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REPORTABLE

**IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 588 OF 2017**

- 1. THE INDIAN NATIONAL CONGRESS,**
A political party registered and recognised under the Representation of the People Act 1950 and the Representation of the People Act 1951 having its registered office at 24, Akbar Road, New Delhi, 110011, through its AICC In charge, Goa, Dr A Chella Kumar, Son of C Arunachalam, 63 years old, married, Indian National, Resident of S-76, 18th Street, Annanagar West, Chennai – 40, Tamil Nadu.
- 2. GOA PRADESH CONGRESS COMMITTEE,**
Goa Territorial Division of Petitioner No. 1, Through its authorised President, Shri Luizinho Faleiro, Son of Joaquim Faleiro, 56 years old, Married, Indian National, Resident of House No. 14/C, Luchil, Caminho de Monte, Borda, Margao, Goa.
- 3. CHANDRAKANT ALIAS BABU KAVLEKAR**
Son of Raghu Biru Kavalkar, Sitting Member of Goa Legislative Assembly, 46 years old, Married, Indian National, Resident of 167, Betul, Quepem, Goa.

4. **LUIZINHO FALEIRO,**
Son of Joaquim Faleiro, 56 years old,
Married, Indian National, Resident of
House No. 14/C, Luchil, Caminho de
Monte, Borda, Margao, Goa.
5. **RAVI SITARAM NAIK**
Son of Sitaram Naik, Sitting Member of
Goa Legislative Assembly, 70 years old,
Married, Indian National, Resident of
House No. 9/207/7, Ravikiran,
Ravinagar, Khadpaband, Ponda, Goa
6. **DIGAMBAR VASANT KAMAT,**
Son of Vasant Kamat, Sitting Member of
Goa Legislative Assembly, 62 years old,
married, Indian National, Resident of
House No 401-1, First Floor, Sanrit
Apartments, Near Masjid, Malbhat,
Margao, Goa
7. **SUBHASH ANKUSH SHIRODKAR,**
Son of Ankush Shirodkar, Sitting
Member of Goa Legislative Assembly, 65
years old, Married, Indian National,
Resident of House No. 1142, Bhatwada,
Shiroda, Ponda, Goa
8. **FILIBE NERY RODRIGUES,**
Son of Cruz Rodrigues, Sitting Member
of Goa Legislative Assembly, 54 years
old, Married, Indian National, Resident
of 590/2, Caramorod, Sirlim,
Chinchinim, Salcete, Goa.
9. **ALEIXO REGINALDO LOURENCO,**
Son of Inacio Lourenco, Sitting Member
of Goa Legislative Assembly, 48 years
old, Married, Indian National, Resident
of House No. 800, Batora, Curtorim,
Salcete, Goa.

10. **ISIDORE ALEIXINHO FERNANDES**,
Son of Inacio Lourenco, Sitting Member
of Goa Legislative Assembly, 48 years
old, Married, Indian National, Resident
of House NO. 800, Batora, Curtorim,
Salcete, Goa.
11. **NILKANTH RAMNATH
HALARNKAR**,
Son of Ramnath Halarnkar, Sitting
Member of Goa Legislative Assembly, 55
years old, Married, Indian National,
Resident of B-6, F-1, Prudential Paradise,
Pedem, Mapusa, Goa.
12. **JENIFER MONSERRATE**,
Wif of Atanasio Monserrate, Sitting
Member of Goa Legislative Assembly, 47
years old, Married, Indian National,
Resident of Casa Monserrate, House No.
167, Galli, Taleigao, Goa.
13. **FRANSISCO SILVEIRA**,
Son of Manuel Silveira, Sitting Member
of Goa Legislative Assembly, 48 years
old, Married, Indian National, Resident
of 37/1, St Lawrence, Dandim, Agaciam,
Tiswadi, Goa.
14. **DAYANAND RAGHUNATH SOPTE**,
Son of Raghunath Sopte, Sitting Member
of Goa Legislative Assembly, 53 years
old, Married, Indian National, Resident
of 652, Chonsai, Parsem, Pernem, Goa.
15. **ANTONIO CAITANO FERNANDES**,
Son of Jose Fernandes, Sitting Member
of Goa Legislative Assembly, 52 years
old, Married, Indian National, Resident
of House No. 1143, Segundo Bairro, St.
Cruz, Tiswadi, Goa.

16. **WILFRED D'SA**,
Son of Joao D'Sa, Sitting Member of
Goa Legislative Assembly, 49 years old,
Married, Indian National, Resident of
House No. 31, P.O. Majorda, Nuvem,
Dongrim, Salcete, Goa.
17. **CLAFACIO DIAS**,
Son of Joaquim Dias, Sitting Member of
Goa Legislative Assembly, 47 years old,
Married, Indian National, Resident of
House No. 151, Agramorod, Paroda, Goa. ... Petitioners

~ VERSUS ~

1. **STATE OF GOA**,
Through the Chief Secretary,
Government of Goa, Goa Secretariat,
Porvorim, Bardez, Goa 403 521.
2. **ELECTION COMMISSION OF INDIA**,
Nirvachan Sadan, Ashoka Road, New
Delhi 110 001
3. **GOA STATE ELECTION COMMISSION**,
Ramchandra Naik Road, Near Traffic
Cell, Altinho, Panaji, Goa 403 001.
4. **THE SPEAKER**,
The Goa Legislative Assembly, Assembly
Complex, Porvorim, Bardez, Goa 403
521.
5. **SIDHARTH SRIPAD KUNCALIENKER**,
Son of late Sripad Kuncalienkar, Sitting
Member of Goa Legislative Assembly, 42
years old, Married, Indian National,

Resident of House No. 115, Sharda
Building, Dada Vaidhya Road, Boca de
Vaca, Panaji, Goa.

6. **VISHWAJIT PRATAP Singh RANE**,
Son of Pratapsingh Raoji Rane, 46 years
old, Married, Indian National, Resident
of Vaibhav Apartments, 1st floor,
Vidhyanagar Colony, Miramar,
Caranzalem, Goa.

... Respondents

APPEARANCES

FOR THE PETITIONERS	Mr SG Desai, Senior Advocate, <i>with Ms Pooja Desai</i>
FOR RESPONDENT NO. 1	Mr Dattaprasad Lawande, Advocate- General, <i>with Mr P Dangui,</i> <i>Government Advocate</i>
FOR RESPONDENT NO. 3	Mr Navdeep Aguiar, Advocate
FOR RESPONDENT NO. 6	Mr MS Doctor, Senior Advocate, <i>with Mr Ameet P Hariani, Mr</i> <i>Aniruddh Hariani and Mr K</i> <i>Noorani</i>

CORAM : **G.S.Patel & Nutan D.
Sardesai, JJ**

JUDGMENT RESERVED ON : **27th September 2017**

JUDGMENT PRONOUNCED ON : **11th October 2017**

JUDGMENT (per GS Patel J):

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A. OVERVIEW

1. This Writ Petition was admitted on 20th June 2017. The order issuing Rule sets out in brief the rival submissions. Paragraphs 7 and 8 say that various aspects, including that of jurisdiction, would have to be examined. The order notes that at that time there was no Affidavit in Reply, and specifically says its observations are *prima facie* and tentative. Yet, there being arguable issues, the Court issued Rule. One of us (Ms Nutan D Sardesai J) was a member of the Bench that admitted the petition.

2. The pleadings are now complete. We have had the benefit of hearing Mr Desai for the Petitioners, Mr Doctor for Respondent No.6 and Mr Lawande, the learned Advocate-General for Respondent No.1. The following summary may lend perspective to the more detailed consideration that follows. We will omit the dates for the purposes of this summary, and come back to them later.

2.1 Vishwajit Rane, Respondent No. 6 (“**Rane**”; “**Vishwajit**”), was elected to the Goa Legislative Assembly (“**Assembly**”) on an Indian National Congress (“**Congress**”) ticket in early 2017. The Congress secured 17 seats, and the Bharatiya Janata Party (“**BJP**”) won 13 seats. The latter was invited to form the government. Respondent No.5 was appointed by the Governor under Article 188 of the Constitution as the person before whom members of the Assembly would affirm oath before taking their seat until the Assembly chose the Speaker of the House (the 4th Respondent; “**the Speaker**”). The 5th Respondent was, for these purposes, the *pro tem* Speaker.

2.2 The Congress moved the Supreme Court, which ordered a floor test. The Congress issued what it calls a ‘whip’ to vote against the BJP in the floor test. On the date of the floor test, Rane was absent from the House before the vote. The BJP won the floor test. Later that day, Rane returned to the Assembly and tendered his resignation to Respondent No.5, then the *pro tem* Speaker, who accepted it. Later that very day, Rane also resigned from the Congress party. A short while later, he joined the BJP and was inducted as a Minister, a post he had held earlier. In a by-poll later in the year, August 2017, he was returned to the Assembly on a BJP ticket.

2.3 The Congress says this is a ‘fraud on the Constitution’. It says Rane earned a disqualification when he absented himself from the vote at the floor test. It also says the Speaker was wrong in accepting his resignation; he should have assessed whether Rane’s resignation was genuine. In short, Rane was instrumental in engineering or

ensuring Congress' defeat at the floor test in March 2017. According to Mr Desai for the Congress, the disqualification is extreme: Rane was and is not only not ineligible to continue as a member of the House, but, on account of that 'disqualification', cannot offer himself for elections at all for the next five years.

2.4 Whether or not 'a member of a House has become subject to a disqualification' is for the Speaker to decide. When the Speaker accepted Rane's resignation, Rane ceased to be a member of the House; and the Speaker ceased to have jurisdiction to decide on his disqualification, one earned while he was a member. In other words, he ceased to be a member of the House before the question arose, i.e., before a disqualification petition could be brought to the Speaker for his decision. That, according to the Petitioners, ousted the Speaker's jurisdiction, and that is, according to them, the fraud on the Constitution. In that scenario, the Petitioners ask us to decide whether or not Rane had earned a disqualification by not being present during the vote on the floor test.

2.5 These are the prayers in the Petition:

A. For a writ of declaration or any other writ, direction, order under Article 226 of the Constitution of India declaring that the **Sixth Respondent stands disqualified for a period of five years from 16.03.2017 to 15.03.2022 under paragraph 2(1)(a) and/ or 2(1)(b) of the Tenth Schedule to the Constitution of India;**

B. For a declaration, declaring the acceptance of resignation of the Sixth Respondent by the Fifth Respondent as unconstitutional and bad in law.

C. For a writ of mandamus or a writ, direction, order in the nature of mandamus or any other writ, direction, order under Article 226 of the Constitution of India **commanding the First Respondent to consider the Sixth Respondent as disqualified under the Tenth Schedule to the Constitution of India for a period of five years from 16.03.2017;**

D. For a writ of prohibition or a writ, direction, order in the nature of prohibition or any other writ, direction, order under Article 226 of the Constitution of India **prohibiting the Second and Third Respondents jointly and severally from accepting nomination of the Sixth Respondent or permitting him to contest Goa Legislative Assembly election / bye-election from any Legislative Assembly Constituency from Goa for a period of five years from 16.03.2017;**

(Emphasis added)

2.6 The questions that fall for determination are, therefore, these:

- (a) Does the resignation of a member from a House rob the Speaker of his jurisdiction to decide whether, at a given time, when that person *was* a member, he had become subject to a disqualification? Put another way: does the Speaker have jurisdiction to decide the disqualification of only those who are, at the time when the Speaker is petitioned, still continuing as members of the House?
- (b) Assuming that the Speaker loses his jurisdiction to decide this question of disqualification upon the resignation of the member, can that question ever be

decided by a High Court in exercise of its extraordinary civil writ jurisdiction under Article 226 of the Constitution of India? Or: is it only the decision of the Speaker on a disqualification petition brought before him that is amenable to judicial review by a High Court in its writ jurisdiction?

- (c) Assuming what was in question was indeed a 'whip' (which is disputed), and if this is defied, what precisely is the disqualification earned?
- (d) Is the Speaker bound to refuse to accept a resignation voluntarily tendered on the footing that a disqualification petition might conceivably be brought? In other words, can the Speaker, even when there is no *pending* disqualification petition, refuse a volunteered resignation so as to force a member to continue as a member only to face a potential disqualification petition and retain jurisdiction?

2.7 Having considered the rival considerations with utmost care, we find ourselves compelled to depart from the *prima facie* view taken at the time of admission. We have held:

- (a) The disqualification in question is not for five years. There is no restraint in a case such as this from offering oneself for re-election.
- (b) The disqualification attaches to a continuing member of the House.

- (c) The disqualification is not automatic or self-operative on the happening of a trigger event. There must be a petition alleging disqualification and it must result in a declaration or a decision by the Speaker that the disqualification was earned by the member.
- (d) Once a member resigns, and his resignation is accepted, the Speaker cannot and does not have jurisdiction to decide whether, at some point when he *was* a member of the House, he had become subject to a disqualification.
- (e) The jurisdiction of the Speaker under paragraph 6 of Schedule X of the Constitution of India is not an 'alternate' remedy. It is the *only* remedy. The Speaker's jurisdiction is exclusive.
- (f) In making a decision under that paragraph, the Speaker functions, for the purposes of that paragraph, as a tribunal, and, as such, his decision is subject to judicial review.
- (g) However, if his jurisdiction does not continue on account of the resignation of the member, say, then a question of 'disqualification' cannot be decided by the High Court under Article 226. That is no part of 'judicial review'. There is nothing to review.
- (h) If there be a pending petition for disqualification, that petition cannot be rendered otiose by accepting a resignation. That would be a fraud on the Constitution.

- (i) The vacancy of a member's seat on acceptance of his resignation requires no declaration. On the other hand, no member vacates his seat simply by 'earning a disqualification'. That vacating happens when it is declared by the authority vested with the power to so declare that there a disqualification has in fact been earned.

2.8 For the reasons that follow, we have discharged Rule and dismissed the Petition.

B. FACTUAL BACKGROUND

3. The facts are not many, and they are largely undisputed.

3.1 The 1st Petitioner is the country's Congress Party, a registered political party. The 2nd Petitioner is the 1st Petitioner's territorial division in Goa. Petitioners Nos. 3 to 17 are elected sitting members of the Goa Legislative Assembly. The 1st Respondent is the State of Goa. Respondents Nos. 2 and 3 are, respectively, the Election Commission of India and the Goa State Election Commission, both constituted under Article 324 of the Constitution of India. The 4th Respondent is the present Speaker of the Goa Legislative Assembly. The 5th Respondent, as we have seen, was, *pro tem*, the person before whom, by an order of the Governor, members of the Legislative Assembly were to affirm oath before taking their seats and until the Assembly chose a speaker.

3.2 Vishwajit Rane, the 6th Respondent, is the scion of a prominent political family in Goa. His father, Pratapsingh Raoji Rane, was previously a Chief Minister of the State himself for six terms: 1980–1985; 1985–1989; a few months in 1990; 1994–1999; briefly in 2005, and then from 2005–2007. Previously a member of the Maharashtrawadi Gomantak Party (“**MGP**”), Pratapsingh has been a member of the Indian National Congress since the mid-1970s. The Rane family is old, and traces its lineage back several generations to the Maratha Ranes. The family has substantial holdings and estates in the State’s north-east Sattari region.

3.3 Vishwajit Rane followed in his father’s political footsteps and joined in the Congress. In 2007, he contested the Goa Legislative Assembly elections as an independent. This was because the Congress had decided at the time not to field more than one candidate from the same family. Vishwajit resigned from the 2nd Petitioner, the Goa Pradesh Congress Committee, and from membership of the Congress itself. That year, the father won on the Congress ticket from the Poriem constituency; and the son was returned from the Valpoi constituency as an independent. Vishwajit was inducted as a Cabinet Minister. He was given the portfolios of Health, Agriculture and Craftsman Training. The Chief Minister was then Digamber Kamat.

3.4 On 24th June 2010, Vishwajit resigned as an independent Member of the Legislative Assembly (“**MLA**”), and from the Cabinet. He successfully contested a by-election from Valpoi on a Congress ticket. He resumed membership of the Congress and was promptly sworn in as a Cabinet Minister on the same day.

3.5 In the 2012 Goa Legislative Assembly elections, Vishwajit took the Valpoi constituency on a Congress ticket.

3.6 On 4th January 2017, elections were notified to the Goa Legislative Assembly. Vishwajit filed his nomination as a Congress party candidate from the Valpoi Assembly constituency. He did not withdraw by the last date stipulated for withdrawals. Polls were held on 4th February 2017. The results were declared on 11th March 2017: neither the BJP nor the Congress had an absolute majority of 21 seats. The Assembly has 40 members. The Congress returned 17 elected candidates, while the BJP returned 13. There were some eight others who belonged to neither party: three to the MGP, another three from the Goa Forward Party, and two independents. The BJP, led by the present Chief Minister, Mr Manohar Parrikar, leading a caretaker government, claimed it had the support of these eight, and thus had a majority, and would form the government. On 12th March 2017, the Governor, Her Excellency Ms Mridula Sinha, in exercise of her powers under Article 184(1) of the Constitution of India appointed Mr Parrikar as the Chief Minister of Goa. The Congress protested, and wrote to the Governor saying it should have been given the first opportunity as it was the single largest party.

3.7 The Congress moved the Supreme Court the next day, 13th March 2017, in WP (C) No D No 8311 of 2017. On that day, nine ministers were sworn in as part of the BJP Government; of these, some seven were outside supporters. The Supreme Court was shown the Governor's order appointing Mr Parrikar. It was also shown the list of outside members said to be supporting the BJP. The Congress questioned the correctness and validity of the

support. In its order of 14th March 2017, while disposing of the petition, the Supreme Court said,:

4. In the communication Annexure P-3, referred to hereinabove, the aforesaid factual position has been seriously disputed. The support in favour of the BJP is alleged to be a mis-representation of fact. The position expressed in the above communication, has however not been specifically disputed. It is in the above manner, that the determination rendered by the Governor, has been assailed at the behest of the petitioner, who indeed is the Leader of the Congress Legislature Party.

5. During the course of hearing, we were satisfied, that the instant sensitive and contentious issue raised on behalf of the petitioner, can be resolved by a simple direction, requiring the holding of a floor test at the earliest. The holding of the floor test would remove all possible ambiguities, and would result in giving the democratic process, the required credibility.

6. **We therefore hereby direct, that all pre-requisite formalities for holding a floor test, including the formalities required to be completed by the Election Commission, be completed by 15.03. 2017. We request the Governor of the State of Goa to ensure, that a floor test is held on 16.03.2017, and the only agenda for the day would be, the holding of a floor test to determine whether the Chief Minister administered the oath of office, has support of the majority. The floor test shall be held on 16.03.2017, as early as possible, but surely during the course of the same day.**

(Emphasis added)

3.8 There followed an order of the Governor on 14th March 2017, dissolving the Legislative Assembly under Article 174(2)(b); another of 15th March 2017 under Article 171 of the Constitution of India summoning the Goa Legislative Assembly on 16th March 2017 at 11:30 am; and a third, appointing the 5th Respondent as the *pro tem* Speaker under Article 181 of the Constitution of India. The 3rd Petitioner (“**Kavlekar**”), who had protested to the Governor and filed the writ petition in the Supreme Court, was appointed Chief Whip of the Indian National Congress Legislature Party.

3.9 On 16th March 2017, Kavlekar sent out a communication to all Congress party members-elect, those returned in the elections. This document (Exhibit P-23 at page 168) calls itself a whip, but Mr Doctor and Mr Lawande dispute that it is in fact one. As it happens, we are not required to decide this. It is sufficient to note that this document directed Congress Party members-elect to attend the Goa Legislative Assembly on 16th March 2017 at 11:00 am and to vote against the Motion of Confidence to be proposed in favour of the government led by Mr Parrikar. The communication did not, Mr Doctor points out, set out the consequences of non-compliance with or defiance of this directive.

3.10 The Goa Legislative Assembly convened on 16th March 2017 at about 11:30 am. At around noon, Vishwajit Rane was administered oath by the 5th Respondent as a member of the Goa Legislative Assembly. Before the floor test or confidence motion could be moved, Vishwajit left the House. He did not vote. According to Mr Desai, he thus defied the whip. He thus earned a disqualification *as a member of the House*. Later that day, at some

point in the early afternoon, Vishwajit Rane returned to the House. By this time, the BJP had passed the floor test; the no-confidence motion was lost. Vishwajit Rane tendered his resignation from membership of the House to the 5th Respondent, the *pro tem* Speaker, who accepted it. Mr Desai would have it that this was a fraud on the Constitution. The 5th Respondent was bound to wait to assess if this was a subterfuge. The 5th Respondent, he says, colluded with Vishwajit Rane. In the resignation letter, Exhibit P-26 at page 171, he said:

To
The Speaker
Legislative Assembly
Goa

I hereby tender my resignation of my seat in the house with effect from afternoon 16th March 2017 from Valpoi-19 Assembly constituency.

Yours faithfully,

Sd/-

Vishwajit Rane

This was accepted at about 3:05 pm.

3.11 On that very day, 16th March 2017, Vishwajit also resigned from the primary membership of the Indian National Congress with immediate effect by a letter to the President of the 2nd Petitioner.

3.12 On 6th April 2017, Vishwajit Rane joined the BJP. Six days later, on 12th April 2017, he was inducted as a minister, and five days after that, given the Health portfolio. He held this until 23rd August 2017, when by-elections were held in Goa again. He stood for election as a BJP candidate and, on 28th August 2017, was once again declared elected.

C. CONSTITUTIONAL PROVISIONS, RIVAL SUBMISSIONS AND FINDINGS

4. We now set out the relevant provisions of the Constitution of India.

4.1 First, Article 164:

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.

(1A) 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.

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

(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

(Emphasis added)

4.2 Article 168 says that for specified states, there are to be two houses, one known as the Legislative Council and the other as the Legislative Assembly. For other states, there is only one house, called the Legislative Assembly. The Goa Legislative Assembly is of the second category. Then Article 172 says this:

172. Duration of State Legislatures

(1) **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:**

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

(2) 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 Parliament by law.

(Emphasis added)

4.3 Vacating of a Parliamentary seat and disqualification of membership of Parliament are covered by Articles 101 and 102. The corresponding provisions for State Assemblies and Councils are covered by Articles 190 to 192, and Article 361B contains certain prohibitions.

Article 101 – Vacation of seats

(1) No person shall be a member of both Houses of Parliament and provision shall be made by Parliament by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other.

(2) No person shall be a member both of Parliament and of a House of the Legislature of a State and if a person is chosen a member both of Parliament and of a House of the Legislature of a State, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in Parliament shall become vacant, unless he has previously resigned his seat in the Legislature of the State

(3) If a member of either House of Parliament—

(a) becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of article 102, or

(b) resigns his seat by writing under his hand addressed to the Chairman or the Speaker, as the case may be, and his resignation is accepted by the Chairman or the Speaker, as the case may be,

his seat shall thereupon become vacant:

Provided that in the case of any resignation referred to in sub-clause (b), if from information received or otherwise and after making such inquiry as he thinks fit, the Chairman or the Speaker, as the case may be, is satisfied that such resignation is not voluntary or genuine, he shall not accept such resignation.

(4) If for a period of sixty days a member of either House of Parliament is without permission of the House absent from all meetings thereof, the House may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

Article 102 – Disqualifications for membership

(1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

Explanation.—For the purposes of this clause, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule.

Article 190 — Vacation of seats

(1) No person shall be a member of both Houses of the Legislature of a State and provision shall be made by the Legislature of the State by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other.

(2) No person shall be a member of the Legislatures of two or more States specified in the First Schedule and if a person is chosen a member of the Legislatures of two or more such States, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in the Legislatures of all such States shall become vacant, unless he has previously resigned his seat in the Legislatures of all but one of the States.

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

(a) becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of article 191; or

(b) resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be,

and his resignation is accepted by the Speaker or the Chairman, as the case may be, **his seat shall thereupon becomes vacant:**

Provided that in the case of any resignation referred to in sub-clause (b), **if from information received or otherwise and after making such inquiry as he thinks fit, the Speaker or the Chairman, as the case may be, is satisfied that such resignation is not voluntary or genuine, he shall not accept such resignation.**

(4) If for a period of sixty days a member of a House of the Legislature of a State is without permission of the House absent from all meetings thereof, the House may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

Article 191 — Disqualifications for membership

(1) A person **shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—**

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

- (b) if he is of unsound mind and stands so declared by a competent court;
- (c) if he is an undischarged insolvent;
- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;
- (e) if he is so disqualified by or under any law made by Parliament.

Explanation.—For the purposes of this clause, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

(2) 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.

192. Decision on questions as to disqualifications of members

- (1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of article 191, the question shall be referred for the decision of the Governor and his decision shall be final.
- (2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion.

361B. Disqualification for appointment on remunerative political post.

A member of a house belonging to any political party who is disqualified for being a member of a House under paragraph 2 of the Tenth Schedule shall also be disqualified to hold any remunerative political post for duration of the period commencing from the date of his disqualification till the date on which he contests an election to a House and is declared elected, whichever is earlier.

Explanation.—For the purpose of this article,—

(a) the expression "House" has the meaning assigned to it in clause (a) of paragraph 1 of the Tenth Schedule;

(b) the expression "remunerative political post" means any office—

(i) Under the Government of India or the Government of a State where the salary or remuneration for such office is paid out of the public revenue of the Government of India or the Government of the State, as the case may be; or

(ii) Under a body, whether incorporated or not, which is wholly or partially owned by the Government of India or the Government of a State and the salary or remuneration for such office is paid by such body,

except where such salary or remuneration paid is compensatory in nature.

(Emphasis added)

4.4 Mr Desai constructs his case thus: the term of an elected Legislative Assembly is five years. When elected, a candidate affirms oath before taking his seat. The 'House' means a Legislative Assembly, a Legislative Council, the Lok Sabha or the Rajya Sabha, as the context requires. On taking his seat, an elected candidate becomes a member of the House. His seat falls vacant when he resigns it, and his resignation is accepted; or he earns one or more of the disqualifications specified in the Constitution itself. The disqualifications are of two kinds. The first is a disqualification resulting from being an undischarged insolvent, holding impermissibly an office of profit, being declared of unsound mind, losing citizenship or being disqualified by any other law made by Parliament. The second is a special type of disqualification that results from a 'defection' within the meaning of the Tenth Schedule of the Constitution of India. Vishwajit's act of not voting as directed was neither previously approved nor later condoned. Therefore, he attracted the second type of disqualification. But before that could be adjudicated, he resigned his seat. His resignation was wrongfully accepted. His seat fell vacant. Therefore, he (in collusion with the Speaker) 'cheated' the Constitution by pre-empting an adjudication of his disqualification. He robbed the Speaker of his exclusive jurisdiction to decide on his disqualification. Had that been done, the consequence would have been extreme, and Vishwajit would have been barred from standing for elections for the next five years. Since the Speaker can no longer adjudicate and pronounce on this, lacking the necessary jurisdiction, we should step in and do so; this is permissible in exercise of our powers under Article 226 of the Constitution of India, and also as a form of judicial review. This is the totality of the Petitioners' case.

4.5 The response, briefly, runs like this. Kavlekar's direction was not a whip. At best it required every member to whom it was issued to act in a certain way. Without default consequences expressly stipulated, it was not a whip. Every defiance is not a defection, nor a disqualification. If it has previous approval or later condonation, it is saved. But even assuming it was a whip, it did not and could not forbid a resignation of membership of the House. The Speaker's acceptance of that resignation was not wrongful. There was no pending disqualification petition, and nothing on which the Speaker could say the resignation was not voluntary or genuine. Once Vishwajit's resignation was accepted, his seat fell vacant. He was then no longer amenable to the Speaker's jurisdiction. But the Petitioners cannot simultaneously say the acceptance was good (and resulted in a removal of the Speaker's jurisdiction) and also that it was bad, for that would mean the Speaker continues to have jurisdiction. If the Petitioners say the Speaker has no jurisdiction, then this can only be because his acceptance of Vishwajit's resignation was good. The Speaker's jurisdiction is not an alternate remedy; it is the only remedy, and it must be availed. The writ jurisdiction of this court, and its powers of judicial review, cannot be invoked before a decision is made, or when no decision is made, even given that in making a decision on a disqualification the Speaker admittedly functions as a tribunal. The scope of judicial review is limited. The Speaker's jurisdiction cannot be assumed by a High Court in exercise of its powers under Article 226. In any case, Vishwajit's seat fell vacant when his resignation was accepted. The Petitioners cannot undo that voluntary vacancy only to force on him an involuntary vacancy. Further, the consequences of an involuntary vacating of office on the defection ground are not the same as the

consequences resulting from a vacating of office for other reasons. There is no absolute bar of five years. The embargo is against defying a party direction *and* continuing in the seat as a member of the very party whose directions were defied without permission or condonation. Once a seat is thus vacated by resignation, or even on a declaration of having earned a disqualification, the ex-member can then return to the electorate and seek re-election. Thus, viewed from any perspective, the Petition must fail.

4.6 Articles 101-102 and 190-191 are *in pari materia*. The first of these applies to Parliament, and the second to State Legislative Assemblies and State Legislative Councils. We are concerned with Articles 190-191 and their application to the Goa Legislative Assembly.

4.7 When does a member of the Legislative Assembly or Council vacate his seat in the House? There are two distinct paths. Article 190(3)(b) provides for a vacating of the seat by resignation. Once the resignation is accepted, the seat falls vacant. There is, of course, the proviso regarding when the resignation ought not to be accepted, but we will keep that aside for the present. Article 190(3)(a) provides for the ‘forced’ vacating, i.e., when there is a declaration that the member has earned a disqualification of the type provided in Articles 191(1) or 191(2) of the Constitution. Article 191 is in two parts. The first is a disqualification under Article 191(1), and should any of the conditions specified in it obtain, the seat is vacated with any question regarding an Article 191(1) disqualification being decided by the Governor under Article 192. The second is a disqualification earned under Article 191(2), and this relates to the

Tenth Schedule. Again, a disqualification earned and so declared results in the vacating of the seat, and the question of disqualification being earned or not is decided by the Speaker or the Chairman under paragraph 6 of the Tenth Schedule.

4.8 What are the consequences of an Article 191 disqualification? Articles 191(1) and 191(2) also speak of the result of the disqualifications under those sub-clauses. The interdiction in Article 191(1) is against the person (a) *from being chosen as* and (b) *from being*, a member of the Legislative Assembly or Council. Article 191(2) uses language materially different from Article 191(1). In Article 191(2) the restraint is *only from being* a member of the Assembly or Council. In other words, an Article 191(1) disqualification — holding office of profit, unsoundness of mind, insolvency, etc., — engenders a disqualification either from *continuing* as a member, or even from standing for election (*‘being chosen as’*). This necessarily means a five-year prohibition, because that is the term of the House under Article 172. We must, and will, straightaway reject Mr Desai’s submission that the second prohibition in Article 191(1), from being chosen as — i.e., for offering oneself for election — must also be ‘read into’ Article 191(2), and that the prohibition in Article 191(2) extends to a five-year term. We are unclear whether this is a suggestion of reading down one clause or reading up another, but neither is possible. The two clauses uses distinct phraseology and the meaning is plain. An Article 191(2) disqualification results in a discontinuance of membership. It does not earn the added disqualification of not returning to the voters and seeking re-election. Disqualifications declared under Articles 191(1) and 191(2) both result in an *eo instante* vacating of the membership of the house

in question, under Article 190(3); but the results of that disqualification are provided in Article 191 in two distinct clauses. Where the language is plain and unambiguous, and where a legislature has used a phrase in one clause, but not the next, we are not to presume that it fell into error, or that it meant something other than what it said, or that it meant to include in the second that which it said in the first but did not in the second.¹ As we shall see, there is sufficient intrinsic evidence why this must be so.

4.9 Actually, this is the fulcrum of Mr Desai's construct, as the prayers set out above show; for if this is negated, as we believe it must be, then nothing remains. The attempt in the petition is to achieve a knock-out of Vishwajit Rane and have him ejected from the House for the next five years, till 2022. If that argument fails, and this is not the disqualification he could ever have earned, then simply by returning to the people and seeking re-election — which is not forbidden under Article 191(2) — he may continue on a fresh re-election as a member of the House.

4.10 Article 192 provides for a decision making process relatable only to the disqualification in Article 191(1), not to the disqualification under Article 191(2). The decision on an Article 191(1) disqualification challenge is to be that of the Governor. As we shall see immediately next, the corresponding provision for an Article 191(2) disqualification vests jurisdiction exclusively in the Speaker, in terms that are exactly the same.

1 *Reema Aggarwal v Anupam*, (2004) 3 SCC 199; *Chief Justice of AP v LVA Dixitulu*, (1979) 2 SCC 34.

4.11 By the mid-1980s, the country faced a political crisis of a growing number of defections; members of houses crossing party lines, yet retaining their seats. The Constitution (Fifty-second Amendment) Act, 1985 popularly known as Anti-Defection Law, which also added the Tenth Schedule to the Constitution of India, intended to curb this practice. This is how the Xth Schedule, added by the 52nd Amendment, reads in its entirety, with our emphasis added throughout:

TENTH SCHEDULE

Articles 102(2) and 191(2)

PROVISIONS AS TO DISQUALIFICATION ON GROUND OF DEFECTION

1. INTERPRETATION

In this Schedule, unless the context otherwise requires,—

- (a) 'House', means either House of Parliament or the Legislative Assembly or, as the case may be, either House of the Legislature of a State;
- (b) 'legislature party', in relation to a member of a House belonging to any political party in accordance with the provisions of paragraph 2 or paragraph 4, means the group consisting of all the members of that House for the time being belonging to that political party in accordance with the said provisions;
- (c) 'original political party', in relation to a member of a House, means the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2;
- (d) 'paragraph' means a paragraph of this Schedule.

2. DISQUALIFICATION ON GROUND OF DEFECTION

(1) Subject to the provisions of paragraphs 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House—

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

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

Explanation.—For the purposes of this sub-paragraph,—

(a) an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member;

(b) a nominated member of a House shall,—

(i) where he is a member of any political party on the date of his nomination as such member, be deemed to belong to such political party;

(ii) in any other case, be deemed to belong to the political party of which he becomes, or, as the case may be, first becomes, a member before the expiry of six

months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188.

(2) An elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election.

(3) A nominated member of a House shall be disqualified for being a member of the House if he joins any political party after the expiry of six months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188.

(4) Notwithstanding anything contained in the foregoing provisions of this paragraph, a person who, on the commencement of the Constitution (Fifty-second Amendment) Act, 1985, is a member of a House (whether elected or nominated as such) shall,—

(i) where he was a member of political party immediately before such commencement, be deemed, for the purposes of sub-paragraph (1) of this paragraph, to have been elected as a member of such House as a candidate set up by such political party;

(ii) in any other case, be deemed to be an elected member of the House who has been elected as such otherwise than as a candidate set up by any political party for the purposes of sub-paragraph (2) of this paragraph or, as the case may be, deemed to be a nominated member of the House for the purposes of sub-paragraph (3) of this paragraph.

4. DISQUALIFICATION ON GROUND OF DEFECTION NOT TO APPLY IN CASE OF MERGER

(1) A member of a House shall not be disqualified under sub-paragraph (1) of paragraph 2 where his original political party merges with another political party and he claims that he and any other members of his original political party—

(a) have become members of such other political party or, as the case may be, of a new political party formed by such merger; or

(b) have not accepted the merger and opted to function as a separate group,

and from the time of such merger, such other political party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this sub-paragraph.

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

5. EXEMPTION

Notwithstanding anything contained in this Schedule, a person who has been elected to the office of the Speaker or the Deputy Speaker of the House of the People or the Deputy Chairman of the Council of States or the Chairman or the Deputy Chairman of the Legislative Council of a State or the Speaker or the Deputy Speaker of the

Legislative Assembly of a State, shall not be disqualified under this Schedule,—

(a) if he, by reason of his election to such office, voluntarily gives up the membership of the political party to which he belonged immediately before such election and does not, so long as he continues to hold such office thereafter, rejoin that political party or become a member of another political party;
or

(b) if he, having given up by reason of his election to such office his membership of the political party to which he belonged immediately before such election, rejoins such political party after he ceases to hold such office.

6. DECISION ON QUESTIONS AS TO DISQUALIFICATION ON GROUND OF DEFECTION

(1) If 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:

Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final.

(2) All proceedings under sub-paragraph (1) of this paragraph in relation to any question as to disqualification of a member of a 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.

***7. BAR OF JURISDICTION OF COURTS**

Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule.²

8. RULES

(1) Subject to the provisions of sub-paragraph (2) of this paragraph, the Chairman or the Speaker of a House may make rules for giving effect to the provisions of this Schedule, and in particular, and without prejudice to the generality of the foregoing, such rules may provide for—

(a) the maintenance of registers or other records as to the political parties if any, to which different members of the House belong;

(b) the report which the leader of a legislature party in relation to a member of a House shall furnish with regard to any condonation of the nature referred to in clause (b) of sub-paragraph (1) of paragraph 2 in respect of such member, the time within which and the authority to whom such report shall be furnished;

(c) the reports which a political party shall furnish with regard to admission to such political party of any members

2 This clause was declared invalid for want of ratification under the proviso to Article 368(2). See *Kihoto Hollohan v Zachillhu*, (1992) 1 SCC 309, “*Kihoto I*”.

of the House and the officer of the House to whom such reports shall be furnished; and

(d) the procedure for deciding any question referred to in sub-paragraph (1) of paragraph 6 including the procedure for any inquiry which may be made for the purpose of deciding such question.

(2) The rules made by the Chairman or the Speaker of a House under sub-paragraph (1) of this paragraph shall be laid as soon as may be after they are made before the House for a total period of thirty days which may be comprised in one session or in two or more successive sessions and shall take effect upon the expiry of the said period of thirty days unless they are sooner approved with or without modifications or disapproved by the House and where they are so approved, they shall take effect on such approval in the form in which they were laid or in such modified form, as the case may be, and where they are so disapproved, they shall be of no effect.

(3) The Chairman or the Speaker of a House may, without prejudice to the provisions of article 105 or, as the case may be, article 194, and to any other power which he may have under this Constitution direct that any wilful contravention by any person of the rules made under this paragraph may be dealt with in the same manner as a breach of privilege of the House.

We have not separately indicated the changes brought about by the 91st Amendment of 2003.

4.12 Read as a whole, this tells us that the provisions of the Tenth Schedule are a complete and self-contained code.³ They relate to Articles 102(2) and 191(2) — the Schedule itself says so — and to nothing else. They do not pertain to matters covered by Articles 102(1) or 191(1). Overall, the scheme seems to be that what happens in the House, in regard to membership, stays in the House. It is the Speaker of the Assembly (or Chairman of the Council) alone who decides whether or not a member has been disqualified, and that decision has a finality to it.

4.13 What is the disqualification? This is set out in paragraph 2(1). Sub-clause (a) speaks of voluntarily giving up of membership of a political *party* (as opposed to resignation of the *seat* in the House under Article 190(3)(a)). Resignation of membership of the political party is not material here. What is canvassed as the basis of the Petition is sub-clause (b), where a member votes or abstains from voting in the House contrary to any direction issued by the political party to which he belongs, without obtaining prior permission and where such voting or abstention has not been condoned within fifteen days from the date of the vote or abstention. It is Mr Desai's case that when Vishwajit left the House in the morning of 16th March 2017, before the floor test was put to vote, he earned precisely this disqualification, because by then Kavlekar, appointed as the Chief Whip, had issued a direction to all Congress members-elect; Vishwajit had not obtained prior permission; and he never obtained condonation either.

3 *Kailas Nath Singh Yadav v Speaker, Vidhan Sabha*, AIR 1993 All 334.

4.14 Had Vishwajit absented himself before the vote, returned thereafter, *and continued to hold his seat as a member of the House*, the Congress would have petitioned the Speaker seeking his disqualification for disobedience of the Kavlekar directive. What pains Mr Desai and his clients is that the disqualification petition process envisaged by paragraph 6 was effectively short-circuited when Vishwajit not only did not vote, but then returned to promptly resign his seat in the House, which was accepted; and later that very day, from the Congress party itself. He simply took himself off the field, and left the arena, leaving the up-in-arms Congress members and party without an opponent. How could we, Mr Desai asks, then have moved the Speaker? By then, Vishwajit was not a 'member of the House'. He had simply quit. We drew our swords, but found ourselves no opponent. If this is not, he says, a fraud on the Constitution, nothing is, and neither Vishwajit nor his 'ally', the *pro tem* Speaker, Respondent No.6, should be allowed to get away like this, with this.

4.15 Let us look more closely at paragraph 6(1), for it is on this that everything turns. We set it out again, with slightly different emphasis.

**6. DECISION ON QUESTIONS AS TO
DISQUALIFICATION ON GROUND OF DEFECTION**

(1) If 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:

4.16 Obviously, the ‘disqualification’ can only ever be of a ‘member’ of the House — no other disqualification falls under the Tenth Schedule. The word “**arises**” is used in the present continuous tense. So is the expression “**has become**”. This suggests that the decision of the Speaker relates, firstly, to a matter brought before him, one that is ‘live’; and it is ‘live’ only when it relates to a *sitting* member of the House. If he is not, and has resigned his seat, it has fallen vacant; and no petition or declaration is needed for that, as he is no longer a ‘member of the House’. The words ‘has become’ also suggest that the disqualification must not only be earned during membership of the House, but that membership must be in continued existence when the question ‘arises’. We will attempt a re-phrasing to see if that makes any difference:

Alternative 1: “The Speaker or the Chairman of the House, as the case may be, shall decide all questions of disqualification. His decision shall be final.”

Alternative 2: “The decision of the Speaker or the Chairman of the House, as the case may be, on any question of disqualification is alone final.”

4.17 Viewed from any perspective, paragraph 6 tells us:

- (a) A question of disqualification only attaches to or arises in the context of a member of the House. If a person is not a member, for whatever reason (resignation, for instance), no question of disqualification can arise. The disqualification is as to the status *as a member*;
- (b) A disqualification must be on a petition made for that purpose;

- (c) The petition must result in a declaration or decision of disqualification;
- (d) The decision is to be that of the Speaker or the Chairman and no one else; and
- (e) That decision is final, which means the grounds even for judicial review are restricted.

4.18 Mr Doctor argues, and we think rightly, that the purpose and ambit of paragraph 2 was to prevent persons from defying the party line, or from refusing to toe it, *and yet continuing to retain their seats as returned, elected and sworn-in members of that very party they defied*. The whole of paragraph 2 and paragraph 6, and indeed the entirety of the Tenth Schedule, is inapplicable to a non-member; someone who stands outside the House.

4.19 Mr Desai sees this; and, indeed, as he says, *ay, there's the rub*. Having defied the party line, could Vishwajit have been allowed to quit the battlefield altogether in this fashion? It is like Brutus fleeing the plains of Philippi and joining the ranks of Antony and Octavian against hapless Cassius. Worse yet, it is like him doing so with Antony's approval. While this is undoubtedly colourful and dramatic, it is not particularly useful as a means of Constitutional interpretation *per se*; nor is that Mr Desai's purpose. He submits that regard must be had to the Constitutional intent, and that this must guide our hand: why the Tenth Schedule, and why in this form? What was the mischief it sought to prevent? It was beyond contemplation, he says, that anyone would be as nimble-footed as Vishwajit — ensure the defeat on the floor of the House of the very

party that put him there in the first place, and then to leave both hearth and home, only to take refuge in the enemy camp. That is, he submits, a wholesale undermining of the Constitutional mandate, and no Court should readily permit such machinations. There is mischief afoot, he submits, and it is plain to see. All this was 'arranged', and even the 5th Respondent, as the *pro tem* Speaker, was in on it. If this is permitted, every party will have to risk being undermined, and its internal policies scuttled by those it counts its own.

4.20 Mr Doctor's clients, having now taken in the refugee, and rehabilitated him, see it very differently. Mr Desai and the Congress are very much hunting the Snark, Mr Doctor says, one that 'softly and suddenly vanished away'. The mischief, Mr Doctor says, is what you make of it; like that other imponderable, it is in the eyes of the beholder. The mischief is not to prevent elected members from voting against the party line, or defying a Whip. It is to prevent them from doing so and yet retaining their seats as members. No one may ensure defeat of the very party that put him there and yet continue to remain in the seat in the House on behalf of that party. That, he agrees, would be unconscionable, and unconstitutional. There is no bar *per se* against voting against a direction. A member may do so, and may yet retain his seat, provided he has obtained either prior approval or had it condoned within 15 days. Paragraph 2(1)(b) makes this clear. The sin is not cardinal any more than the wound is mortal. It is also clear from the wording of Article 190(3)(b) that on resignation, the member's seat becomes vacant. However, if the member is declared to have earned a disqualification under Article 191(2) read with the Tenth Schedule, that does not operate to bar

him from elections for the whole five-year term of the Assembly, but only till he is elected to that House again. The prohibition is against simultaneously holding one's seat, defying the party's directions, and not obtaining prior permission or later condonation for that act of defiance.

4.21 If there was any doubt at all about this, Mr Doctor says, and we think quite correctly, it ends with a look at Article 164(1B), again at the cost of repetition set out below:

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

(Emphasis added)

4.22 The emphasized portion, in his submission, which we believe we must accept, and the use of the words 'whichever is earlier' put this beyond the pale. The disqualification is from continued membership, and it is temporary, until re-elected.

4.23 Further, Mr Desai's reliance on the decision of the Supreme Court in *Election Commission of India v Bhanu Prasad Singh*⁴ is inapposite. The paragraphs he relies on do not say that the disqualification under Article 191(2) is for five years.

4.24 This leaves two questions. First, as to the jurisdiction of the Speaker, with its subsidiary issues. Without invoking that jurisdiction, could the Petitioners come straight to us? Here, we must note that we asked Mr Desai to take instructions as to whether the Petitioners would be inclined to approach the Speaker on all issues, including a decision on jurisdiction. For whatever reason, and we do not hold against the Petitioners for that, the Petitioners did not agree. But we do believe that it was for the complainants to first go to the Speaker, and invite a decision, and then submit that decision to judicial review.

4.25 Instead, what we have here is the Petitioners' case that the Speaker lost his jurisdiction when he accepted Vishwajit's resignation, and allowed his seat as a member to be vacated. That creates a dilemma for the Petitioners, for they must now go the distance and succeed on this: that the very jurisdiction that is exclusive to the Speaker (or Chairman, as the case may be) is one that we can legitimately exercise. We are not persuaded of the soundness of this proposition, and here we must draw a direct parallel to Article 191(1) and Article 192. If what Mr Desai urges is correct, then it must apply to a decision of the Governor under Article 192 in relation to an Article 191(1) disqualification, one such

4 (2015) 12 SCC 570.

as undischarged insolvency. If a member, on that ground, resigns his seat, then there is simply nothing for the Governor to decide, and we can hardly be called on to do so. We see no reason why the same principle should not apply to an Article 192(2) disqualification read with the Tenth Schedule.

4.26 The real difficulty is that the Congress never brought a petition to the Speaker at all. It invited no decision. It took no order, one way or the other. It began on the *a priori* assumption that there was a divesting of jurisdiction when the *pro tem* Speaker accepted Vishwajit's resignation, and this jurisdictional failure is one that we can cure or fill under Article 226. But that again is posited on a flawed reading of Articles 191(1) and Article 191(2), viz., that the disqualification earned is of five years. If it is not, then, as we have noted, nothing remains. Mr Desai would have it, on the basis of *Raja Ram Pal v Hon'ble Speaker, Lok Sabha*⁵ that we can do that which the Speaker was given no opportunity to do, and make the declaration that only he can under paragraph 6. He relies on this passage:

(b) The constitutional system of government abhors absolutism and it being the cardinal principle of our Constitution that no one, howsoever lofty, can claim to be the sole judge of the power given under the Constitution, mere coordinate constitutional status, or even the status of an exalted constitutional functionaries, does not disentitle this Court from exercising its jurisdiction of judicial review of actions which partake the character of judicial or quasi-judicial decision;

5 (2007) 3 SCC 184, paragraph 431(b).

4.27 But surely this does not and cannot assist Mr Desai. As we noted, there is no action that ‘partakes the character of a judicial or quasi-judicial decision’ simply because no petition was brought to the Speaker. We note, too, the wording of paragraph 6: *if any question arises*. This means that the decision on a declaration, and an ensuing declaration, must be on a petition properly brought and presented. It cannot be assumed (or perhaps even taken up *suo motu*). If no petition is brought, and no declaration of disqualification is sought, then there is no ‘decision’, judicial or quasi-judicial; and there is nothing amenable to judicial review. Invoking *Kesavananda Bharati v State of Kerala & Anr*,⁶ *AK Gopalan v State of Madras*⁷ and *L Chandra Kumar v Union of India & Ors*⁸ on the question of the ambit of Article 226 does not alter this position.

4.28 The second remaining question is, of course, as to the correctness of the Speaker’s acceptance of Vishwajit’s resignation.⁹ We are invited to hold that this was wrongful and falls within the proviso to Article 190(3)(b), viz., that when confronted with a resignation, and asked to accept it, if the Speaker “from information received or otherwise, and after making such enquiry as he thinks fit” believes the resignation to be not voluntary or genuine, he is not to accept it. The emphasis of the Petitioners is on the word ‘genuine’, and they ask us to hold that the Speaker should have

6 (1973) 4 SCC 225.

7 AIR 1950 SC 27.

8 (1997) 3 SCC 261.

9 The argument that a *pro tem* Speaker could not accept the resignation was not pressed. In any case, it is decided by this Court in *Surendra Vassant Sirsat v Legislative Assembly of Goa*, AIR 1996 Bom 10 : (1996) 2 Bom CR 362 : (1995) 97 Bom LR 621.

known — and could not have not known — that the resignation was a device or stratagem. That, Mr Desai says, is certainly justiciable and within the frame of our powers under Article 226 of the Constitution of India. In a given case, that might be possible. But the facts of this case do not tend ineluctably to that conclusion, and we cannot have a factual dispute about that, nor can we proceed on conjecture. That would undermine any order under Article 226 of the Constitution of India. The Speaker had not before him on 16th March 2017 a single document or protest about Vishwajit Rane missing the vote or leaving the House before the vote. There was no ‘information received’ and we do not quite know what, if anything, is to be made in this context of the expression ‘or otherwise’. We believe it must speak neither to imputed knowledge nor assumed presumption, but to matters in the public domain, matters of common knowledge, whether they are or are not directly ‘received’ by the Speaker. Mr Desai says the Speaker was part of the fraud and hence the proviso to Article 190(3)(b) must be read to operate. That would, in our view, be an unacceptable enlargement of what is amenable to our jurisdiction.

4.29 Mr Desai’s argument that ‘everyone will resign’ seems to us both implausible and needlessly alarmist. Here, we must distinguish between an Article 190(3)(b) type of vacancy (on resignation) and an Article 191 type of vacancy (of either variety, under Article 191(1) or 191(2) as the case may be). An Article 191 vacancy (under either sub-clause) arises only when there is a declaration by the authority designated to decide it, not on resignation. An Article 190(3)(b) vacancy by resignation occurs without a declaration. We may usefully refer to the observations of the Supreme Court, albeit in the

context of Article 102 and allied articles, but which are in parallel, in *Consumer Education & Research Society v Union of India*:¹⁰

56. The constitutional scheme in Articles 101 to 104 contains several irrefutable indications that the vacancy of the seat would occur only when a decision is rendered by the President under Article 103 which declares that a Member has incurred a disqualification under Article 102(1) and not at the point of time when the Member is alleged to have incurred the disqualification. We may first refer to the different circumstances in which a seat of a Member becomes vacant:

(i) Clause (2) of Article 101 provides that where a person is chosen as a Member both of Parliament and of a House of Legislature of a State then at the expiry of such period as may be specified in the rules made by the President, that person's seat in Parliament shall become vacant unless he/she has previously resigned from his/her seat in the legislature of the State.

(ii) Clause (3)(a) of Article 101 provides that if a Member of either House of Parliament becomes subject to any disqualification mentioned in clause (1) of Article 102, his/her seat shall thereupon become vacant. Clause (1) of Article 102 refers to five circumstances in which a person shall be disqualified for being chosen and for being a Member of Parliament (one of which is if he/she holds any office of profit under the Government of India or the Government of any State other than an office declared by Parliament by law not to disqualify its holder). Article 103 provides that if any question arises as to whether a Member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of

10 (2009) 9 SCC 648.

Article 102, the question shall be referred for the decision of the President whose decision shall be final.

(iii) Clause (3)(a) of Article 101 also provides that if a Member of either House of Parliament becomes subject to any of the disqualifications mentioned in clause (2) of Article 102, his/her seat shall thereupon become vacant. Clause (2) of Article 102 refers to a person being disqualified for being a Member of either House of Parliament on ground of defection under the Tenth Schedule to the Constitution. Para 6 of the Tenth Schedule provides that if any question arises about whether a Member of a House has become subject to disqualification under the Tenth 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/her decision shall be final.

(iv) Clause (3)(b) of Article 101 provides that if a Member of either House of Parliament resigns from his/her seat and his/her resignation is accepted by the Chairman or the Speaker, as the case may be, his/her seat shall thereupon become vacant.

(v) Clause (4) of Article 101 provides that if for a period of 60 days a Member of either House of Parliament is without permission of the House absent from all meetings thereof, the House may declare his/her seat vacant.

It can be seen from the abovementioned permutations that there are several possibilities which may lead to a seat becoming vacant. **It is also clear that a seat becomes vacant only after an adjudication in cases falling under Article 101(3)(a), whereas, the seats become vacant without any adjudication on the happening of specified events in respect of vacancies arising under Articles 101(2), 101(3)(b) and 101(4).**

60. Thus, we find that for a vacancy to occur under Article 101(4), there should be a declaration by the House, for a vacancy to occur under Article 101(3)(b) there should be acceptance of resignation by the Chairman or the Speaker of the House and under Article 101(2) the vacancy arises automatically on the expiry of 15 days after the point of time that the particular MP became a Member of the State Legislature. However, the vacancies contemplated in Article 101(3)(a) will arise only when the disqualification is decided upon and declared by the President under Article 103(1) or declared by the Chairman or the Speaker of the House under Para 6(1) of the Tenth Schedule. Therefore, in the case of vacancy under Article 101(3)(a), the vacancy of the seat is not automatic consequent upon incurring the disqualification but would occur only upon a declaration of the disqualification by the designated authority. For example, if a Member gives up membership of a political party or votes or abstains from voting in the House in a manner that is contrary to the directions issued by his/her political party, Para 2 of the Tenth Schedule provides that the said Member of the House shall be disqualified. However, the vacancy of his/her seat does not become operative on the day he/she gives up membership of the political party or when he/she votes or abstains from voting in a manner that is contrary to the directions issued by his/her political party. With regard to disqualification on the ground of defection, the vacancy of the seat would become operative only when a decision is rendered by the Chairman or the Speaker of the House, as the case may be, declaring his disqualification. Similarly, in respect of the disqualification on the ground of holding an office of profit, the vacancy of the seat would become operative only when the President decides the issue on the subject of the alleged disqualification and declares that a particular Member has incurred the same. Such a decision may be

made either on the basis of an adjudication where the question is disputed, or on the basis of an admission by the Member concerned.

4.30 Whether or not leaving the House and not voting is a disqualification depends largely on how one views the 16th March 2017 directive from Kavlekar, admittedly worded as a whip. But that is not enough. When a petition is brought before us, we must first see whether there is a decision properly so-called in regard to the disqualification alleged.¹¹ This is something the Speaker alone must decide in terms of paragraph 6(1) of the Tenth Schedule. As the Supreme Court held in *Speaker, Haryana Vidhan Sabha v Kuldip Bishnoi*,¹² no one else may do this. Here, Mr Lawande makes a telling point based on *Bishnoi*. Paragraph 6 of the Tenth Schedule is not an 'alternate' remedy; it is the *only* remedy. The Supreme Court held in *Bishnoi*:

43. The scheme of Schedule X to the Constitution indicates that the Speaker is not competent to take a decision with regard to disqualification on ground of defection, without a determination under Para 4, and Para 6 in no uncertain terms lays down that if any question arises as to whether a Member of the House has become subject to disqualification, the said question would be referred to the Speaker of such House whose decision would be final. The finality of the decisions of the Speaker was in regard to Para 6 since the Speaker was not competent to decide a question as to whether there has been a split or merger under Para 4. The

11 *Consumer Education & Research Society v Union of India & Ors*, (2009) 9 SCC 648.

12 *Speaker, Haryana Vidhan Sabha v Kuldip Bishnoi*, (2015) 12 SCC 381.

said question was considered by the Constitution Bench in *Rajendra Singh Rana* case [*Rajendra Singh Rana v. Swami Prasad Maurya*, (2007) 4 SCC 270]. While construing the provisions of Schedule X to the Constitution in relation to Articles 102 and 191 of the Constitution, the Constitution Bench observed that the whole proceedings under Schedule X gets initiated as a part of disqualification proceedings. Hence, determination of the question of split or merger could not be divorced from the motion before the Speaker seeking a disqualification of the Member or Members concerned under Para 6 of Schedule X. Under the scheme of Schedule X the Speaker does not have an independent power to decide that there has been split or merger as contemplated by Paras 3 and 4 respectively and such a decision can be taken only when the question of disqualification arises in a proceeding under Para 6. It is only after a final decision is rendered by the Speaker under Para 6 of Schedule X to the Constitution that the jurisdiction of the High Court under Article 226 of the Constitution can be invoked.

44. We have to keep in mind the fact that these appeals are being decided in the background of the complaint made to the effect that the interim orders have been passed by the High Court in purported exercise of its powers of judicial review under Articles 226 and 227 of the Constitution, when the disqualification proceedings were pending before the Speaker. In that regard, we are of the view that since the decision of the Speaker on a petition under Para 4 of Schedule X concerns only a question of merger on which the Speaker is not entitled to adjudicate, the High Court could not have assumed jurisdiction under its powers of review before a decision was taken by the Speaker under Para 6 of Schedule X to the Constitution. It is in fact in a proceeding under Para 6 that the Speaker assumes jurisdiction to pass a quasi-judicial order which is

amenable to the writ jurisdiction of the High Court. It is in such proceedings that the question relating to the disqualification is to be considered and decided. Accordingly, restraining the Speaker from taking any decision under Para 6 of Schedule X is, in our view, beyond the jurisdiction of the High Court, since the Constitution itself has vested the Speaker with the power to take a decision under Para 6 and care has also been taken to indicate that such decision of the Speaker would be final. It is only thereafter that the High Court assumes jurisdiction to examine the Speaker's order.

47. **In our view, the High Court had no jurisdiction to pass such an order, which was in the domain of the Speaker.** The High Court assumed the jurisdiction which it never had in making the interim order which had the effect of preventing the five MLAs in question from effectively functioning as Members of the Haryana Vidhan Sabha. **The direction given by the learned Single Judge to the Speaker, as endorsed by the Division Bench, is, therefore, upheld to the extent that it directs the Speaker to decide the petitions for disqualification of the five MLAs within a period of four months.** The said direction shall, therefore, be given effect to by the Speaker. **The remaining portion of the order disqualifying the five MLAs from effectively functioning as Members of the Haryana Vidhan Sabha is set aside.** The said five MLAs would, therefore, be entitled to fully function as Members of the Haryana Vidhan Sabha without any restrictions, subject to the final decision that may be rendered by the Speaker in the disqualification petitions filed under Para 6 of Schedule X to the Constitution.

(Emphasis added)

4.31 Mr Lawande is also correct when he says that ‘any question’ in paragraph 6 necessarily includes a question of jurisdiction. It is not possible to segregate this question from other questions, as a question of jurisdiction is fundamental.

4.32 We turn, finally, to the decision of the Supreme Court in *Kihoto Hollohan v Zachillhu & Ors*¹³ (“*Kihoto II*”), one on which both sides have relied. We will quote at length from this decision because it appears to us to be squarely applicable, and its findings would cover most, and perhaps all, the issues canvassed before us.

7. The Committee on Defections recommended that a defector should be debarred for a period of one year or till such time as he resigned his seat and got himself re-elected from appointment to the office of a Minister including Deputy Minister or Speaker or Deputy Speaker, or any post carrying salaries or allowances to be paid from the Consolidated Fund of India or of the State or from the funds of government undertakings in public sector in addition to those to which the defector might be entitled as legislator. The Committee on Defections could not, however, reach an agreed conclusion in the matter of disqualifying a defector from continuing to be a Member of Parliament/State legislator.

9. This brings to the fore the object underlying the provisions in the Tenth Schedule. The object is to curb the evil of political defections motivated by lure of office or other similar considerations which endanger the

13 1992 Supp (2) SCC 651. This decision is of 18th February 1992. The previous decision in *Kihoto Hollohan v Zachilhu* (“*Kihoto I*”), (1982) 1 SCC 309, is of 12th November 1991 held paragraph 7 of the Tenth Schedule to be invalid.

foundations of our democracy. The remedy proposed is to disqualify the Member of either House of Parliament or of the State Legislature who is found to have defected from continuing as a Member of the House. The grounds of disqualification are specified in Paragraph 2 of the Tenth Schedule.

10. Paragraph 2(1) relates to a Member of the House belonging to a political party by which he was set up as a candidate at the election. Under Paragraph 2(1)(a) such a Member would incur disqualification if he voluntarily gives up his membership of such political party. **Under clause (b) he would incur the disqualification if he votes or abstains from voting in the House contrary to “any direction” issued by the political party to which he belongs or by any person or authority authorised by it in this behalf without obtaining, in either case, prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.** This sub-para would also apply to a nominated Member who is a Member of a political party on the date of his nomination as such Member or who joins a political party within six months of his taking oath.

11. Paragraph 2(2) deals with a Member who has been elected otherwise than as a candidate set up by any political party and would incur the disqualification if he joins any political party after such election. A nominated Member of a House would incur his disqualification under sub-para (3) if he joins any political party after the expiry of six months from the date of which he takes his seat.

13. These provisions in the Tenth Schedule give recognition to the role of political parties in the political

process. A political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programme. A person who gets elected as a candidate set up by a political party is so elected on the basis of the programme of that political party. **The provisions of Paragraph 2(1)(a) proceed on the premise that political propriety and morality demand that if such a person, after the election, changes his affiliation and leaves the political party which had set him up as a candidate at the election, then he should give up his membership of the legislature and go back before the electorate.** The same yardstick is applied to a person who is elected as an Independent candidate and wishes to join a political party after the election.

... ..

94. It is, therefore, inappropriate to claim that the determinative jurisdiction of the Speaker or the Chairman in the Tenth Schedule is not a judicial power and is within the non-justiciable legislative area. The classic exposition of Issacs J., in *Australian Boot Trade Employees Federation v. Whybrow & Co.* [(1910) 10 CLR 266, 317] as to what distinguishes a judicial power from a legislative power was referred to with the approval of this Court in *Express Newspaper (P) Ltd. v. Union of India* [AIR 1958 SC 578, 611 : 1959 SCR 12 : (1961) 1 LLJ 339]. Issacs, J., stated: (CLR p. 317 quoted at AIR p. 611)

“If the dispute is as to the relative rights of parties as they rest on past or present circumstances, the award is in the nature of a judgment, which might have been the decree of an ordinary judicial tribunal acting under the ordinary judicial power. There the law

applicable to the case must be observed. If, however, the dispute is as to what shall in the future be the mutual rights and responsibilities of the parties — in other words, if no present rights are asserted or denied, but a future rule of conduct is to be prescribed, thus creating new rights and obligations, with sanctions for non-conformity — then the determination that so prescribes, call it an award, or arbitration, determination, or decision or what you will, is essentially of a legislative character, and limited only by the law which authorises it. If, again, there are neither present rights asserted, nor a future rule of conduct prescribed, but merely a fact ascertained necessary for the practical effectuation of admitted rights, the proceeding, though called an arbitration, is rather in the nature of an appraisal or ministerial act.”

95. In the present case, the power to decide disputed disqualification under Paragraph 6(1) is pre-eminently of a judicial complexion.

96. The fiction in Paragraph 6(2), indeed, places it in the first clause of Article 122 or 212, as the case may be. The words “proceedings in Parliament” or “proceedings in the legislature of a State” in Paragraph 6(2) have their corresponding expression in Articles 122(1) and 212(1) respectively. This attracts an immunity from mere irregularities of procedures.

98. **But then is the Speaker or the Chairman acting under Paragraph 6(1) a Tribunal? “All tribunals are not courts, though all courts are tribunals”. The word**

“courts” is used to designate those tribunals which are set up in an organised State for the Administration of Justice. By Administration of Justice is meant the exercise of judicial power of the State to maintain and uphold rights and to punish “wrongs”. Whenever there is an infringement of a right or an injury, the courts are there to restore the vinculum juris, which is disturbed. (See *Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjhunwala* [(1962) 2 SCR 339 : AIR 1961 SC 1669 : (1961) 31 Comp Cas 387]). In that case Hidayatullah, J. said: (SCR p. 362)

“... By ‘courts’ is meant courts of civil judicature and by ‘tribunals’, those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary courts of civil judicature. Their procedures may differ but the functions are not essentially different. What distinguishes them has never been successfully established. Lord Stamp said that the real distinction is that the courts have ‘an air of detachment’. But this is more a matter of age and tradition and is not of the essence. Many tribunals, in recent years, have acquitted themselves so well and with such detachment as to make this test insufficient.”

99. Where there is a lis — an affirmation by one party and denial by another — and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. **That authority is called a Tribunal, if it does not have all the trappings of a Court.** In *Associated Cement Companies Ltd. v. P.N. Sharma* [(1965) 2 SCR 366 : AIR 1965 SC 1595 : (1965) 1 LLJ 433] this Court said: (SCR pp. 386-87)

“... The main and the basic test however, is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the State’s inherent power exercised in discharging its judicial function. Applying this test, there can be no doubt that the power which the State Government exercises under Rule 6(5) and Rule 6(6) is a part of the State’s judicial power.... There is, in that sense, a lis; there is affirmation by one party and denial by another, and the dispute necessarily involves the rights and obligations of the parties to it. The order which the State Government ultimately passes is described as its decision and it is made final and binding.”

100. By these well known and accepted tests of what constitute a Tribunal, the Speaker or the Chairman, acting under Paragraph 6(1) of the Tenth Schedule is a Tribunal.

109. In the light of the decisions referred to above and the nature of function that is exercised by the Speaker/Chairman under Paragraph 6, **the scope of**

judicial review under Articles 136, and 226 and 227 of the Constitution in respect of an order passed by the Speaker/Chairman under Paragraph 6 would be confined to jurisdictional errors only viz., infirmities based on violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity.

110. In view of the limited scope of judicial review that is available on account of the finality clause in Paragraph 6 and also having regard to the constitutional intendment and the status of the repository of the adjudicatory power i.e. Speaker/Chairman, judicial review cannot be available at a stage prior to the making of a decision by the Speaker/Chairman and a *quia timet* action would not be permissible. Nor would interference be permissible at an interlocutory stage of the proceedings. Exception will, however, have to be made in respect of cases where disqualification or suspension is imposed during the pendency of the proceedings and such disqualification or suspension is likely to have grave, immediate and irreversible repercussions and consequence.

111. In the result, we hold on contentions (E) and (F):

That the Tenth Schedule does not, in providing for an additional grant (sic ground) for disqualification and for adjudication of disputed disqualifications, seek to create a non-justiciable constitutional area. **The power to resolve such disputes vested in the Speaker or Chairman is a judicial power.**

That Paragraph 6(1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the speakers/Chairmen is valid. **But the concept of statutory**

finality embodied in Paragraph 6(1) does not detract from or abrogate judicial review under Articles 136, 226 and 227 of the Constitution insofar as infirmities based on violations of constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and perversity, are concerned.

That the deeming provision in Paragraph 6(2) of the Tenth Schedule attracts an immunity analogous to that in Articles 122(1) and 212(1) of the Constitution as understood and explained in Keshav Singh case [(1965) 1 SCR 413 : AIR 1965 SC 745] to protect the validity of proceedings from mere irregularities of procedure. The deeming provision, having regard to the words 'be deemed to be proceedings in Parliament' or 'proceedings in the legislature of a State' confines the scope of the fiction accordingly.

The Speakers/Chairmen while exercising powers and discharging functions under the Tenth Schedule act as Tribunal adjudicating rights and obligations under the Tenth Schedule and their decisions in that capacity are amenable to judicial review.

However, having regard to the Constitutional Schedule in the Tenth Schedule, judicial review should not cover any stage prior to the making of a decision by the Speakers/Chairmen. Having regard to the constitutional intendment and the status of the repository of the adjudicatory power, no *quia timet* actions are permissible, the only exception for any interlocutory interference being cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repercussions and consequence.

115. The question is, whether the investiture of the determinative jurisdiction in the Speaker would by itself stand vitiated as denying the idea of an independent

adjudicatory authority. We are afraid the criticism that the provision incurs the vice of unconstitutionality ignores the high status and importance of the office of the Speaker in a Parliamentary democracy. The office of the Speaker is held in the highest respect and esteem in Parliamentary traditions. The evolution of the institution of Parliamentary democracy has as its pivot the institution of the Speaker. 'The Speaker holds a high, important and ceremonial office. All questions of the well being of the House are matters of Speaker's concern.' The Speaker is said to be the very embodiment of propriety and impartiality. He performs wide ranging functions including the performance of important functions of a judicial character.

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

119. Accordingly, the contention that the vesting of adjudicatory functions in the Speakers/Chairmen would by itself vitiate the provision on the ground of likelihood of political bias is unsound and is rejected. The Speakers/Chairmen hold a pivotal position in the scheme of Parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to and do take far-reaching decisions in the functioning of Parliamentary democracy. Vestiture of power to adjudicate questions under the Tenth Schedule in such constitutional functionaries should not be considered exceptionable.

123. Keeping in view the consequences of the disqualification i.e., termination of the membership of a House; it would be appropriate that the direction or whip which results in such disqualification under Paragraph 2(1)(b) is so worded as to clearly indicate that voting or abstaining from voting contrary to the said direction would result in incurring the disqualification under Paragraph 2(1)(b) of the Tenth Schedule so that the member concerned has fore-knowledge of the consequences flowing from his conduct in voting or abstaining from voting contrary to such a direction.

(Emphasis added)

4.33 Thus, our power of judicial review is in any case limited, even had there been a decision of the Speaker. There is not, and *Kihoto Hollohan* tells us in no uncertain terms, and to which there is no answer, that we cannot exercise an Article 226 jurisdiction before a decision. If that is so, then we do not see how we can exercise it *without* a decision either.

4.34 There is one further difficulty in the Petitioners' way, and it is a very real difficulty. The Petition takes up two conflicting positions simultaneously. These cannot co-exist. There is a challenge, as we have seen, to the Speaker's acceptance of Vishwajit's resignation. But if that acceptance is bad, then the Speaker must have jurisdiction and the Petition does not lie. The only remedy is to go to the Speaker, and, after his decision is rendered, to bring a challenge on the limited grounds of judicial review. Yet the Petition says the Speaker does *not* have jurisdiction; and he does not have it *because he accepted Vishwajit's resignation*, i.e., that the acceptance of

the resignation is *good*. It follows, therefore, that Vishwajit vacated his seat once his resignation was accepted; and no question remained of deciding any disqualification. The Petitioners cannot maintain that the Speaker's acceptance of the resignation is simultaneously both good and bad. Again, the Petition will not lie. In either scenario, the result is, inevitably, only one. The Petition must fail.

D. ORDER

5. For the foregoing reasons, Rule is discharged and the Petition is dismissed. In the facts of the case, there will be no order as to costs.

6. Our thanks to Mr Desai, Mr Doctor and Mr Lawande for their invaluable assistance.

(G.S. PATEL, J.)

(N. D. SARDESSAI, J.)