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REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6996 OF 2019**

VIJAY NAMDEORAO WADETTIWAR,
Age: 56 years, Occupation: Agriculture,
R/o 73, Brahmapuri, District Chandrapure. ... **PETITIONER**

~ VERSUS ~

- 1. THE STATE OF MAHARASHTRA,**
Through Chief Secretary,
General Administration Department,
Mantralaya, Mumbai.
- 2. THE HON'BLE CHIEF
MINISTER,** Maharashtra State,
Mumbai – 400 032.
- 3. THE HON'BLE GOVERNOR OF
MAHARASHTRA,**
Raj Bhawan, Walkeshwar Road,
Malabar Hills, Mumbai.
- 4. THE HON'BLE SPEAKER,**
Maharashtra State Legislative
Assembly, Mantralaya,
Mumbai – 400 032.
- 5. SHRI. RADHAKRUSHNA EKNATH
@ BALASAHEB VIKHE PATIL,**
Age: Major, Occu: Politician,
R/o: At post Loni (Pravaranagar),
Tq. Rahata, Dist: Ahmednagar.
- 6. SHRI. JAYDATTA SONAJIRAO**

KSHIRSAGAR,

Age: Major, Occu: Politician,

R/o: A/P Rajuri, Tq and Dist: Beed.

7. **SHRI. AVINASH SHARAD**

MAHATEKAR,

Age: Major, Occu: Politician,

R/o: 152/5111, Bhimlight Co-op Hsg.

Soc., Nehru Nagar, Kurla (E),

Mumbai – 400 024.

... **RESPONDENTS**

AND

WRIT PETITION NO. 6922 OF 2019

1. **SURINDER MOHAN ARORA,**

Age: 65 years, Occu.: business,

R/o: Plot No.33/13, A wing,

Kiran Chandra CHS Ltd.,

Manish Nagar, Four Bungalows,

Andheri, Mumbai 400 053.

2. **SANJAY BHASKARRAO KALE**

Age : 57 years, Occu: Medical

Representative and Social work, R/o:

“Swapna Bhaskar”, Swami Vivekanand

Nagar, Kopargaon, Tq. Kopargaon, Dist:

Ahmednagar.

3. **SANDEEP S/O VIJAY KULKARNI**

Age : 46 years, Occu: Clot Store,

R/o At Post Wadala Mahadeo,

Tq. Shrirampur, Dist: Ahmednagar.

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@ BALASAHEB VIKHE PATIL,**
Age: Major, Occu: Politician,
R/o: At post Loni (Pravaranagar),
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 6. **SHRI. JAYDATTA SONAJIRAO
KSHIRSAGAR,**
Age: Major, Occu: Politician,
R/o: A/P Rajuri, Tq and Dist: Beed.
 7. **SHRI. AVINASH SHARAD
MAHATEKAR,**
Age: Major, Occu: Politician,
R/o: 152/5111, Bhimlight Co-op Hsg.
Soc., Nehru Nagar, Kurla (E),
Mumbai – 400 024.
- ... **RESPONDENTS**

APPEARANCES

FOR THE PETITIONER	Mr SB Talekar, with Madhavi Ayyappan, i/b Talekar & Associates.
FOR RESPONDENT NOS. 1 & 2	Mr VA Thorat, Senior Advocate, with PP Kakade, Government Pleader & Mrs AA Purav, AGP.
FOR RESPONDENT	Mr Vinayak D Hon, Senior Advocate,

NO. 5	<i>with Ms Prachi A Tatake.</i>
FOR RESPONDENT	Mr VR Kasle, i/b Ram & Co.
NO. 6	
FOR RESPONDENT	Mr BK Barve, with Archana Lad, i/b BK
NO. 7	Barve & Co.

**CORAM : S.C. Dharmadhikari &
G.S. Patel, JJ.**

DATED : 9th & 13th September 2019

ORAL JUDGMENT (Per S.C. Dharmadhikari, J):

1. By these petitions under Article 226 of the Constitution of India, the essential challenge of the petitioners is to the induction of Mr Radhakrushna Vikhe Patil, Mr Jaydatta Kshirsagar and Mr Avinash Mahatekar as Cabinet Ministers and Minister of State, respectively in the Maharashtra State Cabinet of Ministers. As the challenge is common, both petitions can be disposed of by a single Judgment.

2. We take the facts in in Writ Petition No. 6996 of 2019 filed by Mr Vijay Namdeorao Wadettiwar. He says that he is a member of the Indian National Congress Legislature Party. He has been elected

to the Maharashtra State Legislative Council for a term of six years. He is a leader of the Lower House of the Maharashtra State Legislature. He had officiated as Minister of State twice in the past.

3. The Respondents Nos. 5, 6 and 7 are inducted in the State Cabinet by the Respondent No. 2 and were sworn in as Ministers by the Hon'ble Governor of Maharashtra in terms of the advice tendered to him. These three persons are not members of the legislature.

4. As far as Respondent No. 5 is concerned, he was elected as a Member of the Legislative Assembly from Shirdi constituency in Maharashtra State Legislative Assembly Election 2014. He contested the elections as a candidate of the Indian National Congress. He was leader of opposition in the State Legislative Assembly. The 6th Respondent was elected as an M.L.A. from Beed constituency in Maharashtra State Legislative Assembly Election 2014 as a candidate of the Nationalist Congress Party.

5. Respondent No. 5 resigned from his political party with a declaration that he intends to join the Bharatiya Janata Party, namely, the ruling party. This is evident, according to the Petitioner, from a news item published in the daily newspapers circulated in Mumbai and elsewhere in Maharashtra and that is not disputed. Thus, Respondent No. 5 has now joined the Bharatiya Janata Party.

6. The 6th Respondent is a candidate from Chausala District, Beed. He equally made up his mind on 22nd May 2019 to sever his relations with the Nationalist Congress Party and join the Shiv Sena.

7. These persons thus resigned from their respective erstwhile parties and joined the ruling alliance. These two Respondents have demitted their seats by resigning from the Vidhan Sabha / State Legislative Assembly. Thus, the 5th Respondent is not the leader of opposition in the Assembly nor is he associated with the Indian National Congress Party. On 16th June 2019, he was sworn in as a Cabinet Minister.

8. At page 46 of the paper-book is a letter of one Sanjay Kale. He has invited the attention of the authorities concerned to Article 164 of the Constitution of India. He has complained that this induction into the Cabinet of these two persons in question is nothing but an attempt to get over the Constitutional mandate and avoid the consequences of the Anti-Defection Law. It is an attempt to get over the Constitutional embargo on change of political loyalty by resigning from the party on whose tickets the candidates have been elected, and this is done just five months before the end of the term of the House. Such persons are rewarded by making them Cabinet Ministers although it is known that they will not be elected within the period specified in clause (4) of Article 164 of the Constitution of India. There is no re-election possible. By virtue of Section 151-A of the Representation of Peoples Act 1951, no bye-elections can be held to fill up any vacancy that might be caused even if these two persons resign. Today, the situation is that the disqualification proceedings which have been initiated against these two persons are pending.

9. The 7th Respondent, Avinash Mahatekar, is not a member of either House but he is a Member of the Republican Party of India, Athawale Group. He is equally a beneficiary of a berth in the State Cabinet. He will also not be elected either, for no election is possible to enable him to get elected to the House.

10. Thus, all three of these Respondents have now been rewarded with ministerial berths with the House having less than six months term.

11. Mr Talekar, learned Advocate appearing on behalf of the petitioner in these petitions, addressed several contentions. We found from the nature of the arguments canvassed by both sides that there is no dispute on facts and there is thus no need of filing any returns or Affidavits. Be that as it may, a return is filed by the 5th Respondent and it is treated as a return or Affidavit in Reply for both petitions.

12. Since a short legal question is involved, we grant **Rule** in these petitions. The Respondents concerned waive service. Heard both sides at great length.

13. By consent of both sides, we dispose of these petitions finally.

14. Our attention has been invited by Mr Talekar to Articles 163, 164(1-B) and Article 164(4) of the Constitution of India. He has also invited our attention to Articles 173 and 191 and to the Tenth Schedule to the Constitution. Mr Talekar has submitted that there is an application made to the Speaker (Respondent No.4) seeking disqualification of Respondents Nos. 5 and 6. The applications are filed on 17th June 2019 and prayer clause (c) of Mr Wadettiwar's petition prays for a time-frame for disposal of these petitions.

15. On the larger challenge, Mr Talekar would submit that probity in public administration and ensuring purity in public affairs is the object behind the insertion of these Constitutional provisions. He read extensively from the Constituent Assembly debates to buttress his argument that the Constitution never envisaged the

induction into the Cabinet or the Ministry of persons who are not members of either House, and who cannot continue for more than six months in such ministerial berths and who simultaneously have no prospect or possibility of a re-election within six months. The only non-legislator who can be sworn in as a minister is one who has the actual possibility of getting elected within six months, i.e. when the remaining term of the House permits such a re-election or election. Mr Talekar's arguments are premised on this fact that the Constitution postulates that the a non-legislator Minister is duty-bound to face the electorate within six months. He cannot continue as a non-legislator minister any longer than that. There is no possibility at all of Respondents Nos. 5 and 6 facing an election (let alone being elected) simply because the term of the Legislative Assembly is less than six months from the date of their induction. Pertinently, both these persons have voluntarily resigned from the membership of the original party and of the House as well. Yet they are inducted in the cabinet and given ministerial berths, purely for political expediency. This is all the more egregious when the son of Respondent No. 5 on the eve of Lok Sabha elections joined the

Bharatiya Janata Party. Respondent No. 5 ensured a Lok Sabha nomination by the BJP for his son from the Kopergaon constituency. The son was duly elected. It was, therefore, clear that the Respondent No. 5 desired to defect to the Bharatiya Janata Party.

16. Mr Talekar, therefore, submits that we should not place an interpretation on clause (4) of Article 164 which will reduce it to 'a dead letter'. That Article itself should not be read in isolation but must be read along with Articles 173 and 191(2) and the Tenth Schedule of the Constitution. If elections were not possible for these persons, and that fact was known to the Chief Minister, then such a person could not have been inducted into his Cabinet. Doing so makes not only a mockery of the Constitutional principles and democracy as a whole, but what is directly prohibited is sought to be achieved in an indirect and oblique manner.

17. Apart from extensive oral arguments, Mr Talekar has also handed in a note of his written submissions and several volumes of compilations of additional materials.

18. In that note, we have found that Mr Talekar has made a reference to these Articles and elaborated that the power to induct a non-legislator into a ministerial berth is not an unfettered one. That power has to be exercised on an assurance and understanding that any such non-legislator will get himself or herself elected within six months; he or she cannot continue for any longer period. If a bye-election in the present case within six months was always impossible or impermissible, then exceptional circumstances ought to have existed for such an induction. They should have been demonstrated. There has to be seen to exist an emergent or extraordinary situation for the induction of a non-legislator as a minister and it must be proved that he was inducted to obtain his expert guidance and advice. Therefore, political persons apart, others who are experts in their respective field can be inducted, for, with their experience and expertise, the affairs of the Government and administration can be improved. However, such contingencies and circumstances have to be established. Political expediency or political convenience can never be a substitute nor can it be ever termed as an exceptional circumstance or an extraordinary contingency.

19. The other argument is that merely because an application is made to disqualify these two persons, a writ petition under Article 226 of the Constitution of India cannot be thrown out or held to be not maintainable. This Court is requested to grant a declaration so that the constitutional mechanism is sub-served and moves ahead. That constitutional mandate should not be frustrated and defeated by such a subterfuge, according to Mr Talekar. Therefore, he would submit that the remedy to seek disqualification should not influence the outcome of these petitions. In substance, the power of judicial review can be exercised to scrutinise the instant induction. The petitions raise important questions of interpretation of the Constitution and are therefore maintainable. This Court is not called upon to decide any political issues or questions.

20. Mr Talekar would submit that while interpreting Constitutional provisions, the purpose behind them, and particularly those meant not to encourage but to thwart defection, must be noted by us. If a person is disqualified to be a minister from inception, then that person cannot be brought into the Cabinet by an

oblique or indirect method. Such a disqualified candidate could not have been made a minister in the first place, and that such a disqualification by itself would exclude him therefore is clear. Once that is clear, then a person other than such a candidate can be brought in for a limited period and within that limited period, he must face the electorate. The heart of democracy is free and fair elections. Adult suffrage is the rule and not the exception. We must therefore place a purposive interpretation on these Constitutional provisions and read them harmoniously. That democratic spirit, representative participation, duties of Constitutional functionaries, Constitutional morality, values, and trust are, therefore, to be borne in mind in dealing with such a controversy.

21. Mr Talekar has handed over to us a copy of the notification which notifies the Members of Maharashtra Legislative Assembly (Disqualification on Ground of Defection) Rules 1986. Mr Talekar has also tendered to us the Constituent Assembly Debates, Volume VIII and extracts thereof of 1st June 1949 on Article 164 (or its equivalent in the draft then under discussion). He has also handed in

a copy of the Constitution (Fifty-Second Amendment) Act 1985 and the Constitution (Ninety-First Amendment) Act 2003. Thereafter, heavy reliance is placed upon two judgments of the Hon'ble Supreme Court rendered in the case of *S.R. Chaudhuri v State of Punjab and Others*¹ and *VR Kapoor v State of Tamil Nadu*.² It is submitted that Article 164(4) is neither a source of power nor an enabling provision for the appointment of a non-legislator as a minister even for a short duration. Secondly, a non-member to be appointed as a minister must possess the qualifications under Article 173, and must not have suffered a disqualification under Article 191. The Governor must reject any proposal to appoint such an unqualified or disqualified person as minister. Else a writ of quo warranto can be issued.

22. Our attention is also invited to the judgments which outline the power of judicial review. Our attention is also invited to certain judgments which set out salutary principles on Constitutional interpretation.

1 (2001) 7 SCC 126.

2 (2001) 7 SCC 231.

23. Thus, the emphasis is on giving a meaningful interpretation to the provisions of the Constitution that are pressed into service. The whole purpose is to emphasize that the Constitution is a living document and must take care of, and must reach, every attempt evolved over time by those in the political field and in power to defeat and frustrate its objectives. We are, therefore, called upon to place such an interpretation on the Constitution which would advance its intent and suppress the mischief.

24. During the course of his arguments, Mr Talekar has also invited our attention to a judgment of a Division Bench of this Court rendered at Nagpur. That judgment has been rendered in the case of *Sandeep Yashwantrao Sarode v Election Commission of India*.³

25. On the other hand, Mr V.A. Thorat, learned Senior Advocate who has been appointed as a Special Counsel by the State, would submit that this writ petition should be dismissed. He would submit that in the garb of placing an interpretation on certain Articles of the Constitution, we cannot re-write the Constitution itself. That which

3 2019 SCC On-Line Bombay 629.

is not expressly provided in the Constitution cannot be introduced or imputed by an interpretative process. Mr Thorat would submit that if the Constitution enacts something as an express bar or a prohibition, then and then alone is there an opportunity to consider the arguments canvassed by Mr Talekar. Mr Thorat would submit that the very foundation of the edifice of Mr Talekar's argument is flawed simply because there is no express prohibition in appointing or inducting a non-legislator as a minister merely because the term of the House is coming to an end in less than six months. That the term of the House is less than six months and hence the induction is bad is not a possible argument in this case. This Court is called upon to read a Constitutional Article in a manner convenient to the petitioners, one of whom is also an active politician. What the petitioner seeks to do is to introduce an otherwise non-existent link or nexus in the Constitution between the outer limit within which the non-legislator must get elected and the term (or remainder of the term) of the House. If such a link or nexus was the Constitutional intent and purpose, a specific provision would have been made in the Constitution itself. Absent such a provision, we

cannot read anything like it into the Constitution. Thus, it is not permissible to take away or add something to the Constitution.

26. There is another error in the understanding of the Constitutional provision, namely that it has not been inserted only to take care of political manoeuvring or the engineering of defections. The provision to induct a non-legislator enables a person who is not a member of either House to be brought in the cabinet so that his expertise or experience can be utilized for improving the administration and the affairs of the State. It is entirely left to the discretion of the Chief Minister therefore to induct such a non-legislator and when that advice is tendered, the Governor has only to ensure that the constitutional mandate enshrined in clause (4) of Article 164 would be adhered to later on. If such a person cannot get elected after six months, he would cease to be a Minister. That is provided in the Constitution itself. In other words, the non-legislator-Minister must get elected to the House within six months, else the Chief Minister must drop him. None has a choice. In the circumstances, the induction of Respondents Nos. 5 and 6 does not

suffer from a constitutional anomaly or illegality of such nature as would warrant interference with their induction in our limited jurisdiction under Article 226 of the Constitution of India. Mr Thorat, therefore, would submit that the writ petition be dismissed.

27. For properly appreciating the rival contentions, a reference to the Constitution would be necessary. The Constitution of India contains specific Articles inserted in Part VI Chapter 2, titled as “The Executive” with the sub-title “*The Governor*”. Articles 153 to 158 deal with the Governor and in Article 159 “Oath or affirmation by the Governor” is provided for. The “Discharge of the functions of the Governor in certain contingencies” is a matter dealt with by Article 160 and Article 161 enacts the power of Governor to grant pardons etc. and to suspend, remit or commute sentences in certain cases. The extent of the executive power of the State is set out by Article 162 and then another sub-title “*Council of Ministers*” contains Articles 163 and 164. The said Articles read as under:

“163. Council of Ministers to aid and advise Governor.—
(1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his

functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

(2) *If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.*

(3) *The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any Court.*

164. Other provisions as to Ministers.— (1) *The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor.*

Provided that in the States of Chhattisgarh, Jharkhand, Madhya Pradesh and Odisha, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.

(1-A) *The total number of Ministers, including the Chief Minister, in the Council of Ministers in a State shall not exceed fifteen per cent of the total number of members of the Legislative Assembly of that State:*

Provided that the number of Ministers, including the Chief Minister, in a State shall not be less than twelve.

Provided further that where the total number of Ministers, including the Chief Minister, in the Council of

Ministers in any State at the commencement of the Constitution (Ninety-first Amendment) Act, 2003 exceeds the said fifteen per cent or the number specified in the first proviso, as the case may be, then, the total number of Ministers in that State shall be brought in conformity with the provisions of this clause within six months from such date as the president may by public notification appoint.

(1-B) 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.

(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.

(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(4) A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.

(5) The salaries and allowances of Ministers shall be such as the Legislature of the State may from time to time by law

*determine and, until the Legislature of the State so determines,
shall be as specified in the Second Schedule.”*

28. A perusal of Article 163 shows that by clause (1) it mandates that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion. Clause (2) of Article 163 says that if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final. The validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. Clause (3) of Article 163 says that question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any Court. The marginal heading of Article 164 head is “Other provisions as to Ministers”. By clause (1), the Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief

Minister, and the Ministers shall hold office during the pleasure of the Governor. There is a proviso to clause (1) of Article 164, which requires the States of Chhattisgarh, Jharkhand , Madhya Pradesh and Odisha to have a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work. By clause (1-A), there is an outer limit on the number of Ministers including the Chief Minister in the Council of Ministers in a State and that shall not exceed fifteen per cent of the total number of Members of the Legislative Assembly of that State.

29. This clause has been inserted by the Constitution (Ninety-first Amendment) Act, 2003 with effect from 1st January 2004. Clause (1-B) says that a Member of the Legislative Assembly of a State or either House of the Legislature of the State having a Legislative Council, and 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.

30. There is a further stipulation. Clause (2) of Article 164 says that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State and by clause (3) before a Minister enters upon his office, the Governor shall administer to him the oath of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

31. Then comes clause (4). This says that a Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister. Advisedly the clause says a 'Minister'. That means a person can be sworn in as a Minister even if he is not a Member of the Legislature of the State, but if for any period of six consecutive months, he is not a Member of the Legislature of the State, then he shall at the expiration of that period cease to be a Minister.

32. There is no dispute about the understanding of this clause and that is that a person who is a non-legislator but made a Minister has to be elected before the expiration of the period specified in clause (4). Else he ceases to be a Minister.

33. Admittedly this is not the situation or position obtaining before us on facts.

34. The position obtaining on facts is that the persons who are now inducted as Ministers, Respondents Nos. 5 and 6, were erstwhile Members of the House and were also Members at one time of political parties who sponsored their candidature from distinct constituencies. They severed their connection or relations with these political parties, tendered their resignation from the House and joined the ruling alliance. Whether they have defected or not is not the question before us. That would be addressed distinctly by the competent authority in different and separate proceedings. We are only concerned about the induction of such persons as are referred by us above in the Council of Ministers by the Chief Minister.

35. The argument is that the Chief Minister and the Governor both knew, since the Governor acted on the advice of the Chief Minister, that Respondents Nos. 5 and 6 can never be elected as Members of the Legislature of the State before the expiration of the period mentioned in clause (4) of Article 164 because the duration or term of the House itself is coming to an end. That term will end even before the outer limit of six months stipulated in this clause. Therefore, knowingly such non-legislators were inducted as Ministers in the Council, particularly on the eve of elections for purely political reasons and convenience. Their induction, therefore, is contrary to the mandate of this clause. Once their election is an impossibility then all the more the induction cannot be supported. This is the frame of Mr Talekar's case.

36. In this regard, Mr Talekar also invites our attention to other Articles of the Constitution, viz., Articles 172, 173 and 191(2) which set out the duration of State Legislature. Article 172 says in clause (1) that every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for

its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly. Clause (2) of Article 172 says that the Legislative Council of a State shall not be subject to dissolution but as nearly as possible one-third of the Members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by the Parliament by law.

37. Then Article 173 sets out the qualification for Membership of the State Legislature. A person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he is a citizen of India, by clause (a) of Article 173, in the case of seat in Legislative Assembly shall not less than twenty-five years of age and in the case of a seat in the Legislative Council shall not be less than thirty years of age and possesses such other qualifications as may be prescribed in that behalf by or under any law made by the Parliament.

38. Article 191 follows a series of Articles, particularly Article 190 under the sub-title '*Disqualification of Members*' and says in specific terms that a person shall be disqualified for being a Member of the

Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule.

39. Of course, he will be disqualified if he incurs the disqualification under clause (1) of Article 191 and he cannot be chosen as, or for being, a Member of the Legislative Assembly or Legislative Council of a State on his inviting these disqualifications.

40. We must at once deal with the contention of Mr Talekar that Respondents Nos. 5 and 6 are disqualified on account of their defections. This is not the law, for a person stands disqualified only on being so adjudged. No such adjudication has taken place in the case of Respondents Nos. 5 and 6, for the applications seeking their disqualification are admittedly pending. One cannot presume that they are disqualified merely because there is an allegation of disqualification made against them. That allegation will have to be inquired into by a process known to law. The disqualification is not automatic in this case and it will have to be adjudicated upon by the process set out in Tenth Schedule of the Constitution. We cannot, therefore, agree with Mr Talekar that the Respondents Nos. 5 and 6

stand disqualified. The allegation or case that they have incurred or invited this disqualification by their acts of omission or commission or conduct must be ruled upon under specific provisions. Persons like Respondents Nos. 5 and 6 cannot be held to be disqualified for being inducted in the Ministry as suggested by Mr Talekar, viz., that because they resigned from one party to join another and they allegedly tried to get over a defection by resigning from the House. This in itself will not allow us to hold that they stand disqualified for being inducted as Ministers. At best, they have joined another alliance which is in power. That alliance thought of inducting them in the Ministry, maybe for political reasons, but that by itself will not enable us to hold that disqualified Members or disqualified persons are inducted. 'Disqualification' means something that disqualifies and 'to disqualify' means to make or pronounce ineligible or unsuitable, to incapacitate legally. This pronouncement or declaration is awaited. The proceedings in that behalf are pending and the Hon'ble Speaker is yet to rendering his ruling on that question.

41. The argument of Shri Talekar overlooks the scheme of the Tenth Schedule to the Constitution. However, we cannot ignore the same and take over the powers of the Hon'ble Speaker of the House to decide the application seeking disqualification of respondent Nos. 5 and 6.

42. After disposing of the first contention of Mr Talekar, we equally do not agree with him for he demands that we should set out a time schedule for the Speaker to deal with the applications or prescribe a time-frame. In that regard, a perusal of the Tenth Schedule of the Constitution would reveal that the disqualification proceedings have to take a specific route. The disqualification proceedings envisaged by this Schedule would demonstrate that firstly the disqualification on the ground of defection set out in paragraph 2, which is subject to the provisions of paragraphs 4 and 5, has been shown to be incurred or attracted. Paragraphs 4 and 5 clarify that disqualification on ground of defection will not apply in case of merger. Then, there is an exemption carved out by paragraph (5).

43. What we have for our consideration and importantly is paragraph 6, which says in clearest terms in sub-paragraph (1) that when any question arises as to whether a Member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final. Then sub-paragraph (2) says that all proceedings under sub-paragraph (1) of this paragraph in relation to any question as to disqualification of a Member of the House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of Article 212. Then by paragraph 8 there is a rule making power conferred. That is subjected to sub-paragraph (2) of paragraph 8. However, importantly for us, we must refer to clause (1) of sub-paragraph 1 of Rule 8 which says that the Rules contemplated by that paragraph may provide for the procedure for deciding any question referred to in sub-paragraph (1) of paragraph 6 including procedure for any inquiry which may be made for the purpose of deciding such question.

44. The Authority that is chosen for the purposes of a decision on the applications made in this case is the Speaker of the House. The specific rules which would enable the Speaker to deal with such a question are in place. We have not been shown any time-frame either in the Tenth Schedule or in the Members of Maharashtra Legislative Assembly (Disqualification on ground of Defection) Rules 1986 which would mandate the disposal of the applications within a given time-frame. The disqualification proceedings have to follow Rules 6 and 7 and the procedure set out therein before a decision either way can be taken.

45. The language of Rule 8 of these Rules is important for our purpose. It says that at the conclusion of the consideration of the petition, the Speaker shall by an order in writing dismiss the petition or declare that the Member in relation to whom the petition has been made has become subject to disqualification under the Tenth Schedule and cause copies of the order to be delivered or forwarded to the Petitioner, the Member in relation to whom the petition has been made and the leader of the Legislature Party, if any concerned.

Every decision declaring a Member to have become subject to disqualification under the Tenth Schedule shall be reported to the Assembly forthwith if the Assembly is in session and if the Assembly is not in session immediately after the Assembly re-assembles. The procedure that is to be followed and as laid down in Rule 7 is fairly elaborate. Advisedly, therefore, there is no outer limit prescribed. The decision has to be taken by the Speaker of the House. We cannot by a judicial fiat set out a time frame for the Hon'ble Speaker to render his decision when neither the substantive provisions in the Tenth Schedule nor the Rules set out the same. To our mind, therefore, these questions are best left to the wisdom and experience of the Speaker. We assume that the Speaker would give the proceedings the required priority and would not allow their purpose to be defeated and frustrated.

46. Now we come to the main question of interpretation of Article 164 of the Constitution of India, and particularly clause (4) thereof. Before we render our opinion on this question, we would

advantageously refer to certain judgments of the Hon'ble Supreme Court on the point of interpretation of the Constitution.

Resumed on 13th September 2019:

47. As early as in 1994, in *R.C. Poudyal v Union of India and Others*,⁴ a decision by a bench of five judges, the Hon'ble Supreme Court had an occasion to express its opinion on the preamble to the Constitution of India. The Hon'ble Court elucidated some of the expressions employed therein, and generally with regard to the meaning of the term 'democratic republic', in the following words:

"52. The preamble of the Constitution of India emphatically declares that we were giving to ourselves the Constitution with a firm resolve to constitute a sovereign, democratic, republic; with equality of status and of opportunity to all its citizens. The issue which has direct bearing on the question under consideration is as to what is the meaning of 'democratic republic'. The expressions 'democracy' and 'democratic' have been used in varying senses in different countries and in many places have

4 1994 Supp (1) 324.

been subjected to denote the state of affairs which is in complete negation of the meaning in which they are understood. During the present century it progressively became more fashionable and profitable to frequently use those terms and accordingly they have been grossly misused. We are not concerned with that kind of so-called democracy, which is used as a stepping stone for the establishment of a totalitarian regime, or that which is hypocritically dangled before the people under the name of democracy but is in reality an oligarchical set-up concentrating the power in a few. We are also not concerned with the wider theoretical conception in which the word can be understood. In our Constitution, it refers to denote what it literally means, that is, "people's power". It stands for the actual, active and effective exercise of power by the people in this regard. Schumpeter gives a simple definition of democracy as "the ability of a people to choose and dismiss a Government". Giovanni Sartori translates the same idea in institutional form and says that democracy is a multi-party system in which the majority governs and respects the right of minority. In the present context it refers to the political participation of the people in running the administration of the government. It conveys the state of affairs

in which each citizen is assured of the right of equal participation in the polity.”

48. The later judgment of the Hon’ble Supreme Court in *Union of India v Naveen Jindal & Anr.*⁵ raised a short but important question and that was whether the right to fly the national flag by Indian Citizen is a fundamental right within the meaning of Article 19(1)(a) of the Constitution of India. In regard to that, the Hon’ble Supreme Court observed that although interpretation of the Constitution is based on, and must be based on, materials available in India, relevant Rules of other countries can be looked into for guidance. In paragraphs 31, 38 and 39 of this decision, the Hon’ble Supreme Court outlined the principles of interpretation as under:

“31. In S.C. Advocates-on-Record Asscn. V Union of India ((1993) 4 SCC 441), it was held:

“Constitution is the “will” of the people whereas the statutory laws are the creation of the legislators who are the elected representatives of the people. Where the will of

5 AIR 2004 SC 1559.

the legislature — declared in the statutes — stands in opposition to that of the people — declared in the Constitution — the will of the people must prevail.”

38. *In S.C. Advocates-on-Record Asscn. V Union of India ((1993) 4 SCC 441), it was held:*

Constitution being a living organ, its ongoing interpretation is permissible. The supremacy of the Constitution is essential to bring social changes in the national polity evolved with the passage of time.

39. *Interpretation of the Constitution is a difficult task. While doing so, the constitutional Courts are not only required to take into consideration their own experience over the time, the international treatise and covenants but also keeping the doctrine of flexibility in mind. This Court times without number has extended the scope and extent of the provisions of the fundamental rights, having regard to several factors including the intent and purport of the constitution makers as reflected in Parts IV and IVA of the Constitution of India.”*

49. This principle has throughout been guiding the Courts in India and they look at the Constitution as a living organ to hold that its ongoing interpretation is permissible. The interpretation of the Constitution is a difficult task but at the same time the Courts can draw from their experience, international treaties and covenants keeping in mind the 'doctrine of flexibility'. Mr Talekar possibly has this view in mind when he says emphatically that the interpretation that we must place on the provision in question ought to be guided by these principles. In one of the decisions rendered by the Constitution Bench of the Hon'ble Supreme Court in the case of *Gujarat Assembly Election Matter In Re*,⁶ the Hon'ble Supreme Court came to the conclusion that it is permissible to interpret the Constitution by applying the historical legislative developments and taking into consideration the Constituent Assembly Debates. The Hon'ble Supreme Court however outlined the basic Rules of interpretation of the Constitution itself in the following words, which we draw from the headnote:

⁶ (2002) 8 SCC 237.

“Since it is permissible to look into the pre-existing law, historical legislative developments, and Constituent Assembly Debates, the same have to be referred to for interpreting the provisions of the Constitution.

S. Interpretation of the Constitution — External aids — Historical legislative developments and Constituent Assembly Debates — can be referred to for ascertaining intention behind a provision

Per majority

Once of the known methods to discern the intention behind enacting a provision of the Constitution and also to interpret the same is to look into the historical legislative developments, Constituent Assembly Debates or any enactment preceding the enactment of the constitutional provision. (para 15)

Kesavananda Bharati v State of Kerala (1973) 4 SCC 225 : AIR 1973 SC 1461; R.S. Nayak v A.R. Antulay, (1984) 2 SCC 183 : 1984 SCC (Cri) 172 : (1984) 2 SCR 495, relied on

T. Interpretation of the Constitution — Liberal and visionary interpretation necessary

Per Arijit Pasayat, .

The old articles of the suprema lex meet new challenges of life, the old legal pillars suffer new stresses. So the Court has to adopt the law and develop its latent capabilities if novel situations, as here, are encountered. In the reasoning adopted and the perspective projected the Court has to be not literal nor lexical but liberal and visional in its interpretation of the articles of the Constitution.
(para 126)

U. Interpretation of Statutes — Basic rules of interpretation — Contextual construction — Explained

Per Arijit Pasayat, J.

In providing key to the meaning of any word of expression the context in which it is said has significance. Colour and content emanating from context may permit sense being preferred to mere meaning depending on what is sought to be achieved and what is sought to be prevented by the legislative scheme surrounding the expression. It is a settled principle that in interpreting the statute the words used therein cannot be read in isolation. Their colour and content are derived from their context and, therefore, every

word in a statute must be examined in its context. By the word “context”, it means in its widest sense as including not only other enacting provisions of the same statute but its preamble, the existing state of the law, other statutes in pari materia and the mischief which the statute intended to remedy. While making such interpretation, the roots of the past, the foliage of the present and the seeds of the future cannot be lost sight of. Judicial interpretation should not be imprisoned in verbalism and words lose their thrust when read in vacuo. Context would quite often provide the key to the meaning of the word and the sense it should carry. Its setting would give colour to it and provide a clue to the intention of the legislature in using it. A word is not a crystal, transparent and unchanged; it is the skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which the same is used.

Towne v Eisner, 245 US 418, 425 : L Ed 372 (1917), relied on.

***V. Interpretation of the Constitution — Generally —
Judicial function of Supreme Court***

Per Arijit Pasayat, J.

A constitutional court like the Supreme Court is a nice balance of jurisdiction and it declares the law as contained in the Constitution but in doing so it rightly reflects that the Constitution is a living and organic thing which of all instruments has the greatest claim to be construed broadly and liberally. (Para 138)

Goodyear India Ltd v State of Haryana, (1990) 2 SCC 71 : 1990 SCC (Tax) 223 : AIR 1990 SC 781 : Synthetics and Chemicals Ltd. V. State of U.P., (1990) 1 SCC 109 : AIR 1990 SC 1927, relied on

W. Interpretation of the Constitution — Meaning of the words should be understood having regard to their line of growth and change of concepts

Per Arijit Pasayat, J.

In the interpretation of a constitutional document words are but the framework of concepts and concepts may change more than words themselves. The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of words without an acceptance of

the line of their growth. It is aptly said that the intention of the Constitution is rather to outline principles than to engrave details (Para 139).

R.C. Poudyal v. Union of India, 1994 Supp (1) SCC 324 : AIR 1993 SC 1804, relied on.

150. The necessity for completing the election expeditiously is enjoined by the Constitution in public and State interest to see that the governance of the country is not paralysed.

151. The impossibility of holding the election is not a factor against the Election Commission. The maxim of Law impotentia excusat legem is intimately connected with another maxim of law lex non cogit ad impossibilia. Impotentia excusat legem is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotential excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the

formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance with the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God (See Broom's Legal Maxims, 10th Edn., at pp. 1962-63 and Craies on Statute Law, 6th Edn., p. 268.) These aspects were highlighted by this Court in Special Reference No. 1 of 1974 ((1974) 3 Addms 210). Situations may be created by interested persons to see that elections do not take place and the caretaker Government continues in office. This certainly would be against the scheme of the Constitution and the basic structure to that extent shall be corroded."

50. There is, therefore, according to Mr Talekar, a certain latitude available to us in interpreting the Constitution and we must therefore be guided by these principles and bear them in mind throughout. The preamble to the Constitution also envisages that the manner in which the Constitution has been framed and drafted

would provide enough flexibility to the Courts to interpret it in accordance with the conditions prevailing at the relevant time. Mr Talekar would therefore submit that we must give a purposive and meaningful interpretation to the Constitution, and particularly to clause (4) of Article 164. Mr Talekar would submit that given the mandate of the Representation of Peoples Act 1951, and when no bye-elections can be held as the period that is now available at the disposal of the Legislature is less than what is prescribed by the RP Act, a backdoor method is chosen so as to bring in either a dissatisfied or disgruntled a member of the opposition into the fold of the ruling alliance. The apprehension of Mr Talekar is that if this is held to be permitted by the Constitution, then cases like the present one would increase manifold. There will be then an unhealthy trend and practice of inducting in the ruling alliance, on the eve of the Assembly, certain influential and powerful regional or local leaders by promising them cabinet or ministerial berths. This would then facilitate a defection from one party to another. If this trend is not curbed by judicial intervention then that would lead to subversion of the Constitutional and democratic principles. Mr

Talekar therefore submits that we should not allow this trend to continue and pollute public and political life. Mr Talekar's endeavour is to urge that the respondents feel that there is no prohibition in taking the step and measure that has been undertaken by them. Mr Talekar submits that if we do not arrest this trend, the Constitution would be construed as permitting and encouraging defections, particularly on the eve of elections.

51. Therefore, Mr Talekar presses into service the principles of interpretation of Constitution and particularly that it is a living organ and that its ongoing interpretation is permissible. Mr Talekar has also invited our attention to several judgments, and particularly the judgment of the Hon'ble Supreme Court rendered recently on the powers of a Lieutenant Governor.⁷ The Governor of National Capital Territory of Delhi who is styled as a Lieutenant Governor had a conflict with the elected Government, and while resolving that conflict, the issues that cropped up for consideration before the Supreme Court were noted and considered. While we appreciate the

⁷ *State (NCT at Delhi) vs Union of India and Ors*, (2018) 8 SCC 501.

anxiety of Mr Talekar, what we can do by an interpretative process has certain in-built and inherent limitations.

52. Mr Talekar's arguments are premised on his reading of Article 164(4) as covering even a situation of the present nature. He would submit that if it is impossible for the Election Commission to hold a bye-election or a re-election and that is because the term of the Assembly itself is going to expire, then that impossibility of holding an election, re-election or bye-election should not mean that a handle is provided to induct in the ministry the non-legislators.

53. We do not think that the Constitution can be read as suggested by Mr Talekar.

54. There are numerous instances where the Supreme Court has considered several provisions of the Constitution. One may illustratively refer to two recent judgments. In one judgment, the Hon'ble Supreme Court was considering the challenge to Sections 499 and 500 of the Indian Penal Code 1860. While holding them as constitutional, legal and valid, the Hon'ble Supreme Court took

note of established principles of interpretation, particularly on the interpretation of statutes, and held these to govern questions of interpretation of the Constitution itself. The Hon'ble Supreme Court adverted to its previous decisions and concluded that the Constitution of India has to be interpreted so as to give meaning to every expression and word used therein. There is, therefore, no scope for whittling down or diluting the Constitution in any manner.⁸

55. At the same time, in another decision in *Manoj Narula v Union of India*,⁹ the Supreme Court considered the limitations which are exceptions to this principle. In that decision, the Hon'ble Supreme Court concluded that in the garb of interpreting the Constitution itself, we cannot assume that there is a defect or lacunae therein or that we can remove it by an interpretative process. The Court cautioned that nothing should be read in the Constitution that is expressly not there. There is no question of adding or subtracting anything as far as the Constitution is

8 *Subramanian Swamy v Union of India & Ors*, (2016) 7 SCC 221.

9 (2014) 9 SCC 1.

concerned. The caution administered in the later judgment is, to our mind, enough guidance. The judgment of the Hon'ble Mr Justice Madan B. Lokur, as His Lordship then was, shows us the path in holding that the Constitution cannot be interpreted in the manner suggested in that case as well as in the present case. We cannot re-write a Constitutional provision. In the garb of its interpretation it will not be possible to assume that there is something lacking or missing in the Constitution itself.

56. What the decision in the case of *Manoj Narula v Union of India* says, speaking through a five judge Bench of the Hon'ble Supreme Court, is eloquent enough. The issue there was somewhat comparable. In that case, the Hon'ble Supreme Court had before it a writ petition under Article 32 of the Constitution filed by the petitioner, Manoj Narula *pro bono publico* assailing the appointment of some of the original respondents to that petition as ministers in the Council of Ministers of Union of India despite their involvement in serious and heinous crimes. On 24th March 2006, this matter was listed before a bench presided over by the then learned Chief Justice

and he passed an order referring it to a Constitution Bench. The controversy required the Supreme Court to interpret the scope and purpose of Articles 75 and 164 of the Constitution regard being had to the text, context, scheme and spirit of the Constitution.

57. While lamenting the fact that there is a gross criminalisation of politics and that is an anathema to the sacredness of democracy, the Hon'ble Supreme Court laid down a principle of interpretation of Constitution, one we find to be vital and salutary. The Hon'ble Supreme Court outlined the concept that because a constitutional provision does not encompass every possible situation including of the nature brought before us does not mean its silence is not telling or it is not speaking at all. A constitutional silence is also important and equally salutary. The Hon'ble Supreme Court held that what is not constitutionally prohibited cannot be held to be permitted and that is not how the Constitution must be read and interpreted. That the Prime Minister and Chief Ministers cannot be constitutionally prohibited to give advice to the President and the Governor in respect of a person becoming a Minister who is charged for serious

or heinous offences or offences relating to corruption, would not mean that by interpretative process we will read such a prohibition into Article 75(1) or 161(4)(i). These will have to be then taken as fetters on the powers of the Prime Minister and Chief Ministers to include in their Ministry persons of their choice. That would tantamount to prescribing an eligibility qualification and adding a disqualification which has not been stipulated in the Constitution. There is a basic rule of interpretation of Constitution and that is that one takes into consideration the intent of the framers. There is a doctrine of implied limitation. That Constituent Assembly or Parliamentary Debates are but aids to interpreting the Constitution. However, we cannot substitute, amend and rewrite a Constitutional provision with the aid of these debates. The debates are enlightening enough as we have noted in this case. In the debates themselves, there is an indicator as to why the Members of the Constituent Assembly did not frame or model Article 164(4) in the manner suggested before us by Mr Talekar. That they left the matter at that or by not encompassing a situation like the one brought before us does not mean that there is an approval or permission to resort to

what is complained of in this case. The Supreme Court has said and in clearest terms that whenever the Constitution is silent in matters of the nature covered by Articles 75 and 164, there is a Constitutional trust reposed in holders of high office. In a written Constitution like ours, the Prime Minister as also the Chief Ministers are expected to act with Constitutional responsibility as a consequence of which the cherished values of democracy and established norms of good governance get condignly fructified. The framers of the Constitution left many a thing unwritten by reposing immense trust in the Prime Minister. The scheme of the Constitution suggests that there has to be an emergence of Constitutional governance which would gradually grow to give rise to a Constitutional renaissance.

58. Thus, the silence has been taken to be a doctrine by itself. The principle of constitutional silence or abeyance is progressive and is applied as a recognized advanced constitutional practice to fill up gaps in respect of certain areas in the interest of justice and larger public interest. The applicability of such a doctrine of silence when

there is already an existing express provision, particularly in relation to disqualifications, therefore, has an in-built limitation and would enable the Court to leave the silence at that and not attempt to re-write or introduce into the Constitution something which is expressly not there.

59. We also note from the Constituent Assembly Debates, Vol VIII, 1st June 1949, that the precise issue came up for discussion. The Article in the draft being discussed corresponding to present Article 164(4) was Article 144(3). It read, in its original form, exactly as the current Article 164(4) reads today, viz., thus:

A.144(3) A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.

Shri Mohd Tahir moved the following amendment, as Amendment No.185:

*A.144(3) A Minister shall, at the time of his being chosen
as such be a member of the Legislative Assembly or Legislative
Council as the case may be.*

We find from a close reading of the transcript that Amendment No. 185 was negatived.

60. It follows therefore, that in addition to the doctrine of silence, what will apply here is another principle: once a provision has been negatived and specifically omitted, it can be re-introduced or imputed back into the very provision from which it was excluded by a process of interpretation of ‘intent and purpose’. The only manner in which it can be re-introduced is by a positive act of legislature, i.e. by a full-fledged amendment. Therefore, what Mr Talekar urges us to do is not merely absent from the Constitution. An amendment very similar to what Mr. Talekar proposes today was actually canvassed and entirely negatived just a little over seven decades ago on 1st June 1949. We do not see how we can possibly re-introduce by a process of interpretation the very thing that the Constituent Assembly so considered and negatived.

61. We think that the portions of the judgments that we reproduce hereinbelow are a complete answer to the submissions of Mr Talekar.

62. Before their reproduction, we must clarify that reluctance to agree with Mr Talekar should not be construed as a sign of weakness much less a approval of the induction of Respondent Nos. 5 and 6. We are of the firm opinion that the doctrine of public trust applies even when the Chief Minister exercises his powers to make or expand his Council of Ministers. The Chief Minister is the head of the Council and he ought to be aware of his duty to abide by the trust reposed in him by the Constitution, the supreme instrument. A political compulsion or convenience should not result in a compromise with the Constitutional values and ideals of Democracy. A true and real leader of the State, which the Chief Minister is, and not just of the ruling party, is vested with a power which is coupled with a duty. While making the Cabinet, he is expected to act with maturity and responsibility and do nothing to destroy the trust reposed in him by the Constitution. Very often, the

Chief Minister is compelled to accept as his colleagues, persons of doubtful integrity and character only because they have been elected at the general elections from a area or region where the ruling party has strong roots and a base or a sizeable presence. Popular leaders are foisted on the Chief Minister and consequently imposed on the State. It is here that the Chief Minister is tested and if he possesses qualities of statesmanship, he can successfully get over the above-noted situations. All political parties, whether in power today or in opposition should remember the following words of the Hon'ble Supreme Court in *Shailesh Manubhai Parmar v Election Commission of India*:¹⁰

“19. The aforesaid passages throw immense light on the distinction between direct and indirect elections and especially on the concept of indirect election which encompasses proportional representation. There is voting by open ballot and it has been so introduced to sustain the foundational values of party discipline and to avoid any kind of cross voting thereby ensuring purity in the election process. They have been treated as

10 (2018) 9 SCC 100.

core values of democracy and fair election. It is worth to note that in a voting for members of the Council of States, the nature of voting by an elector is a grave concern. It is because in such an election, there is a party whip and the elector is bound to obey the command of the party. The party discipline in this kind of election is of extreme significance, for that is the fulcrum of the existence of political parties. It is essential in a parliamentary democracy. The thought of cross voting and corruption is obnoxious in such a voting. In this context, we may refer with profit to the authority in Ravi S. Naik v. Union of India (1994 Supp (2) SCC 641). In the said case, the question arose relating to the disqualification of a Member of the State Legislature under Article 191(2) read with the Tenth Schedule to the Constitution. The two-Judge Bench referred to the decision in Kihoto Hollohan v. Zachillhu (1992 Supp (2) SCC 651) and addressed the issue of defection covered under paragraphs 2(1)(a) and 2(1)(b) of the Tenth Schedule. Referring to the said paragraphs, the Court ruled: (Ravi S Naik Case, SCC p.649, para 11)

“11. ... The said paragraph provides for disqualification of a member of a House belonging to a political party “if he has voluntarily given up his membership of such political party”. The words “voluntarily given up his membership” are not synonymous with “resignation” and have a wider connotation. A person may voluntarily give up his membership of a political party even though he has not tendered his resignation from the membership of that party. Even in the absence of a formal resignation from membership an inference can be drawn from the conduct of a member that he has voluntarily given up his membership of the political party to which he belongs.”

23. In a democracy, the purity of election is categorically imperative. The democratic body polity, as has been held in Manoj Narula v. Union of India ((2014) 9 SCC 1), stipulates that the quintessential idea of democracy is abhorrent to corruption and laws emphasize on prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmation of constitutional morality which is the pillar stone of good governance. The purity of democracy does not withstand anything that has the potential to create an

incurable chasm in the backbone of a democratic setup. The law is meant to eradicate the same. It is a well settled principle that what cannot be done directly, cannot be done indirectly. To elaborate, if NOTA is allowed in the election of the members to the Council of States, the prohibited aspect of defection would indirectly usher in with immense vigour.

24. *We may further add with profit that the purpose of introduction of NOTA in PUCL case is that a provision for negative voting can send a clear message to the political parties and what a voter thinks about the candidates in the fray. Thus, the said decision is directly relatable to a direct election, one man, one vote and one value.”*

63. Pertinently, *Manoj Narula (supra)* is followed and, hence, we quote the paragraphs from the same:

“By interpretative process, it is difficult to read such prohibition into Arts. 75(1) or 164(1) on the powers of PM/CMs as that would tantamount to prescribing eligibility qualification and adding a disqualification which has not been stipulated in the Constitution - Representation of the People

Act, 1951 -5. 8-Constitutional Interpretation - Basic rules of interpretation -Framers'/legislative intent-Doctrine of implied limitation-Constitution of India, Art. 32

D. Constitutional Law - Silences of the Constitution/Implied Limitation-Constitutional trust reposed in holders of high office- Held, in a controlled Constitution like ours, the Prime Minister, as also the Chief Ministers, are expected to act with constitutional responsibility as a consequence of which the cherished values of democracy and established norms of good governance get condignly fructified - The Framers of the Constitution left many a thing unwritten by reposing immense trust in the Prime Minister - The scheme of the Constitution suggests that there has to be an emergence of constitutional governance which would gradually grow to give rise to a constitutional renaissance- Constitution of India, Arts.75 and 164

E. Constitutional Law - Constitutional Trust - Applicability - Held, doctrine of constitutional trust is applicable not only to exercise of legislative power but also

to every high constitutional functionary -Therefore, doctrine is applicable to Prime Minister as also Chief Ministers who hold high constitutional positions - Constitution of India - Arts. 75 and 164 - Prime Minister and Chief Ministers - Position and status of

F. Constitutional Interpretation Subsidiary rules of-interpretation Casus omissus/Necessary implication - Doctrine of implication - Scope and applicability - Explained in detail - Held, doctrine of implication can be taken aid of for interpreting constitutional provision in expansive manner - Doctrine is fundamentally founded on rational inference of idea from words used in the text - However, interpretation given by Court has to have a base in Constitution - Court cannot rewrite a constitutional provision - Words "on the advice of the Prime Minister/Chief Minister" under Arts. 75(1) and 164(1) of Constitution - Interpretation of - Held, while interpreting these words "on the advice of the PM/CM" appearing in Arts. 75(1) and 164(1), it cannot be legitimately inferred that there is prohibition to think of

person as Minister if charges have been framed against him in respect of serious or heinous offences including corruption cases - Constitution of India, Arts. 32, 75(1) and 164(1)

S. Public Accountability, Vigilance and Prevention of Corruption - Corruption/ Abuse of power - Held, erodes fundamental tenets of rule of law - Corruption has potentiality to destroy many a progressive aspect and has acted as formidable enemy of the nation - Prevention of Corruption Act, 1988- Ss. 7 to 13- Rule of Law

(Paras 16 to 18)

Subramanian Swamy v. CBI, (2014) 8 SCC 682, relied on Niranjan Hemchandra Sashittal v. State of Maharashtra, (2013) 4 SCC 642 : (2013) 2 SCC

(Cri) 737 : (2013) 2 SCC (L&S) 187, affirmed

X. Constitutional Law - Democracy - Conditions for survival and success of democratic values - Constitution of India - Preamble

Held:

The Constitution of India is a living instrument with capabilities of enormous dynamism. It is a Constitution made for a progressive society. Working of such a Constitution depends upon the prevalent atmosphere and conditions. The Constitution can live and grow on the bedrock of constitutional morality. The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. Democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality. Thus, institutional

respectability and adoption of precautions for the sustenance of constitutional values would include reverence for the constitutional structure. It is always profitable to remember that a Constitution is "written in blood, rather than ink". (Paras 74 to 76, 138 and 139)

Constituent Assembly Debates, 1989, VII, 38; James Madison as Publius, Federalist 51, <<http://parliamentofindia.nic.in/ls/debates/volllp11.htm>>; <<http://parliamentofindia.nic.in/ls/debates/vol11p12.htm>>; Laurence H. Tribe, The Invisible Constitution (2008) 29, relied on

Corruption in the present scenario

16. *Criminality and corruption go hand in hand. From the date the Constitution was adopted i.e. 26-1-1950, a Red Letter Day in the history of India, the nation stood as a silent witness to corruption at high places. Corruption erodes the fundamental tenets of the rule of law. In Niranjana Hemchandra Sashittal v. State of Maharashtra [(2013) 4 SCC 642 : (2013) 2 SCC (Cri) 737 : (2013) 2 SCC (L&S) 187] the Court has observed: (SCC pp. 654-55, para 26)*

“26. It can be stated without any fear of contradiction that corruption is not to be judged by degree, for corruption mothers disorder, destroys societal

will to progress, accelerates undeserved ambitions, kills the conscience, jettisons the glory of the institutions, paralyses the economic health of a country, corrodes the sense of civility and mars the marrows of governance. It is worth noting that immoral acquisition of wealth destroys the energy of the people believing in honesty, and history records with agony how they have suffered. The only redeeming fact is that collective sensibility respects such suffering as it is in consonance with the constitutional morality.”

17. Recently, in *Subramanian Swamy v. CBI* [(2014) 8 SCC 682] , the Constitution Bench, speaking through R.M. Lodha, C.J., while declaring Section 6-A of the Delhi Special Police Establishment Act, 1946, which was inserted by Act 45 of 2003, as unconstitutional, has opined that: (SCC pp. 725-26, para 59)

“59. It seems to us that classification which is made in Section 6-A on the basis of status in the government service is not permissible under Article 14 as it defeats the purpose of finding prima facie truth into the allegations of graft, which amount to an offence under the PC Act, 1988. Can there be sound differentiation between corrupt public servants based on their status? Surely not, because irrespective of their

status or position, corrupt public servants are corrupters of public power. The corrupt public servants, whether high or low, are birds of the same feather and must be confronted with the process of investigation and inquiry equally. Based on the position or status in service, no distinction can be made between public servants against whom there are allegations amounting to an offence under the PC Act, 1988.”

And thereafter, the larger Bench further said: (SCC p. 726, para 60)

“60. Corruption is an enemy of the nation and tracking down corrupt public servants and punishing such persons is a necessary mandate of the PC Act, 1988. It is difficult to justify the classification which has been made in Section 6-A because the goal of law in the PC Act, 1988 is to meet corruption cases with a very strong hand and all public servants are warned through such a legislative measure that corrupt public servants have to face very serious consequences.”

And again: (SCC pp. 730-31, paras 71-72)

“71. Office of public power cannot be the workshop of personal gain. The probity in public life is of great importance. How can two public servants against whom there are allegations of corruption of graft or

bribe-taking or criminal misconduct under the PC Act, 1988 can be made to be treated differently because one happens to be a junior officer and the other, a senior decision maker.

72. *Corruption is an enemy of nation and tracking down corrupt public servant, howsoever high he may be, and punishing such person is a necessary mandate under the PC Act, 1988. The status or position of public servant does not qualify such public servant from exemption from equal treatment. The decision-making power does not segregate corrupt officers into two classes as they are common crimedoers and have to be tracked down by the same process of inquiry and investigation.”*

18. *From the aforesaid authorities, it is clear as noonday that corruption has the potentiality to destroy many a progressive aspect and it has acted as the formidable enemy of the nation.*

Doctrine of implied limitation

51. *It has been highlighted before us by Mr Dwivedi, as noted earlier, that regard being had to the nature of office a Minister holds in a democratic set-up under the Constitution, persons with criminal antecedents especially charged for heinous*

and serious offences cannot and should not hold the said office. He has emphatically put forth that apart from the prohibitions contained in Articles 102 and 179 of the Constitution and the conviction under the 1951 Act, the relevant stage in trial needs to be introduced to the phraseology of Article 75(1) as well as Article 164(1) so that the Prime Minister's authority to give advice has to be restricted to the extent not to advise a person with criminal antecedents to become a Minister. To substantiate the said view, he has taken aid of the doctrine of "implied limitation".

52. *In Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] , Sikri, C.J., while expressing his view on the doctrine of implied limitation, has observed that in a written Constitution, it is rarely that everything is said expressly. Powers and limitations are implied from necessity or the scheme of the Constitution. He has further held: (Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] , SCC pp. 364-65, paras 282-284)*

“282. It seems to me that reading the Preamble the fundamental importance of the freedom of the individual, indeed its inalienability, and the importance of the economic, social and political justice mentioned in the Preamble, the importance of directive principles, the non-inclusion in Article 368 of provisions like Articles 52, 53 and various other provisions to which reference has already been made an irresistible conclusion emerges that it was not the intention to use the word ‘amendment’ in the widest sense.

283. It was the common understanding that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare State.

284. In view of the above reasons, a necessary implication arises that there are implied limitations on the power of Parliament that the expression ‘amendment of this Constitution’ has consequently a limited meaning in our Constitution and not the meaning suggested by the respondents.”

53. Shelat and Grover, J.J., in their opinion, while speaking about the executive power of the President, have observed that:

(Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225], SCC p. 437, para 550)

“550. ... Although the executive power of the President is apparently expressed in unlimited terms, an implied limitation has been placed on his power on the ground that he is a formal or constitutional head of the executive and that the real executive power vests in the Council of Ministers.”

The learned Judges arrived at the said conclusion on the basis of the implications of the Cabinet system of government so as to constitute an implied limitation on the power of the President and the Governors. Proceeding further as regards the amending power of the Constitution, as engrafted under Article 368 of the Constitution, said the learned Judges: (Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225], SCC p. 454, para 583)

“583. The entire discussion from the point of view of the meaning of the expression ‘amendment’ as employed in Article 368 and the limitations which arise by implications leads to the result that the amending power under Article 368 is neither narrow nor unlimited. On the footing on which we have proceeded

the validity of the 24th Amendment can be sustained if Article 368, as it originally stood and after the amendment, is read in the way we have read it. The insertion of Articles 13(4) and 368(3) and the other amendments made will not affect the result, namely, that the power in Article 368 is wide enough to permit amendment of each and every article of the Constitution by way of addition, variation or repeal so long as its basic elements are not abrogated or denuded of their identity.”

54. *Hegde and Mukherjea, JJ., while discussing about implied limitations, opined thus: (Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225], SCC p. 482, para 655)*

“655. Implied limitations on the powers conferred under a statute constitute a general feature of all statutes. The position cannot be different in the case of powers conferred under a Constitution. A grant of power in general terms or even in absolute terms may be qualified by other express provisions in the same enactment or may be qualified by the implications of the context or even by considerations arising out of what appears to be the general scheme of the statute.”

And again: (SCC pp. 482, para 656)

“656. Lord Wright in James v. Commonwealth of Australia [1936 AC 578 : (1936) 2 All ER 1449 (PC)] stated the law thus:

‘The question, then, is one of construction, and in the ultimate resort must be determined upon the actual words used, read not in vacuo but as occurring in a single complex instrument, in which one part may throw light on another. The Constitution has been described as the federal compact, and in the construction must hold a balance between all its parts.’”

Thereafter, the learned Judges proceeded to state that:
(Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225], SCC p. 482, para 657)

“657. Several of the powers conferred under our Constitution have been held to be subject to implied limitations though those powers are expressed in general terms or even in absolute terms.”

And further proceeded to state thus: (SCC p. 483, para 657)

“657. ... though plenary powers of legislation have been conferred on Parliament and the State Legislatures in respect of the legislative topics allotted to them, yet this Court has opined that by the exercise of

that power neither Parliament nor the State Legislatures can delegate to other authorities their essential legislative functions nor could they invade on the judicial power. These limitations were spelled out from the nature of the power conferred and from the scheme of the Constitution. But, it was urged on behalf of the Union and the States that, though there might be implied limitations on other powers conferred under the Constitution, there cannot be any implied limitations on the amending power. We see no basis for this distinction.”

55. *Jaganmohan Reddy, J., in his separate opinion, concurred with the view expressed by Sikri, C.J.*

56. *Palekar, J., has opined thus: (Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225], SCC p. 713, para 1307)*

“1307. ... Some more cases like Ranasinghe case [Bribery Commr. v. Ranasinghe, 1965 AC 172 : (1964) 2 WLR 1301 : (1964) 2 All ER 785 (PC)], Taylor v. Attorney General of Queensland [(1917) 23 CLR 457 (Aust)] ; Mangal Singh v. Union of India [AIR 1967 SC 944 : (1967) 2 SCR 109], were cited to show that constitutional laws permit implications to be drawn where necessary. Nobody disputes that proposition.

Courts may have to do so where the implication is necessary to be drawn.”

After so stating, the learned Judge distinguished the cases by observing that: (SCC p. 714, para 1307)

“1307. ... None of the cases sheds any light on the question with which we are concerned viz. whether an unambiguous and plenary power to amend the provisions of the Constitution, which included the Preamble and the fundamental rights, must be frightened by the fact that some superior and transcendental character has been ascribed to them.”

And eventually, ruled thus: (SCC p. 720, para 1318)

“1318. On a consideration, therefore, of the nature of the amending power, the unqualified manner in which it is given in Article 368 of the Constitution it is impossible to imply any limitations on the power to amend the fundamental rights. Since there are no limitations express or implied on the amending power, it must be conceded that all the Amendments which are in question here must be deemed to be valid. We cannot question their policy or their wisdom.”

57. *Chandrachud, J., has observed that: (Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225], SCC p. 988, para 2087)*

“2087. In considering the petitioner's argument on inherent limitations, it is well to bear in mind some of the basic principles of interpretation. Absence of an express prohibition still leaves scope for the argument that there are implied or inherent limitations on a power, but absence of an express prohibition is highly relevant for inferring that there is no implied prohibition.”

58. *Khanna, J., while speaking on implied limitation, noted the submission of the learned counsel for the petitioner in the following terms: (Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225], SCC p. 776, para 1444)*

“1444. The learned counsel for the petitioners has addressed us at some length on the point that even if there are no express limitations on the power of amendment, the same is subject to implied limitations, also described as inherent limitations. So far as the concept of implied limitations is concerned, it has two facets. Under the first facet, they are limitations which flow by necessary implications from express provisions of

the Constitution. The second facet postulates limitations which must be read in the Constitution irrespective of the fact whether they flow from express provisions or not because they are stated to be based upon certain higher values which are very dear to the human heart and are generally considered essential traits of civilized existence. It is also stated that those higher values constitute the spirit and provide the scheme of the Constitution. This aspect of implied limitations is linked with the existence of natural rights and it is stated that such rights being of paramount character, no amendment of Constitution can result in their erosion.”

Dealing with the same, the learned Judge ruled: (SCC p. 776, para 1446)

“1446. So far as the first facet is concerned regarding a limitation which flows by necessary implication from an express provision of the Constitution, the concept derives its force and is founded upon a principle of interpretation of statutes. In the absence of any compelling reason it may be said that a constitutional provision is not exempt from the operation of such a principle. I have applied this principle to Article 368 and despite that, I have not been able to discern in the language of that article or other relevant articles any implied limitation on the power to make amendment contained in the said article.”

Be it clarified, in subsequent paragraphs, the learned Judge expressed the view that though Parliament has been conferred with the power of amendment under Article 368 of the Constitution, yet it cannot be permitted to incorporate an amendment which would destroy the basic structure or essential feature of the Constitution.

59. In Minerva Mills Ltd. v. Union of India [Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625], the Constitution Bench was dealing with the validity of Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976. Chandrachud, C.J., speaking for himself, Gupta, Untwalia and Kailasam, JJ., referred to the majority opinion in Kesavananda Bharati [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] and referred to the opinion given by Sikri, C.J. and Shelat and Grover, JJ., Hegde and Mukherjea, JJ., Jaganmohan Reddy, J. and Khanna, J. and opined thus: (Minerva Mills Ltd. case [Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625], SCC p. 641, paras 11-12)

“11. Khanna, J. broadly agreed with the aforesaid views of the six learned Judges and held that

the word ‘amendment’ postulated that the Constitution must survive without loss of its identity, which meant that the basic structure or framework of the Constitution must survive any amendment of the Constitution. According to the learned Judge, although it was permissible to Parliament, in exercise of its amending power, to effect changes so as to meet the requirements of changing conditions, it was not permissible to touch the foundation or to alter the basic institutional pattern. Therefore, the words ‘amendment of the Constitution’, in spite of the width of their sweep and in spite of their amplitude, could not have the effect of empowering Parliament to destroy or abrogate the basic structure or framework of the Constitution.

12. The summary of the various judgments in Kesavananda Bharati [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] was signed by nine out of the thirteen Judges. Para 2 of the summary reads to say that according to the majority, ‘Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution’. Whether or not the summary is a legitimate part of the judgment, or is per incuriam for the scholarly reasons cited by authors, it is undeniable that it correctly reflects the majority view.”

Thereafter, the learned Chief Justice proceeded to state thus:
(Minerva Mills Ltd. case [Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625], SCC p. 642, para 16)

“16. ... The theme song of the majority decision in Kesavananda Bharati [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] is: ‘Amend as you may even the solemn document which the Founding Fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity’.”

60. *In B.R. Kapur [B.R. Kapur v. State of T.N., (2001) 7 SCC 231], the Constitution Bench, after referring to the decision in Kesavananda Bharati [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225], reproduced para 16 from Minerva Mills case [Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625] and opined that: (B.R. Kapur case [B.R. Kapur v. State of T.N., (2001) 7 SCC 231], SCC p. 292, para 28)*

“28. ... Since the Constitution had conferred a limited amending power on Parliament, Parliament could not in the exercise of that limited power, enlarge

that very power into an absolute power. A limited amending power was one of the basic features of the Constitution and, therefore, the limitations on that power could not be destroyed. In other words, Parliament could not, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power could not by the exercise of that power convert the limited power into an unlimited one.”

61. *In I.R. Coelho v. State of T.N. [(2007) 2 SCC 1], the nine-Judge Bench, while dealing with the doctrine of implied limitation, ruled thus: (SCC p. 97, para 96)*

“96. ... In the four different opinions six learned Judges came substantially to the same conclusion. These Judges read an implied limitation on the power of Parliament to amend the Constitution. Khanna, J. also opined that there was implied limitation in the shape of the basic structure doctrine that limits the power of Parliament to amend the Constitution but the learned Judge upheld the 29th Amendment and did not say, like the remaining six Judges, that the Twenty-ninth Amendment will have to be examined by a smaller Constitution Bench to find out whether the said amendment violated the basic structure theory or not.

This gave rise to the argument that fundamental rights chapter is not part of basic structure. Khanna, J. however, does not so say in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225].”

62. *From the aforesaid authorities, it is luminescent that the principle of implied limitation is attracted to the sphere of constitutional interpretation. The question that is required to be posed here is whether taking recourse to this principle of interpretation, this Court can read a categorical prohibition to the words contained in Article 75(1) of the Constitution so that the Prime Minister is constitutionally prohibited to give advice to the President in respect of a person for becoming a Minister of the Council of Ministers who is facing a criminal trial for a heinous and serious offence and charges have been framed against him by the trial Judge. Reading such an implied limitation as a prohibition would tantamount to adding a disqualification at a particular stage of the trial in relation of a person. This is neither expressly stated nor is impliedly discernible from the provision. The doctrine of implied limitation was applied to the amending power of the*

Constitution by Parliament on the fundamental foundation that the identity of the original Constitution could not be amended by taking recourse to the plenary power of amendment under Article 368 of the Constitution. The essential feature or the basic structure of the doctrine was read into Article 368 to say that the identity or the framework of the Constitution cannot be destroyed. In Minerva Mills case [Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625] , giving example, the Court held that by amendment, Parliament cannot damage the democratic republican character as has been conceived in the Constitution. Though in Article 368 of the Constitution there was no express prohibition to amend the constitutional provisions, yet the Court in the aforesaid two cases ruled that certain features which are basic to the Constitution cannot be changed by way of amendment. The interpretative process pertained to the word “amendment”. Therefore, the concept of implied limitation was read into Article 368 to save the constitutional integrity and identity.

63. *In B.R. Kapur case [B.R. Kapur v. State of T.N., (2001) 7 SCC 231] , the Constitution Bench ruled that a non-*

legislator can be made a Chief Minister or Minister under Article 164(1) only if he has qualifications for membership of the Legislature prescribed under Article 173 and is not disqualified from the membership thereof by reason of the disqualifications set out in Article 191. Bharucha, J. (as His Lordship then was), speaking for the majority, opined that as the second respondent therein had been convicted for offences punishable under Sections 13(1)(c), 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 and Sections 409 and 120-B of the Penal Code and sentenced to undergo rigorous imprisonment for three years, she was disqualified under Section 8(4) of the 1951 Act as the said respondent was disqualified to contest the election. In the said case, she was sworn in as the Chief Minister by the Governor. This Court was moved in by a writ of quo warranto that she was not eligible to hold the post of the Chief Minister. A submission was advanced that it was not open to the Court to read anything into Article 164, for a non-legislator could be sworn in as the Chief Minister, regardless of the qualifications or disqualifications. The Court placed reliance on Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] and Minerva Mills case [Minerva Mills Ltd. v.

Union of India, (1980) 3 SCC 625] and opined that if a non-legislator is made a Chief Minister under Article 164, then he must satisfy the qualification for membership of a legislator as prescribed under Article 173. A specific query was made by the Court that even when the person recommended, was, to the Governor's knowledge, a non-citizen or underaged or lunatic or discharged insolvent, could he be appointed as a Chief Minister? It was urged that he/she could only be removed by the vote of no-confidence in the Legislature or at the next election. Discarding the same, the Court opined that acceptance of such a submission would invite disaster. The Court further ruled that when a person is not qualified to become a Member in view of Article 173, he cannot be appointed as a Chief Minister under Article 164(1). Be it noted, there was disqualification in the Constitution and under the 1951 Act to become a Member of the State Legislature, and hence, the Court, appreciating the text and context, read the disqualification into Article 164(1) of the Constitution.

64. On a studied scrutiny of the ratio of the aforesaid decisions, we are of the convinced opinion that when there is no

disqualification for a person against whom charges have been framed in respect of heinous or serious offences or offences relating to corruption to contest the election, by interpretative process, it is difficult to read the prohibition into Article 75(1) or, for that matter, into Article 164(1) to the powers of the Prime Minister or the Chief Minister in such a manner. That would come within the criterion of eligibility and would amount to prescribing an eligibility qualification and adding a disqualification which has not been stipulated in the Constitution. In the absence of any constitutional prohibition or statutory embargo, such disqualification, in our considered opinion, cannot be read into Article 75(1) or Article 164(1) of the Principle of constitutional silence or abeyance

Principle of constitutional silence or abeyance

65. *The next principle that can be thought of is constitutional silence or silence of the Constitution or constitutional abeyance. The said principle is a progressive one and is applied as a recognised advanced constitutional practice. It has been recognised by the Court to fill up the gaps in respect of certain areas in the interest of justice and larger public*

interest. Liberalisation of the concept of locus standi for the purpose of development of public interest litigation to establish the rights of the have-nots or to prevent damages and protect environment is one such feature. Similarly, laying down guidelines as procedural safeguards in the matter of adoption of Indian children by foreigners in Laxmi Kant Pandey v. Union of India [(1987) 1 SCC 66 : 1987 SCC (Cri) 33 : AIR 1987 SC 232] or issuance of guidelines pertaining to arrest in D.K. Basu v. State of W.B. [(1997) 1 SCC 416 : 1997 SCC (Cri) 92 : AIR 1997 SC 610] or directions issued in Vishaka v. State of Rajasthan [(1997) 6 SCC 241 : 1997 SCC (Cri) 932] are some of the instances.

66. *In this context, it is profitable to refer to the authority in Bhanumati v. State of U.P. [(2010) 12 SCC 1] wherein this Court was dealing with the constitutional validity of the U.P. Panchayat Laws (Amendment) Act, 2007. One of the grounds for challenge was that there is no concept of no-confidence motion in the detailed constitutional provision under Part IX of the Constitution and, therefore, the incorporation of the said provision in the statute militates against the principles of*

Panchayati Raj institutions. That apart, reduction of one year in place of two years in Sections 15 and 28 of the Amendment Act was sought to be struck down as the said provision diluted the principle of stability and continuity which is the main purpose behind the object and reason of the constitutional amendment in Part IX of the Constitution. The Court, after referring to Articles 243-A, 243-C(1), (5), 243-D(4), 243-D(6), 243-F(1), 243-G, 243-H, 243-I(2), 243-J, 243-K(2) and (4) of the Constitution and further taking note of the amendment, came to hold that the statutory provision of no-confidence is contrary to Part IX of the Constitution. In that context, it has been held as follows: (Bhanumati case [(2010) 12 SCC 1] , SCC p. 17, paras 49-50)

“49. Apart from the aforesaid reasons, the arguments by the appellants cannot be accepted in view of a very well-known constitutional doctrine, namely, the constitutional doctrine of silence. Michael Foley in his treatise on The Silence of Constitutions (Routledge, London and New York) has argued that in a Constitution ‘abeyances are valuable, therefore, not in spite of their obscurity but because of it. They are significant for the attitudes and approaches to the

Constitution that they evoke, rather than the content or substance of their strictures'. (p. 10)

50. The learned author elaborated this concept further by saying, "Despite the absence of any documentary or material form, these abeyances are real and are an integral part of any Constitution. What remains unwritten and indeterminate can be just as much responsible for the operational character and restraining quality of a Constitution as its more tangible and codified components.' (p. 82)"

67. The question that is to be posed here is whether taking recourse to this doctrine for the purpose of advancing constitutional culture, can a court read a disqualification to the already expressed disqualifications provided under the Constitution and the 1951 Act. The answer has to be in the inevitable negative, for there are express provisions stating the disqualifications and second, it would tantamount to crossing the boundaries of judicial review.

Doctrine of constitutional implications

68. The next principle that we intend to discuss is the principle of constitutional implication. We are obliged to discuss this principle as Mr Dwivedi, learned Amicus Curiae, has put

immense emphasis on the words “on the advice of the Prime Minister” occurring in Article 75(1) of the Constitution. It is his submission that these words are of immense significance and apposite meaning from the said words is required to be deduced to the effect that the Prime Minister is not constitutionally allowed to advise the President to make a person against whom charge has been framed for heinous or serious offences or offences pertaining to corruption as Minister in the Council of Ministers, regard being had to the sacrosanctity of the office and the oath prescribed under the Constitution. The learned Senior Counsel would submit that on many an occasion, this Court has expanded the horizon inherent in various articles by applying the doctrine of implication based on the constitutional scheme and the language employed in other provisions of the Constitution.

69. *In this regard, inclusion of many a facet within the ambit of Article 21 is well established. In R. Rajagopal v. State of T.N. [(1994) 6 SCC 632], right to privacy has been inferred from Article 21. Similarly, in Joginder Kumar v. State of U.P. [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172 : AIR 1994 SC*

1349] , inherent rights under Articles 21 and 22 have been stated. Likewise, while dealing with freedom of speech and expression and freedom of press, the Court, in Romesh Thappar v. State of Madras [AIR 1950 SC 124 : (1950) 51 Cri LJ 1514] , has observed that freedom of speech and expression includes freedom of propagation of ideas.

70. *There is no speck of doubt that the Court has applied the doctrine of implication to expand the constitutional concepts, but the context in which the horizon has been expanded has to be borne in mind. What is suggested by Mr Dwivedi is that by taking recourse to the said principle, the words employed in Article 75(1) are to be interpreted to add a stage in the disqualification i.e. framing of charges in serious and heinous criminal offences or offences relating to corruption. At this juncture, it is seemly to state that the principle of implication is fundamentally founded on rational inference of an idea from the words used in the text. The concept of legitimate deduction is always recognised. In Melbourne Corpn. v. Commonwealth [(1947) 74 CLR 31 (Aust)] , Dixon, J. opined that constitutional implication should be based on considerations*

which are compelling. Mason, C.J., in Political Advertising case [Australian Capital Television Pty. Ltd. v. Commonwealth, (1992) 177 CLR 106 (Aust)] , has ruled that there can be structural implications which are “logically or practically necessary for the preservation of the integrity of that structure”. Any proposition that is arrived at taking this route of interpretation must find some resting pillar or strength on the basis of certain words in the text or the scheme of the text. In the absence of that, it may not be permissible for a court to deduce any proposition as that would defeat the legitimacy of reasoning. A proposition can be established by reading a number of articles cohesively, for that will be in the domain of substantive legitimacy.

71. Dixon, J., in Australian National Airways Pty. Ltd. (No. 1) v. Commonwealth [(1945) 71 CLR 29 at p. 85 (Aust)] , said: “I do not see why we should be fearful about making implications”. The said principle has been approved in Lamshed v. Lake [(1958) 99 CLR 132 at pp. 144-5 (Aust)] , and thereafter, in Payroll Tax case [Victoria v. Commonwealth, (1971) 122 CLR 353 at p. 401 (Aust)] . Thus, the said principle

can be taken aid of for the purpose of interpreting constitutional provision in an expansive manner. But, it has its own limitations. The interpretation has to have a base in the Constitution. The Court cannot rewrite a constitutional provision. In this context, we may fruitfully refer to Kuldip Nayar case [Kuldip Nayar v. Union of India, (2006) 7 SCC 1] wherein the Court repelled the contention that a right to vote invariably carries an implied term i.e. the right to vote in secrecy. The Court observed that where the Constitution thought it fit to do so, it has itself provided for elections by secret ballot e.g. in the case of election of the President of India and the Vice-President of India. Thereafter, the Court referred to Articles 55(3) and 66(1) of the Constitution which provide for elections of the President and the Vice-President respectively, referring to voting by electoral colleges, consisting of elected Members of Parliament and Legislative Assembly of each State for the purposes of the former office and Members of both Houses of Parliament for the latter office and in both cases, it was felt necessary by the Framers of the Constitution to provide that the voting at such elections shall be by secret ballot through inclusion of the words “and the voting at such election shall be by secret

ballot”. If the right to vote by itself implies or postulates voting in secrecy, then Articles 55(3) and 66(1) would not have required the inclusion of such words. The necessity for including the said condition in the said Articles shows that “secret ballot” is not always implied. It is not incorporated in the concept of voting by necessary implication. Thereafter, the Court opined: (Kuldip Nayar case [Kuldip Nayar v. Union of India, (2006) 7 SCC 1], SCC p. 139, para 424)

“424. It follows that for ‘secret ballot’ to be the norm, it must be expressly so provided. To read into Article 80(4) the requirement of a secret ballot would be to read the words ‘and the voting at such election shall be by secret ballot’ into the provision. To do so would be against every principle of constitutional and statutory construction.”

72. *Thus analysed, it is not possible to accept the submission of Mr Dwivedi that while interpreting the words “advice of the Prime Minister” it can legitimately be inferred that there is a prohibition to think of a person as a Minister if charges have been framed against him in respect of heinous and serious offences including corruption cases under the criminal law.*

Other relevant constitutional concepts — Constitutional morality, good governance and constitutional trust

73. *Though we have not accepted the inspired arguments of Mr Dwivedi to add a disqualification pertaining to the stage into Article 75(1) of the Constitution, yet we cannot be oblivious of the three concepts, namely, constitutional morality, good governance and constitutional trust.*

Constitutional morality

74. *The Constitution of India is a living instrument with capabilities of enormous dynamism. It is a Constitution made for a progressive society. Working of such a Constitution depends upon the prevalent atmosphere and conditions. Dr Ambedkar had, throughout the debate, felt that the Constitution can live and grow on the bedrock of constitutional morality. Speaking on the same, he said:*

“Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially

*undemocratic.” [Constituent Assembly Debates, 1948,
Vol. VII, 38.]*

75. *The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality. In this context, the following passage would be apt to be reproduced:*

“If men were angels, no Government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and

in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. [James Madison as Publius, Federalis]

76. *Regard being had to the aforesaid concept, it would not be out of place to state that institutional respectability and adoption of precautions for the sustenance of constitutional values would include reverence for the constitutional structure. It is always profitable to remember the famous line of Laurence H. Tribe that a Constitution is “written in blood, rather than ink.” [Laurence H. Tribe, The Invisible Constitution (2008) 29]*

Good governance

77. *Having stated about the aspect of the constitutional morality, we presently proceed to deal with the doctrine of good governance. In A. Abdul Farook v. Municipal Council, Perambalur [(2009) 15 SCC 351], the Court observed that: (SCC p. 352)*

“The doctrine of good governance requires the Government to rise above their political interest and act

only in the public interest and for the welfare of its people.”

78. *In Patangrao Kadam v. Prithviraj Sayajirao Yadav Deshmukh [(2001) 3 SCC 594]*, the Court, referring to the object of the provisions relating to corrupt practices, elucidated as follows: (SCC p. 605, para 14)

“14. ... Clean, efficient and benevolent administration are the essential features of good governance which in turn depends upon persons of competency and good character.”

79. *In M.J. Sivani v. State of Karnataka [(1995) 6 SCC 289]*, it has been held that: (SCC pp. 306-07, para 31)

“31. ... Fair play and natural justice are part of fair public administration; non-arbitrariness and absence of discrimination are hallmarks for good governance under the rule of law.”

80. *In State of Maharashtra v. Jalgaon Municipal Council [(2003) 9 SCC 731]*, it has been ruled that: (SCC p. 760, para 37)

“37. ... One of the principles of good governance in a democratic society is that smaller interest must

always give way to larger public interest in case of conflict.”

81. In U.P. Power Corpn. Ltd. v. Sant Steels & Alloys (P) Ltd. [(2008) 2 SCC 777 : AIR 2008 SC 693] , the Court observed that in this 21st century, when there is global economy, the question of faith is very important.

82. In a democracy, the citizens legitimately expect that the Government of the day would treat the public interest as the primary one and any other interest secondary. The maxim salus populi suprema lex, has not only to be kept in view but also has to be revered. The faith of the people is embedded in the root of the idea of good governance which means reverence for citizenry rights, respect for fundamental rights and statutory rights in any governmental action, deference for unwritten constitutional values, veneration for institutional integrity, and inculcation of accountability to the collective at large. It also conveys that the decisions are taken by the decision-making authority with solemn sincerity and policies are framed keeping in view the welfare of the people, and including all in a homogeneous compartment. The concept of good governance is not a Utopian

conception or an abstraction. It has been the demand of the polity wherever democracy is nourished. The growth of democracy is dependent upon good governance in reality and the aspiration of the people basically is that the administration is carried out by people with responsibility with service orientation.

Constitutional trust

83. *Having stated about good governance, we shall proceed to deal with the doctrine of “constitutional trust”. The issue of constitutional trust arises in the context of the debate in the Constituent Assembly that had taken place pertaining to the recommendation for appointment of a Minister to the Council of Ministers. Responding to the proposal for the amendment suggested by Prof. K.T. Shah with regard to the introduction of a disqualification of a convicted person becoming a Minister, Dr B.R. Ambedkar had replied: (CAD Vol. VII, p. 1160)*

“His last proposition is that no person who is convicted may be appointed a Minister of the State. Well, so far as his intention is concerned, it is no doubt very laudable and I do not think any Member of this House would like to differ from him on that proposition. But the whole question is this: whether we should introduce all

these qualifications and disqualifications in the Constitution itself. Is it not desirable, is it not sufficient that we should trust the Prime Minister, the legislature and the public at large watching the actions of the Ministers and the actions of the legislature to see that no such infamous thing is done by either of them? I think this is a case which may eminently be left to the good sense of the Prime Minister and to the good sense of the legislature with the general public holding a watching brief upon them. I therefore say that these amendments are unnecessary.” (emphasis supplied)

84. *The trust reposed in the Prime Minister is based on his constitutional status. In Ram Jawaya Kapur v. State of Punjab [AIR 1955 SC 549], B.K. Mukherjea, C.J., while referring to the scope of Article 74, observed that under Article 53(1) of the Constitution, the executive power of the Union is vested in President but under Article 74, there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has, thus been, made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet.*

85. *In Samsher Singh [Samsher Singh v. State of Punjab, (1974) 2 SCC 831 : 1974 SCC (L&S) 550] , Ray, C.J., speaking for the majority, opined that the President as well as the Governor are the constitutional or the formal head and exercise the power and functions conferred on them by or under the Constitution on the aid and advice of the Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. The learned Chief Justice further observed that the satisfaction of the President or the Governor in the constitutional sense in the Cabinet system of government is really the satisfaction of the Council of Ministers on whose aid and advice the President or the Governor generally exercises his powers and functions and, thereafter, it has been held that they are required to act with the aid and advice of the Council of Ministers and are not required by the Constitution to act personally without the aid and advice. Krishna Iyer, J., speaking for himself and Bhagwati, J., opined that under the Constitution, the President and Governor, custodian of all executive and other powers under various articles, are to exercise their formal constitutional powers only upon and in accordance with the due advice of their Ministers,*

save in few well-known exceptional situations. The learned Judge has carved out certain exceptions with which we are really presently not concerned with.

86. In Supreme Court Advocates-on-Record Assn. v. Union of India [(1993) 4 SCC 441 : AIR 1994 SC 268], while discussing about constitutional functions, the Court observed that it is a constitutional requirement that the person who is appointed as Prime Minister by the President is the effective head of the Government and the other Ministers are appointed by the President on the advice of the Prime Minister and both the Prime Minister and the Ministers must continuously have the confidence of the House of the People, individually and collectively. The Court further observed that: (SCC p. 650, para 336)

“336. ... The powers of the President are exercised by him on the advice of the Prime Minister and the Council of Ministers which means that the said powers are effectively exercised by the Council of Ministers headed by the Prime Minister.”

87. *We have referred to these authorities singularly for the purpose that the Prime Minister has been conferred an extremely special status under the Constitution.*

88. *As the Prime Minister is the effective head of the Government, indubitably, he has enormous constitutional responsibility. The decisions are taken by the Council of Ministers headed by the Prime Minister and that is the Cabinet form of government and our Constitution has adopted it. While discussing about the successful working of the Cabinet form of government, H.M. Seervai, the eminent author of Constitutional Law [H.M. Seervai, Constitutional Law of India, Vol. 2, 4th Edn., 2060], observed:*

“18.57. The Constitution does not guarantee that power would be wisely exercised by the executive. — ... But as long as the political atmosphere remains what it is, the Constitution cannot be worked as it was intended to be worked. It has been said that the Constitution confers power, but it does not guarantee that the power would be wisely exercised. It can be said equally that the Constitution confers power but it gives no guarantee that it will be worked by men of high character, capacity and integrity. If the Constitution is

to be successfully worked, an attempt must be made to improve the political atmosphere and to laydown and enforce standards of conduct required for a successful working of our Constitution.” (emphasis added)

89. *In Constitutional and Administrative Law [2nd Edn., 368-370, David Polland, Neil Parpworth David Hughs] , the learned authors while dealing with individual responsibility of Ministers, have said:*

“3. *The individual responsibility of Ministers*

The individual responsibility of ministers illustrates further Prof. Munro's continuum theory. Ministers are individually accountable for their own private conduct, the general running of their departments and acts done, or omitted to be done, by their civil servants; responsibility in the first two cases is clearer than in others. A minister involved in sexual or financial scandals particularly those having implications for national security, is likely to have to resign because his activities will so attract the attention of the press that he will be no longer able to carry out departmental duties.”

90. *In Constitutional & Administrative Law [5th Edn., 297-305], Hilaire Barnett, while dealing with the conduct of Ministers, referred to the Nolan Committee [Nolan Report,*

“Standards in Public Life”, Cm 2850-I, 1995, London HMSO, Chapter 3, Para 4.] which had endorsed the view that:

“public is entitled to expect very high standards of behaviour from ministers, as they have profound influence over the daily lives of us all”.

91. *In Constitutional Practice [Second Edn., 146-148] , Rodney Brazier has opined:*

“... a higher standard of private conduct is required of Ministers than of others in public life, a major reason for this today being that the popular press and the investigative journalism of its more serious rivals will make a wayward Minister's continuance in office impossible.”

92. *Centuries back what Edmund Burke had said needs to be recapitulated:*

“All persons possessing a position of power ought to be strongly and awfully impressed with an idea that they act in trust and are to account for their conduct in that trust to the one great Master, Author and Founder of Society.”

93. *This Court, in Delhi Laws Act, 1912, In re [AIR 1951 SC 332] , opined that the doctrine of constitutional trust is*

applicable to our Constitution since it lays the foundation of representative democracy. The Court further ruled that accordingly, the Legislature cannot be permitted to abdicate its primary duty viz. to determine what the law shall be. Though it was stated in the context of exercise of legislative power, yet the same has signification in the present context, for in a representative democracy, the doctrine of constitutional trust has to be envisaged in every high constitutional functionary.

96. The repose of faith in the Prime Minister by the entire nation under the Constitution has expectations of good governance which is carried on by the Ministers of his choice. It is also expected that the persons who are chosen as Ministers do not have criminal antecedents, especially facing trial in respect of serious or heinous criminal offences or offences pertaining to corruption. There can be no dispute over the proposition that unless a person is convicted, he is presumed to be innocent but the presumption of innocence in criminal jurisprudence is something altogether different, and not to be considered for being chosen as a Minister to the Council of Ministers because framing of charge in a criminal case is totally another thing. Framing of

charge in a trial has its own significance and consequence. Setting the criminal law into motion by lodging of an FIR or charge-sheet being filed by the investigating agency is in the sphere of investigation. Framing of charge is a judicial act by an experienced judicial mind. As the debates in the Constituent Assembly would show, after due deliberation, they thought it appropriate to leave it to the wisdom of the Prime Minister because of the intrinsic faith in the Prime Minister. At the time of framing of the Constitution, the debate pertained to conviction. With the change of time, the entire complexion in the political arena as well as in other areas has changed. This Court, on number of occasions, as pointed out hereinbefore, has taken note of the prevalence and continuous growth of criminalisation in politics and the entrenchment of corruption at many a level. In a democracy, the people never intend to be governed by persons who have criminal antecedents. This is not merely a hope and aspiration of citizenry but the idea is also engrained in apposite executive governance.

97. It would be apt to say that when a country is governed by a Constitution, apart from constitutional provisions, and

principles constitutional morality and trust, certain conventions are adopted and grown. In Supreme Court Advocates-on-Record Assn. [(1993) 4 SCC 441 : AIR 1994 SC 268] , the Court reproduced a passage from K.C. Wheare's book The Statute of Westminster and Dominion Status (4th Edn.) and we quote: (SCC p. 650, para 337)

“337. ... ‘The definition of “conventions” may thus be amplified by saying that their purpose is to define the use of constitutional discretion. To put this in slightly different words, it may be said that conventions are non-legal rules regulating the way in which legal rules shall be applied.’”

I. Jennings, in The Law and the Constitution [5th Edn., ELBS: London, 1976), in his Chapter “Conventions” 247.] , stated that a convention exists not only due to its non-enforceability but also because there is a reason for the rule. I. Lovehead, in Constitutional Law — A Critical Introduction [2nd Edn., Butterworths: London, 2000), 247] , has said that the conventions provide a moral framework within which the government ministers or the monarch should exercise non-justiciable legal powers and regulate relations between the

Government and other constitutional authorities. In the Constituent Assembly Debates, Dr Rajendra Prasad, in his speech as President of the Constituent Assembly, while moving for the adoption of the Constitution of India, had observed: (CAD p. 993)

“... Many things which cannot be written in a Constitution are done by conventions. Let me hope that we shall show those capacities and develop those conventions.”

Conclusion

98. From the aforesaid, it becomes graphically vivid that the Prime Minister has been regarded as the repository of constitutional trust. The use of the words “on the advice of the Prime Minister” cannot be allowed to operate in a vacuum to lose their significance. There can be no scintilla of doubt that the Prime Minister's advice is binding on the President for the appointment of a person as a Minister to the Council of Ministers unless the said person is disqualified under the Constitution to contest the election or under the 1951 Act, as has been held in B.R. Kapur case [B.R. Kapur v. State of T.N.,

(2001) 7 SCC 231] . That is in the realm of disqualification. But, a pregnant one, the trust reposed in a high constitutional functionary like the Prime Minister under the Constitution does not end there. That the Prime Minister would be giving apposite advice to the President is a legitimate constitutional expectation, for it is a paramount constitutional concern. In a controlled Constitution like ours, the Prime Minister is expected to act with constitutional responsibility as a consequence of which the cherished values of democracy and established norms of good governance get condignly fructified. The Framers of the Constitution left many a thing unwritten by reposing immense trust in the Prime Minister. The scheme of the Constitution suggests that there has to be an emergence of constitutional governance which would gradually grow to give rise to constitutional renaissance.

99. It is worthy to note that the Council of Ministers has the collective responsibility to sustain the integrity and purity of the constitutional structure. That is why the prime Minister enjoys a great magnitude of constitutional power. Therefore, the responsibility is more, regard being had to the instillation of

trust, a constitutional one. It is also expected that the Prime Minister should act in the interest of the national polity of the nation-State. He has to bear in mind that unwarranted elements or persons who are facing charge in certain category of offences may thwart or hinder the canons of constitutional morality or principles of good governance and eventually diminish the constitutional trust. We have already held that prohibition cannot be brought in within the province of “advice” but indubitably, the concepts, especially the constitutional trust, can be allowed to be perceived in the act of such advice.

100. Thus, while interpreting Article 75(1), definitely a disqualification cannot be added. However, it can always be legitimately expected, regard being had to the role of a Minister in the Council of Ministers and keeping in view the sanctity of oath he takes, the Prime Minister, while living up to the trust reposed in him, would consider not choosing a person with criminal antecedents against whom charges have been framed for heinous or serious criminal offences or charges of corruption to become a Minister of the Council of Ministers. This is what the Constitution suggests and that is the constitutional

expectation from the Prime Minister. Rest has to be left to the wisdom of the Prime Minister. We say nothing more, nothing less.

101. At this stage, we must hasten to add what we have said for the Prime Minister is wholly applicable to the Chief Minister, regard being had to the language employed in Article 164(1) of the Constitution of India.

114. In S.R. Chaudhuri [S.R. Chaudhuri v. State of Punjab, (2001) 7 SCC 126] the following question arose for consideration: (SCC p. 138, para 20)

“20. ... can a non-member, who fails to get elected during the period of six consecutive months, after he is appointed as a Minister or while a Minister has ceased to be a legislator, be reappointed as a Minister, without being elected to the legislature after the expiry of the period of six consecutive months?”

(emphasis in original)

This question arose in the context of Article 164 of the Constitution [“164. Other provisions as to Ministers.—(1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the

Ministers shall hold office during the pleasure of the Governor: Provided that in the States of Chhattisgarh, Jharkhand, Madhya Pradesh and Odisha, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.

(1-A) The total number of Ministers, including the Chief Minister, in the Council of Ministers in a State shall not exceed fifteen per cent of the total number of members of the Legislative Assembly of that State: Provided that the number of Ministers, including the Chief Minister, in a State shall not be less than twelve: Provided further that where the total number of Ministers, including the Chief Minister, in the Council of Ministers in any State at the commencement of the Constitution (Ninety-first Amendment) Act, 2003 exceeds the said fifteen per cent or the number specified in the first proviso, as the case may be, then, the total number of Ministers in that State shall be brought in conformity with the provisions of this clause within six months from such date as the President may by public notification appoint.

(1-B) 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 Para 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.

(2) The Council of Ministers shall be collectively responsible to the

Legislative Assembly of the State.(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.(4) A Minister who for any period of six consecutive months is not a member of the legislature of the State shall at the expiration of that period cease to be a Minister.(5) The salaries and allowances of Ministers shall be such as the legislature of the State may from time to time by law determine and, until the legislature of the State so determines, shall be as specified in the Second Schedule.” Note:—The Article is reproduced as it is today.] and is mentioned here since one of the issues raised during submissions related to the permissibility of reading implied limitations in the Constitution. It was submitted that implied limitations can be read into the Constitution and this is an appropriate case in which this Court should read an implied limitation in the appointment of a Minister in the Government of India, the implied limitation being that a person with criminal antecedents or a criminal background should not be appointed a Minister.

115. *In S.R. Chaudhuri [S.R. Chaudhuri v. State of Punjab, (2001) 7 SCC 126] this Court examined the law in England, Canada and Australia and by reading an implied limitation, answered the question in the negative. It was held that a non-elected person may be appointed as a Minister, but only for a*

period of six months. During that period the Minister would either have to get elected to the Legislature or quit his or her position. That person cannot again be appointed as a Minister unless elected. It was said: (SCC p. 142, paras 32-33)

“32. Thus, we find from the positions prevailing in England, Australia and Canada that the essentials of a system of representative government, like the one we have in our country, are that invariably all Ministers are chosen out of the members of the Legislature and only in rare cases, a non-member is appointed as a Minister, who must get himself returned to the legislature by direct or indirect election within a short period. He cannot be permitted to continue in office indefinitely unless he gets elected in the meanwhile. The scheme of Article 164 of the Constitution is no different, except that the period of grace during which the non-member may get elected has been fixed as ‘six consecutive months’, from the date of his appointment. (In Canada he must get elected quickly and in Australia, within three months.) The Framers of the Constitution did not visualise that a non-legislator can be repeatedly appointed as a Minister for a term of six months each time, without getting elected because such a course strikes at the very root of parliamentary democracy. According to learned counsel for the respondent, there is no bar to

this course being adopted on the 'plain language of the article', which does not 'expressly' prohibit reappointment of the Minister, without being elected, even repeatedly, during the term of the same Legislative Assembly. We cannot persuade ourselves to agree.

33. Constitutional provisions are required to be understood and interpreted with an object-oriented approach. A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve. Debates in the Constituent Assembly referred to in an earlier part of this judgment clearly indicate that a non-member's inclusion in the Cabinet was considered to be a 'privilege' that extends only for six months, during which period the member must get elected, otherwise he would cease to be a Minister. It is a settled position that debates in the Constituent Assembly may be relied upon as an aid to interpret a constitutional provision because it is the function of the court to find out the intention of the Framers of the Constitution. We must remember that a Constitution is not just a document in solemn form, but a living framework for the Government of the people exhibiting a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying it being respected in letter

and in spirit. The debates clearly indicate the 'privilege' to extend 'only' for six months.

116. An implied limitation in the Constitution was also read in B.R. Kapur [B.R. Kapur v. State of T.N., (2001) 7 SCC 231]. In that case, the second respondent was not even eligible to become a legislator (having earned a disqualification under Section 8 of the Representation of the People Act, 1951) and therefore the question of getting elected to the State Legislature did not arise. Nevertheless, having been projected as the Chief Ministerial nominee of the political party that obtained a majority in the elections, she was elected as its leader and appointed as the Chief Minister of the State. The question before this Court was whether a person who has been convicted of a criminal offence and whose conviction has not been suspended pending appeal can be sworn in and can continue to function as the Chief Minister of a State? Reliance was placed on the plain language of Article 164 of the Constitution. Answering the question in the negative, this Court held in para 30 of the Report: (B.R. Kapur case [B.R. Kapur v. State of T.N., (2001) 7 SCC 231], SCC p. 293, para 30)

“30. We hold, therefore, that a non-legislator can be made a Chief Minister or Minister under Article 164 only if he has the qualifications for membership of the legislature prescribed by Article 173 and is not disqualified from the membership thereof by reason of the disqualifications set out in Article 191.”

This was reiterated by this Court in para 45 of the Report in the following words” (B.R. Kapur v State of T.N., (2001) 7 SCC 231, SCC p.298)

“45. Our conclusion, therefore, is that on the date on which the second respondent was sworn in as Chief Minister she was disqualified, by reason of her convictions under the Prevention of Corruption Act and the sentences of imprisonment of not less than two years, for becoming a Member of the Legislature under Section 8(3) of the Representation of the People Act.”

117. Finally, in paras 50 and 51 of the Report, this Court held: (B.R. Kapur case [B.R. Kapur v. State of T.N., (2001) 7 SCC 231], SCC p. 301)

“50. We are in no doubt at all that if the Governor is asked by the majority party in the legislature to appoint as the Chief Minister a person who is not qualified to be a member of the Legislature or who

is disqualified to be such, the Governor must, having due regard to the Constitution and the laws, to which he is subject, decline, and the exercise of discretion by him in this regard cannot be called in question.

51. *If perchance, for whatever reason, the Governor does appoint as Chief Minister a person who is not qualified to be a Member of the Legislature or who is disqualified to be such, the appointment is contrary to the provisions of Article 164 of the Constitution, as we have interpreted it, and the authority of the appointee to hold the appointment can be challenged in quo warranto proceedings. That the Governor has made the appointment does not give the appointee any higher right to hold the appointment. If the appointment is contrary to constitutional provisions it will be struck down. The submission to the contrary—unsupported by any authority—must be rejected.”*

Therefore, two implied limitations were read into the Constitution with regard to the appointment of an unelected person as a Minister. Firstly, the Minister cannot continue as a Minister beyond a period of six months without getting elected, nor can such a person be repeatedly appointed as a Minister. Secondly, the person should not be under any disqualification for being appointed as a legislator. If a person is disqualified

from being a legislator, he or she cannot be appointed as a Minister.

118. Implied limitations to the Constitution were also read in B.P. Singhal [B.P. Singhal v. Union of India, (2010) 6 SCC 331] . In that case, an implied limitation was read into the pleasure doctrine concerning the removal of the Governor of a State by the President in terms of Article 156 of the Constitution. It was held that the pleasure doctrine as originally envisaged in England gave unfettered power to the authority at whose pleasure a person held an office. However, where the rule of law prevails, the “fundamentals of constitutionalism” cannot be ignored, meaning thereby that the pleasure doctrine does not enable an unfettered discretion to act arbitrarily, whimsically, or capriciously. It does not dispense with the need for a cause for withdrawal of the pleasure, which can only be for valid reasons.

119. Similarly, in Salil Sabhlok [(2013) 5 SCC 1 : (2013) 2 SCC (L&S) 1] integrity and competence were read as implied in the appointment of the Chairperson of the State Public Service Commission. It was held in para 45 of the Report as follows: (SCC pp. 35-36)

“45. I have already held that it is for the Governor who is the appointing authority under Article 316 of the Constitution to lay down the procedure for appointment of the Chairman and Members of the Public Service Commission, but this is not to say that in the absence of any procedure laid down by the Governor for appointment of Chairman and Members of the Public Service Commission under Article 316 of the Constitution, the State Government would have absolute discretion in selecting and appointing any person as the Chairman of the State Public Service Commission. Even where a procedure has not been laid down by the Governor for appointment of Chairman and Members of the Public Service Commission, the State Government has to select only persons with integrity and competence for appointment as Chairman of the Public Service Commission, because the discretion vested in the State Government under Article 316 of the Constitution is impliedly limited by the purposes for which the discretion is vested and the purposes are discernible from the functions of the Public Service Commissions enumerated in Article 320 of the Constitution. Under clause (1) of Article 320 of the Constitution, the State Public Service Commission has the duty to conduct examinations for appointments to the services of the State. Under clause (3) of Article 320, the State Public Service Commission has to be consulted by

the State Government on matters relating to recruitment and appointment to the civil services and civil posts in the State; on disciplinary matters affecting a person serving under the Government of a State in a civil capacity; on claims by and in respect of a person who is serving under the State Government towards costs of defending a legal proceeding; on claims for award of pension in respect of injuries sustained by a person while serving under the State Government and other matters. In such matters, the State Public Service Commission is expected to act with independence from the State Government and with fairness, besides competence and maturity acquired through knowledge and experience of public administration.”

Thereafter in para 99 of the Report, it was said: (Salil Sabhlok case [(2013) 5 SCC 1 : (2013) 2 SCC (L&S) 1], SCC p. 52)

“99. While it is difficult to summarise the indicators laid down by this Court, it is possible to say that the two most important requirements are that personally the Chairperson of the Public Service Commission should be beyond reproach and his or her appointment should inspire confidence among the people in the institution. The first ‘quality’ can be ascertained through a meaningful deliberative process, while the second ‘quality’ can be determined by taking into

account the constitutional, functional and institutional requirements necessary for the appointment.”

Conclusions on the first relief

120. Therefore, the position as it stands today is this:

120.1. To become a Member of Parliament, a person should possess the qualifications mentioned in Article 84 of the Constitution;

120.2. To become a Member of Parliament, a person should not suffer any of the disqualifications mentioned in Article 102 of the Constitution;

120.3. The Constitution does not provide for any limitation on a Member of Parliament becoming a Minister, but certain implied limitations have been read into the Constitution by the decisions rendered by this Court regarding an unelected person becoming a Minister;

120.4. One implied limitation read into the Constitution is that a person not elected to Parliament can nevertheless be appointed as a Minister for a period of six months;

120.5. Another implied limitation read into the Constitution is that though a person can be appointed as a Minister for a period of six months, he or she cannot repeatedly be so appointed;

120.6. Yet another implied limitation read into the Constitution is that a person otherwise not qualified to be elected as a Member of Parliament or disqualified from being so elected cannot be appointed as a Minister;

120.7. In other words, any person, not subject to any disqualification, can be appointed a Minister in the Central Government.

120.8. Given this position in law, is it necessary to read any other implied limitation in the Constitution concerning the appointment of a person as a Minister in the Government of India, particularly any implied limitation on the appointment of a person with a criminal background or having criminal antecedents?

Conclusions on the second relief

133. The discussion leads to the following conclusions:

133.1. To become a legislator and to continue as a legislator, a person should not suffer any of the disqualifications mentioned in Section 8 of the Representation of the People Act, 1951;

133.2. There does seem to be a gap in Section 8 of the Representation of the People Act, 1951 inasmuch as a person convicted of a heinous or a serious offence but awarded a sentence of less than two years' imprisonment may still be eligible for being elected as a Member of Parliament;

133.3. While a debate is necessary for bringing about a suitable legislation disqualifying a person from becoming a legislator, there are various factors that need to be taken into consideration;

133.4. That there is some degree of criminalisation of politics is quite evident;

133.5. It is not for this Court to lay down any guidelines relating to who should or should not be entitled to become a legislator or who should or should not be appointed a Minister in the Central Government.

134. The range of persons who may be elected to a legislature is very wide and amongst those, who may be appointed a Minister in the Central Government is also very wide, as mentioned above. Any legislator or non-legislator can be appointed as a Minister but must quit as soon as he or she earns a disqualification either under the Constitution or under Section 8 of the Representation of the People Act, 1951. [Lily Thomas v. Union of India, (2013) 7 SCC 653 : (2013) 3 SCC (Civ) 678 : (2013) 3 SCC (Cri) 641 : (2013) 2 SCC (L&S) 811] In B.P. Singhal [B.P. Singhal v. Union of India, (2010) 6 SCC 331] this Court observed that “a Minister is hand-picked member of the Prime Minister's team. The relationship between the Prime Minister and a Minister is purely political”.

135. In addition to the above, how long a Minister should continue in office is best answered by the response to a question put to the British Prime Minister John Major who was asked to “list the circumstances which render Ministers unsuitable to retain office”. His written reply given to the House of Commons on 25-1-1994 was:

“There can be a variety of circumstances but the main criterion should be whether the Minister can continue to perform the duties of office effectively.”
<http://hansard.millbanksystems.com/written_answers/1994/jan/25/ministers-unsuitability-foroffice#S6-CV0236-P0_19940125_CWA_172>

136. This being the position, the burden of appointing a suitable person as a Minister in the Central Government lies entirely on the shoulders of the Prime Minister and may eminently be left to his or her good sense. This is what our Constitution-makers intended, notwithstanding the view expressed by Shri H.V. Kamath in the debate on 30-12-1948. He said: (CAD p. 1149)

“My Friend, Prof. Shah, has just moved Amendment No. 1300 comprising five sub-clauses. I dare say neither Dr Ambedkar nor any of my other honourable friends in this House will question the principle which is sought to be embodied in Clause (2-E) of Amendment No. 1300 moved by Prof. Shah. I have suggested my Amendment No. 46 seeking to delete all the words occurring after the words ‘moral turpitude’ because I think that bribery and corruption are offences which involve moral turpitude. I think that moral turpitude covers bribery, corruption and many other cognate offences as well. Sir, my friends here will, I am

sure, agree with me that it will hardly redound to the credit of any Government if that Government includes in its fold any Minister who has had a shady past or about whose character or integrity there is any widespread suspicion. I hope that no such event or occurrence will take place in our country, but some of the recent events have created a little doubt in my mind. I refer, Sir, to a little comment, a little article, which appeared in the Free Press Journal of Bombay dated 8-9-1948 relating to the ... Ministry. The relevant portion of the article runs thus:

‘The Cabinet (the ... Cabinet) includes one person who is a convicted blackmarketeer, and although it is said that his disabilities, resulting from his conviction in a court of law, which constituted a formidable hurdle in the way of his inclusion in the interim Government, were graciously removed by the Maharaja.’”
[Constituent Assembly Debates, Vol. 7]

137. In this respect, the Prime Minister is, of course, answerable to Parliament and is under the gaze of the watchful eye of the people of the country. Despite the fact that certain limitations can be read into the Constitution and have been read in the past, the issue of the appointment of a suitable person as a

Minister is not one which enables this Court to read implied limitations in the Constitution.

Epilogue

138. It is wise to remember the words of Dr Ambedkar in the Constituent Assembly on 25-11-1949. He had this to say about the working of our Constitution: (CAD p. 975)

“As much defence as could be offered to the Constitution has been offered by my friends Sir Alladi Krishnaswami Ayyar and Mr T.T. Krishnamachari. I shall not therefore enter into the merits of the Constitution. Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their parties will behave? Will they uphold constitutional

methods of achieving their purposes or will they prefer revolutionary methods of achieving them? If they adopt the revolutionary methods, however good the Constitution may be, it requires no prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to play.”
[<<http://parliamentofindia.nic.in/ls/debates/vol11p11.htm>>]

143. *Court is the conscience of the Constitution of India. Conscience is the moral sense of right and wrong of a person. (Ref.: Oxford English Dictionary.) Right or wrong, for court, not in the ethical sense of morality but in the constitutional sense. Conscience does not speak to endorse one's good conduct; but when things go wrong, it always speaks; whether you listen or not. It is a gentle and sweet reminder for rectitude. That is the function of conscience. When things go wrong constitutionally, unless the conscience speaks, it is not good conscience; it will be accused of as numb conscience.*

144. *One cannot think of the Constitution of India without the Preambular principle of democracy and good governance. Governance is mainly in the hands of the Executive. The executive power of the Union under Article 53 and that of the*

States under Article 154 vests in the President of India and the Governor of the State, respectively. Article 74 for the Union of India and Article 163 for the State have provided for the Council of Ministers to aid and advise the President or the Governor, as the case may be. The executive power extends to the respective legislative competence.

145. *Before entering office, a Minister has to take oath of office (Articles 75/164). In form, except for the change in the words “Union” or particular “State”, there is no difference in the form of oath. Ministers take oath to ... “faithfully and conscientiously discharge ...” their duties and “... do right to all manner of people in accordance with Constitution and the law, without fear or favour, affection or ill will”.*

146. *Allegiance to the Constitution of India, faithful and conscientious discharge of the duties, doing right to people and all these without fear or favour, affection or ill will, carry heavy weight. “Conscientious” means “wishing to do what is right, relating to a person's conscience”. (Ref.: Concise Oxford English Dictionary.) The simple question is, whether a person who has come in conflict with law and, in particular, in conflict with law*

on offences involving moral turpitude and laws specified by Parliament under Chapter III of the Representation of the People Act, 1951, would be in a position to conscientiously and faithfully discharge his duties as Minister and that too, without any fear or favour?

149. Good governance is only in the hands of good men. No doubt, what is good or bad is not for the court to decide: but the court can always indicate the constitutional ethos on goodness, good governance and purity in administration and remind the constitutional functionaries to preserve, protect and promote the same. Those ethos are the unwritten words in our Constitution. However, as the Constitution-makers stated, there is a presumption that the Prime Minister/Chief Minister would be well advised and guided by such unwritten yet constitutional principles as well. According to Dr B.R. Ambedkar, as specifically referred to by my learned Brother at para 83 of the leading judgment, such things were only to be left to the good sense of the Prime Minister, and for that matter, the Chief Minister of the State, since it was expected that the two great constitutional functionaries would not dare to do any infamous

thing by inducting an otherwise unfit person to the Council of Ministers. It appears, over a period of time, at least in some cases, it was only a story of great expectations. Some of the instances pointed out in the writ petition indicate that Dr Ambedkar and other great visionaries in the Constituent Assembly have been bailed out. Qualification has been wrongly understood as the mere absence of prescribed disqualification. Hence, it has become the bounden duty of the Court to remind the Prime Minister and the Chief Minister of the State of their duty to act in accordance with the constitutional aspirations.

150. Fortunately for us, our Constitution has stood the test of time and is acclaimed to be one of the best in the world. Problem has been with the other part, though sporadically. Kautilya, one of the great Indian exponents of art of government, has dealt with qualification of king and his councillors at Chapter IX in Arthasastra, said to be compiled between BC 321-296. To quote relevant portion:

“Chapter IX

THE CREATION OF COUNCILLORS AND PRIESTS

NATIVE, born of high family, influential, well trained in arts, possessed of foresight, wise, of strong memory, bold, eloquent, skilful, intelligent, possessed of enthusiasm, dignity and endurance, pure in character, affable, firm in loyal devotion, endowed with excellent conduct, strength, health and bravery, free from procrastination and fickle mindedness, affectionate, and free from such qualities as excite hatred and enmity— these are the qualifications of a ministerial officer.”

151. The attempt made by this Court in the above background history of our country and the Constitution is only to plug some of the bleeding points in the working of our Constitution so that the high constitutional functionaries may work it well and not wreck it. Beauty of democracy depends on the proper exercise of duty by those who work it.

152. No doubt, it is not for the Court to issue any direction to the Prime Minister or the Chief Minister, as the case may be, as to the manner in which they should exercise their power while selecting the colleagues in the Council of Ministers. That is the constitutional prerogative of those functionaries who are called upon to preserve, protect and defend the Constitution. But it is the prophetic duty of this Court to remind the key duty holders

about their role in working the Constitution. Hence, I am of the firm view, that the Prime Minister and the Chief Minister of the State, who themselves have taken oath to bear true faith and allegiance to the Constitution of India and to discharge their duties faithfully and conscientiously, will be well advised to consider avoiding any person in the Council of Ministers, against whom charges have been framed by a criminal court in respect of offences involving moral turpitude and also offences specifically referred to in Chapter III of the Representation of the People Act, 1951.”

64. That there is this trust underlying reposed by the Constitution makers and framers is therefore evident and we must never lose sight of the same. We will not betray the constitutional and public trust deface and defile the Constitution itself is therefore the ordinary and normal expectation. The recent trend in the State is to the contrary is what is complained before us. We cannot ignore or brush it aside. We are not in agreement with the extreme proposition that in no case of this nature will the Courts intervene; a court may, where the facts so warrant and where the law permits

such an intervention. But even this must remain within the confines of the sage caution administered by the Hon'ble Supreme Court. Judicial discipline requires us not to attempt to travel beyond the limits of what the Supreme Court has held to be permissible in Constitutional interpretation. Judicial activism is one thing, and judicial adventurism quite another. We regret that while canvassing the former, Mr Talekar is actually inviting us to engage in the latter.

65. In taking this approach, we do not for a moment suggest that we construe the Constitution as promoting and encouraging defections. We find Mr. Talekar's submission in this regard to be unfortunate, viz., that should we not accept his construct and interpretation, it would tantamount to our holding that the Constitution promotes and encourages defections. We are not saying anything of this kind. What we are questioning is the fundamental premise underlying Mr. Talekar's case and, particularly, his understanding of the word 'defections'. When we say 'defections', we are careful not to express any opinion on the facts and circumstances of the present case. However, it is

understood by the common man as a switching of loyalties and shifting of one's position frequently and for political gains. The Webster's Dictionary defines the term as under:

*“Defection: 1. FAILING, FAILURE, LOSS
{fell into a ~spirit} 2. obs: IMPERFECTION,
DEFECT 3: the act of abandoning a person, cause, or
doctrine to whom or to which one is bound by some tie (as
of allegiance or duty)”*

66. It is abandoning a cause and embracing some other. That we are noticing such a trend in Maharashtra on the eve of the elections may be unfortunate. But that will not allow us to read into an Article something that is not there, and is wholly left out. Where political leaders and parties betray the constitutional trust, then such matters are best left to the judgment of the people. It is eventually the voters who have to take responsibility. The Constitution reposes equal trust in civil society. After all, it is a Constitution given by the people to themselves. It is their bounden duty to uphold the cherished values of democracy. The world over, democracy comes

at a price; and achieving it as a form of governance has required a monumental sacrifice. When we take pride in Indian democracy, we should note that we as Indians are equally observed world over for our responses and reactions to acts subversive of democracy. When we call ourselves a “civil society” it is our duty to ensure that there is probity in public life and the purity of the electoral process is maintained at all costs. Our votes are not on sale. The right to vote must be exercised in a manner befitting the trust and faith reposed in us. That has to be preserved at all costs. When the Hon’ble Supreme Court in the case of *Manoj Narula* says that we must not tinker with the Constitution, it also means that we should not allow its goals to be frustrated and defeated. There is a Constitutional morality and that is recognized principle recognized as well in this decision.

67. Merely because our courts, including the highest Court in the country, have not allowed the Constitution to be interpreted in a manner suggested by parties like the Petitioners before us to take care of every evil does not mean that the Constitution promotes,

allows or permits, much less approves, such evil. If it is an evil, it must be looked at as such. If for pure political gains people are crossing over, then it is the bounden duty of the voters to take care of such a situation and teach these leaders or defectors a lesson. Ultimately, in every democracy real power rests with the people. Merely because one is in majority does not mean there is a license to strangle the minority. In democracy there is an equal place, respect and regard for an opposition. It guides the majority in carrying out the administrative and governmental affairs properly and smoothly. It is that aspect of the matter inbuilt in the observations, findings and conclusions of the Hon'ble Supreme Court in *Manoj Narula's* case which we have reproduced above.

68. We do not think that anything more has to be said for our judgment and order expresses our disinclination to read into the Constitution what is absent therein but which the Petitioners would have us read into it. Our order is, therefore, an attempt at striking a balance and must be seen as such. A balance has to be struck and everything cannot be taken over by Courts. The Courts can bring to

the notice of the public at large the above facts and to subserve its interest to the maximum, but in our role as essentially of an adjudicator of disputes, we cannot take over every function including the responsibilities of a voter. It is for a voter to respond and we are sure that in a State like Maharashtra we are aware and enlightened enough to take note of the recent happenings and events. That it is not enhancing the image, prestige and reputation of our State but bringing disrepute to it is therefore a matter which should be noted by the voters and we leave it to the wisdom and knowledge of the voters and residents of the State.

69. We do not think that in the Constitutional scheme noted above, we must read into clause (4) of Article 164 what is expressly not there. We are not introducing a disqualification therein nor are we re-writing that provision. It has a certain intent and purpose and why it is not worded as desired by the petitioners in this petition is therefore clear from the principles to which we have made a detailed reference. That on the eve of elections none except, qualified, eligible, experienced and experts in specified fields would be

inducted into ministries so as to smoothen the affairs or to assist the government in power particularly the Chief Minister to tide over certain emergent crisis, particularly a financial and economic one, is therefore the expectation of the framers of the Constitution. In the last six months preceding the expiry of the term of the house the leader, namely, the Chief Minister, would not induct anybody for pure political gains or for political convenience is thus the underlying hope. In situations where the country is facing an economic and financial crisis, or a vital issue of its defence, these would then enable the Prime Minister to induct into the Cabinet experts in such fields and obtain their advice, guidance and assistance. It is that advice and assistance which would guide the affairs of the Government and the Prime Minister would ordinarily want such a person in the cabinet and not necessarily a politician. He may be a politician but not a member of the House. Nonetheless he/she could be an expert in economics, finance, law and justice, corporate affairs or a defence tactician. Merely because he is not a member of the ruling combine or any political party should not therefore be a impediment in his or her induction. That is how the

Constitution must be read and interpreted. None expects this provision to be used to achieve an ouster or a complete take over of the opposition in the Legislative Assembly or the Parliament. None would expect this as a trade or a bargain for retaining power or obtaining political gains. None would ever expect this to be resorted to for political convenience or to make inroads into or split opposition parties as well. In such circumstances, we are not endorsing what has been done in the State but we are expressing our concern and anxiety in the words and expressions of the Supreme Court itself.

70. We find that the Petitioners are placing their case only on the disqualification of respondents Nos. 5 and 6. That they and the other respondent who is not a member of the either House and can never be elected because the six months period is not available for holding a election is the other complaint. We find that these respondents may have been inducted in the ministry on the eve of the elections or on the eve of the expiry of the term of the House purely because of political reasons or to enable them to cross over at

an opportune time but that by itself and without anything more would not enable us to hold that these persons were ‘disqualified’. We cannot term them as ‘defectors’ in terms of the Tenth Schedule of the Constitution of India. That contains elaborate and exhaustive provisions to deal with defections. Whether the act of respondents Nos. 5 and 6 amounts to defection is not our concern presently. There are distinct proceedings pending in that regard. Those proceedings would be taken up and decided on their own merits and in accordance with law. However, we cannot presume that the acts of the respondents Nos. 5 and 6 amount to defection and therefore they could not have been inducted in the ministry. That they resigned from the House as also a political party on whose ticket they have been elected may invite other consequences, including a declaration in terms of the Tenth Schedule of the Constitution and its paragraphs, but because the Petitioners have sought their disqualification, we cannot assume that their induction in the ministry was impermissible. That is now not how we have or rather we can read the Constitution and clause (4) of Article 164. We

refuse to read it in that manner for the reasons enumerated hereinabove.

71. As a result of the above discussion we do not think that there is any merit in the submissions of Mr Talekar. The reliance by Mr Talekar is essentially on the judgment of the Hon'ble Supreme Court in a case arising from the State of Punjab (*S.R. Chaudhuri v State of Punjab & Ors.*¹¹) which would now be required to be noted.

72. In the Punjab decision the situation was peculiar. The petitioner, SR Chaudhari approached the Hon'ble Supreme Court of India complaining that respondent No. 2, Tej Parkash Singh, was appointed as a minister in the State of Punjab on the advice of the Chief Minister, Sardar Harcharan Singh Brar, on 9th September 1995. At the time of his appointment as a Minister he was not a Member of the Punjab Legislative Assembly. He failed to get himself elected as a member of the Legislature of the State of Punjab within a period of six months and submitted his resignation from the Council of Ministers on 8th March 1996. The term of the

¹¹ (2001) 7 SCC 126.

House had not expired and there was a change in the leadership of the ruling party. The 3rd respondent on her election as a Chief Minister (after being chosen as the leader of the ruling party) still inducted the said Tej Parkash Singh. He had not been elected as a member of the Legislature even when Smt. Rajinder Kaur Bhattal took over as the Chief Minister on 21st November 1996. However, Tej Parkash was appointed Minister with effect from 23rd November 1996 and the appellant, SR Chaudhari filed a petition seeking Writ of Quo Warranto against 2nd Respondent, Tej Parkash Singh. It was stated in the petition that appointment of the 2nd Respondent for a second time during the term of the same Legislature, without being elected as a member of the Legislature was violative of the constitutional provisions and therefore bad. This Writ Petition was dismissed in limine. The matter was therefore taken to the Hon'ble Supreme Court.

73. Mr Talekar's arguments overlook this peculiar factual position.

74. It was in the peculiar facts and circumstances of that case and finding that this would be a total subversion of the rule of law and would make mockery of the constitutional provision that the Hon'ble Supreme Court stepped in and held that a person who could not, within the term of the house, get himself elected within six months of his initial induction cannot overtake the constitutional mandate. By ceasing to be a minister on expiry of six months his re-election cannot be facilitated in this manner so as to give him an extended term in the Ministry, whatever may be the compelling reasons for his induction. The observations heavily relied upon by Mr Talekar would have to be considered in the backdrop of the factual controversy before the Hon'ble Supreme Court. The Hon'ble Supreme Court was not dealing with a controversy or the issue projected before us. All observations would have to be seen and noted in the factual backdrop. They are very apt but by relying on them we cannot arrive at the conclusion desired by the petitioners before us. In paragraph 33 of this judgment it is held that Constitutional provisions are required to be understood and interpreted with an object-oriented approach. There is no quarrel

and indeed there can be none about this principle and equally the other that Constitution must not be construed in a narrow and pedantic manner. Moreover, the general words have to be given there full import and true meaning, and particularly when we are considering the Constitution itself is another precept of equal importance. However, all these principles have their application to a given fact situation and that cannot be lost sight of. Even if the Petitioners insist that the conduct of these Respondents merits our disapproval, and that their conduct is a blot on the purity of elections and probity in public life, that by itself does not allow us to conclude that *SR Chaudhari*'s case is exactly on all fours as far as the present petitions are concerned. That judgment is therefore distinguishable on facts.

75. In this context, Mr. Talekar expresses a secondary apprehension that if, in the forthcoming elections, Respondents Nos. 5 and 6 are again not elected, or do not contest, then, by claiming that a 'fresh term' has begun for the new house, and the meter has, so to say, been reset to zero, these same non-elected

persons will be brought into the Cabinet for another six months. We need not consider that aspect of the matter at all. At this stage, it is both premature and speculative (and defeatist, for it assumes that the present ruling alliance will necessarily be returned at the next polls). It seems to us clear, however, that the six-month period is a single opportunity. No one can take a break before six months by demitting the office of Minister and then be inducted again. That there is an intervening election will make no difference. Article 164(4) is person-specific, and no person can be a minister without facing an election in six months. He cannot come back again and again by taking, for illustration, a day's or a month's gap or break between ministerial terms. That would undoubtedly be a fraud on the Constitution and is clearly forbidden. For a non-legislator inducted into a ministry, the terminus a quo is an election, not a mere demitting of office. However, since we are not presently called upon to go into this, we leave the Petitioners' contentions open in that regard.

76. As far the judgment in the case of *BR Kapur V State of Tamil Nadu*,¹² even that turns on a peculiar factual position. In that case, a non-legislator was made a Chief Minister and it was argued that he must possess qualifications under Article 173 and must not suffer from disqualifications under Article 191 for membership of the legislature. It is in that context that the Supreme Court held that it is its duty to interpret the Constitution even if the answer to the question before it has a political effect. There again the Supreme Court noted that the essential controversy was that the Election Commission of India by an order dated 28th August 1997 dealt with the legal position and issued directions. All returning officers at the time of scrutiny of nominations were directed to take a note of the legal position and decide accordingly about the validity or otherwise of the candidature of the contestants disqualified under Section 8 of the Representation of the Peoples Act 1951. The nomination papers of the 2nd Respondent were rejected by a speaking order by the returning officer on 24th April 2001. The order of the Election Commission of India mentions clearly that despite suspension of

¹² (2001) 7 SCC 231.

sentence and release on bail, the order of conviction remains in operation. This order was not challenged. The 2nd Respondent did not challenge the election of the respective candidates from these constituencies by an election petition on the ground that her nomination was wrongly rejected. The period of limitation for filing the election petition of 45 days was also over. Thus, the issue was that the rejection on the ground of disqualification had reached finality. It was therefore not permissible for such a candidate or person to take over and be appointed as a Chief Minister and that is how the matter was brought before the Supreme Court of India. A totally ineligible candidate, already disqualified from the inception was sought to be appointed as a Chief Minister. A Chief Minister is of the State and does not remain a mere leader of the largest single party in the House, on being sworn in as such. The real issue therefore was whether by the above mode can he/she enter the House. The answer is obviously no.

77. The exhaustive discussion of legal principles is binding in a case similar. We have noted the reliance placed by Mr Talekar on

certain paragraphs of this judgment, but we do not think that even this judgment has any application to the facts and circumstances before us. We are mindful of the judgment of the Hon'ble Supreme Court which outlines the powers of judicial review and enables us in certain circumstances to interfere directly under Article 226 of the Constitution of India even when the election of otherwise disqualified candidates has not been challenged by way of an election petition. However, even these judgments have no application to the facts and circumstances before us. The Division Bench Judgment of the Nagpur Bench of this Court is also distinguishable on facts.¹³ There, an election was declared to fill a vacancy caused in the Assembly contrary to the mandatory provision in Section 151-A of the Representation of People Act, 1951. Hence, the Notification to that effect was struck down.

78. As far as the judgment of the Constitution Bench of the Supreme Court in the case of *State (NCT at Delhi) vs Union of India and Ors* is concerned,¹⁴ we do not think the we have deviated or

¹³ *Sandeep Yeshwantrao Sarode v Election Commission of India*, (2019) SCC Online Bom 629.

¹⁴ (2018) 8 SCC 501.

departed from any of the principles enshrined in several paragraphs of this judgment, particularly the principles on interpretation of the Constitution.

79. As a result of the above discussion, we do not think that either of these petitions can be accepted. For the reasons recorded above, they are dismissed but without any order as to costs. Rule discharged.

(S. C. DHARMADHIKARI, J)

(G. S. PATEL, J)