

e. **Nabam Rebia** (supra) does not conflict with **Kihoto Hollohan** (supra) because the latter permits *quia timet* actions where there are "grave, imminent and irreparable consequences."

38. By its order dated 17 February 2023, this Court directed that the issue of whether a reference of the decision in **Nabam Rebia** (supra) to a larger Bench was warranted, would be determined together with the merits of the case. The order reads thus:

"8. The issue of whether a reference to a Bench of seven Judges should be made cannot be considered in the abstract; isolated or divorced from the facts of the case. Whether, the above

principle which has been formulated in Nabam Rebia (supra) has an impact upon the factual position in the present case, needs deliberation.

9. In the above backdrop, the issue whether a reference of the decision in Nabam Rebia (supra) to a larger Bench is warranted, would be determined together with the merits of the case."

39. Learned counsel appearing for the parties were then heard on the merits of the case.

ii. Submissions on the merits of the case

40. Mr. Kapil Sibal, learned senior counsel appearing on behalf of the petitioners made the following submissions:

a. A constitutional court, by virtue of its power under Articles 32 and 226 of the Constitution can decide whether an MLA is disqualified under the provisions of the Tenth Schedule. This Court has recognised this exceptional power in **Rajendra Singh Rana** (supra). The following exceptional circumstances indicate that this Court must decide the disqualification petitions in these proceedings:

i. The constitutionality of events which succeeded the filing of the disqualification petitions, namely, the direction of the Governor on 28 June 2022 to the then Chief Minister Mr. Uddhav Thackeray to face a floor test, the swearing in of Mr. Eknath Shinde as the Chief Minister on 30 June 2022, the appointment of the Speaker on 3 July 2022, the floor test held on 4 July 2022, and the petition filed by a faction led by Mr. Eknath Shinde under Paragraph 15 of the Symbols Order, have been challenged before this court;

ii. The Speaker was appointed with the support of the faction of the Shiv Sena legislators led by Mr. Eknath Shinde. The Speaker has conducted himself in a biased and *mala fide* manner. In a communication dated 3 July 2022, the Speaker de-recognised Mr. Ajay Choudhari and Mr. Sunil Prabhu as the Leader of the SSLP and the Chief Whip of the Shiv Sena respectively, and instead recognised Mr. Eknath Shinde and Mr. Bharat Gogawale respectively. The decision of the Speaker in the disqualification proceedings would depend on who was recognized as the Chief Whip which is also under challenge in the instant batch of proceedings;

iii. A Constitutional Court while deciding disqualification petitions must decide if a *per se* case of disqualification is made out against the MLAs;

iv. In the facts of the present case, a *per se* case of disqualification is made out under Paragraph 2(1)(a) of the Tenth Schedule against the faction of legislators led by Mr. Eknath Shinde because:

I. They deliberately did not attend the SSLP meetings held on 21 June 2022 and 22 June 2022;

II. On 22 June 2022, they passed illegal resolutions appointing Mr. Shinde as the Leader of the SSLP, and Mr. Gogawale as the Chief Whip; and

III. The faction led by Mr. Shinde met the Governor along with Mr. Devendra Fadnavis, the then Leader of Opposition. The alliance of legislators of Mr. Shinde's faction with the BJP was against the wishes of the Shiv Sena political party.

v. In the facts of the present case, a *per se* case of disqualification is made out under Paragraph 2(1)(b) of the Tenth Schedule against the faction of legislators led by Mr. Eknath Shinde. On 2 July 2022, Mr. Sunil Prabhu issued a whip for the election of the Speaker. The faction of legislators led by Mr. Shinde violated the whip and voted in favour of Mr. Rahul Narwekar, who was the candidate nominated by the BJP.

vi. Disqualification under the Tenth Schedule relates back to the date on which the MLA engaged in the act incurring disqualification. Thus, the outcome of the proceedings on the floor of the House which took place during the pendency of the disqualification proceedings would depend on the decision of the Speaker on the disqualification petitions. In the same vein, the outcome of the trust vote would depend on the decision in the disqualification proceedings. Additionally, this Court by its order dated 29 June 2022 while dismissing the writ petition filed by the petitioners seeking a stay on the direction of the Governor to hold a trust vote, observed that the proceedings of the trust vote shall be subject to the final outcome of the writ petition;

vii. The faction of legislators led by Mr. Shinde have asserted that they are the "real" Shiv Sena. They have also initiated proceedings under Paragraph 15 of the Symbols Order. The defence of the respondents in *effect* is that of a split. The defence of split having been deleted from the Tenth Schedule by the Constitution (Ninetyfirst Amendment) Act 2003 cannot be used by the respondents as a defence for actions that incur disqualification;

b. The purported resolution dated 21 June 2022 passed by the respondents appointing Mr. Gogawale as the Chief Whip, and the communication of the Speaker dated 3 July 2022 recognising Mr. Gogawale as the Chief Whip are illegal and must be set aside. The Chief Whip and the Leader of the legislature party must be appointed by the political party and not the legislature party because:

i. Paragraph 2(1)(b) of the Tenth Schedule stipulates that the whip must be issued by the political party (and not the legislature party) or by an authority authorised by the political party. Thus, the whip cannot be issued or altered by a majority of the legislature party. Paragraphs 1(b) and 1(c) differentiate between a legislature party and a political party for the purposes of the Tenth Schedule. This reading of the Tenth Schedule has been affirmed by Srinivasan, J. in his separate opinion in **Mayawati** v. **Markandeya Chand**;[12]

ii. A majority faction of the legislature party cannot be construed as the political party for the purposes of the Tenth Schedule;

iii. The explanation to Section 23 of the Maharashtra Legislature Members (Removal of Disqualification) Act 1956[13] provides that the Chief Whip in relation to the Maharashtra Legislative Assembly means a member of the House who has been declared as the Whip by the *party* forming the government;

iv. The Constitution (Fifty-second Amendment) Act 1985, by introducing disqualification of legislators on the ground of defection, recognised the role of political parties in parliamentary democracy;

v. The decision of the Speaker ought to be set aside on the ground of procedural irregularity. The Speaker did not provide the political party with an opportunity of being heard before issuing the communication dated 3 July 2022 recognising Mr. Gogawale as the Chief Whip;

vi. The decision of the Speaker recognising a whip is not excluded from judicial review by the provisions of Article 212 of the Constitution. Article 212 only precludes judicial review of 'proceedings in the Legislature of the State' on the ground of *procedural irregularity*. This Court in **Raja Ram Pal** v. **Hon'ble Speaker, Lok Sabha**[14] has held that

[12] (1998) 7 SCC 517
[13] "Act of 1956"
[14] (2007) 3 SCC 184

Article 212 does not exclude judicial review on the grounds of substantive or gross illegality; and

vii. The Leader of the legislature party must be appointed only by the political party. The link between the political party and the legislature party would be severed if the legislature party is permitted to appoint a Leader different from the candidate selected by the political party.

c. An MLA who the Speaker holds to have voluntarily given up membership for the purpose of the Tenth Schedule cannot initiate proceedings under Paragraph 15 of the Symbols Order because they will no longer be a part of the political party. Thus, members of a splinter faction who have been disqualified cannot be permitted to stake a claim under the Symbols Order *as* the political party;

d. The decision of the ECI does not have any bearing on proceedings under the Tenth Schedule because: (i) Disqualification relates back to the date of the actions which led to the incurring of disqualification; and (ii) The decision of the ECI will only have a prospective effect either from the date on which proceedings were instituted under Paragraph 15 of the Symbols Order or the decision of the ECI in those proceedings;

e. The communication of the Governor dated 28 June 2022 calling for a trust vote is illegal. The Governor's power to call for a trust vote is not unrestrained. The Governor's decision to call for a floor test is subject to judicial review and is liable to be quashed if it is based on extraneous considerations. The Governor's decision to call for a floor test on 28 June 2022 was illegal because:

i. The resolution of thirty-four members of the SSLP which is relied upon by the Governor does not state that they intend to exit the MVA; and

ii. The Governor cannot base his satisfaction on a claim of a majority of the SSLP against the government formed by their own political party;

f. The communication of the Governor dated 30 June 2022 calling Mr. Eknath Shinde to take oath as the Chief Minister is unconstitutional and ought to be set aside for the following reasons:

i. The Governor calling Mr. Shinde to take oath amounts to a recognition of a split in the Shiv Sena;

ii. The Governor could not have called Mr. Shinde to form the Government when a disqualification petition was pending against him;

iii. The recommendations of the Sarkaria Commission on the order of preference in which the Governor ought to call for the formation of the government were approved by this Court in **Rameshwar Prasad** v. **Union of India**.[15] The Governor did not follow this order of precedence**;**

iv. The decision of the Speaker disqualifying a member is *ex post facto.* The Speaker must decide as on facts that existed on the date the alleged action incurring disqualification had taken place. A disqualified member of the Assembly cannot be appointed as a Minister in view of the bar in Article 164(1-B) of the Constitution.

g. The order of this Court dated 27 June 2022 created a hiatus in the operation of the Tenth Schedule.

[15] (2006) 2 SCC 1

41. Dr. Abhishek Manu Singhvi, learned senior counsel appearing on behalf of the petitioners made the following submissions:

a. The *status quo ante* as on 27 June 2022 ought to be restored for the following reasons:

i. The order of this Court on 27 June 2022 extending the time granted to the respondents to respond to the disqualification petitions created a negative injunction on the functioning of the Speaker. The order of this Court on 29 June 2022 declining to stay the trust vote was a positive order. The Government in the State of Maharashtra would not have changed 'but for' the above orders of this Court (relied on **Indore Development Authority** v. **Manohar Lal**;[16]

ii. The order of this Court on 27 June 2022 is contrary to the judgment of the Constitution Bench in **Kihoto Hollohan** (supra) where it was held that judicial review cannot be made available at a stage prior to the decision of the Speaker under the Tenth Schedule. By this order, the court tilted the delicate balance of unfettered functioning of different constitutional functionaries in their respective spheres;

iii. The order of this Court on 29 June 2022 held that the trust vote would be "subject to the final outcome of the instant writ petition as well as the writ petitions referred above." Thus, the consequences and the new status quo created must be subject to the final outcome of the instant proceedings. Status quo ante ought to be restored as on 27 June 2022. The power of the court to restore status quo ante is not unheard of. This Court directed status quo ante in **Nabam Rebia** (supra); and

iv. This Court must direct status quo ante to give effect to the object behind the introduction of the Tenth Schedule, which is to curb the evil of political defections;

b. Immediately after his appointment as the Speaker on the evening of 3 July 2022, Mr. Rahul Narwekar recalled the order of the Deputy Speaker dated 21 June 2022 recognising Mr. Ajay Choudhari as the Leader of SSLP and Mr. Bharat Gogawale as the Chief Whip of the SSLP. The validity of the order of the Deputy Speaker dated 21 June 2022 was sub judice before this Court. Further, upon his appointment, the Speaker issued notice only on the disqualification petitions instituted by the respondents. The Speaker has behaved contrary to the spirit of neutrality and independence. Allowing the Speaker to decide the disqualification petition would amount to incentivising defection. Thus, this Court and not the Speaker must decide the disqualification petitions; c. The Governor could not have directed a trust vote when the legality of the disqualification petitions was pending consideration;

d. The letter of the Governor dated 28 June 2022 recognises a split in the Shiv Sena. He does not have the authority to recognise a split;

e. The majority in **S R Bommai** v. **Union of India**[17] held that it would be open to the Court to restore status quo ante before the issuance of the proclamation if the presidential proclamation was invalid. It was held that status quo ante could be restored even if the proclamation is approved by both the Houses of Parliament. It was also held that it would be open to the court to mould the relief while restoring status quo ante. Thus, this Court has the power to mould relief by holding that legislations passed in the intervening period would not be invalid but other actions during the pendency of the disqualification proceedings such as the election of the Speaker would be invalid if those who voted for the Speaker are held to have incurred disqualification;

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[16] (2020) 8 SCC 129
[17] (1994) 3 SCC 1

f. Article 189(2) extends only to situations where there is a challenge to the proceedings solely because of the eligibility of the members and there is no *per se* challenge to the validity of the proceedings. However, in the instant case, there is a prior challenge to the decision of the Governor to direct a trust vote. This action of the Governor cannot be immunised from judicial review by virtue of Article 189(2);

g. The resignation of Mr. Uddhav Thackeray on 29 June 2022 cannot dilute the illegality of the action of the Governor in directing a trust vote;

h. The decision of the ECI under Paragraph 15 of the Symbols Order will have prospective effect. The decision of the ECI recognising one of the factions as the Shiv Sena for the purposes of the Symbols Order cannot be applied retrospectively to the pending disqualification petitions. Such an interpretation would also be contrary to settled law that disqualification relates back to the date when the actions constituting defection were committed; and

i. MLAs who are dissatisfied with the status quo of the political party are entitled to resort to a merger under paragraph 4, or resign and re-contest elections, or apply to the ECI under Paragraph 15 of the Symbols Order for recognition of their faction as the political party and *await* the decision of the ECI. The members ought to be disqualified if they have chosen to act in a manner that is prohibited under the Tenth Schedule.

42. Mr. Devdatt Kamat, learned senior counsel appearing on behalf of the petitioners made the following submissions:

a. The term 'political party' as it occurs in the Tenth Schedule relates to the association of persons registered under Section 29A of the Representation of the People Act 1951. 'Political party' refers to the leadership structure subsisting on the date of the alleged prohibited conduct until the recognition of the political party and its leadership structure is altered under the law;

b. The members of the legislature party cannot claim that they represent the political party as a defence to the disqualification petitions instituted against them. Any such faction is only entitled to advance such a claim before the ECI in proceedings under the Symbols Order. The members cannot indulge in conduct that is prohibited under the Tenth Schedule until their claim is settled under the Symbols Order;

c. The Tenth Schedule will be put on a hiatus if the contention of the respondents that the disqualification petitions depend on the adjudication of their claim under Paragraph 15 of the Symbols Order is accepted; and

d. The respondents could not have initiated proceedings under Paragraph 15 of the Symbols Order when disqualification petitions are pending against them since the factor of legislative majority laid down in **Sadiq Ali** v. **Election Commission of India**[18] may be altered based on the adjudication of the disqualification proceedings.

43. Mr. Neeraj Kishan Kaul, learned senior counsel appearing on behalf of the respondents, made the following submissions:

a. In terms of Paragraph 6 of the Tenth Schedule, the Speaker is the sole constitutional authority to adjudicate upon the issue of disqualification. Moreover, Article 212(1) of the Constitution provides that the validity of proceedings of the state legislature cannot be called into question before courts. The petitioners are attempting to surpass the constitutional authority of the Speaker to adjudicate upon the disqualification petitions;

[18] (1972) 4 SCC 664

b. The concept of *per se* disqualification is unknown to the Constitution. Any decision as to the disqualification proceedings under the Tenth Schedule must be taken after following the due process of law and the principles of natural justice. A member incurs disqualification only after adjudication by the Speaker. The procedure for the adjudication of disqualification petitions is prescribed under the Maharashtra Legislative Assembly (Disqualification on Ground of Defection) Rules 1986;[19]

c. The MLAs facing disqualification retain the right to participate in the proceedings of the House and vote on resolutions. Article 189(2) of the Constitution provides that any proceedings of the House are not invalid even if it is subsequently discovered that persons who were not entitled to participate or vote or otherwise take part in the proceedings, did so. In **Pratap Gouda Patil** v. **State of Karnataka**[20] and **Speaker, Haryana Vidhan Sabha** v. **Kuldeep Bishnoi**,[21] this Court observed that members should not be stopped from taking part in the proceedings of the House merely because disqualification proceedings were pending against them;

d. Prior to the deletion of Paragraph 3 of the Tenth Schedule, the Speaker's enquiry as to the existence of a split within a political party was limited to a *prima facie* determination for deciding the disqualification proceedings. As a result of the deletion of Paragraph 3, the authority of the Speaker to form even a *prima facie* opinion regarding a split within a political party has been removed. Upon the deletion of Paragraph 3, the only defence for disqualification proceedings under the Tenth Schedule is that of a merger under Paragraph 4. The ECI is the sole authority empowered to decide disputes between rival factions of a political party according to the provisions of the Symbols Order;

e. A majority of a legislature party may appoint the Leader and the Chief Whip of the legislature party. The 1986 Rules provide that only the members of the legislature party shall choose their Leader. When the Leader and the Chief Whip are elected by the majority of the legislature party, the Speaker must take a *prima facie* view and grant recognition to such Leader and Chief Whip for the purposes of the Tenth Schedule. The Speaker has no choice but to appoint a Leader and a Chief Whip elected by a majority of the members of the legislature party; and

f. The decision of the Governor calling Mr. Eknath Shinde to form the Government is valid and cannot be called into question because:

i. Mr. Thackeray resigned on 29 June 2022 without facing the floor test;

ii. On the resignation of Mr. Thackeray, it was the constitutional duty of the Governor to call upon another person who commanded the majority in the Legislative Assembly to form the government; and

iii. Mr. Shinde staked his claim to form the government and subsequently proved his majority on the floor of the Legislative Assembly.

44. Mr. Tushar Mehta, learned Solicitor General, appearing on behalf of the Governor, made the following submissions:

a. The decision of the Governor calling upon Mr. Thackeray to prove his majority on the floor of the House was justified because:

i. The Governor has a constitutional obligation to ensure that the Council of Ministers led by the Chief Minister enjoys the support of the majority of the House. The Governor

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[19] "1986 Rules"
[20] (2019) 7 SCC 463
[21] (2015) 12 SCC 381

directed Mr. Thackeray to face the floor test based on the prevailing circumstances and the material before him;

ii. In directing the floor test, the Governor did not decide who enjoys the majority in the Legislative Assembly. Further, he did not decide any matter pertaining to the disqualification petitions or the split within the Shiv Sena;

iii. The Governor is not precluded from exercising their discretionary power to call for a floor test. Constitutional propriety requires the Governor to act independently and call for an immediate floor test when serious doubts have been raised about the majority enjoyed by the incumbent government in the Legislative Assembly. In the present case, the Governor called for the floor test based on the following objective facts:

I. The letter dated 21 June 2022 along with the resolution signed by thirty-four MLAs of the SSLP reaffirming support to Mr. Shinde as the Leader of the SSLP;

II. The letter dated 25 June 2022 addressed by thirty-eight MLAs of the SSLP claiming that the lives of the MLAs

and their family members were under threat, as was their property; and

III. The letter dated 28 June 2022 by the Leader of Opposition requesting him to call upon the then-Chief Minister to prove his majority on the floor of the Legislative Assembly.

b. The Supreme Court in **S R Bommai** (supra) and **Shivraj Singh Chouhan** v. **Union of India**[22] held that calling for an immediate floor test is the most appropriate measure in case any doubt arises as to whether the Chief Minister and the Council of Ministers enjoy the confidence of the House;

c. The issue of the propriety of the Governor's action calling Mr. Thackeray to prove his majority on the floor of the House has become infructuous because the latter did not face the floor test and instead resigned from the post of Chief Minister; and

d. The decision of the Governor to administer the oath of office to Mr. Shinde cannot be called into question as it was based on the following objective facts:

i. The letter dated 30 June 2022 by Mr. Devendra Fadnavis extending support to Mr. Eknath Shinde for the formation of the government by the latter;

ii. The letter dated 30 June 2022 by Mr. Eknath Shinde informing the Governor that he enjoys the support of a majority of the MLAs and requesting the Governor to invite him to take oath as Chief Minister; and

iii. The letters dated 30 June 2022 by seventeen independent MLAs and MLAs from other parties supporting Mr. Eknath Shinde.

45. Mr. Maninder Singh, learned senior counsel for the respondents made the following submissions:

a. The disqualification petitions under the Tenth Schedule must be decided by the Speaker. Reliance by the petitioners on **Rajendra Singh Rana** (supra) is erroneous because in that case, the disqualification petitions were already decided by the Speaker. It was only in appeal that this Court decided the issue of disqualification instead of remanding the matter back to the Speaker;

b. The disqualification of a member by the Speaker under the Tenth Schedule has drastic consequences. There can never be an automatic or deemed disqualification of an

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elected representative without affording any opportunity of hearing (relied on **Kshetrimayum Biren Singh** v. **Hon'ble Speaker, Manipur Legislative Assembly**[23]);

c. The Tenth Schedule cannot be used to stifle intra-party dissent amongst members of the same political party. Intra-party dissent cannot be termed as defection. Therefore, the respondents did not indulge in prohibitory conduct under Paragraph 2(1)(a) of the Tenth Schedule. Any act of expression of dissent against the leadership of the party does not constitute 'voluntarily giving up membership of the party' under Paragraph 2(1)(a). Paragraph 2(1)(b) also has no applicability in the facts of the present case;

d. After the deletion of Paragraph 3 from the Tenth Schedule, the Speaker has no jurisdiction to take cognizance of a split in a political party. The ECI has the exclusive jurisdiction to decide a split in a political party under Paragraph 15 of the Symbols Order; and

e. The order of this Court on 27 June 2022 granting additional time to the respondents to reply to the disqualification petitions was in accordance with the principles of natural justice.

46. Mr. Mahesh Jethmalani, learned senior counsel appearing for the respondents made the following submissions:

a. The concept of 'deemed disqualification' does not exist under the Constitution. Disqualification must be actual and there is a mandated procedure for disqualification proceedings under Rule 7(7) of the 1986 Rules;

b. The Speaker decides disqualification proceedings with reference to the date of on which action due to which the MLA is alleged to have incurred disqualification, is committed. However, in view of Articles 189(2) and 191(2) of the Constitution, the order of disqualification only has prospective effect; and

c. The petitioners instituted disqualification petitions against sixteen out of the thirty-nine MLAs who were part of Mr. Shinde's faction to entice those against whom petitions were not filed to gravitate towards Mr. Thackeray's faction. The petitioners knew that if all thirty-nine MLAs were disqualified, the MVA government would fall. Later, on 27 June 2022, a second disqualification petition was filed against the remaining twenty-three MLAs.

47. Mr. Harish Salve, learned senior counsel for the respondents made the following submissions:

a. During the pendency of the disqualification petitions, MLAs are entitled to participate in the proceedings of the House. Article 189(2) of the Constitution indicates that the subsequent disqualification of a member does not vitiate any actions in the House; and

b. The petitioners argued that but for the interim order of the Supreme Court, the disqualification would have followed, that Mr. Thackeray would not have resigned, and that he would have survived the trust vote. This Court should not enter into the realm of speculation while deciding constitutional matters. In the eventuality that Mr. Thackeray faced the floor test, he would not have had the support of the majority of the legislators. Mr. Thackeray's resignation on the eve of the trust vote is a testament to the fact that he had lost the confidence of the House.

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E. Analysis

i. Reference of **Nabam Rebia's case** to a larger Bench

48. Article 179 stipulates that a Speaker (or a Deputy Speaker) may be removed from their office by a resolution passed by a majority of "all the then members of the Assembly." Article 179 of the Constitution reads as follows:

"179. A member holding office as Speaker or Deputy Speaker of an Assembly—

…

(c) may be removed from his office by a resolution of the Assembly passed by a majority of all the then members of the Assembly:

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution:

Provided further that, whenever the Assembly is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the Assembly after the dissolution."

49. In **Nabam Rebia** (supra), the INC formed the government in Arunachal Pradesh under the leadership of Mr. Nabam Tuki. Mr. Nabam Rebia was elected as the Speaker of the Arunachal Pradesh Legislative Assembly. In October 2015, a section of the MLAs of the INC formed a separate group and opposed the leadership of the Chief Minister. Twenty MLAs of the INC along with two independent MLAs wrote to the Governor claiming that the Chief Minister has lost the trust and confidence of the House. Later, certain MLAs from the opposition parties issued a notice of intention to move a resolution for the removal of the Speaker of the Assembly under Article 179(c) of the Constitution. Thereafter, the Chief Whip of the Congress Legislature Party filed disqualification petitions under Paragraph 2(1)(a) of the Tenth Schedule against fourteen MLAs of the INC for breaching party directions. The Speaker then issued notices in the disqualification petitions to the MLAs.

50. On 9 December 2015, the Governor issued an order advancing the session of the Assembly originally scheduled to be held on 14 January 2016 to 16 December 2015. On the same day, the Governor also issued a message under Article 175(2). In the message, he fixed the resolution for the removal of the Speaker as the first item on the agenda of the House and tasked the Deputy Speaker with conducting the proceedings of the House. The Governor also directed that the Presiding Officer shall not alter the party composition in the House till the session was prorogued. On 17 December 2015, the Government headed by the Chief Minister Mr. Nabam Tuki was declared to have lost the confidence of the House.

51. It was in this context that **Nabam Rebia** (supra) came to be decided. A Constitution Bench of this Court in that case (speaking through the majority opinion authored by Khehar, J. and the concurring opinion by Misra, J., as the learned Chief Justices then were) *inter alia* ruled that it was impermissible for a Speaker to adjudicate upon disqualification petitions under the Tenth Schedule after a notice of intention to move a resolution for their removal from the office of the Speaker was issued.

52. Khehar, J. grounded his opinion on constitutional and moral reasoning. The learned Judge observed that when the position of the Speaker is under challenge, it would "seem" just and proper for the Speaker to establish their right to continue before adjudicating on the disqualification petition(s) pending before them:

"189. When the position of a Speaker is under challenge, through a notice of resolution for his removal, it would "seem" just and appropriate, that the Speaker first demonstrates his right to continue as such, by winning support of the majority in the State Legislature. The action of the

Speaker in continuing, with one or more disqualification petitions under the Tenth Schedule, whilst a notice of resolution for his own removal, from the Office of the Speaker is pending, would "appear" to be unfair. Why would a Speaker who is confident of his majority, fear a floor test? After his position as the Speaker is affirmed, he would assuredly and with conviction, deal with the disqualification petitions, under the Tenth Schedule. And, why should a Speaker who is not confident of facing a motion, for his removal, have the right to adjudicate upon disqualification petitions, under the Tenth Schedule? The manner in which the matter has been examined hereinabove, is on ethical considerations. A constitutional issue, however, must have a constitutional answer. We shall endeavour to deal with the constitutional connotation of the instant issue, in the following paragraphs."

53. Khehar, J. referred to the Constituent Assembly Debates to elucidate the meaning of the phrase "all the then members of the Assembly" as it appears in Article 179(c) (draft Article 158). In the course of the debates in the Constituent Assembly, Mr. Mohd. Tahir proposed to substitute the phrase "all the then members of the Assembly" with the phrase "the members of the Assembly present and voting". However, the proposed amendment was negatived. Justice Khehar observed that the Constituent Assembly Debates do not appear to have recorded any discussion on this proposed amendment. Khehar, J. noted that this meant that the members of the Constituent Assembly used the phrase to indicate definiteness and that any change in the composition of the Assembly when the notice of intention to move a resolution for the removal of the Speaker was pending would conflict with the express mandate of Article 179(c):

"191. […] We are satisfied that the words "passed by a majority of all the then Members of the Assembly", would prohibit the Speaker from going ahead with the disqualification proceedings under the Tenth Schedule, as the same would negate the effect of the words "all the then Members", after the disqualification of one or more MLAs from the House. The words "all the then Members", demonstrate an expression of definiteness. Any change in the strength and composition of the Assembly, by disqualifying sitting MLAs, for the period during which the notice of resolution for the removal of the Speaker (or the Deputy Speaker) is pending, would conflict with the express mandate of Article 179(c), requiring all "the then Members" to determine the right of the Speaker to continue."

54. The opinion of the majority further noted that the purpose sought to be achieved through the Tenth Schedule is clear and unambiguous, and that it is distinct from the purpose sought to be achieved by Article 179(c):

"192. The purpose sought to be achieved through the Tenth Schedule, is clear and unambiguous. The same is unrelated to, and distinct from, the purpose sought to be achieved through Article 179(c). Neither of the above provisions, can be seen as conflicting with the other. Both, must, therefore, freely operate within their individual constitutional space. Each of them will have to be interpreted, in a manner as would serve the object sought to be achieved, without treading into the constitutional expanse of the other. The interpretation would have to be such, as would maintain constitutional purpose and harmony."

55. Khehar, J. observed that if the Speaker decided a disqualification petition before surviving the vote, it would prejudice the MLAs facing disqualification but not the Speaker. The disqualified MLAs would not have a right to participate in the motion moved against the Speaker even if the order of disqualification was set aside. They would, in his view, have been effectively deprived of the opportunity to participate in the motion against the Speaker. However, the MLAs would not lose their right to participate if the disqualification petition was taken up after the motion against the Speaker was put to vote.

56. Referring to the first proviso to Article 179, Misra, J. observed that the Speaker would gain an advantage if they were allowed to change the composition of the Assembly by adjudicating the disqualification petitions in the fourteen days when the notice was

pending. This, he observed, would result in a constitutional conflict between the role of the Speaker as the presiding member of the Assembly and the role of the Speaker as a Tribunal under the Tenth Schedule. Misra, J. also referred to the amendment to Article 179(c) (draft Article 158) that was negatived by the Constituent Assembly, to reach the same conclusion as Khehar, J. Article 181(2) of the Constitution provides that the Speaker shall have the right to speak in and take part in the proceedings of the Legislative Assembly while a resolution for their removal from office is under consideration but shall not be entitled to vote in case of an equality of votes. The learned Judge held that the requirement under Article 181(2) when contradistinguished with Article 189 restricts the power of the Speaker to participate in the proceedings seeking their removal since the Speaker has been given the power to vote in the event of an equality of votes under the latter provision. This constitutional design indicated, in the view of the Judge, that the Speaker cannot be given the power to interfere with the resolution for their removal.

57. Madan Lokur, J. held that the Court was not called upon to decide this issue:

"401. In the view that I have taken, I am of the opinion that the view expressed by my learned Brothers relating to the power or propriety of the Speaker taking a decision under the Tenth Schedule of the Constitution with regard to the fourteen Members of the Legislative Assembly does not at all arise in these appeals."

58. As noticed in the previous segment of this judgment, this Court deferred taking a view on the question of whether the decision in **Nabam Rebia** (supra) ought to be referred to a larger Bench until the hearing on the merits of the case was concluded.

59. Having considered the submissions advanced by counsel for all the parties, we are of the view that the ruling in **Nabam Rebia** (supra) does not apply to the factual scenario of the present case.

60. In terms of Article 180 of the Constitution, the Deputy Speaker performs the duties of the Speaker while the office of the Speaker is vacant. The functions of the Speaker include the adjudication of disqualification petitions. In the present case, the office of the Speaker of the Maharashtra Legislative Assembly was vacant and the Deputy Speaker Mr. Narhari Zirwal was discharging the functions of the Speaker. A notice of intention to move a resolution for his removal under Article 179 is stated to have been issued on 22 June 2022. Mr. Sunil Prabhu filed disqualification petitions against some of the MLAs led by Mr. Shinde on 23 June 2022.

61. The first circumstance commences with the notice dated 21 June 2022, under Article 179(c) asking the Deputy Speaker to refrain from discharging his functions. The reply of the Deputy Speaker is crucial. The relevant portion is as under:

"In view of the gravity of the subject matter of the said communication, it is imperative that the genuineness of the communication be verified and ascertained before taking the same on record. Therefore, unless and until the persons who have purportedly signed the aforesaid communication satisfy the undersigned about the authenticity of any such notice, such communication is not liable to be taken on record or acted upon.

In view of the same and in my capacity as the Master of House, unless and until the genuineness and the veracity of any such communication and its signatories is ascertained, no further action can be taken and said communication dated 22.06.2022 is therefore not being taken on record. Any such notice will only be taken on record after I am satisfied of its genuineness and authenticity."

62. It is evident from the above that the Deputy Speaker decided not to take cognizance of the notice under Article 179(c). We believe that the Speaker being the adjudicator, their understanding of the jurisdiction that they may or may not exercise is of utmost

importance. The Deputy Speaker proceeded to issue notices to the respondents on 25 June 2022, requiring them to file written submissions by 27 June 2022. The notice was as follows:

"Whereas the Applicant has filed Application Number 1 of 2022 for disqualification of you Non-Applicant before Deputy Speaker, Maharashtra Legislative Assembly, we hereby along with all the annexed documents issue summons as under. You are instructed to submit written submissions as per the procedure laid in the members of Maharashtra Legislative Assembly (Disqualification on ground of defections) Rules 1986) by Monday, 27th June 2022 by 5.30 pm to Deputy Speaker. You are also instructed to submit all the relevant documents you are going to rely or dependent to be submitted along with this reply. You also note that, if these written submissions not given within stipulated time, it will be assumed that you have nothing to say on this Application & decision will be taken accordingly."

63. As is evident from the above, the Deputy Speaker did not consider the decision in **Nabam Rebia** (supra) as an impediment, from proceeding to adjudicate upon the complaint made under the Tenth Schedule.

64. The sixteen MLAs filed a Writ Petition under Article 32 before this Court being W.P. (C) Nos. 468-469 of 2022 raising two grounds. The first relates to the disability of the Speaker in proceeding with the hearing in view of the decision in **Nabam Rebia** (supra). The second ground relates to the legality of the summons issued by the Deputy Speaker granting only forty-eight hours for filing a written statement. What is important is the order passed by this Court on 27 June 2022 which is as under:

"Meanwhile as an interim measure, the time granted by the Deputy Speaker of the Assembly to the petitioners or other similarly placed Members of the Legislative Assembly to submit their written submissions upto today by 5.30P.M., is extended till 12.07.2022."

65. It is clear that this Court did not injunct the Deputy Speaker from proceeding with the hearing of the cases under the Tenth Schedule. In fact, this Court merely extended the time for filing a written statement till 12 July 2022, which goes to show that this Court intended that the proceedings must go on.

66. The petitioners urge that that the order of this Court dated 27 June 2022 relied on the decision in **Nabam Rebia** (supra) to injunct the Deputy Speaker from adjudicating the disqualification petitions. This submission cannot be accepted. Although the parties may have addressed this Court on the applicability of **Nabam Rebia** (supra), the order dated 27 June 2022 did not rely on **Nabam Rebia** (supra) to injunct the Deputy Speaker from adjudicating the disqualification petitions on the ground that a notice of intention to move a resolution for his removal had been issued. This Court instead granted an extension of time to the persons against whom disqualification petitions were filed, to file their written submissions, in view of the principles of natural justice.

67. The election of the Speaker was conducted shortly thereafter, and Mr. Rahul Narwekar was appointed as the Speaker. As a consequence, the Deputy Speaker was no longer required to discharge the functions of the Speaker. It fell to the Speaker to adjudicate any disqualification petitions that were pending. This being the case, **Nabam Rebia** (supra) does not apply to the lis before us. We will therefore render a verdict on the merits of the matter.

68. The reason why the Deputy Speaker did not proceed with the hearing is completely attributable to events that happened thereafter. After the notice of intention to move a resolution for the removal of the Deputy Speaker was issued, the subsequent events such as the Governor calling upon the then Chief Minister to prove the majority on the floor of the House, followed by the resignation of the then Chief Minister, formation of the new

government, election of the new Speaker and passing of the trust vote, all in quick succession, happening within a fortnight relegated the issue now referred to seven Judges to the backseat. These events brought about a dramatic change in the power structure and the reasons for such change became the main challenge and more fundamental to the present proceedings. The case of the petitioners now rests on their challenges to the decisions of, (i) the Governor calling upon the then Chief Minister to prove his majority; (ii) swearing in Mr. Ekanth Shinde as the Chief Minister; (iii) election of the Speaker by the House which included the thirty-four MLAs who are facing disqualification notices; and (iv) legality of the trust vote dated 4 July 2022.

69. Although the decision in **Nabam Rebia** (supra) is not applicable to the factual scenario before us, we are alive to the competing considerations which animated this Court in its order dated 23 August 2022 by which the decision in **Nabam Rebia** (supra) was referred to a Constitution Bench. In that order, this Court formed a prima facie opinion that the proposition of law laid down in **Nabam Rebia** (supra) was based on "contradictory reasoning." The order of reference notes:

"4. We may prima facie observe that the proposition of law laid down by the Constitution bench in Nabam Rebia (supra), stands on contradictory reasoning, which requires gap filling to uphold the constitutional morality. As such, this question needs a reference to a Constitution bench for the requisite gap filling exercise to be conducted."

70. Based on the submissions which have been canvassed before us, we are of the view that the decision in **Nabam Rebia** (supra) merits reference to a larger Bench because a substantial question of law remains to be settled. The following are our *prima facie* reasons for reaching this conclusion:

a. **Nabam Rebia** (supra) is in conflict with the judgement in **Kihoto Hollohan** (supra) because the decision in **Kihoto Hollohan** (supra) holds that there is no reason to doubt the independence and impartiality of the Speaker when adjudicating on proceedings under the Tenth Schedule. In contrast, in **Nabam Rebia** (supra), this Court doubted the ability of the Speaker to remain neutral while deciding disqualification petitions after a notice of intention to move a resolution for the removal of the Speaker has been issued.

b. In **Nabam Rebia** (supra), this Court referred to the Constituent Assembly Debates to interpret the phrase "all the then members" in Article 179(c). This Court noticed the amendment moved by Mr. Mohd Tahir, proposing that the term "all the then members of the Assembly" in Article 179(c) (draft Article 158(c)) be replaced with the term "all the members of the Assembly present and voting." In **Nabam Rebia** (supra), this Court noticed that this proposal was rejected and observed that the "Constituent Assembly Debates do not appear to have recorded any discussion on the above amendment." It was inter alia on this basis that this Court held that the phrase "all the then members of the Assembly" meant that the composition of the Assembly ought not to be changed after the notice of intention to move a resolution for the removal of the Speaker (or the Deputy Speaker) was issued. However, the members of the Constituent Assembly discussed the import of the phrase "all the then members" occurring in other provisions of the Constitution. Dr. BR Ambedkar clarified that the phrase "all the then members" has been used to indicate all members who are members of Parliament and whose seats are not vacant, and it does not mean members sitting or present and voting. This Court appears not to have noticed the entirety of the discussion in the Constituent Assembly regarding the phrase "all the then members" while using the Constituent Assembly Debates as an internal aid of interpretation;

c. Article 181 of the Constitution provides that the Speaker shall not preside over a sitting of the Legislative Assembly while a resolution for their removal is under consideration. It appears that the majority in **Nabam Rebia** (supra) did not consider the effect and import of Article 181, and whether the Constitution envisages the imposition of any restriction on the functions of the Speaker beyond the limited restriction imposed by Article 181;

d. The second proviso to Article 179 provides that whenever the Assembly is dissolved, the Speaker shall not vacate their office until immediately before the first meeting of the Assembly after the dissolution. This Court did not consider if the Constitution envisages a restriction on the continuous performance of the functions of the Speaker under the Tenth Schedule in view of this provision;

e. Rule 11 of the Maharashtra Legislative Assembly Rules stipulates that upon the expiry of the period of fourteen days provided under the proviso to Article 178, leave is granted to move the motion only when twenty-nine members vote in favour of it. This Court did not consider the possibility that a notice of intention to move a resolution for the removal of the Speaker may not culminate in such a motion being moved. The Speaker may be effectively barred from adjudicating disqualification petitions based on the mere issuance of a notice of intention to move a resolution by one member of the House;

f. It appears that the following aspects were not considered in **Nabam Rebia** (supra):

i. Whether the temporary disablement of the functions of the Speaker under the Tenth Schedule is prone to misuse by MLAs who anticipate that disqualification petitions will be instituted against them or by MLAs against whom disqualification petitions have already been instituted; and

ii. Whether a “constitutional hiatus” in the operation of the Tenth Schedule ensues because of the temporary disablement of the Speaker.

71. To give quietus to the issue, we refer the following question (and any allied issues which may arise) to a larger Bench: whether the issuance of a notice of intention to move a resolution for the removal of the Speaker restrains them from adjudicating disqualification petitions under the Tenth Schedule of the Constitution. The matter may be placed before the Chief Justice for appropriate orders. We accordingly answer the question referred to us as noted in Paragraph 32(a) of this judgment.

72. Pending the decision of the larger Bench, as an interim measure, adoption of the following procedure may subserve the objective of the Tenth Schedule, Symbols Order as well as Article 179(c). It may also provide some amount of clarity and certainty.

a. The investiture of exclusive adjudicatory jurisdiction upon the Speaker to determine the complaints under the Tenth Schedule will entitle the Speaker to rule upon and decide applications questioning their jurisdiction; and

b. (i) The Speaker is entitled to rule on applications which require them to refrain from adjudicating proceedings under the Tenth Schedule on the ground of initiation of a motion for their removal under Article 179(c). A Speaker can examine if the application is bonafide or intended only to evade adjudication;

(ii) If the Speaker believes that the motion is well founded, they may adjourn the proceedings under the Tenth Schedule till the decision for their removal is concluded. On the other hand, if they believe that the motion is not as per the procedure contemplated under the Constitution, read with the relevant rules, they are entitled to reject the plea and proceed with the hearing; and

(iii) The decision of the Speaker, either to adjourn the proceedings under the Tenth Schedule in view of the pending proceedings under Article 179(c) or to proceed with the hearing will be subject to judicial review. As the decision of the Speaker relates to their jurisdiction, the bar of a *qua timet* action, as contemplated in **Kihoto Hollohan** (supra) will not apply.

ii. The power of this Court to decide disqualification petitions at the first instance

73. The petitioners have urged that the Speaker cannot be entrusted with the adjudication of disqualification petitions because is biased and partial as he was appointed with the support of the MLAs against whom disqualification petitions have been filed. They have relied on **Rajendra Singh Rana** (supra) to argue that this Court should decide the disqualification petitions against the respondents.

74. Article 191(2) of the Constitution stipulates that an MLA disqualified under the Tenth Schedule shall be disqualified for being a member of the House. Under Paragraph 6 of the Tenth Schedule, the Speaker has the exclusive jurisdiction to decide the question of disqualification. Paragraph 8 empowers the Chairman or Speaker of the House to make rules on the procedure for deciding any question referred to in Paragraph 6 including the procedure for any inquiry which may be made for the purpose of deciding such question. In exercise of the powers conferred under Paragraph 8, the Speaker of the Maharashtra Legislative Assembly notified the 1986 Rules.

75. Rule 6 of the 1986 Rules lays down the procedure for the filing of disqualification petitions against a member of the House before the Speaker. Rule 7 provides that the Speaker may either dismiss the petition for non-compliance with the requirements laid down under Rule 6 or proceed to determine the question of disqualification against a member of the House. According to Rule 7(7), the Speaker must grant a reasonable opportunity to such member to represent their case. Rule 8 provides that the Speaker shall after due consideration of the merits of the case either dismiss the disqualification petition or declare that the member has become subject to disqualification under the Tenth Schedule by an order in writing. Thus, the Tenth Schedule (read together with the 1986 Rules for Maharashtra) provides a detailed procedure guiding the exercise of power by the Speaker under the Tenth Schedule. The Speaker must decide disqualification petitions by following this procedure.

76. In **Kihoto Hollohan** (supra), this Court held that the Speaker is a Tribunal for the purposes of the Tenth Schedule. Therefore, the exercise of power under the Tenth Schedule is subject to the jurisdiction of Courts under Articles 136, 226, and 227 of the Constitution. This Court further observed that the finality clause contained in Paragraph 6(2) did not completely exclude the jurisdiction of Courts. However, it was held that such a clause limits the scope of judicial review because the Constitution intended the Speaker or the Chairman to be "the repository of adjudicatory powers" under the Tenth Schedule. This Court held that judicial review is not available at a stage prior to the decision of the Speaker or Chairman, save in certain exceptional circumstances detailed in that case. Thus, **Kihoto Hollohan** (supra) makes it evident that the exclusive power to decide the question of disqualification under the Tenth Schedule vests with the Speaker or Chairman of the House.

77. The petitioners have relied on **Rajendra Singh Rana** (supra) to urge that this Court should invoke its extraordinary jurisdiction and itself decide the question of disqualification against the respondent MLAs. Alternatively, it is urged that this Court should direct the Deputy Speaker, Mr. Zirwal, who was performing the functions of Speaker prior to 3 July 2022, to decide the disqualification petitions.

78. In **Rajendra Singh Rana** (supra), disqualification petitions were filed against thirteen MLAs of the Bahujan Samaj Party[24] on 4 September 2003. On 26 August 2003, the Speaker accepted a split in the BSP and recognized a separate group by the name of Lok Tantrik Bahujan Dal. The thirteen MLAs against whom disqualification petitions were instituted were also part of the Lok Tantrik Bahujan Dal. On 6 September 2003, the Speaker accepted the merger of the Lok Tantrik Bahujan Dal with the Samajwadi Party without deciding the disqualification petitions against the thirteen MLAs. On 7 September 2005, the Speaker rejected the disqualification petitions against the MLAs. By its judgment dated 28 February 2006, the High Court quashed the order of the Speaker rejecting the disqualification petitions against the MLAs and directed him to reconsider the petitions.

79. On appeal, this Court observed that it would not be appropriate for it to decide the disqualification petitions for the first time when the concerned authority had not taken a decision. It observed that this Court would normally remit the matter to the Speaker or Chairman to take a proper decision in accordance with law. However, this Court decided to adjudicate the disqualification petitions in view of the following peculiar facts and circumstances: (i) the Speaker of the Legislative Assembly in that case failed to decide the question of disqualification in a timebound manner; (ii) the Speaker decided the issue of whether there was a split in the party without deciding whether the MLAs in question were disqualified; and (iii) the necessity of an expeditious decision in view of the fact that the disqualification petitions were not decided by the Speaker for more than three years and the term of the Assembly was coming to an end. In view of the above facts and circumstances, this Court was of the opinion that remanding the disqualification proceedings to the Speaker would lead to them becoming infructuous.

80. This Court should normally refrain from deciding disqualification petitions at the first instance, having due regard to constitutional intendment. The question of disqualification ought to be adjudicated by the constitutional authority concerned, namely the Speaker of the Legislative Assembly, by following the procedure prescribed. Disqualification of a person for being a member of the House has drastic consequences for the member concerned and by extension, for the citizens of that constituency. Therefore, any question of disqualification ought to be decided by following the procedure established by law. In **Kshetrimayum Biren Singh** (supra), a three-Judge Bench of this Court set aside the order of the Speaker disqualifying MLAs under Paragraph 2(1)(a) for not granting an opportunity to them to lead evidence and present their case. The Speaker was directed to decide the disqualification petitions afresh by complying with the principles of natural justice. Even in cases where the Speaker decides disqualification petitions without following the procedure established by law, this Court normally remands the disqualification petitions to the Speaker. Therefore, absent exceptional circumstances, the Speaker is the appropriate authority to adjudicate petitions for disqualification under the Tenth Schedule.

81. The petitioners have urged that in view of the facts and circumstances, this Court should not remand the disqualification proceedings to the Speaker of the Maharashtra Legislative Assembly, on the ground that he has demonstrated himself to be incapable of acting fairly and impartially. Before addressing the petitioner's submission, it is necessary to refer to the status of the Speaker under the Constitution. Article 178 provides that the Legislative Assembly shall, as soon as may be, choose two members of the Assembly to be the Speaker and Deputy Speaker. The procedure for the election of Speaker and the Deputy Speaker is generally provided by the relevant rules of the Legislative Assembly.

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[24] "BSP"

82. In a parliamentary democracy, the Speaker is an officer of the Assembly. The Speaker performs the function of presiding over the proceedings of the House and representing the House for all intents and purposes. In **Kihoto Hollohan** (supra), it was contended that the Speaker does not represent an independent adjudicatory machinery since they are elected by the majority of the Assembly. Rejecting the argument, this Court emphasized that the office of the Speaker is held in high respect in parliamentary tradition. The Court held that the Speaker embodies propriety and impartiality and that it was therefore inappropriate to express distrust in the office of the Speaker:

"118. It would, indeed, be unfair to the high traditions of that great office to say that the investiture in it of this jurisdiction would be vitiated for violation of a basic feature of democracy. **It is inappropriate to express distrust in the high office of the Speaker, merely because some of the Speakers are alleged, or even found, to have discharged their functions not in keeping with the great traditions of that high office. The robes of the Speaker do change and elevate the man inside**."

(emphasis supplied)

83. The petitioners have relied upon the judgment in **Shrimanth Balasaheb Patil** v. **Speaker, Karnataka Legislative Assembly**,[25] where it was observed that the Speaker does not deserve to be reposed with public trust and confidence if they are not able to dissociate from their political party and if they act contrary to the spirit of neutrality and independence. In **Shrimanth Balasaheb Patil** (supra), the Speaker issued orders disqualifying certain MLAs, prohibiting them from contesting elections and becoming members for the remaining term of the Legislative Assembly. This Court upheld the decision of the Speaker on the question of disqualification. However, it held that the Speaker does not have the power to specify the period of disqualification under the Tenth Schedule. It was in view of the unconstitutional exercise of power by the Speaker that this Court expounded on the general principles that a Speaker is expected to follow while adjudicating questions of disqualification.

84. A similar submission was made before this Court in the case of **Keisham Meghachandra Singh** v. **Hon'ble Speaker Manipur Legislative Assembly**[26]**,** where it was submitted that this Court should issue a writ of quo-warranto against the appointment of an MLA as a minister when disqualifications petitions are pending. Rejecting the submission, this Court held as under:

"**8.** Shri Kapil Sibal, learned Senior Advocate appearing on behalf of the Appellant, in the Civil Appeal arising out of SLP(C) No. 18659 of 2017, has argued that the Speaker in the present case has deliberately refused to decide the disqualification petitions before him…… In these circumstances, he has exhorted us to issue a writ of quo warranto against Respondent No. 3 stating that he has usurped a constitutional office, and to declare that he cannot do so…

32. It is not possible to accede to Shri Sibal's submission that this Court issue a writ of quo warranto quashing the appointment of the Respondent No. 3 as a minister of a cabinet led by a BJP government. Mrs. Madhavi Divan is right in stating that a disqualification under the Tenth Schedule from being an MLA and consequently minister must first be decided by the exclusive authority in this behalf, namely, the Speaker of the Manipur Legislative Assembly. It is also not possible to accede to the argument of Shri Sibal that the disqualification petition be decided by this Court in these appeals given the inaction of the Speaker. It cannot be said that the facts in the present case are similar to the facts in Rajinder Singh Rana (supra). In the present case, the life of the legislative assembly comes to an end only in March, 2022 unlike in Rajinder Singh Rana (supra) where, but for this Court deciding the disqualification petition in effect, no relief could have

[25] (2020) 2 SCC 595
[26] (2020) SCC OnLine SC 55

been given to the petitioner in that case as the life of the legislative assembly was about to come to an end. The only relief that can be given in these appeals is that the Speaker of the Manipur Legislative Assembly be directed to decide the disqualification petitions pending before him within a period of four weeks from the date on which this judgment is intimated to him. In case no decision is forthcoming even after a period of four weeks, it will be open to any party to the proceedings to apply to this Court for further directions/reliefs in the matter."

85. The incumbent Speaker of the Maharashtra Legislative Assembly has been duly elected by the MLAs in terms of the procedure laid down under the Maharashtra Assembly Rules 1960. The petitioners have referred to the decision of the Speaker to cancel the recognition of Mr. Sunil Prabhu as the Chief Whip of the Shiv Sena on 3 July 2022 to argue that the Speaker is biased and impartial. The decision of the Speaker to cancel the recognition of Mr. Prabhu has also been challenged in the instant proceedings. Even if this Court sets aside the decision of the Speaker cancelling the recognition of Mr. Prabhu on merits, it would not be a sufficient reason for this Court to decide the disqualification petitions. We are also unable to accept the alternative submission of the petitioners to direct the Deputy Speaker to adjudicate the question of disqualification for the simple reason that the Maharashtra Legislative Assembly has duly elected the Speaker, who has been entrusted with the authority to decide disqualification petitions under the Constitution. The Deputy Speaker can perform the duties of the Speaker only when the office of the Speaker is vacant.[27] As observed in **Kihoto Hollohan** (supra) and **Shrimanth Balasaheb Patil** (supra), the Speaker is expected to act fairly, independently, and impartially while adjudicating the disqualification petitions under the Tenth Schedule. Ultimately, the decision of the Speaker on the question of disqualification is subject to judicial review. Therefore, this Court is of the opinion that the Speaker of the Maharashtra Legislative Assembly is the appropriate constitutional authority to decide the question of disqualification under the Tenth Schedule.

iii. Validity of the proceedings of the House between the prohibitory conduct and the decision in the disqualification petitions

86. In **Rajendra Singh Rana** (supra), a Constitution Bench of this Court observed that disqualification is incurred at the point when the MLA indulges in conduct prohibited under the Tenth Schedule. The petitioners rely on this observation to contend that the validity of the proceedings in the House during the pendency of the disqualification petitions depends on the outcome of the disqualification petitions. The petitioners urge that though the MLAs cannot be barred from participating in the proceedings of the House merely on the initiation of disqualification petitions against them, the outcome of such proceedings will be subject to the decision of the Speaker in the pending disqualification petitions. It is important to understand the context in which this Court decided **Rajendra Singh Rana** (supra) to appreciate the gamut of its observations.

87. A coalition Government, headed by the leader of the BSP, Ms. Mayawati, was formed in May 2002 pursuant to the elections to the 14th Legislative Assembly of Uttar Pradesh. On 27 August 2003, thirteen MLAs of the BSP wrote to the Governor requesting him to invite the Leader of the Samajwadi Party to form the Government. On 4 September 2003, the leader of the BSP filed disqualification petitions against the thirteen MLAs under the provisions of Paragraph 2(1)(a) of the Tenth Schedule. On 6 September 2003, thirty-seven MLAs of the BSP filed a claim before the Speaker for recognition of a split in the party. They claimed that pursuant to a meeting in Lucknow on 26 August 2003, the BSP split and that they constituted the group representing a faction which had arisen as a result

[27] Article 180 of the Constitution

of the split, namely the Lok Tantrik Bahujan Dal. On the very same day, the Speaker accepted the claim of a split and recognized a separate group by the name Lok Tantrik Bahujan Dal while the disqualification petitions were kept pending. Proceedings under Article 226 of the Constitution were instituted before the High Court challenging the order of the Speaker recognizing the split. The High Court set aside the order of the Speaker and directed the Speaker to consider the disqualification petitions instituted against the thirteen MLAs. The appeal against the order of the High Court was disposed by the Constitution Bench in **Rajendra Singh Rana** (supra).

88. This Court held that the Speaker could not have decided whether a split existed *de hors* the disqualification petitions. The Court considered the issue of the point in time when the defence of a split must have existed. The respondents in that case contended that the defence of a split in terms of Paragraph 3 must have existed on the day on which the MLAs indulged in prohibitory conduct. In response, the petitioners contended that it is sufficient for the MLAs to prove a split in terms of Paragraph 3 as on the day when the disqualification petitions are decided by the Speaker. It was in this context that this Court observed that the MLAs incurred disqualification when they indulged in prohibitory conduct and therefore, the defence to disqualification (in this case, a split) must also have existed when the MLAs indulged in prohibitory conduct. The relevant observations are extracted below:

"34. As we see it, the act of disqualification occurs on a member voluntarily giving up his membership of a political party or at the point of defiance of the whip issued to him. Therefore, the act that constitutes disqualification in terms of para 2 of the Tenth Schedule is the act of giving up or defiance of the whip. **The fact that a decision in that regard may be taken in the case of voluntary giving up, by the Speaker at a subsequent point of time cannot and does not postpone the incurring of disqualification by the act of the legislator.** Similarly, the fact that the party could condone the defiance of a whip within 15 days or that the Speaker takes the decision only thereafter in those cases, cannot also pitch the time of disqualification as anything other than the point at which the whip is defied. Therefore in the background of the object sought to be achieved by the Fifty-second Amendment of the Constitution and on a true understanding of para 2 of the Tenth Schedule, with reference to the other paragraphs of the Tenth Schedule, **the position that emerges is that the Speaker has to decide the question of disqualification with reference to the date on which the member voluntarily gives up his membership or defies the whip. It is really a decision ex post facto.** The fact that in terms of para 6 a decision on the question has to be taken by the Speaker or the Chairman, cannot lead to a conclusion that the question has to be determined only with reference to the date of the decision of the Speaker. An interpretation of that nature would leave the disqualification to an indeterminate point of time and to the whims of the decision-making authority. The same would defeat the very object of enacting the law. Such an interpretation should be avoided to the extent possible. We are, therefore, of the view that the contention that (sic it is) only on a decision of the Speaker that the disqualification is incurred, cannot be accepted. This would mean that what the learned Chief Justice has called the snowballing effect, will also have to be ignored and the question will have to be decided with reference to the date on which the membership of the legislature party is alleged to have been voluntarily given up."

(emphasis supplied)

89. The observations that are sought to be relied upon by the petitioners were made in the context of deciding the relevant point of time at which the defence to disqualification must have existed.

90. In **Kuldeep Bishnoi** (supra), five MLAs from Haryana Janhit Congress wrote to the Speaker of their intention to merge with the INC which formed the Government in Haryana. The Speaker accepted the merger. Disqualification petitions under Paragraph 2(1)(a) of

the Tenth Schedule were instituted. The Speaker incessantly adjourned the proceedings and did not decide on the disqualification petitions for more than seven months. One of the orders of adjournment was challenged before the High Court. The High Court directed the Speaker to decide the petitions within four months, stayed the order recognizing the merger, and declared the five MLAs to be unattached members. The High Court directed that the five MLAs would neither be treated as a part of the INC nor the Haryana Janhit Congress, and they would only have a right to attend the session. On appeal, a two-Judge Bench of this Court set aside the direction declaring the five MLAs as unattached members. In **Kuldeep Bishnoi** (supra), the issue before this Court was whether the High Court could have passed an interim order declaring members of the House as unattached members when disqualification petitions were pending against them. This Court answered in the negative. It observed that the MLAs were entitled to function without any restrictions. This Court in **Kuldeep Bishnoi** (supra) did not address the argument of whether the outcome of the proceedings of the House in the period intervening the prohibitory act and decision in the disqualification petition, would be subject to the decision. Thus, the contention that has been raised by the petitioners needs to be considered afresh by this Court.

91. Article 191(2) provides that a person shall be disqualified for being a member of the Legislative Assembly if they are so disqualified under the Tenth Schedule. Article 190(3) stipulates that if an MLA incurs a disqualification under the provisions of Article 191(2) read with Tenth Schedule, their seat shall *thereupon* become vacant:

"190. […]

(3) If a member of a House of the Legislature of a State –

(a) becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of Article 191; or (b) resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be, and his resignation is accepted by the Speaker or the Chairman, as the case may be, his seat shall thereupon become vacant"

The term '*thereupon*' denotes that the seat becomes vacant only from such date when the Speaker decides the disqualification petition. An MLA has the right to participate in the proceedings of the House *until* they are disqualified.[28]

92. Articles 189(2) and 100(2) (the corresponding provisions for Parliament) stipulate that the validity of *any proceedings* of the legislature shall not be questioned on the ground that it was discovered *subsequently* that a legislator who was not entitled to vote or sit, took part in the proceedings. Article 189(2) is extracted below:

"(2) A House of the Legislature of the State shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the Legislature of a State shall be valid notwithstanding that it was discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings."

The provisions of Article 189(2) will have no bearing on the determination of this issue because members of the House lose their right to participate in the proceedings of the House only upon their disqualification. The decision of the Speaker does not relate back to the date when the MLA indulged in prohibitory conduct. The decision of the Speaker and the consequences of disqualification are prospective.

93. Article 189(2) would only apply where it is subsequently discovered that an MLA was not entitled to have voted. That situation does not arise here. Therefore, it was not

[28] See Shivraj Singh Chouhan (supra) and Pratap Gouda Patil (supra) where this Court observed that MLAs will be reflected in the strength of the House until they are disqualified and will have the right to participate in the proceedings.

necessary for the respondents to take recourse to Article 189(2). The proceedings of the House cannot be *subject to* the decision in the disqualification petitions when the decision is prospective. Moreover, the interpretation advanced by the petitioners would render the parliamentary system of governance unworkable. Parliament undertakes innumerable functions on the floor of the House, including passing legislations and approving the annual budget. These actions of the legislators are irrevocable except in accordance with law. The constitutional sanctity of the proceedings in Parliament or the state legislatures cannot be set in a state of uncertainty. To allow the validity of such proceedings to be subject to a future decision would lead to chaos. For the above reasons, the action of the House in electing the Speaker, Mr. Rahul Narwekar, on 3 July 2022 is not invalid merely because some MLAs who participated in the election faced disqualification proceedings. We accordingly answer the question referred to us as noted in Paragraphs 32(d) and 32(e) of this judgment.

iv. <u>The power to appoint the Whip and the Leader of the Legislature Party</u>

94. The respondents have challenged the communication of the Deputy Speaker dated 21 June 2022 appointing Mr. Ajay Choudhari as the Leader of the SSLP. The petitioners have challenged the communication of the Speaker dated 3 July 2022 by which (i) the appointment of Mr. Ajay Choudhari was cancelled and Mr. Shinde was appointed as the Leader of the SSLP; and (ii) Mr. Gogawale was appointed as the Chief Whip in place of Mr. Sunil Prabhu. Before adjudicating on the validity of the impugned communications, it is necessary to answer the preliminary objection that the courts cannot inquire into communications recognizing the Whip and the Leader of a legislature party because of the bar under Article 212 of the Constitution.

a. The bar under Article 212: justiciability of legislative proceedings

95. Article 212(1) stipulates that the Court shall not inquire into the validity of the proceedings of the Legislature of a State on the ground of any alleged irregularity of procedure:

"212. Courts not to inquire into proceedings of the Legislature.- (1) The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure."

96. This Court has on earlier occasions construed the scope of the restriction on judicial review of proceedings of the Legislature under Article 212 (and the corresponding provision for Parliament, Article 122). In **Special Reference No. 1 of 1964 (Powers, Privileges and Immunities of State Legislatures)**,[29] a sevenJudge Bench observed that Article 212 only restricts judicial review on the ground of 'irregularity of procedure' and that proceedings of the legislature can still be challenged if the 'procedure is illegal and unconstitutional.' In **Raja Ram Pal** (supra), a Constitution Bench held that legislative proceedings can be challenged on the grounds of 'substantive illegality or unconstitutionality'. In **Justice KS Puttaswamy** v. **Union of India (Aadhar 5J)**,[30] one of the issues before this Court was whether Article 212 precluded judicial review of the Speaker's authorization of a Money Bill. Sikri, J. writing for the majority observed that Article 212 only limited challenges on the ground of 'irregularity of procedure' and not 'substantive illegality'. One of us (D Y Chandrachud, J.) observed in his dissenting opinion that Article 212 does not preclude judicial review of proceedings of a Legislature if the decision of the Speaker suffers from "illegality or a violation of constitutional provisions."

[29] AIR 1965 SC 745
[30] (2019) 1 SCC 1

In **Rojer Mathew** v. **South Indian Bank Ltd.**,[31] this Court observed that a "gross violation of the constitutional scheme" cannot be considered a procedural irregularity. This Court has consistently held that a substantive illegality or a violation of a constitutional provision is distinct from a mere irregularity of procedure and is amenable to judicial review.

97. Similar provisions barring Courts from interfering on the ground of irregularity of procedure occur in the Code of Criminal Procedure 1973.[32] Section 465 of the CrPC provides that a finding or a sentence cannot be reversed solely on the ground of irregularity of proceedings unless, in the opinion of the Court, there has been a failure of justice.[33] The concept of irregularity of procedure is also common in service jurisprudence. In the context of regularisation of employment, this Court has held that while employees who were irregularly appointed can be regularised, those appointed illegally cannot. In **State of UP** v. **Desh Raj**,[34] this Court held that "an appointment which was made throwing all constitutional obligations and statutory rules to the winds would render the same illegal whereas irregularity presupposes substantial compliance with the rules." Thus, the issue of whether the action violating a procedure would render the proceedings irregular or illegal is specific to context of each case. It depends on the purpose of the prescribed procedure and the consequence of non-compliance with such procedure. This is true across diverse areas of law.

98. The House of the People and the Legislative Assemblies of States are constituted of members directly elected by the electorate. The candidate who secures the highest number of votes is returned to the Assembly. The political party which reaches the half-way mark forms the government. A coalition of political parties may form the government if no single political party reaches the half-way mark. Articles 75 and 164 provide that the Council of Ministers is collectively responsible to the House of the People and Legislative Assembly of the State respectively. The legislators who are directly elected by the people have a duty to hold the executive accountable on the floor of the House. Legislative procedures serve two objectives - first, they enable deliberation and discussion on the floor of the House to hold the executive accountable, and such deliberation also produces better constitutional outcomes; and second, they create a system to place a check on the exercise of power by the incumbent government. Certain procedural requirements prescribed by the Constitution safeguard constitutional values. This is reflected in Article 368 which prescribes a special majority to amend certain constitutional provisions, which according to the members of the Constituent Assembly hold a higher constitutional (and democratic) value. Certain other legislative procedures further democratic processes and accountability, and prevent the concentration of power in the hands of the incumbent government. Article 212 cannot be interpreted as placing all procedural infringements beyond the pale of judicial review. Such an interpretation would completely disregard the importance of legislative processes in a constitutional democracy.

99. The distinction between irregular procedure and illegal procedure must be drawn based on the nature of the procedure which was violated, and the impact of such a violation on democratic ideals. An infringement of a procedure would be irregular if the purpose of such procedure is unrelated to democratic ideals and its violation does not go to the root of democratic processes.

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[31] (2020) 6 SCC 1

[32] "CrPC"

[33] See Pradeep S Wodeyar v. State of Karnataka, 2021 SCC OnLine SC 1140

[34] (2007) 1 SCC 257

100. The observations of this Court on the interpretation of Article 212 highlighted above do not make a distinction between irregularity and illegality *solely* based on the source of law. The distinction is not based on whether the procedure is entrenched in the Constitution but whether it is crucial for the sustenance of democracy. A violation of a procedure that fulfils the twin objectives highlighted above and which is necessary for the sustenance of parliamentary democracy would render the action illegal. On the other hand, a violation of a procedure that establishes orderliness may only be irregular.

101. In **Ramdas Athawale** v. **Union of India**,[35] a member of the Lok Sabha challenged the validity of the proceedings in the Lok Sabha on the ground that the President had not addressed both Houses of Parliament under Article 87 when the session commenced on 29 January 2004 which was the first session of the year. The Speaker ruled that the sitting on 29 January 2004 could not be deemed to be the first session of the year merely because it was the first session of the calendar year, and that at best, it could be treated as the second part of the fourteenth session of the Thirteenth Lok Sabha. This Court held that in view of the bar under Article 122, the issue of whether the sitting on 29 January 2004 was a new session or a second part of the same session was a "matter relating purely to the procedure of Parliament":

"37. […] The Speaker's decision adjourning the House sine die on 23-12-2003 and direction to resume its sittings in part two essentially relates to proceedings in Parliament and is procedural in nature. The business transacted and the validity of proceedings after the resumption of its sittings pursuant to the directions of the Speaker cannot be inquired into by the courts."

The observations in **Ramdas Athawale** (supra) that it was *purely* a matter of procedure cannot be interpreted to mean that procedural infringements are not subject to judicial review. This Court observed that the procedure that was alleged to have been violated would only render the proceedings irregular and that it would not vitiate the proceedings themselves. The observations in **Ramdas Athawale** (supra) must be read in light of our analysis above that procedural infringements would vitiate the proceedings based on their purpose and the impact of their infringement on the democratic functioning of Parliament.

b. The power to appoint the Whip and the Leader of the legislature party

I. 'Political party' and 'legislature party' are distinguishable concepts.

102. Paragraph 1(b) of the Tenth Schedule defines "legislature party" as follows:

"legislature party, in relation to a member of a House belonging to any political party in accordance with the provisions of paragraph 2 or paragraph 4, means the group consisting of all the members of that House for the time being belonging to that political party in accordance with the same provisions"

Paragraph 1(c) defines "original political party" as the political party to which the member belongs for the purposes of Paragraph 2(1). Paragraph 2 stipulates that a member belonging to 'any political party' shall be disqualified from being a member of the House if they have voluntarily given up membership of such political party, or if they vote contrary to the direction issued by the political party to which they belong or by any person or authority authorised by it. A member who has voted contrary to the direction of the political party would not incur disqualification if such a vote is condoned by the political party or if the prior permission of the political party is secured:

[35] (2010) 4 SCC 1

"2. Disqualification on ground of defection.—(1) Subject to the provisions of 3 [paragraphs 4 and 5], a member of a House belonging to any political party shall be disqualified for being a member of the House—

(a) if he has voluntarily given up his membership of such political party; or

(b) if he votes or abstains from voting in such House contrary **to any direction issued by the political party** to which he belongs or **by any person or authority authorised by *it* in this behalf**, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.

Explanation.—For the purposes of this sub-paragraph,— (a) an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member;" (emphasis supplied)

103. The petitioners contend that the Whip and the Leader must be appointed by the political party because Paragraph 2(1)(b) requires that the direction to vote in a particular manner in the House must be from the political party or a person authorised by *it*, meaning the political party. The respondents submit that the distinction between political party and legislature party is artificial and that they are intertwined concepts. For this purpose, reference was made to Paragraph 4(2) of the Tenth Schedule and Paragraph 6A of the Symbols Order. The term 'political party' is not defined in the Tenth Schedule. However, the explanation to Paragraph 2 creates a deeming fiction while referring to political parties. The explanation to Paragraph 2 provides that an elected member of a House shall be deemed to belong to the political party by which they were set up as a candidate for election. Paragraph 4 creates another deeming fiction. The provision provides that if the "original political party" merges with another political party and they become members of such other political party or a new political party, then such other political party or the new political party shall be *deemed* to be the political party of the member for the purposes of Paragraph 2. To illustrate, Ms. Z belonging to party A shall not be disqualified for voting against the direction of party A if party A merges with party B to form party C or if party A is subsumed by party B. This is because for the purposes of Tenth Schedule, Party B or Party C shall be deemed to be their original political party. Paragraph 4(2) stipulates that a merger is deemed to have taken place only if not less than two-third of the members of the *legislature party* have agreed to the merger:

"4. […]

(2) For the purposes of sub-paragraph (1) of this paragraph, the merger of the original political party of a member of a House shall be deemed to have taken place if, and only if, not less than two-thirds of the members of the legislature party concerned have agreed to such merger."

Paragraph 3 which was omitted by the Constitution (Ninety-first Amendment) Act 2003 stipulated that a member would not be disqualified for their prohibitory conduct if there is a split in the original political party and the legislature party.

104. Paragraph 6A of the Symbols Order lays down conditions for the recognition of a political party as a recognized State party for the purposes of the Symbols Order. The provision provides that the political party must have secured a certain percentage of votes and should have returned a certain number of candidates to the assembly to be recognized as a State party:

"6A. Conditions for recognition as a State Party – A political party shall be eligible for recognition as a State party in a State, if, and only if, any of the following conditions is fulfilled:

(i) At the last general election to the Legislative Assembly of the State, the candidates set up by the party have secured not less than six percent of the total valid votes polled in the State; and,

in addition, the party has returned at least two members to the Legislative Assembly of that State at such general election; or

(ii) At the last general election to the House of the People from that State, the candidates set up by the party have secured not less than six percent of the total valid votes polled in the State; and, in addition, the party has returned at least one member to the House of the People from that State at such general election; or

(iii) At the last general election to the Legislative Assembly of the State, the party has won at least three percent of the total number of seats in the Legislative Assembly, (any fraction exceeding half being counted as one), or at least three seats in the Assembly, whichever is more; or

(iv) At the last general election to the House of the People from the State, the party has returned at least one member to the House of the People for every 25 members or any fraction thereof allotted to that State;] or

(v) At the last general election to the House of the People from the State, or at the last general election to the Legislative Assembly of the State, the candidates set up by the Party have secured not less than eight percent of the total valid votes polled in the State."

105. 'Political party' and 'legislature party' cannot be conflated. The contention of the respondents that political party and legislature party is inextricably intertwined is erroneous for the following reasons:

a. Parliament in its constituent capacity was conscious of the necessity of not allowing anti-defection laws to stifle intra-party dissent and the freedom of expression of legislators. It was with this objective that the defences of merger, and split (which was later omitted) were introduced. The Tenth Schedule confers legitimacy to the actions of the legislators which would otherwise lead to disqualification if a *substantial* number of legislators (two-third in the case of a merger, and one-third in the case of the erstwhile provision for a split) disagree with the political party. The Tenth Schedule recognizes the independent existence of the legislature party to the limited extent of presenting a defence to the actions of the legislators which would otherwise have amounted to defection; and

b. Section 29A of the Representation of the People Act 1951 requires an association of individuals calling itself a political party to be registered with the ECI. The party need not have returned candidates to the assembly to be registered as a political party. Under the Symbols Order, a political party receives recognition as a State Party or a National Party based on the total number of candidates returned to the assembly by the political party, and/or the total percentage of votes secured in the election. The purpose of the requirement under the Symbols Order is to identify whether the political party has a substantial presence in the electoral fray to freeze an electoral symbol for that party. The Symbols Order does not refer to an association of legislators *de hors* the political party like the Tenth Schedule. It recognises a 'legislator' and a 'political party.' Thus, the reference to provisions of the Symbols Order to argue that the concepts of political party and legislature party are intertwined does not hold merit because the concept of legislature party is not recognized by the Symbols Order.

II. Literal and purposive interpretation of the provisions of the Tenth Schedule, the 1986 Rules, and the Act of 1956

106. Rule 2(f) of the 1986 Rules defines 'leader' in relation to a legislature party as a member of the party chosen by it as its leader and includes any other member of the party authorised by the party to act in the absence of the leader. Rule 3(1) states that the leader of a legislature party must furnish the following within thirty days of forming the legislature party:

a. A statement in writing containing the names of members of the legislature party with the particulars of the members as specified in Form I, and the names and designations of the members who have been authorised by it for communicating with the Speaker for the purposes of these rules;

b. A copy of the rules and regulations of the political party; and

c. A copy of the rules and regulations of the legislature party, if it has separate rules.

Rule 3(1) is extracted below:

"3. Information to be furnished by leader of a legislature party.—

*(*1) The leader of each legislature party (other than a legislature party consisting of only one member) shall within thirty days from the date of commencement of these rules or, where such legislature party is formed after such date within thirty days from the date of its formation, or, in either case, within such further period as the Speaker may for sufficient cause allow, furnish the following to the Speaker, namely

:—

(a) a statement (in writing) containing the names of members of such legislature party together with other particulars regarding such members as in Form- I, and the names and designations of the members of such party who have been authorised by it for communicating with the Speaker for purposes of these rules ;

(b) a copy of the rules and regulations (whether known as such or as Constitution or by any other name) of the political party concerned ; and

(c) where such legislature party has any separate set of rules and regulations (whether known as such or as Constitution or by any other name), also a copy of such rules and regulations.

[...]"

107. Rule 3(4) stipulates that the Leader of the legislature party must furnish the updated information if there has been a change in the information furnished under Rule 3(1). Rule 3(5) states that if a member votes or abstains from voting in the assembly contrary to the direction of the political party without the prior permission of the political party, the Leader of the legislature Party may within thirty days of such voting or abstention communicate to the Speaker as to whether such voting or abstention has been condoned by the political party. The rule also stipulates that the Leader must inform the Speaker even if they voted contrary to the direction of the political party. The 1986 Rules neither use nor define the term 'Whip'.

108. The term 'Whip' is defined in the Act of 1956. Section 2 of the Act of 1956 provides that an MLA shall not be disqualified for holding the offices stipulated in Schedule I. Clause 23 of Schedule I mentions the offices of Chief Whip or Whip in the Maharashtra State Legislature. The explanation to this clause defines a Whip as follows:

"Explanation.- (1) The expression "Chief Whip" or "Whip", in relation to the Maharashtra Legislative Assembly, means that Member of the House who is, for the time being, declared by the party forming the Government to be the Chief Whip or Whip in that House and recognized as such by the Speaker; and includes a member of the House, who, is for the time being, declared as such by the party having at-least ten percent of the total number of the House and recognized as such by the Speaker; and

(2) The expression "Chief Whip" or "whip", in relation to the Maharashtra Legislative Council, means that member of the House who is, for the time being, declared by the party forming the Government to be the Chief Whip or Whip in the House and recognized as such by the Chairman; and includes a member of the House, who, is for the time being, declared as such by the party

having at-least ten percent of the total members of the House and recognized as such by the Chairman."

109. On a literal interpretation of the provisions of the Tenth Schedule, the 1986 Rules and the Act of 1956, the direction to vote or abstain from voting arises from the political party and not the legislature party for the following reasons:

a. Paragraph 2(1)(b) of the Tenth Schedule provides that the direction to vote or abstain from voting must be issued by the *political party* or by "any person or authority authorised by it," with the word 'it' referring to the political party. The provision states that prior permission must have been received from the political party if the member wants to vote contrary to the direction issued, and the political party must condone such action within fifteen days. The provisions of the Tenth Schedule stipulate in unequivocal terms that the direction must come from the political party and not the legislature party. The distinction between political party and legislature party is made in the definition clause in Paragraph 1. There are no two ways about it. The Tenth Schedule would become unworkable if the term 'political party' is read as the 'legislature party.' A clear demarcation is made between political party and legislature party for the purpose of a merger under Paragraph 4, which stipulates that two-thirds of the members of the *legislature party* must have agreed to a merger of the *original political party* before such a merger can be deemed to have taken place. To read the term 'political party' as 'legislature party' would be contrary to the plain language of the Tenth Schedule;

b. It is an accepted position that the Whip communicates the directions of the party to its members. The phrase 'Whip' is neither used in the Tenth Schedule nor in the 1986 Rules. The phrase finds a mention in the Act of 1956 as one of the offices that would not be covered within the meaning of 'office of profit.' The explanation to Clause 23 of Schedule I in the Act of 1956 states that the Chief Whip is declared by the party forming the Government. The reference to 'party' in the explanation clause means political party and not legislature party because the term 'party' is used to depict political party in common parlance; and

c. The respondents urge that the Whip is chosen by the legislature party because Rule 3(1)(a) of the 1986 Rules provides that the Leader shall inform the Speaker of the names and designations of the members who have been authorised by it for communicating with the Speaker for the purposes of these rules. This argument is erroneous. The phrase 'any other member who has been authorised to communicate with the Speaker' in Rule 3(1)(a) must be read with the definition of 'Leader' under Rule 2(f), which includes such other member authorised to act in the absence of the Leader or discharge the functions of the Leader for the purpose of the Rules. When read together, it is evident that Rule 3(1)(a) refers to the furnishing of information about members who have been authorised to act as the Leader in the absence of the Leader themselves. The Whip interacts with the members of the legislature party to communicate the direction(s) of the political party. Rule 3(5) which prescribes that the Leader has to inform the Speaker if the political party has condoned the prohibitory actions of the members of the legislature party clearly establishes that it is only the Leader who communicates with the Speaker for the purposes of the 1986 Rules. This is all the more evident since Rule 3(5) requires the Leader to inform the Speaker in a situation where the Leader votes or abstains from voting contrary to the direction of the political party. Under the 1986 Rules, the Whip is not the designated authority to file disqualification petitions. Rule 6 provides that a petition for disqualification can be filed by any member of the Maharashtra Legislative Assembly. The argument of the respondents that the legislature party appoints the Whip fails, so far as it is based on the provisions of the 1986 Rules discussed in this paragraph.

110. In **Mayawati** (supra), the appellant issued a direction to all the MLAs of the BSP directing them to vote against the motion of no confidence moved by the BJP. Twelve MLAs belonging to the BSP voted in favour of the no confidence motion. The appellant filed petitions for disqualification against these twelve MLAs for the violation of Paragraphs 2(1)(a) and 2(1)(b). The Speaker dismissed the disqualification petitions. One of the findings of the Speaker was that it was not proved that the appellant was authorised to issue the direction on behalf of the political party. The order of the Speaker was challenged before this Court. It was submitted that 'political party' in Paragraph 2(1)(b) must be read as 'political party in the House', meaning the legislature party. Srinivasan, J. in his separate opinion rejected this argument and upheld the order of the Speaker by observing that there was no material to indicate that the appellant was authorised by the BSP to issue the direction. In this context, Srinivasan, J. held that 'political party' cannot be read as 'legislature party' for the following reasons:

a. The phrase 'political party' in Paragraph 2(1)(b) cannot be interpreted to mean legislative party while the same phrase in Paragraph 2(1)(a) retains its original meaning;

b. Such an interpretation would render explanation(a) to Paragraph 2(1) otiose because a legislature party cannot set up a person as a candidate for election;

c. Disqualification from membership of the assembly is a serious consequence. Such a consequence can only ensue from voting contrary to the direction of the political party; and

d. In **Kihoto Hollohan** (supra), it was held that to balance the competing considerations of the anti-defection law and intra-party dissent, a direction to vote (or abstain from voting) can only be given if the vote would alter the status of the government formed or if it is on a policy on which the political party that set up the candidate went to polls on. Only the political party and not the legislature party can issue directions concerning issues of this nature.

111. Hence, the plain meaning of the provisions of the Tenth Schedule, 1986 Rules, and Act of 1956 indicate that the Whip and the Leader must be appointed by the political party.

112. The Tenth Schedule was introduced to thwart the growing tendency of legislators to shift allegiance to another political party after being elected on the ticket of a certain political party. The defection of MLAs would alter the composition of the House, and in most cases would lead to the toppling of the Government. Moral and democratic principles are compromised when a legislator shifts allegiance after the electorate votes for that legislator on the belief that they represent the ideology of a certain political party. The Tenth Schedule was introduced, as the Statement of Objects and Reasons of the Constitution (Fifty Second Amendment) Bill 1985 states, to combat the evil of political defections which was "likely to undermine the very foundations of our democracy and the principles which sustain it."[36] In **Kihoto Hollohan** (supra), **SR Bommai**, and **Kuldip Nayar** v. **Union of India**[37] this Court recognized that political parties are central to the Indian democratic set-up, and that the Tenth Schedule seeks to curb defections from political parties. When the anti-defection law seeks to curb defections from a political party, it is only a logical corollary to recognize that the power to appoint a Whip vests with the political party.

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[36] Statement of Objects and Reasons appended to the Constitution (Fifty-second Amendment) Bill, 1985 (Bill No. 22 of 1985) which was enacted as the Constitution (Fifty-second Amendment) Act, 1985

[37] (2006) 7 SCC 1

113. To hold that it is the legislature party which appoints the Whip would be to sever the figurative umbilical cord which connects a member of the House to the political party. It would mean that legislators could rely on the political party for the purpose of setting them up for election, that their campaign would be based on the strengths (and weaknesses) of the political party and its promises and policies, that they could appeal to the voters on the basis of their affiliation with the party, but that they can later disconnect themselves entirely from that very party and be able to function as a group of MLAs which no longer owes even a hint of allegiance to the political party. This is not the system of governance that is envisaged by the Constitution. In fact, the Tenth Schedule guards against precisely this outcome.

114. That a Whip be appointed by the political party is crucial for the sustenance of the Tenth Schedule. The entire structure of the Tenth Schedule which is built on political parties would crumble if this requirement is not complied with. It would render the provisions of the Tenth Schedule otiose and have wider ramifications for the democratic fabric of this country. Thus, the Courts cannot be excluded by Article 212 from inquiring into the validity of the action of the Speaker recognizing the Whip.

115. On 25 November 2019, a meeting with the newly elected MLAs belonging to the Shiv Sena was chaired by Mr. Uddhav Thackeray, in his capacity as the Shiv Sena Party President ('Paksh Pramukh'). The resolution notes that the MLAs unanimously resolved that all decisions in the meeting would be taken by Mr. Thackeray. A resolution was issued appointing Mr. Eknath Shinde as the Group Leader of SSLP and Mr. Sunil Prabhu as the Chief Whip. On 21 June 2022, some members of the SSLP held a meeting under the chairmanship of the president of the Shiv Sena, Mr. Uddhav Thackeray. In the meeting, it was resolved to remove Mr. Shinde as the Group Leader of the SSLP, and appoint Mr. Ajay Choudari. The resolution was signed by Mr. Uddhav Thackeray in his capacity as the party president on the official letterhead of the office of the SSLP.

116. It is the case of the respondents that on the same day, that is, 21 June 2022, a separate meeting of the "real" SSLP was held. At this meeting, thirty-four members of the SSLP issued a resolution (i) reaffirming that Mr. Shinde who was appointed as the Leader of the SSLP on 31 October 2019 continued to be Leader; and (ii) cancelling the appointment of Mr. Sunil Prabhu as the Chief Whip and appointing Mr. Gogawale in his place. The resolution *inter alia* stated that (i) there was enormous discontent amongst the cadre and party workers of Shiv Sena for breaking the pre-poll alliance with BJP and forming the Government with INC and NCP; and (ii) the leaders of the Shiv Sena had compromised on the principles of the Shiv Sena party to attain power. The petitioners contend that this letter was issued on 22 June 2022 and has been back dated as 21 June 2022.

117. By an order dated 21 June 2022, the Deputy Speaker (who was at the time discharging the functions of the Speaker) approved the request to appoint Mr. Ajay Choudari as the Leader of SSLP. Meanwhile, on 3 July 2022, the election for the post of Speaker was held. Mr. Rahul Narwekar, the candidate of BJP was elected as the Speaker. On the same day, the Speaker took cognizance of the resolution passed by thirty-four MLAs belonging to the faction led by Mr. Shinde and appointed Mr. Shinde as the Leader and Mr. Gogawale as the Chief Whip. The Deputy Secretary of the Maharashtra Legislative Assembly issued a communication that the Speaker has recognised a new Whip and a new Leader of the SSLP:

"With reference to your abovementioned letter, I have been ordered to inform you that you have been replaced from the post of Leader of Legislative Party by nominating the name of Shri Ajay

Choudhari. In this regard, you have raised the objection by addressing the letter on 22nd June. In this regard, after deliberation on provision in the law, Hon'ble Speaker, Maharashtra Legislative Assembly has cancelled the approval granted to Shri Ajay Choudhari as leader, Shiv Sena Legislature Party and approves & recognizes the nomination of Shri Eknath Shinde as Leader, Shiv Sena Legislative Party as per the letter dated 31 October 2019. Similarly, the proposal to nominate Shri Sunil Prabhu as Chief Whip of Shiv Sena Legislative Party is to be cancelled and to recognize the nomination of Shri Bharat Gogavale as Chief Whip of Shiv Sena Legislature Party has been approved and recorded in the registry."

118. It is important to note that the above communication (i) recognizes that the faction led by Mr. Shinde objected to the communication of the Deputy Speaker replacing Mr. Shinde as the Leader by a resolution dated 22 June 2022; and (ii) appreciates the objection of the faction led by Mr. Shinde to the appointment of Mr. Choudhari to the role of Leader. We will proceed on the assumption that the objection by the faction led by Mr. Shinde was received by the Speaker on 22 June 2022 since the communication of the Speaker notes this date.

119. The Speaker was aware of the emergence of two factions in the legislature party on 3 July 2022 when he appointed a new Whip and a new Leader because the resolution of the respondents specifically mentions that a "split" had occurred due to prevailing dissatisfaction in some MLAs of the Shiv Sena. Further, the fact that there were two resolutions appointing two different Whips and two different Leaders would no doubt have resulted in the Speaker inferring that there were two factions of the Shiv Sena. The Speaker on taking cognizance of the resolution passed by the faction of SSLP led by Mr. Shinde, did not attempt to identify which of the two persons who were nominated (Mr. Prabhu or Mr. Gogawale) were authorised by the *political party*. In a contentious situation such as this, the Speaker should have conducted an independent inquiry based on the rules and regulations of the political party to identify the Whip authorised by the Shiv Sena Political Party. For the reasons detailed in the preceding paragraphs, the Speaker must only recognize the Whip appointed by the political party. The decision of the Speaker recognizing Mr. Gogawale as the Chief Whip of the Shiv Sena is illegal because the recognition was based on the resolution of a faction of the SSLP without undertaking an exercise to determine if it was the decision of the political party.

120. Rule 2(f) defines 'Leader' in relation to the legislature party as a member of the *party* chosen by *it* as its leader. The term 'party' is ambiguous. It is not preceded by either 'political' or 'legislature'. It may be interpreted to mean 'legislature party' because the definition clause defines a Leader in relation to 'legislature party' and then proceeds to use the phrase 'party.' Alternatively, it could also take the meaning of 'political party' because 'party' in common parlance means 'political party.'

121. Under Paragraph 8(1)(b) of the Tenth Schedule and Rule 3(5) of the 1986 Rules, the Leader of the legislature party is required to inform the Speaker if the political party condoned the prohibitory act under Paragraph 2(1)(b) of the Tenth Schedule. Thus, the Leader of the legislature party is the link between the political party and the legislative assembly. If the interpretation of the respondents is accepted, the action of the leader condoning an MLA's prohibitory conduct would not reflect the voice of the political party and would instead reflect the voice of the legislature party. This would be contrary to the manner in which the Tenth Schedule is intended to operate. The manner in which the Tenth Schedule would then operate would not effectively prevent or provide a solution to the constitutional sin of defection.

122. On 21 June 2022, there was no material on record before the Deputy Speaker for him to doubt that the resolution of SSLP dated 21 June 2022 (appointing Mr. Ajay

Choudhari as the Leader of the SSLP) was *de hors* the political party, or that two factions of the party had emerged. The resolution was signed by Mr. Thackeray in his capacity as the party president much like the resolution appointing the Whip and Leader in 2019. This makes it evident that Mr. Thackeray issued the communication on behalf of the political party. Thus, the decision of the Deputy Speaker recognising Mr. Ajay Choudhari as the Whip in place of Mr. Eknath Shinde is valid.

123. However, the resolution passed by SSLP on 22 June 2022 brought to the attention of the Speaker that it was passed by a faction of the SSLP. Thus, the Speaker by recognising the action of a faction of the SSLP without determining whether they represented the will of the political party acted contrary to the provisions of the Tenth Schedule, the 1986 Rules, and the Act of 1956. The decision of the Speaker recognising Mr. Shinde as the Leader is illegal.

124. The Speaker must recognize the Whip and the Leader who are duly authorised by the political party with reference to the provisions of the party constitution, after conducting an enquiry in this regard and in keeping with the principles discussed in this judgement.

v. Deciding who the "real" Shiv Sena is

125. Time and again, the parties before this Court asserted that they were the "real" Shiv Sena. In cases such as the present one, the answer to this question will have implications in the disqualification proceedings under the Tenth Schedule as well as proceedings for the allotment of a symbol under the Symbols Order.

126. The petitioners argue that this Court ought to lay down a constitutional sequence in order to harmonise proceedings for disqualification under the Tenth Schedule, the notice of intention to move a resolution for the removal of the Speaker under Article 179(c) of the Constitution, and the allotment of an election symbol under Paragraph 15 of the Symbols Order.

127. Since we have referred the issues arising from the issuance of a notice of intention to move a resolution for the removal of the Speaker under Article 179(c) to a larger Bench, it only remains for us to consider the manner in which the remaining two proceedings ought to be harmonized.

a. The purpose of the Tenth Schedule and the effect of disqualification

128. As discussed extensively in this judgement as well as in other judgements of this Court, the purpose of the Tenth Schedule is to disincentivize and penalize the constitutional sin of defection.[38] A violation of the anti-defection law results in a member of the House being:

a. Disqualified from the House;[39]

b. Disqualified from holding any remunerative political post for the duration of the period commencing from the date of their disqualification till the date on which the term of their office as a member of the House would expire or till the date on which they contest election to a House and are declared elected, whichever is earlier;[40] and

c. Disqualified from being appointed as a Minister for the duration of the period commencing from the date of their disqualification till the date on which the term of their

[38] Kihoto Hollohan (surpa); Nabam Rebia (supra)
[39] Paragraph 2, Tenth Schedule, Constitution of India 1950
[40] Article 361-B, Constitution of India 1950

office as a member of the House would expire or till the date on which they contest election to a House and are declared elected, whichever is earlier.[41]

129. These consequences ensure that a member of the House is unable to reap the fruits of defection within the House. Significantly, the Tenth Schedule does not have a bearing on the status of a disqualified member of a House vis-à-vis their political party. In other words, if a member incurs disqualification under the Tenth Schedule, it does not automatically result in their expulsion from the political party to which they belong. It is up to the political party and its internal processes to determine whether to expel a member.

b. The purpose of the Symbols Order and the effect of the decision under Paragraph 15

130. The ECI issued the Symbols Order in 1968 in exercise of the powers conferred by Article 324 of the Constitution read with Section 29A of the Representation of the People Act 1951 and Rules 5 and 10 of the Conduct of Elections Rules 1961. The Symbols Order governs the reservation and allotment of symbols to candidates for the purpose of elections. The preamble to the Symbols Order states that it is:

"An Order to provide for specification, reservation, choice and allotment of symbols at elections in Parliamentary and Assembly Constituencies, for the recognition of political parties in relation thereto and for matters connected therewith."

131. Political parties are classified into recognised political parties and unrecognised political parties under the Symbols Order.[42] Recognised political parties are further classified into National Parties and State Parties.[43] The ECI recognizes political parties as National Parties or State Parties if they satisfy the requirements prescribed in the Symbols Order.[44]

132. The ECI allots a symbol to every candidate who contests elections, in accordance with the Symbols Order.[45] Some symbols are called "reserved symbols" because they are reserved for a recognised political party and are exclusively allotted to candidates set up by that party and the remaining symbols are called "free symbols."[46] The political party is granted recognition under the Symbols Order based on the total number of candidates returned to the Legislative Assembly or the total percentage of votes secured by the political party. Candidates set up by recognised political parties must contest elections by using the symbol that is reserved for their party, and no other symbol.[47] In contrast, candidates other than those who are set up by national or state political parties and who do not fall under certain special categories,[48] may choose and will be allotted a free symbol.[49] Reserved symbols are not allotted to candidates who are not set up by the political party for which that symbol has been reserved.[50]

133. From this, it is evident that the purpose of the Symbols Order is:

a. To provide a uniform procedure for the recognition of political parties; and

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[41] Article 75(1-B) and Article 164(1-B), Constitution of India 1950
[42] Paragraph 6(1), Symbols Order
[43] Paragraph 6(2), Symbols Order
[44] Paragraphs 6A, 6B, 6C, Symbols Order
[45] Paragraph 4, Symbols Order
[46] Paragraph 5, Symbols Order
[47] Paragraph 8, Symbols Order
[48] Paragraphs 10, 10A, 10B, Symbols Order
[49] Paragraph 12, Symbols Order
[50] Paragraph 8(3), Symbols Order

b. To provide a uniform and just system for the allotment of symbols for candidates to contest in elections.

134. The raison d'être for the Symbols Order is the fact that political parties (and 'independent' candidates) rely on the symbol allotted to them while campaigning to the electorate. To a significant extent, the electorate too, associates the symbol allotted to a party with the party itself and with the candidates set up for election by that party. The association between the party, the candidates set up for election by that party, and the symbol is strengthened with the passage of time. This association becomes significant in the polling booth when voters press the button on the Electronic Voting Machine to register their vote for a particular candidate because the symbol is depicted on or next to the button. The association is doubly significant for voters who have not had the opportunity to attain literacy and who rely solely on symbols to cast their vote. In this way, symbols are crucial to the contest of elections. It is therefore not surprising that when rival factions of a political party emerge, both or all such factions vie for the symbol allotted to that party.

135. The ECI is empowered to adjudicate disputes between rival sections or groups of a recognised political party, each of whom claims to be that party, under Paragraph 15 of the Symbols Order. When such a dispute arises, the ECI will decide if one of the rival sections or groups is that recognised political party. In the alternative, it may decide that none of the rival groups is that recognised political party. The decision of the ECI is to be based on a consideration of all the available facts and circumstances as well as the representations advanced by the rival groups and other persons who desire to be heard. Paragraph 15 is reproduced below:

"15. Power of Commission in relation to splinter groups or rival sections of a recognised political party –

When the Commission is satisfied on information in its possession that there are rival sections or groups of a recognised political party each of whom claims to be that party, the Commission may, after taking into account all the available facts and circumstances of the case and hearing such representatives of the sections or groups and other persons as desire to be heard, decide that one such rival section or group or none of such rival sections or groups is that recognised political party and the decision of the Commission shall be binding on all such rival sections or groups."

136. The natural consequence of the decision of the ECI is that the group that is recognised as constituting the political party is allotted the symbol that was reserved for that political party. Prior to 1997, the faction which was not granted the symbol of the political party (and by corollary was not recognised as the political party) was also recognised as a National Party or a State Party under the Symbols Order.[51] The ECI departed from this practice in 1997. The ECI has since held that the faction that is not recognised as the political party in the proceedings under Paragraph 15 cannot be automatically recognised as a State or National Party because its members were not elected on the ticket of the newly formed political party but on the ticket of the political party from which their faction emerged.[52] The unsuccessful group must now apply for the registration of its political party under Section 29A of the Representation of the People Act 1951. The ECI will allot a symbol to the political party when it is recognised as a State or National Party under the Symbols Order.

137. The essence of the decision of the ECI cannot be understood as solely a determination as to who is entitled to the symbol for the purposes of election. While that is the outcome of the decision under Paragraph 15, the substance of the decision is the

[51] V S Rama Devi and S K Mendiratta, How India Votes (3rd edition, 2014), at 621
[52] V S Rama Devi and S K Mendiratta, How India Votes (3rd edition, 2014), at 621-622

determination as to which of the groups is the lifeblood of the recognised political party. In order to reach a determination as to which group is entitled to the symbol, it becomes necessary for the ECI to adjudicate which group is that political party itself. In other words, the ECI determines who the "real" political party is and the symbol is allotted as a consequence of this decision.

138. In this regard, in **Sadiq Ali** (supra), this Court held that:

"35. …The allotment of a symbol to the candidates set up by a political party is a legal right and in case of split, the Commission has been authorised to determine which of the rival groups or sections is the party which was entitled to the symbol. **The Commission in resolving this dispute does not decide as to which group represents the party but which group is that party. If it were a question of representation, even a small group according to the Constitution of the organisation may be entitled to represent the party.** Where, however, the question arises as to which of the rival groups is the party, the question assumes a different complexion and the numerical strength of each group becomes an important and relevant factor. **It cannot be gainsaid that in deciding which group is the party, the Commission has to decide as to which group substantially constitutes the party**."

(emphasis supplied)

c. The test(s) applicable to disputes under Paragraph 15 of the Symbols Order

139. Paragraph 15 stipulates that the ECI must take into account all the available facts and circumstances of the case and hear representatives of the rival groups and other persons who wish to be heard. However, neither Paragraph 15 nor the other provisions of the Symbols Order specify the test which is to be applied by the ECI in arriving at its decision as to who the political party is. Similarly, no test is excluded from application by the ECI. This means that the ECI is free to fashion a test which is suited to the facts and complexities of the specific case before it.

140. In **Sadiq Ali** (supra), this Court had occasion to consider a few of the different tests that were capable of being applied in proceedings under Paragraph 15. In that case, two rival groups, Congress O and Congress J, emerged from the INC. While adjudicating their competing claims under Paragraph 15, the ECI considered the following tests:

a. A test analysing the provisions of the constitution of the party;

b. A test assessing which of the two rival groups adhered to the aims and objects of the party as incorporated in its constitution; and

c. A test evaluating which of the two rival groups enjoyed a majority in the legislature (i.e., the Houses of Parliament as well as the Legislative Assemblies of States) and in the organisational wing of the party.

141. The ECI declined to apply the first test detailed above because each group had expelled members from the other group. It was of the opinion that the second test was not suited to the facts of that case because neither Congress O nor Congress J had "openly repudiated" the aims and objects of the constitution of the party. The ECI held that the third test was most appropriate to the facts of that case. Accordingly, it assessed which of the two groups constituted a majority in Parliament and in the State Legislatures, and in the organisational wing of the party. It found that Congress J enjoyed a majority in both the organizational wing and the legislative wing, and that it was entitled to utilise the symbol which had been reserved for the INC.

142. On appeal, this Court upheld the decision of the ECI and ruled that the 'test of majority' was a very valuable test in the facts and circumstances of the case:

"26. … As Congress is a democratic organisation, the test of majority and numerical strength, in our opinion, was a very valuable and relevant test. Whatever might be the position in another system of government or organisation, numbers have a relevance and importance in a democratic system of government or political set-up and it is neither possible nor permissible to lose sight of them. Indeed it is the view of the majority which in the final analysis proves decisive in a democratic set-up.

27. It may be mentioned that according to Paragraph 6 of the Symbols Order, one of the factors which may be taken into account in treating a political party as a recognised political party is the number of seats secured by that party in the House of People or State Legislative Assembly or the number of votes polled by the contesting candidates set up by such party. If the number of seats secured by a political party or the number of votes cast in favour of the candidates of a political party can be a relevant consideration for the recognition of a political party, one is at a loss to understand how the number of seats[...] to be irrelevant

31. … All that this Court is concerned with is whether the test of majority or numerical strength which has been taken into account by the Commission is in the circumstances of the case a relevant and germane test. On that point, we have no hesitation in holding that in the context of the facts and circumstances of the case, the test of majority and numerical strength was not only germane and relevant but a very valuable test."

143. Subsequent to the decision in **Sadiq Ali** (supra), the Election Commission consistently applied the test of majority in the legislative and organisational wings of the party to disputes under Paragraph 15.[53] However, neither the Symbols Order nor **Sadiq Ali** (supra) indicates that this is the only or even the primary test to be applied while determining disputes under Paragraph 15. The ECI may apply a test which is suitable to the facts of the particular dispute before it. It need not apply the same test to all disputes, regardless of the suitability of the test to those facts and circumstances.

d. The potential for complications in the present case

144. In the present case, in late June 2022 and in the first week of July 2022, members of each faction filed petitions for the disqualification of members of the opposing faction under the Tenth Schedule. On 19 July 2022, Mr. Shinde filed a petition before the ECI under Paragraph 15 of the Symbols Order, claiming that the faction led by him constituted the "real" Shiv Sena and that it should therefore be allotted the symbol of the Shiv Sena (the 'bow and arrow').

145. When the Tenth Schedule and the Symbols Order are invoked concurrently, complications may arise, including in cases such as the present one. If the ECI applies the 'test of majority,' it will be required to consider (among other things) which of the two factions enjoys a majority in the Maharashtra State Legislature. Therefore, which faction has a majority in the House will have some bearing on the outcome of the proceedings before the ECI. Whether or not a particular faction has a majority in the legislature will depend on whether members from that faction have incurred disqualification. For example, we may illustratively consider a case where Party X has a hundred seats in the Legislative Assembly of a state. Two factions, Group A and Group B, emerge. The former consists of sixty MLAs and the latter consists of the remaining forty. Members of each group file disqualification petitions against members of the other group. The ECI is called upon to decide which group is Party X under Paragraph 15 of the Symbols Order. In terms of the law as it currently stands, there are two possible outcomes:

a. The ECI renders its decision prior to the Speaker. It observes that Group A enjoys a majority in the legislature. This has a significant bearing on its decision although it is not

[53] V S Rama Devi and S K Mendiratta, How India Votes (3rd edition, 2014), at 619

the only factor which is considered. Group A is adjudicated to be Party X and is awarded the symbol; or

b. The Speaker renders their decision prior to the ECI. They disqualify some or all the members of Group A for violating the anti-defection law. While adjudicating the petition under Paragraph 15 of the Symbols Order, the ECI (after taking into account the disqualification incurred by some or all of Group A) notes that Group A does not enjoy a majority in the legislature. Once again, this has a significant bearing on its decision although it is not the only factor which is considered. Group B is adjudicated to be Party X and is awarded the symbol.

146. The outcome of the dispute before the ECI may change depending on the outcome of the disqualification petitions. It is precisely this complication which the petitioners seek to guard against. The petitioners urge that when proceedings under Paragraph 15 of the Symbols Order and the Tenth Schedule have arisen concurrently, this Court ought to lay down a 'constitutional sequence' for the proceedings. They submit that proceedings under the Tenth Schedule must be adjudicated before the dispute under Paragraph 15 of the Symbols Order is determined, and that a symbol can be allotted only after "the final adjudication of the Tenth Schedule proceedings."

147. The contentions of the petitioners cannot be brushed aside. If the faction which enjoys a majority in the House is disqualified soon after being adjudicated to be the political party, the very foundation of their claim of being the political party no longer subsists. Even if they are not disqualified, the foundation of their claim (i.e., a legislative majority) is still on uncertain ground at the time of adjudication. This is not a constitutionally desirable outcome.

e. Harmonising the Tenth Schedule with Paragraph 15 of the Symbols Order

148. This Court cannot accept the solution proposed by the petitioners and lay down a constitutional sequence. To hold that the ECI is barred from adjudicating petitions under Paragraph 15 of the Symbols Order until the "final adjudication" of the disqualification petitions under the Tenth Schedule would be, in effect, to indefinitely stay the proceedings before the ECI. This is because an order of the Speaker attains finality only after all avenues for appeal have been exhausted or are barred by the passage of time. The time that it would take for an order of the Speaker to attain finality is uncertain. The ECI is a constitutionally entrenched institution which is entrusted with the function of superintendence of and control over the electoral process. The ECI, which is a constitutional authority, cannot be prevented from performing its constitutional duties for an indefinite period of time. Proceedings before one constitutional authority cannot be halted in anticipation of the decision of another constitutional authority.

149. This Court must also be alive to the possibility of the death of a political party in the intervening period, or further complications that may arise if elections are announced during the period when proceedings before the ECI are stayed, if a stay were to be granted. When a dispute under Paragraph 15 of the Symbols Order is pending adjudication, it is standard practice for the ECI to freeze the symbol reserved for that political party and allot interim symbols to the rival groups. If the reserved symbol is frozen for an inordinately long period of time and the interim symbols must be resorted to for every by-election and election, it may well end the association between the reserved symbol and the political party in the minds of the electorate. This will no doubt be a blow to the political party which is lawfully entitled to the symbol reserved for its use. Therefore, the ECI must render a decision as to which group constitutes that political party.

150. In arriving at this decision, it is not necessary for the ECI to rely on the test of majority in the legislature alone. In cases such as the present one, it would be futile to assess which group enjoys a majority in the legislature. Rather, the ECI must look to other tests in order to reach a conclusion under Paragraph 15 of the Symbols Order. The other tests may include an evaluation of the majority in the organisational wings of the political party, an analysis of the provisions of the party constitution, or any other appropriate test.

151. When this Court decided the petition in **Sadiq Ali** (supra), the Tenth Schedule did not form a part of the Constitution. There was no way for this Court to have anticipated the complexities that could arise on its inclusion while deciding which test was most appropriate. Regardless, this Court did not hold that the test of majority in the legislature was exclusively appropriate or even that it was the primary test. It instead found that the test was suited to the facts and circumstances of that case. As noticed in the preceding paragraphs, nothing in the Symbols Order mandates the use of a particular test to the exclusion of other tests. The ECI must apply a test which is best suited to the unique facts and circumstances of the case before it. The parties in the dispute before the ECI are free to propose a suitable test and the ECI may either apply one of the tests proposed or fashion a new test, as appropriate. This Court observed in **Sadiq Ali** (supra) that the test of legislative majority was a relevant test under Paragraph 15 proceedings in that case for two reasons: first, INC was according to the court a democratic organisation, and numbers matter in such organisations; and second, the total number of seats secured by the political party in the legislative assembly is a relevant factor for the recognition of a political party as a State or a National Party. When legislators are disqualified under the Tenth Schedule, the basis of recognition of the political party under the Symbols Order and correspondingly, one of the reasons for using the test of legislative majority itself becomes diluted. Thus, it is not appropriate to confine the ECI to the singular test of legislative majority in such situations.

152. In **Sadiq Ali (supra)**, this Court noted that one of the tests considered by the ECI was an assessment of which of the two rival groups adhered to the aims and objects of the party as incorporated in its constitution. This Court did not have occasion to express its opinion on the validity of this test because it found that the test of majority was relevant to the facts in **Sadiq Ali** (supra). Since we have left it open to the ECI to apply a test other than that which evaluates which of the groups constitute a majority, it becomes necessary to consider whether the alternatives are viable.

153. An evaluation of whether rival groups are adhering to the aims and objects of the party as incorporated in its constitution, and which of the rival groups is more in consonance with such aims and objects, is an entirely subjective exercise. Different groups may adopt different paths or methods to achieve the same object. It would not be appropriate for the ECI to accord its stamp of approval to the routes or methods chosen by one group over those chosen by another group. This would amount to entering the political arena. For example, one of the aims detailed in the constitution of a party could be that it will work towards attaining economic justice. Two rival sections of this party may emerge. The first group may happen to advocate for direct benefit transfers whereas the second group may be of the belief that subsidising the cost of certain products is a preferable alternative. The exercise of the ECI in determining which of these methods (and by extension, which of the rival groups) is more suited to attaining economic justice is subjective. Although this is a simplified example, it is illustrative of the manner in which the same goal can be sought to be attained by different routes, and the ECI while making such an assessment would be rendering its opinion without any objective basis. The ECI

must remain a neutral body and refrain from passing a subjective judgement on the approaches preferred by the rival factions.

154. At this stage, a question may arise as to whether the decision of the ECI under the Symbols Order must be consistent with the decision of the Speaker under the Tenth Schedule. The answer is no. This is because the decision of the Speaker and the decision of the ECI are each based on different considerations and are taken for different purposes.

155. The decision of the ECI has prospective effect. A declaration that one of the rival groups is that political party takes effect prospectively from the date of the decision. In the event that members of the faction which has been awarded the symbol are disqualified from the House by the Speaker, the members of the group which continues to be in the House will have to follow the procedure prescribed in the Symbols Order and in any other relevant law(s) for the allotment of a fresh symbol to their group.

156. The disqualification proceedings before the Speaker cannot be stayed in anticipation of the decision of the ECI. In cases where a petition under Paragraph 15 of the Symbols Order is filed after the (alleged) commission of prohibitory conduct, the decision of the ECI cannot be relied upon by the Speaker for adjudicating disqualification proceedings. If the disqualification petitions are adjudicated based on the decision of the ECI in such cases, the decision of the ECI would have retrospective effect. This would be contrary to law.

157. When the conduct prohibited under the Tenth Schedule is (allegedly) committed, there is only one political party. As discussed in the preceding segments of this judgement, this necessitates the Speaker *prima facie* determining who the political party was at the time of the act which is alleged attract the provisions of the Tenth Schedule. The decision of the Speaker that a member of the House is disqualified for voluntarily giving up the membership of the political party would only disqualify them from the House. It would not lead to an automatic expulsion of the member from the political party. It follows that the submission of the petitioners that a legislator who has incurred disqualification under Paragraph 2 of the Tenth Schedule has no locus to institute a petition under Paragraph 15 of the Symbols Order, cannot be accepted. We accordingly answer the question referred to us as noted in Paragraph 32(j) of this judgment.

158. In the proceedings instituted by Mr. Shinde under Paragraph 15 of the Symbols Order, the ECI awarded the symbol “bow and arrow” reserved for the Shiv Sena to the faction led by him. The petitioners challenged this order before this Court.[54] By an order dated 22 February 2023, this Court issued notice. We have not expressed any opinion on the merits of that case.

vi. <u>The impact of the deletion of Paragraph 3 of the Tenth Schedule</u>

159. The Tenth Schedule to the Constitution was inserted by the Constitution (Fifty-second Amendment) Act 1985. The Tenth Schedule sought to provide a remedy to the ‘constitutional sin’ of defection. Simply put, defection is the act of members of either House of the state legislature or of either House of Parliament shifting allegiances by exiting the political party on whose ticket they went to the polls and joining another political party. The years prior to the insertion of the Tenth Schedule witnessed innumerable defections in political parties at both the Union and State level. The turbulent political scenario ensuing from these defections gave rise to the need for an anti-defection law in the country.

[54] SLP(C) No. 3997 of 2023

160. The Tenth Schedule penalises defection by disqualifying any member of the House who is found to have indulged in the prohibited act. Paragraph 2(1)(a) stipulates that a member of a House belonging to any political party shall be disqualified for being a member of the House if they have voluntarily given up their membership of such political party. Paragraph 2(1)(b) provides that a member shall be disqualified if they vote or abstain from voting in the House contrary to any directions issued by the political party to which they belong, or by any person authorised by it in this behalf.

161. Paragraph 6 of the Tenth Schedule entrusts the Speaker of the House with the authority to adjudicate disqualification petitions. While adjudicating a disqualification petition, the Speaker must also consider any defence(s) raised by the member against whom the petition has been filed. The Tenth Schedule, as it currently stands, specifies five defences which a member may take recourse to, to shield themselves from the consequences of the anti-defection law:

a. A member will not be disqualified under Paragraph 2(1)(b) if they have obtained the prior permission of their political party to vote or abstain from voting contrary to the directions issued by such political party;[55]

b. A member is protected from being disqualified under Paragraph 2(1)(b) if the political party to which they belong has condoned their actions in voting or abstaining from voting contrary to the directions issued by such political party, within fifteen days from such voting or abstention;[56] c. In terms of Paragraph 4, a member will not be disqualified either under Paragraph 2(1)(a) or under Paragraph 2(1)(b) where their original political party merges with another political party and they claim that they and any other members of their original political party have become members of such other political party or of a new political party formed by the merger.[57] This defence is made out only if not less than two-thirds of the members of the legislature party concerned have agreed to the merger;[58]

d. In cases where the original political party of a member is found to have merged with another political party under Paragraph 4(1)(a), members of the original political party are protected from being disqualified if they have not accepted such merger and have opted to function as a separate group;[59] and

e. Members who have been elected to the office of the Speaker or the Deputy Speaker (or the Chairman or the Deputy Chairman as the case may be) in Parliament or in the Legislative Assemblies of States are exempted from disqualification under the Tenth Schedule if they voluntarily give up the membership of their political party by reason of their election to such office and do not re-join the political party or become a member of another political party so long as they continue to hold such office. Further, they are not disqualified if they re-join the political party which they gave up membership of, after ceasing to hold office.[60]

162. Prior to 2003, a sixth defence under Paragraph 3 was available to members against whom disqualification petitions were filed. Paragraph 3 stipulated that a member of the House would not be subject to disqualification if there was a split in their original political

[55] Paragraph 2(1)(b) of the Tenth Schedule to the Constitution
[56] Paragraph 2(1)(b) of the Tenth Schedule to the Constitution
[57] Paragraph 4(1)(a) of the Tenth Schedule to the Constitution
[58] Paragraph 4(2) of the Tenth Schedule to the Constitution
[59] Paragraph 4(1)(b) of the Tenth Schedule to the Constitution
[60] Paragraph 5 of the Tenth Schedule to the Constitution

party. It was omitted from the Tenth Schedule by the Constitution (Ninety-first Amendment) Act 2003. Prior to its omission, Paragraph 3 read as follows:

"3. Disqualification on ground of defection not to apply in case of split.—Where a member of a House makes a claim that he and any other members of his legislature party constitute the group representing a faction which has arisen as a result of a split in his original political party and such group consists of not less than one-third of the members of such legislature party,—

(a) he shall not be disqualified under sub-paragraph (1) of paragraph 2 on the ground—

(i) that he has voluntarily given up his membership of his original political party; or

(ii) that he has voted or abstained from voting in such House contrary to any direction issued by such party or by any person or authority authorised by it in that behalf without obtaining the prior permission of such party, person or authority and such voting or abstention has not been condoned by such party, person or authority within fifteen days from the date of such voting or abstention; and

(b) from the time of such split, such faction shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this paragraph."

a. The defence of a 'split' is no longer available to members who face disqualification proceedings

163. The question before this Court is – what is the impact of the deletion of Paragraph 3 of the Tenth Schedule? This question has arisen in the context of both factions of the Shiv Sena claiming to be the "real" Shiv Sena. In effect, this points to the existence of a split within the SSLP. However, no faction or group can argue that they constitute the original political party as a defence against disqualification on the ground of defection.

164. The inevitable consequence of the deletion of Paragraph 3 from the Tenth Schedule is that the defence of a split is no longer available to members who face disqualification proceedings. In cases where a split has occurred in a political party or in a legislature party, members of neither faction may validly raise the defence that they are the political party in the event that each faction files petitions for the disqualification of members of the other faction. The defence sought to be availed of must be found within the Tenth Schedule as it currently stands.

165. Members of multiple groups or factions can all continue as members of the House if the requirements of Paragraph 4(1) of the Tenth Schedule are satisfied. Two (or more) factions of a political party can both remain in the House if one of the factions has opted to merge with another political party in terms of Paragraph 4(1)(a) and the other faction has chosen not to accept the merger. However, in cases where a split has occurred, and members of one of the factions are found to have satisfied the conditions in Paragraph 2(1) and are also unable to establish any of the five defences detailed above, they would stand disqualified. The percentage of members in each faction is irrelevant to the determination of whether a defence to disqualification is made out.

166. This is necessarily the implication of the deletion of Paragraph 3. To hold otherwise would be to permit the entry of the defence of 'split' in the Tenth Schedule through the back door. This is impermissible and would render the deletion of Paragraph 3 meaningless. It is trite law that what cannot be done directly cannot be permitted to be

done indirectly.[61] The interpretation which we have expounded is the only one which comports with the deletion of Paragraph 3.

b. The decision of the Speaker under Paragraph 2 of the Tenth Schedule

167. Regardless of the defence available to members who face disqualification proceedings, the Speaker may be called upon to determine who the "real" political party is while adjudicating disqualification petitions under Paragraph 2(1)(a) where two or more factions of the political or legislature party have arisen. The effect of the deletion of Paragraph 3 is that both factions cannot be considered to constitute the original political party. In order to determine which (if any) of the members of the party have voluntarily given up membership of the political party under Paragraph 2(1)(a), it is necessary to first determine which of the factions constitute the political party. This determination is a prima facie determination and will not impact any other proceedings including the proceedings under Paragraph 15 of the Symbols Order.

168. In arriving at their decision, the Speaker must consider the constitution of the party as well as any other rules and regulations which specify the structure of the leadership of the party. If the rival groups submit two or more versions of the party constitution, the Speaker must consider the version which was submitted to the ECI before the rival factions emerged. In other words, the Speaker must consider the version of the party constitution which was submitted to the ECI with the consent of both factions. This will obviate a situation where both factions attempt to amend the constitution to serve their own ends. Further, the Speaker must not base their decision as to which group constitutes the political party on a blind appreciation of which group possesses a majority in the Legislative Assembly. This is not a game of numbers, but of something more. The structure of leadership outside the Legislative Assembly is a consideration which is relevant to the determination of this issue.

169. The deletion of Paragraph 3 impacts the proceedings under Paragraph 2(1)(b) as well. When there are two Whips appointed by two or more factions of the political party, the Speaker, as held in the preceding section of the judgement, decides which of the two Whips represents the political party. Thus, the adjudication of the Speaker on whether a member must be disqualified under Paragraph 2(1)(b) would also depend on the decision of the Speaker recognising one of the two (or more) Whips. We accordingly answer the question referred to us as noted in Paragraph 32(f) of this judgment.

vii. <u>The exercise of discretion by the Governor in directing Mr. Thackeray to face a floor test</u>

170. The facts relevant to the determination of this issue have been narrated in the introductory part of this judgement. To recount, thirty-four MLAs of the Shiv Sena met and passed a resolution on 21 June 2022. The resolution reaffirmed that Mr. Eknath Shinde "*continues to be*" the Group Leader of the SSLP, cancelled the appointment of Mr. Sunil Prabhu as the Chief Whip, and appointed Mr. Bharat Gogawale in his place. The signatories also expressed their discontent and dissatisfaction with the Shiv Sena for forming the Government in alliance with the INC and the NCP. Separately, on 28 June 2022, the Governor received letters from the Leader of Opposition at the time, Mr. Devendra Fadnavis, and seven MLAs who were elected as independent candidates requesting him to direct Mr. Thackeray to prove his majority on the floor of the House. On the same day, the Governor issued the communication impugned in WP(C) 470 of 2022

[61] Delhi Admn. v. Gurdip Singh Uban, (2000) 7 SCC 296; Taxi Owners United Transport v. State Transport Authority (Orissa), (1983) 4 SCC 34

to Mr. Thackeray, directing him to prove his majority on the floor of the House on 30 June 2022. Mr. Thackeray resigned on 29 June 2022 after this Court declined to stay the trust vote. Thus, WP(C) 470 of 2022 has been rendered infructuous. This Court is no longer called upon to set aside the letter dated 28 June 2022. However, the question of whether the Governor exercised the discretion vested in him by the Constitution in accordance with law is required to be addressed by this Court in view of the enormity of the responsibility entrusted with the gubernatorial office as well as the significance of the consequences which follow from the exercise of such discretion.

171. The letter sent by the Governor to the then-Chief Minister indicates that he relied on the following circumstances in arriving at the conclusion that a floor test was required:

a. A letter received from the then Leader of Opposition stating that Mr. Thackeray no longer enjoyed the confidence of the House;

b. Letters received from seven independent MLAs requesting the Governor to direct Mr. Thackeray to prove his majority on the floor of the House;

c. The resolution dated 21 June 2022 signed by thirty-four members of the SSLP stating that they were dissatisfied with the Shiv Sena for forming an alliance with the INC and the NCP;

d. A letter dated 21 June 2022 addressed by Mr. Shinde to the Deputy Speaker stating that the appointment of Mr. Ajay Choudhari as the Leader of the SSLP was illegal; and

e. A letter dated 25 June 2022 received from thirty-eight members of the SSLP stating that the security provided to them by the State Government had been withdrawn illegally and that their lives were in danger.

172. Based on these materials, the Governor (in the letter dated 28 June 2022) concluded that Mr. Thackeray had lost the confidence of the House:

"… a majority of the Shiv Sena MLAs have given a clear indication on behalf of the Shiv Sena Legislature Party that they intend to exit from the Maha Vikas Aghadi Government and that you have been made aware of the same and that you are trying to win over your MLAs and cadre by means which are not democratic. I am therefore confident that you and your Government has lost the trust of the House and the Government is in minority."

The Governor then called upon Mr. Thackeray to prove his majority on the floor of the House on 30 June 2022.

173. The Governor constitutes an integral part of a State Legislature. The executive power of the State is vested in the Governor. Article 163 requires the Governor to exercise their legislative and executive power on the aid and advice of the Council of Ministers. Article 163(2) empowers the Governor to exercise their discretionary powers when required by or under the Constitution. Article 174(1) provides that the Governor shall from time to time summon the House to meet at such time and place as they think fit. Article 175(1) empowers the Governor to address the House. Article 175(2) permits the Governor to send messages to the House whether with respect to a pending Bill or otherwise.

a. The power of the Governor to call for a floor test

174. In **S R Bommai** (supra) the Janata Party formed the government in Karnataka under the leadership of S R Bommai in August 1988. Soon after, the Janata Party and Lok Dal (B) merged into a new party called Janata Dal. In April 1989, seventeen Janata Dal legislators wrote to the Governor withdrawing their support to the government. On 19 April 1989, the Governor sent a report to the President stating that the Chief Minister had lost the majority in the Assembly and recommended invocation of the President's rule under

Article 356(1) of the Constitution. On 20 April 1989, the Chief Minister offered to prove majority on the floor of the House. However, on the same day the Governor sent another report to the President reiterating that the Chief Minister had lost the confidence of the majority of the House and recommended action under Article 356(1). Accordingly, on 21 April 1989, the President issued a proclamation, dismissed the State Government, and dissolved the Assembly.

175. This Court held that the Governor cannot decide whether the Council of Ministers has lost the confidence of the House and this has to be determined on the floor of the House. This Court approvingly referred to the Report of the fivemember Committee of Governors which recommended that when a Governor is satisfied "by whatever process or means" that the Government no longer enjoys the support of the majority, they should ask the Chief Minister to prove their majority on the floor of the Assembly. B P Jeevan Reddy, J held that loss of confidence by a Government is an objective fact which has to be ascertained only on the floor of the House:

"391. [...] The Constitution does not create an obligation that the political party forming the ministry should necessarily have a majority in the Legislature. Minority Governments are not unknown. What is necessary is that that Government should enjoy the confidence of the House. This aspect does not appear to have been kept in mind by the Governor. Secondly and more importantly, whether the Council of Ministers has lost the confidence of the House is not a matter to be determined by the Governor or for that matter anywhere else except the floor of the House. The principle of democracy underlying our Constitution necessarily means that any such question should be decided on the floor of the House. The House is the place where the democracy is in action. It is not for the Governor to determine the said question on his own or on his own verification. This is not a matter within his subjective satisfaction. It is an objective fact capable of being established on the floor of the House. [...]"

176. In **Shivraj Singh Chouhan** (supra), the government in the State of Madhya Pradesh was formed by the INC. During the term of the Assembly, MLAs of the BJP submitted resignation letters of twenty-two MLAs from the INC to the Speaker. The Speaker accepted six of the twenty-two resignations. The party in the opposition in the Assembly wrote a letter to the Governor adverting to these resignations. The Governor directed a trust vote to be carried out. The action of the Governor was assailed before this Court. This Court held that the constitutional scheme vested the Governor with the power and discretion to call for a trust vote in a "running Assembly" and that such a decision is subject to judicial review. This Court ruled that the decision to call for a floor test should be based on objective material and reasons which are relevant and germane to the exercise of discretion, and not extraneous to it. The Court emphasised that the Governor should not use their discretionary power to destabilise or displace democratically elected governments:

"71. The powers which are entrusted to constitutional functionaries are not beyond the pale of judicial review. Where the exercise of the discretion by the Governor to call a floor test is challenged before the court, it is not immune from judicial review. The court is entitled to determine whether in calling for the floor test, the Governor did so on the basis of objective material and reasons which were relevant and germane to the exercise of the power. The exercise of such a power is not intended to destabilise or displace a democratically elected Government accountable to the Legislative Assembly and collectively responsible to it. The exercise of the power to call for a trust vote must be guided by the overarching consideration that the formation of satisfaction by the Governor is not based on extraneous considerations."

177. This Court also observed that unless there are "exigent and compelling circumstances", the Governor should not prevent the ordinary legislative process of a no-confidence motion from running its due course. In **Shivraj Singh Chouhan** (supra), the

Speaker accepted the resignations of only six members who were Ministers of the incumbent Government, and adjourned the Assembly for thirteen days. It was in view of these facts that this Court held there was objective material and relevant reasons for the Governor to call for a floor test.

178. The power of the Governor to summon the House under Article 174 must be exercised on the aid and advice of the Council of Ministers. Rule 95 of the Maharashtra Legislative Assembly Rules stipulates that a member who wishes to move a motion of no-confidence in the Council of Ministers shall do so by a notice in writing. If the motion is admitted by the Speaker and the Assembly is in session, leave to move the motion must be granted not later than two days from the date of the notice. However, if the notice is received when the Assembly is not in session, leave to move the motion shall be granted within two days from the commencement of the session.

179. To avert a no-confidence motion, the incumbent Government may not advise the Governor to convene a session of the Assembly, and the Speaker may adjourn the sitting of the House to prevent voting for granting leave to move a motion of no-confidence. If the Speaker and the Government attempt to circumvent a no-confidence motion, the Governor would be justified in exercising the power under Article 174 without the aid and advice of the Council of Ministers.

180. The Constitution and the system of governance that it provides is based on representative democracy. This means that each citizen has an active and participatory role in how the governments at various levels function. The elected representatives of the people act on their behalf by enacting laws and overseeing the implementation of policies. This is our chosen path to achieve democracy. Direct and indirect elections and the candidates who are elected are indispensable to our model of representative democracy. Hence, the Constitution empowers the elected representatives to act on behalf of the people. Consequently, the Governor who despite their constitutional status is unelected, is vested with limited discretionary powers.

181. The power of the Governor to act without the aid and advice of the Council of Ministers is of an extraordinary nature. The exercise of such power has ramifications on parliamentary democracy. Hence, the ambit of the exercise of such power by the Governor must be calibrated to meet the exigencies of situations where the Governor is satisfied on the basis of objective material that there is sufficient cause to warrant the exercise of their extraordinary power. The discretion to call for a floor test is not an unfettered discretion but one that must be exercised with circumspection, in accordance with the limits placed on it by law.

b. The Governor's exercise of the power to call for a floor test

182. In his letter dated 28 June 2022, the Governor relied on the five circumstances mentioned above to arrive at following conclusions: (i) a majority of the MLAs of Shiv Sena intended to exit from the MVA government; (ii) Mr. Thackeray was trying to win over the MLAs using undemocratic methods; and (iii) Mr. Thackeray had lost the trust of the House and the MVA Government was in the minority.

183. The petitioners have urged that the Governor was not justified in reaching the conclusion that he did on the basis of the resolution dated 21 June 2022 because: (i) the thirty-four MLAs belonging to Shiv Sena did not express their intention to exit the MVA government; and (ii) the MLAs who signed the resolution constituted a faction of the SSLP.

184. Although the resolution dated 21 June 2022 specifies that some MLAs of the SSLP were dissatisfied with the functioning of the MVA government, it does not record their

intention to withdraw support from the Government. Among the thirtyfour MLAs who signed the resolution dated 28 June 2022, a few were also Ministers in the Government. On the basis of this resolution, the Governor concluded that "a majority of the Shiv Sena MLAs have given a clear indication … that they intend to exit from the Maha Vikas Aghadi Government."

185. The assembly was not in session when Mr. Fadnavis and seven independent MLAs wrote to the Governor. However, there was no attempt made by the members of the opposition parties to issue a notice for a no-confidence motion against the incumbent government.

186. The Governor had no objective material on the basis of which he could doubt the confidence of the incumbent government. The resolution on which the Governor relied did not contain any indication that the MLAs wished to exit from the MVA government. The communication expressing discontent on the part of some MLAs is not sufficient for the Governor to call for a floor test. The Governor ought to apply his mind to the communication (or any other material) before him to assess whether the Government seemed to have lost the confidence of the House. We use the term 'opinion' to mean satisfaction based on *objective* criteria as to whether he possessed relevant material, and not to mean the *subjective* satisfaction of the Governor. Once a government is democratically elected in accordance with law, there is a presumption that it enjoys the confidence of the House. There must exist some objective material to dislodge this presumption.

187. The MLAs did not express their desire to withdraw support from the MVA Government in the resolution dated 21 June 2022. Even if it is assumed that the MLAs implied that they intended to exit from the Government, they only constituted a faction of the SSLP and were at most, indicating their dissatisfaction with the course of action adopted by their political party.

188. The political imbroglio in Maharashtra arose as a result of party differences within the Shiv Sena. However, the floor test cannot be used as a medium to resolve internal party disputes or intra party disputes. Dissent and disagreement within a political party must be resolved in accordance with the remedies prescribed under the party constitution, or through any other methods that the party chooses to opt for. There is a marked difference between a *party* not supporting a *government*, and *individuals* within a party expressing their discontent with their *party* leadership and functioning.

189. The Governor is the titular head of the State Government. He is a constitutional functionary who derives his authority from the Constitution. This being the case, the Governor must be cognizant of the constitutional bounds of the power vested in him. He cannot exercise a power that is not conferred on him by the Constitution or a law made under it. Neither the Constitution nor the laws enacted by Parliament provide for a mechanism by which disputes amongst members of a particular political party can be settled. They certainly do not empower the Governor to enter the political arena and play a role (however minute) either in inter-party disputes or in intra-party disputes. It follows from this that the Governor cannot act upon an inference that he has drawn that a section of the Shiv Sena wished to withdraw their support to the Government on the floor of the House.

190. It is true that the letter dated 25 June 2022 sent by some MLAs of the Shiv Sena to the Governor requesting him to issue directions to the appropriate authorities for the restoration of their security details mentions that those MLAs "no longer wanted to be a part of the corrupt MVA government." However, this cannot be taken to mean that they

had withdrawn their support *on the floor of the House*. Nothing in any of the communications relied upon by the Governor indicates that the dissatisfied MLAs from the Shiv Sena intended to withdraw their support to the Chief Minister and the Council of Ministers. At the highest, the various communications expressed the fact that a faction of MLAs disagreed with some policy decisions of the party. The course of action they wished to adopt in order to air their grievances and redress them was, at the time the floor test was directed to be conducted, uncertain. Whether they would choose to enter deliberations with their colleagues in the House or in the political party, or mobilise the cadres, or resign from the Assembly in protest, or opt to merge with another party, was uncertain. Therefore, the Governor erred in relying upon the resolution signed by a faction of the SSLP MLAs to conclude that Mr. Thackeray had lost the support of the majority of the House.

191. Second, the Governor relied on the letter dated 25 June 2022 from thirtyeight SSLP members claiming that the security provided to them and to their families was illegally withdrawn. The MLAs claimed that the security was withdrawn to coerce them into continuing to support the MVA government "against their free will." Therefore, they demanded restoration of the security provided to them and to their family members. After receiving the letter, the Governor issued directions to the state police to provide adequate protection to the MLAs, the members of their families, and their property. However, the lack of security to MLAs has no bearing on the question of whether the Government enjoys the confidence of the House. The appropriate response of the Governor in such cases is to ensure that the security that they are lawfully entitled to continues to be provided to them, if it has been removed. This was an extraneous reason that was considered by the Governor.

192. The third communication that the Governor relied on is the letter dated 21 June 2022 addressed by Mr. Eknath Shinde to the Deputy Speaker stating that the appointment of Mr. Ajay Choudhari was illegal. The Governor may not enquire into or express an opinion on the validity of proceedings of the legislature. That is exclusively within the domain of the legislature itself or in certain circumstances (discussed in the previous segment of this judgement) within the domain of Courts. The discretionary power of the Governor under Article 163 of the Constitution is limited to situations where a constitutional provision expressly provides for it, or where the Constitution cannot be construed otherwise than to grant such discretion.[62] Hence, the Governor ought not to have relied on the letter dated 21 June 2022. In any event, the contents of the letter did not indicate anything to suggest that the then-Chief Minister Mr. Thackeray had lost the confidence of the House.

193. Finally, the Governor relied on the letters written by Mr. Fadnavis and seven 'independent' MLAs, calling upon him to direct Mr. Thackeray to prove his majority on the floor of the House. First, both Mr. Fadnavis as well as the seven MLAs could have well moved a motion of no-confidence. Nothing prevented them from doing so. Second, a request by some MLAs for a direction to the Chief Minister to prove his majority does not, taken alone, amount to a relevant and germane reason to call for a floor test. There must be some *objective* material in addition to a mere request to call for a floor test. In the present case, the Governor did not have any objective material before him to indicate that the incumbent government had lost the confidence of the House and that he should call for a floor test. Hence, the exercise of discretion by the Governor in this case was not in accordance with law.

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[62] Nabam Rebia (supra)

194. Relying on **Bommai** (supra) and **Nabam Rebia** (supra), the petitioners argue that this Court has the power to restore the *status quo ante* and rule that the Government with Mr. Thackeray as its Chief Minister is to be reinstated. However, this argument does not account for the fact that Mr. Thackeray did not face the floor test on 30 June 2022 and instead submitted his resignation. This Court cannot quash a resignation that has been submitted voluntarily. Had Mr. Thackeray refrained from resigning from the post of the Chief Minister, this Court could have considered the grant of the remedy of reinstating the government headed by him. The order of this Court dated 29 June 2022 held that the outcome of the trust vote to be conducted on 30 June 2022 "shall be subject to the final outcome" of this batch of petitions. Since the trust vote was not held, the question of it being subject to the final outcome of these petitions does not arise.

195. The petitioners urge that the pendency of disqualification petitions before the Speaker or the Deputy Speaker ought to have resulted in the postponement of the floor test. This argument cannot be accepted. As discussed in the previous section of this judgement, the pendency of disqualification petitions does not bar an MLA from participating in the proceedings of the House. This includes the right of an MLA to participate in the floor test. It is true that adjudication of disqualification petitions would alter the numbers in the Assembly, and ultimately bear on the outcome of a floor test. The option of initiating a no-confidence motion after the adjudication of disqualification petitions is open to the MLAs. However, this Court cannot stay the proceedings of the House until the disqualification petitions are decided. To do so would amount to interfering with the proceedings of the House. The discretion of the Governor to direct the Chief Minister to face a floor test ought to be based on objective material.

viii. <u>The exercise of discretion by the Governor in inviting Mr. Shinde to be the Chief Minister</u>

196. The petitioners have challenged the exercise of discretion by the Governor in inviting Mr. Shinde to form the government on two grounds: first, Mr. Shinde's appointment is barred by Article 164(1B) of the Constitution; and second, the Governor has exceeded the scope of his authority by recognizing one of the two rival factions as being the "real" Shiv Sena. These submissions are addressed in turn.

a. Mr. Shinde's appointment is not barred by Article 164(1B) of the Constitution

197. Article 164(1B) of the Constitution is reproduced below:

"164. Other provisions as to Ministers.

…

(1B) A member of the Legislative Assembly of a State or either House of the Legislature of a State having Legislative Council belonging to any political party **who is disqualified for being a member of that House under paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a Minister** under clause (1) for duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or where he contests any election to the Legislative Assembly of a State or either House of the Legislature of a State having Legislative Council, as the case may be, before the expiry of such period, till the date on which he is declared elected, whichever is earlier."

(emphasis supplied)

198. Article 164(1B) bars an MLA or a Member of the Legislative Council of a State (where one exists) from being appointed as a Minister if they have been disqualified under Paragraph 2 of the Tenth Schedule. The bar begins to operate only upon the member of the legislature incurring disqualification. Article 164(1B) does not interdict the appointment

of a member to the post of a Minister if a petition for their disqualification under Paragraph 2 of the Tenth Schedule is pending adjudication before the Speaker. This is evident from the language of Article 164(1B), which states that a member who is disqualified under Paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a Minister.

199. In other words, the mere institution of a disqualification petition does not trigger some or all of the consequences which flow from the disqualification itself. To hold otherwise would be to blur or efface the distinction between the institution of a disqualification petition against a member of the House and the disqualification of that member. A claim that something is true does not mean that it is actually true. A claim must be established according to the procedure established by law before it can be considered to be a fact. When a petition for disqualification under the Tenth Schedule is filed before the Speaker, the party who filed the petition asserts that the respondent in the petition has contravened the provisions of the Tenth Schedule. This averment must be tested on the anvil of evidence before the Speaker, who acts as a Tribunal under the Tenth Schedule. Article 164(1B) is therefore triggered only when the Speaker returns a verdict finding that the member of the House in question has breached Paragraph 2 of the Tenth Schedule. If the Speaker finds that Mr. Shinde is disqualified, he will no longer be eligible to hold the post of Chief Minister for the duration specified in Article 164(1B).

200. The petitioners have relied on the decision in **Rajendra Singh Rana** (supra) in support of their contention. As discussed in the previous segment of this judgment, the disqualification of a member of the House relates back to the date on which the proscribed act was performed for the purpose of determining whether a defence to disqualification is made out.

201. The petitioners have also relied on the decision in **Shrimanth Balasaheb Patil** (supra) to urge that the appointment of Mr. Shinde is barred by Article 164(1B). In this case, the State Government of Karnataka was formed by a coalition consisting of MLAs of the INC and the Janata Dal (Secular) in 2018. In early 2019, a series of disqualification petitions under the Tenth Schedule were filed against MLAs of various parties which formed the government. Some of them submitted their resignations to the Speaker either immediately before or shortly after the disqualification petitions were filed against them. The case had a chequered history. The Speaker ultimately passed an order inter alia disqualifying these MLAs.

202. Aggrieved by the order of the Speaker, the disqualified MLAs approached this Court under Article 32 of the Constitution. The MLAs who had tendered their resignations argued that the Speaker did not have the jurisdiction to adjudicate the petitions for their disqualification because they had already resigned and were therefore not members of the House who could be disqualified. Relying on **Rajendra Singh Rana** (supra), this Court rejected this submission and held that the Speaker has the jurisdiction to determine the disqualification petitions because disqualification relates to the date when the act constituting defection is alleged to have been committed:

"93. As such, there is no doubt that the disqualification relates to the date when such act of defection takes place. The tendering of resignation does not have a bearing on the jurisdiction of the Speaker in this regard. At this point we may allude to the case of D. Sanjeevayya v. Election Tribunal [D. Sanjeevayya v. Election Tribunal, AIR 1967 SC 1211] , wherein this Court has held that : (AIR pp. 1213-14, para 5)

"5. It is, therefore, not permissible, in the present case, to interpret Section 150 of the Act in isolation without reference to Part III of the Act which prescribes the machinery for calling in question the election of a returned candidate. When an election petition has been referred to a

Tribunal by the Election Commission and the former is seized of the matter, the petition has to be disposed of according to law. The Tribunal has to adjudge at the conclusion of the proceeding whether the returned candidate has or has not committed any corrupt practice at the election and secondly, it has to decide whether the second respondent should or should not be declared to have been duly elected. A returned candidate cannot get rid of an election petition filed against him by resigning his seat in the legislature, whatever the reason for his resignation may be."

Therefore, the aforesaid principle may be adopted accordingly, wherein the taint of disqualification does not vaporise, on resignation, provided the defection has happened prior to the date of resignation."

(emphasis supplied)

203. The decision in **Shrimanth Balasaheb Patil** (supra) applied the principle that disqualification relates to the date on which the act of defection takes place to mean that acts or events subsequent to the commission of the conduct prohibited under the Tenth Schedule, do not have an exculpatory effect. In other words, subsequent acts or events do not have the effect of curing such conduct or releasing the actor from the consequences which follow. This is consistent with the decision in **Rajendra Singh Rana** (supra). Mr. Shinde's appointment is therefore not barred by Article 164(1B) of the Constitution.

b. The Governor did not exceed the scope of his authority

204. The petitioners submit that the Governor has exceeded the scope of his authority by inviting Mr. Shinde to form the government because:

a. The President of the Shiv Sena, Mr. Thackeray, was not in favour of a government formed in coalition with the BJP. However, the group led by Mr. Shinde was in favour of such an alliance. By inviting Mr. Shinde to form the government, the Governor has de facto recognized the group led by him as the "real" Shiv Sena; and

b. The Governor is not empowered to recognize the legitimacy of one faction over another. The ECI is the appropriate authority to determine which of the two factions constitute the Shiv Sena.

205. The BJP returned one hundred and six candidates to the Maharashtra Legislative Assembly, the highest amongst all political parties. It formed the primary opposition party in the House. By a letter dated 30 June 2022, the then Leader of Opposition, Mr. Fadnavis, wrote to the Governor claiming that one hundred and six MLAs of the BJP extend their support to Mr. Eknath Shinde for the formation of a government headed by Mr. Shinde. Eight independent candidates also extended their support to a government helmed by Mr. Shinde. On the same day, Mr. Shinde wrote to the Governor seeking to be called to form the Government. Based on the material before him, that is, the communications received, the Governor invited Mr. Shinde to take the oath of office, and directed him to prove his majority on the floor of the House within a period of seven days. The post of the Chief Minister of the State of Maharashtra fell vacant after the resignation of Mr. Thackeray on 29 June 2022. The leader of the party that had returned the highest number of candidates to the State Assembly extended support on behalf of the party to Mr. Shinde. Thus, the decision of the Governor dated 30 June 2022 inviting Mr. Shinde to form the Government was justified.

F. Conclusions

206. In view of the discussion above, the following are our conclusions:

a. The correctness of the decision in **Nabam Rebia** (supra) is referred to a larger Bench of seven judges;

b. This Court cannot ordinarily adjudicate petitions for disqualification under the Tenth Schedule in the first instance. There are no extraordinary circumstances in the instant case that warrant the exercise of jurisdiction by this Court to adjudicate disqualification petitions. The Speaker must decide disqualification petitions within a reasonable period;

c. An MLA has the right to participate in the proceedings of the House regardless of the pendency of any petitions for their disqualification. The validity of the proceedings of the House in the interregnum is not "subject to" the outcome of the disqualification petitions;

d. The political party and not the legislature party appoints the Whip and the Leader of the party in the House. Further, the direction to vote in a particular manner or to abstain from voting is issued by the political party and not the legislature party. The decision of the Speaker as communicated by the Deputy Secretary to the Maharashtra Legislative Assembly dated 3 July 2022 is contrary to law. The Speaker shall recognize the Whip and the Leader who are duly authorised by the Shiv Sena political party with reference to the provisions of the party constitution, after conducting an enquiry in this regard and in keeping with the principles discussed in this judgement;

e. The Speaker and the ECI are empowered to concurrently adjudicate on the petitions before them under the Tenth Schedule and under Paragraph 15 of the Symbols Order respectively;

f. While adjudicating petitions under Paragraph 15 of the Symbols Order, the ECI may apply a test that is best suited to the facts and circumstances of the case before it;

g. The effect of the deletion of Paragraph 3 of the Tenth Schedule is that the defence of 'split' is no longer available to members facing disqualification proceedings. The Speaker would *prima facie* determine who the political party is for the purpose of adjudicating disqualification petitions under Paragraph 2(1) of the Tenth Schedule, where two or more factions claim to be that political party;

h. The Governor was not justified in calling upon Mr. Thackeray to prove his majority on the floor of the House because he did not have reasons based on objective material before him, to reach the conclusion that Mr. Thackeray had lost the confidence of the House. However, the *status quo ante* cannot be restored because Mr. Thackeray did not face the floor test and tendered his resignation; and

i. The Governor was justified in inviting Mr. Shinde to form the government.

207. This batch of Writ Petitions is disposed of in terms of the conclusions and directions recorded above.

208. Pending applications, if any, stand disposed of.