

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.11.2017

DELIVERED ON : 22.03.2018

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE

AND

The Hon'ble Mr.JUSTICE M.SUNDAR

W.P. Nos.16275, 18788, 29591 to 29593 of 2017

and

W.M.P.Nos.17605, 18478, 18479 to 18481, 20316 and
31877 to 31887 of 2017

W.P.No.16275 of 2017 :

K.Lakshminarayanan .. Petitioner

Vs.

1.The Union of India,
represented by the Secretary to Government,
Ministry of Home Affair,
Government of India,
New Delhi.

2.The Union of India,
represented by
the Government of Union Territory of Puducherry
through the Chief Secretary to Government,
Government of Puducherry,
Puducherry. .. Respondents

W.P.No.18788 of 2017 :

S.Dhanalakshmi .. Petitioner

Vs.

- 1.The Union of India,
represented by Secretary to Government,
Ministry of Home Affairs,
Government of India,
New Delhi.
- 2.The Joint Secretary to Government of India,
Ministry of Home Affairs,
New Delhi.
- 3.Union Territory of Puducherry,
rep by Chief Secretary to Government,
Government of Puducherry,
Puducherry.
- 4.V.Saminathan
President,
Bharathiya Janatha Party-Puducherry Unit,
Shahti Nagar, Opp. Pasic Water Unit,
Karuvadikuppam Road,
Puducherry.
- 5.K.G.Shankar,
Treasurer,
Bharathiya Janatha Party-Puducherry Unit,
Opp. Balaji Theatre,
Puducherry.
- 6.S.Selvaganapathy,
Correspondent,
Vivekananda Matriculation School,
Lawspet, Puducherry. ... Respondents

W.P.Nos.29591, 29592 and 29593 of 2017 :

V.Saminathan ... Petitioner in
W.P.No.29591/2017

K.G.Shankar ... Petitioner in
W.P.No.29592/2017

S.Selvaganabathy ... Petitioner in
W.P.No.29593/2017

Vs.

- 1.The Union Territory of Puducherry,
represented by the Chief Secretary to Government,
Secretariat,
Government of Puducherry
Puducherry.
- 2.The Secretary,
Legislative Assembly Secretariat,
Government of Puducherry,
Puducherry.
- 3.The Secretary to Lt. Governor
of Union Territory of Puducherry,
Rajnivas,
Puducherry.
- 4.The Union of India,
represented by
the Secretary to Government,
Ministry of Home Affairs,
Government of India,
New Delhi. ... Respondents in
all writ three petitions

W.P.No.16275 of 2017 has been filed under Article 226 of the Constitution of India praying for the issue of a writ of mandamus forbearing the respondents from in any manner nominating or filling up the nominated seats of Members for the Puducherry Legislative Assembly except with the consultation and choice of the elected Council of Ministers.

W.P.No.18788 of 2017 has been filed under Article 226 of the Constitution of India praying for the issue of a writ of Declaration pertaining to Section 3(3) of the Government of Union Territories Act, 1963 and the impugned notification in F.No.11012/1/2014-UTL dated 23.6.2017, which is published in Gazette of Puducherry Extraordinary Part-I G.O.Ms.No.43, Puducherry, dated 4.7.2017 issued by the respondents 1 and 2 herein in exercise of the powers conferred by the above mentioned impugned statutory provision and declare the same as unconstitutional and ultra vires Article 14 of Constitution of India.

W.P.Nos.29591, 29592 and 29593 of 2017 have been filed under Article 226 of the Constitution of India praying for the issue of a writ of certiorarified mandamus to call for the records relating to impugned order No.124/LAS/Ref./2017 dated 13.11.2017 issued by the second respondent and quash the same as unconstitutional, unsustainable, unreasonable, illegal, unlawful, arbitrary, ultravires and violative of Section 3(3) of the Government of Union Territories Act, 1963 and consequently

direct the respondent Nos.1 and 2 to implement the Notification F.No.U-11012/1/2014-UTL dated 23.6.2017 issued by the fourth respondent and consequential Gazette Publication effected by the first respondent in Extraordinary the Gazette of Puducherry Part-I vide G.O.Ms.No.43 dated 4.7.2017 for nomination of the petitioner as Member of Legislative Assembly for Union Territory of Puducherry.

For Petitioners : Mr.V.T.Gopalan, SC
for Mr.T.Saikrishnan in
W.P.No.167275 of 2017

Mr.T.R.Rajagopal, SC
for Mr.D.Ravichander in
W.P.No.18788 of 2017

Mr.P.S.Raman, SC
for Mr.M.Vaikunth in W.P.No.29591 of 2017

Mr.P.H.Arvind Pandian, SC
for Mr.Prakash Adiapadam
in W.P.No.29592 of 2017

Mr.Yasodh Varadhan, SC
for Mr.M.Vaikunth in W.P.No.29593 of 2017

For Respondents : Mr.G.Rajagopalan,
Additional Solicitor General
assisted by Mr.Venkatesan, SCGSC,
for R1 in W.P.No.16275 of 2017
for RR1 and 2 in W.P.No.18788 of 2017
for R4 in W.P.Nos.29591 to 29593 of 2017

Mr.A.Gandhiraj, Govt. Pleader (Puducherry)
for R2 in W.P.No.16275 of 2017
for R3 in W.P.No.18788 of 2017
for R1 in W.P.Nos.29591 to 29593 of 2017

Mr.P.S.Raman, Senior counsel
for Mr.M.Vaikunth for R-4
in W.P.No.18788 of 2017

Mr.P.H.Arvind Pandian, Senior counsel
for Prakash Adiapadam for R-5
in W.P.No.18788 of 2017

Mr.Yasodh Varadhan, Senior counsel
for Mr.M.Vaikunth for R-6
in W.P.No.18788 of 2017

Mr.AR.L.Sundaresan, Senior counsel
for Mr.Bharatha Chakaravarthy for R-2
in W.P.Nos.29591 to 29593 of 2017

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COMMON ORDER

M.SUNDAR, J.

All these five writ petitions arise out of a common factual matrix and raise a common central issue. Therefore, we propose to dispose of all these five writ petitions by this common order. For appreciating this common order, it is necessary to set out the factual matrix in a nutshell and we do so infra.

2 FACTUAL MATRIX IN A NUTSHELL :

2(a) The common central issue that all these five writ petitions raise is whether nomination of three individuals as Members of Puducherry Legislative Assembly is valid. In other words, the central theme of these five writ petitions is validity, legality and propriety of nomination of three individuals as Members of Legislative Assembly of Puducherry.

2(b) One writ petition has been filed as a Public Interest Litigation ('PIL' for brevity), i.e., W.P.No.18788 of 2017 by an individual, who is a voter in one of the assembly constituencies of Puducherry Union Territory. Another writ petition, i.e., W.P.No.16275 of 2017 has been filed by the Chief Government Whip in the Puducherry Legislative Assembly. Three writ petitions being W.P.Nos.29591 to 29593 of 2017 have been filed by three individuals nominated as Members of Puducherry Legislative Assembly (hereinafter referred to as 'MLAs' for brevity and convenience). To be noted, nomination of these three individuals as MLAs itself is under challenge here and referring to them as 'MLAs' is only for convenience. Aforesaid PIL and W.P.No.16275 of 2017 on one side and the three writ petitions filed by the MLAs on the other side are in the nature of cross suits. It may be appropriate to use the expression 'cross writ petitions' here. While the PIL and W.P.No.16275 of 2017 assail the proposed nomination / nomination on various grounds, three writ petitions by nominated MLAs assail a communication from the Secretary, Government of Puducherry, Legislative Assembly Secretariat dated 13.11.2017 communicating an order of the Speaker of Puducherry Legislative Assembly dated 12.11.2017 which in sum and substance says that the Speaker does not recognize their nominations.

2(c) Puducherry is a Union Territory with a legislative assembly. Puducherry legislative assembly is made up of 30 elected MLAs and 3 nominated MLAs.

2(d) In the last General Election to Puducherry Legislative Assembly held in 2016, one political party, i.e., Indian National Congress (hereinafter referred to as 'INC' for brevity) emerged as the single largest party and the break up of MLAs returned to the assembly by Puducherry electorate is as follows :

INC - 15

NR Congress - 8

AIADMK - 4

DMK - 2

Independent - 1

(AIADMK stands for All India Anna Dravida Munnetra Kazhagam and DMK stands for Dravida Munnetra Kazhagam and we are informed that 'NR' in 'NR Congress' denotes Thiru.N.Rengasamy, former Chief Minister of Puducherry)

It unfurls from the submissions in the hearing that INC being the single largest party formed the Government in 30 member legislative assembly with the support of 2 DMK MLAs and one independent MLA.

2(e) On 23.06.2017, the Central Government in exercise of its powers under Section 3(3) of the Government of Union Territories Act, 1963 (hereinafter referred to as 'UT Act' for brevity) nominated 3 individuals as nominated MLAs of Puducherry Legislative Assembly. The three individuals are V.Saminathan, K.G.Shankar and S.Selvaganabathy, who are writ petitioners in W.P.Nos.29591, 29592 and 29593 of 2017 respectively.

2(f) As stated supra, of all five writ petitions, two on one side and three on the other side are in the nature of cross litigations and for the sake of convenience and clarity, in this order, we refer to parties either by name or by designation rather than by their rank in any of the writ petitions.

2(g) The grounds of challenge of respective parties shall be set out *infra* under the caption 'Discussion'.

2(h) In the instant case, all three nominated members are also members of Bharatiya Janata Party (hereinafter 'BJP'). A letter written by the three nominated MLAs (letter dated 6.7.2017 from three nominated MLAs addressed to Legislative Assembly Secretary, Puducherry) suggests that the three of them constitute BJP legislature party and they have even chosen one amongst themselves, i.e., V.Saminathan, as their leader. Be that as it may, we are informed that in the past, i.e., in the last six nominations over the years, nominated MLAs belonged to one political party or the other which already had a presence in the Puducherry Legislative Assembly. To be noted, the first of the

nominations was made only in 1985 after the 52nd amendment to the Constitution of India ('COI' for brevity), in and by which Tenth Schedule to the COI was brought in. Therefore, before proceeding with discussion in this judgment, at the outset, we wanted to know the exact status of the nominated MLAs in the Puducherry Legislative Assembly. In other words, we wanted to know as to whether, in the past, nominated MLAs, on nomination and on entering the legislative assembly, became part of the legislature party of the respective political parties they belonged to and as to whether they were not controlled by the Whip of the legislature party. In other words, the neat question which we posed to all the learned counsel is "whether nominated MLAs become part of the legislature party if they belong to a political party at the time of nomination?" We posed this question, particularly in the light of explanation (b) to paragraph 2(1)(b) and paragraph 2(3) of Tenth Schedule of COI, which reads as follows :

"2. Disqualification on ground of defection.--(1) x x x x x

(a) x x x x x x x x x x x x

(b) x x x x x x x x x x x x

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

(a) x x x x x x x x x x x

(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.

x x x x x x x x x x

(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."

2(i) Another reason for us to pose the aforesaid question is, nominated MLAs in the instant case have voting rights. To this, it was conceded by all the learned senior counsel and learned Solicitor before us that the position is not clear and it was submitted by learned Additional Solicitor General that it is a grey area which requires examination. With this preface, we proceed to discuss the lis further.

3 RIVAL SUBMISSIONS :

3(a) Submissions in the PIL and W.P.No.16275 of 2017 assailing proposed nominations and nominations can broadly be set out as under :

(i) Nomination of MLAs under Section 3(3) of the UT Act has to be done by the Central Government. In the instant case, the nomination has not been done by the 'Central Government' as in law qua Puducherry Union Territory.

(ii) The process of nomination of the three MLAs purportedly under Section 3(3) of the UT Act is in complete violation of a time honoured procedure for nomination which has attained the status of constitutional convention. According to PIL petitioner and petitioner in W.P.No.16275 of 2017, the constitutional convention is that recommendation should emanate from the Council of Ministers. The recommendation of names which emanate from the Council of Ministers should be forwarded to the Lieutenant Governor, who in turn shall forward it to the President for nomination and in the event of disagreement between the recommendation made by the Council of Ministers and Lieutenant Governor, the same shall be settled by the President.

(iii) Individuals, who have been nominated as MLAs, are of doubtful credentials. In other words, it is argued that there are FIRs pending against two of them.

(iv) As a corollary to the preceding ground, it was contended that persons to be nominated should have certain qualities and distinctions, such as high integrity, merit, rectitude and honesty, whereas nominated MLAs do not qualify in this regard.

(v) As a further corollary to the preceding point, it was contended that three nominated MLAs have been so nominated on the sole ground that they are functionaries of BJP, which does not have any presence in the assembly.

(vi) With regard to attacking the credentials of MLAs qua nomination, it was contended that V.Saminathan contested the last general elections in 2016 in a BJP ticket from Lawspet assembly constituency and lost so badly that he did not get back his deposit. To be noted, for a candidate to get back his / her deposit, he / she has to secure 1/6th of the total number of valid votes polled.

(vii) Sub-section (3) of section 3 of UT Act is ultra vires the Constitution and therefore, deserves to be so declared.

3(b) Countering the aforesaid attack of PIL petitioner and

petitioner in W.P.No.16275 of 2017 and also advancing their own case in their respective writ petitions, nominated MLAs made submissions, which can broadly be set out as under :

(i) There is no constitutional convention as alleged and on a demurer, even if there is one, there is no violation of any constitutional convention.

(ii) Nominations to Puducherry Legislative Assembly have been done on six earlier occasions in 1985, 1990, 1996, 2001, 2006 and 2011, but on every occasion, nominated members belonged to one political party or the other.

(iii) As a corollary to the preceding ground, it was urged that an individual being member of a political party is not a bar for being nominated as an MLA in the Puducherry legislative Assembly.

(iv) Nomination has been made by the Central Government in exercise of its power under Section 3 (3) of the UT Act. The Speaker has no authority whatsoever to say that he does not accept the nomination. It was contended that the Speaker is the Master of the House and that is with regard to proceedings in the House as contemplated under Article 212 of the COI, but the Speaker has no authority to say that he does not accept the nomination and in fact, there is no need or necessity for the Speaker to accept their nominations.

(v) FIRs against two of the nominated MLAs are matters pertaining to agitations, where public causes / issues were agitated and complaints are only at the FIR stage with not even a charge sheet being filed, much less conviction.

(vi) It is incorrect to contend that nominations have not been done by the Central Government qua Puducherry within the meaning of Section 3(3) of the UT Act as the file pertaining to the nomination, ultimately, comes to the Home Ministry as per the Business Rules of the Central Government.

(vii) A very unique argument made is that the Speaker of the Puducherry Legislative Assembly is only a Speaker with statutory authority and not one who wields constitutional authority unlike other Speakers in a State.

3(c) Submissions raised on behalf of the Speaker can broadly be summarized and encapsulated as follows :

(i) Justiciability of an order made by the Speaker is very limited. In other words, scope of judicial review of an order of the Speaker is on very limited grounds.

(ii) It is for the Speaker to decide who can be permitted to enter and participate in the proceedings

of the House as he is the Master of the House.

3(d) On behalf of the Central Government, learned Additional Solicitor General of India made submissions and his submissions can be summarized and broadly set out as follows :

(i) Article 239-A of the COI makes it clear that Puducherry Legislative Assembly is to be constituted by MLAs who are partly nominated and partly elected and therefore, nominated MLAs are necessarily part of Puducherry legislative assembly.

(ii) Resisting the challenge to sub-section (3) of section 3 of UT Act, it was submitted that the said statutory provision cannot be challenged without challenging Article 239A of COI.

(iii) A mere possibility of misuse of the provision of law cannot be a ground to challenge the validity and vires of the said provision.

(iv) Under Section 50 of the UT Act, Central Government is supreme qua Puducherry.

4 DISCUSSION :

4(a) Having set out the rival submissions before us, we now proceed to discuss the submissions.

4(b) To be noted, the petitioner in W.P.No.16275 of 2017, K.Lakshminarayanan, is a legislator and he is also the Parliamentary Secretary to the Chief Minister. Most importantly, he is the Whip of the ruling Congress party (INC) in the Puducherry legislative assembly. As would be evident from the narrative supra, this writ petition filed by K.Lakshminarayanan and the PIL filed by one S.Dhanalakshmi (W.P.No.18788 of 2017) go together in terms of submissions, though prayers are little different. For the sake of convenience, petitioner in W.P.No.16275 of 2017 is referred to as 'Whip' from hereon in this order. As far as the petitioner in W.P.No.18788 of 2017 is concerned, she will be referred to as 'PIL petitioner'.

4(c) The Whip's writ petition is the first of the five writ petitions qua date of filing and the prayer therein was against proposed nominations. Prayer in the PIL petitioner's writ petition has two limbs. One limb is challenge to Section 3(3) of the UT Act. The other limb is challenge to the order nominating the three MLAs.

4(d) As would be evident from the rival submissions set out supra, primary contention of the PIL petitioner and the Whip is that Article 239A of COI which provides for a legislature in Puducherry constituted by elected and nominated members, does not explain the term 'Central Government'. Article 367 of COI states that the General Clauses Act, 1897 will apply for the interpretation of the Constitution. Section 3(8)(b)(iii) of the General Clauses Act defines 'Central Government'. Going by this definition, 'Central Government' insofar as Union Territories

are concerned, is either the President or Administrator. On this basis, it is contended by PIL petitioner and the Whip that nomination of MLAs should have been done either by the President or by the Administrator. To be noted, in the instant case, the nomination has been done by the Home Ministry.

4(e) In response to this contention, learned Solicitor submitted that in the light of the language employed in Section 3(3) of the UT Act, petitioners cannot be heard to contend that 'Central Government' means President. However, according to us, the most relevant submission in this regard turns on Article 77 (1) of COI. It was contended by learned Solicitor that Article 77, particularly, sub-article (3) of Article 77 enables the President to make rules for more convenient transaction of the business of the Government of India as well as for allocation of business amongst Ministers and in exercise of such powers, the President of India has made 'The Government of India (Allocation of Business) Rules, 1961'. The business rules were placed before us by the Solicitor and it was explained as to how the nomination of MLAs reached the Ministry of Home Affairs. Argument of PIL petitioner that Article 77(3) has no relevance in the present case as Executive wing of Union Territory is distinct from the executive wing of Union of India does not appeal to us and we reject that submission on the ground that it is untenable in the light of the factual matrix of the instant cases.

4(f) To our mind, what follows as a sequitur is, even if 'Central Government' as occurring in Section 3(3) of the UT Act is to be construed to be the President, 'President' under Article 77(3) has powers to make business rules, particularly for allocation of business, such powers have been exercised by the President, business rules have, in fact, been made and nomination has reached the Ministry of Home Affairs in accordance with such business rules and ultimately, nominations have been made by the Ministry of Home Affairs. Therefore, in the aforesaid view of the matter, we have no difficulty in accepting that the nominations have been made by an appropriate authority in accordance with Section 3(3) of the UT Act, which in other words is traceable to Article 239A of the COI.

4(g) With regard to who or which office is 'Central Government' with regard to the Union Territory of Puducherry, two judgments were pressed into service by the PIL petitioner and the Whip. Those judgments are 'Goa Sampling Employees' Association Vs. General Superintendence Co. of India Pvt. Ltd. and others reported in (1985) 1 SCC 206 and 'Government of NCT Delhi Vs. All India Central Civil Accounts, JAO's Association and others reported in (2002) 1 SCC 344. Goa Sampling Employees' Association case dealt with the aspect of which would be the appropriate authority with regard to industrial disputes when it comes to Union Territory of Puducherry and JAO's Association case dealt with the case of repatriation of

JAOs/AOs to the parent department, i.e., Ministry of Urban Development which is in the realm of service law. However, we are of the view that it may not be necessary to go into these aspects of the matter as we have tested the proposition on a demurer and answered the same supra.

4(h) We now turn to the challenge of the PIL petitioner and the Whip to Section 3(3) of the UT Act itself. The primary ground of challenge to the constitutionality of Section 3(3) of the UT Act is that this provision confers unfettered, unguided and uncontrolled discretionary powers on Central Government qua nomination of MLAs to Puducherry Legislative Assembly. To buttress this submission, it was pointed out that any person can be nominated as an MLA and the only bar is that such person should not be a government servant. In other words, it is the case of the PIL petitioner and the Whip that nomination process has not been explained, nomination procedure has not been set out and qualification for persons to be nominated has also not even been outlined, much less prescribed.

4(i) In support of this proposition, State of West Bengal Vs. Anwar Ali Sarkar reported in AIR 1952 SC 75, State of Maharashtra Vs. Kamal S.Durgule reported in (1985) 1 SCC 234, B.B.Rajwanshi Vs. State of U.P. reported in (1988) 2 SCC 415, Senior Superintendent of Post Offices, Allahabad Vs. Izhar Hussain reported in (1989) 4 SCC 318 and West Bengal State Electricity Board Vs. Desh Bandhu Ghosh reported in (1985) 3 SCC 116 were pressed into service. The common thread in all these judgments is that they turn on reasonable classification, intelligible differentia and test of arbitrariness qua Article 14 of COI. Be that as it may, in the instant case, challenge to constitutionality of Section 3(3) of the UT Act is predicated on the ground that there is possibility of misuse of the provision as the powers, according to the PIL petitioner and the Whip, are unfettered, unguided and uncontrolled. Law is too well settled that constitutionality of a provision in a statute cannot be assailed on the ground of possibility of misuse. This proposition is well settled in Indira Jaising Vs. Supreme Court of India [(2017) 9 SCC 766] and paragraph 55 of the said judgment reads as follows :

"55.The exercise of the power vested in the Supreme Court and the High Courts to designate an advocate as a Senior Advocate is circumscribed by the requirement of due satisfaction that the advocate concerned fulfils the three conditions stipulated under Section 16 of the Advocates Act, 1961 i.e. (1) ability; (2) standing at the Bar; and/or (3) special knowledge or experience in law that the person seeking designation has acquired. It is not an uncontrolled, unguided, uncanalised power though in a given case its exercise may partake such a character. However, the possibility of misuse cannot be a ground for holding a provision of the

statute to be constitutionally fragile.”

Besides Indira Jaising case supra, the proposition that constitutionality of a provision in a statute cannot be assailed on the ground of possibility of misuse has already been laid down in a long line of authorities (prior to Indira Jaising supra) and we deem it appropriate to catalogue some of them here. They are as follows :

(a) Collector of Customs, Madras Vs. Nathella Sampathu Chetty and another [(1962) 3 SCR 786 = AIR 1962 SC 316];

(b) State of Rajasthan Vs. Union of India [(1977) 3 SCC 592]; and

(c) Mafatlal Industries Ltd. and others Vs. Union of India and others [(1997) 5 SCC 536].

4(j) We hasten to add that it is high time that guidelines both in terms of qualification for MLAs to be nominated and constitutional process and procedure for nomination are codified and clearly laid down. We shall be making recommendations in this regard in the latter part of this judgment. On this aspect of the discussion, in view of the narrative and discussion supra, suffice to say that challenge to constitutionality of Section 3(3) of UT Act cannot be sustained as it is predicated solely on the basis of misuse owing to powers being unfettered / unguided and possibility of misuse.

4(k) We have also noticed that constitutionality of Section 3(3) of UT Act was put to challenge in 1980s itself and a Division Bench of Bombay High Court turned down such challenge in Manohar S. Prabhu Vs. Union of India reported in AIR 1987 Bom 158. From the submissions at the Bar, it is not clear as to whether this matter was carried to the Hon'ble Supreme Court. To the best of our research, this matter has not been carried to the Hon'ble Supreme Court. This division bench judgment may not qualify as a judgment of a coordinate bench, as it is division bench of another High Court, but we are broadly in agreement with the views expressed in that judgment. It has been contended before us that Manohar S. Prabhu's case requires reconsideration as it had chosen to interpret the word 'chosen' based on the plain dictionary meaning and it does not refer to Section 3(2) of the UT Act and further it does not refer to mandatory process of oath or affirmation under Section 4(a) of the UT Act. Such a submission before us, that too after three decades does not carry the PIL petitioner's case any further. However, we leave it open to PIL petitioner to seek reconsideration of the same in a appropriate Fora. If the PIL petitioner chooses to do so, we make it clear that this judgment will not come in the way and will not be an impediment.

4(l) Now that we are not sustaining the challenge to the constitutionality of Section 3(3) of the UT Act, we proceed to

examine the nominations itself which also have been put in issue in these writ petitions.

4(m) With regard to challenge to the nominations, as would be evident from the summary of rival submissions, which we have set out supra, the challenge is effectively two pronged. In other words, the grounds of challenge are effectively twofold. One set of challenge is predicated on the ground that the procedure required for such nominations which according to PIL petitioner and the Whip has attained the status of constitutional convention has been violated and given a go-by. In other words, the time honoured procedures followed for such nominations have not been followed or have been given a go-by. The second set of grounds of challenge is with regard to credentials of nominated MLAs. We shall deal with both.

4(n) With regard to the procedure, it was contended by the learned senior counsel appearing for the Whip and the PIL petitioner that only the elected Government of the day has the right to choose the names and forward it to the Administrator, who in turn should forward it to the President for approval, after which a nomination should be made. It was asserted that this procedure has been followed in earlier occasions when MLAs were nominated to Puducherry Legislative Assembly. It was also argued that owing to this being followed over a considerable period of time and considering the nature of nominations, i.e., of MLAs, this procedure has attained the status of a constitutional convention. It was further argued that there is no distinction between 'Constitutional Law' and 'established constitutional convention'. In support of this proposition, a judgment of the Supreme Court of India in Supreme Court Advocates-on-Record Association and others Vs. Union of India reported in (1993) 4 SCC 441 was pressed into service. On this basis, it was further argued that power of nomination of an MLA is exercisable only in consultation with, with the aid and advice of the Chief Minister and the Council of Ministers of Union Territory of Puducherry.

4(o) We were taken through the six nominations made earlier, details of which have been set out supra in this order. We find that on earlier occasions, political complexion of the ruling establishment in the Union Territory of Puducherry and the Central Government have either been same or have at least been of same hues and shades. In this occasion, with regard to 14th Legislative assembly, it is a scenario where political complexions of ruling establishments are completely different in the Union Territory and Centre. Further more, there is nothing on record before us to show that the aforesaid procedure alone was followed on all earlier six occasions. For that matter, none of the parties to the lis were able to place before us material to show, what exactly was the procedure followed earlier. Therefore, we do not have sufficient material placed before us to conclusively decide whether this procedure was construed to be so sanctus that it was followed without a shred

of deviation on all previous occasions, so as to attain the status of a constitutional convention as contended. In the absence of such material, it may not be appropriate for us to come to a conclusion that this procedure has attained the status of a constitutional convention.

4(p) Be that as it may, with regard to procedure, the answer to this issue lies in the very contention of the writ petitioner in the Whip's writ petition. As alluded to supra, in the writ petition of the PIL petitioner, the constitutionality of Section 3(3) of the UT Act was assailed and in so assailing Section 3(3) of the UT Act, it has been contended that no procedure has been laid down for nomination of an MLA. This was one of the grounds to say that powers are unguided. Therefore, while the PIL petitioner and the Whip contended in unison that the procedure for nomination of an MLA has not been followed, in the same breath, they have also contended that no procedure has been laid down. As set out supra, with regard to the procedure also, we are of the view that it is high time that well established procedures are laid down and we shall be making recommendations in this regard also in the latter part of this judgment infra.

4(q) With regard to credentials of individuals, who have been nominated, this second ground is predicated on two aspects of the matter. One aspect is that there are First Information Reports (FIRs) pending against two out of three nominated MLAs pertaining to alleged criminal offences. The second aspect is that all the three have been nominated only because of their political affiliation. In other words, all the three are members / party functionaries of BJP and they have been so nominated only on this consideration.

4(r) With regard to FIR pending against two out of three nominated MLAs, reliance was placed on a judgment of the Supreme Court of India in Union of India Vs. Association for Democratic Reforms and another reported in (2002) 5 SCC 294, wherein the Supreme Court held that antecedents of candidates and particularly as to whether they are involved in any criminal case have to be placed before the electorate. Some other judgments in this regard were also pressed into service and they are : (1) Resurgence India Vs. Election Commission of India reported in (2014) 14 SCC 189, (2) People's Union for Civil Liberties (PUCL) and another Vs. Union of India and another reported in (2003) 4 SCC 399 and K.Prabhakaran Vs. P.Jayarajan reported in (2005) 1 SCC 754. To be noted, all these cases dealt with direct election by people. In other words, these judgments dealt with electorate having details/particulars about the credentials of a candidate, so that they can make an informed choice. Therefore, we are of the view that these judgments do not help the case of the PIL petitioner and the Whip in the instant cases, which deal with nominations and not elections by ballot.

4(s) We have also examined the FIRs against two out of three nominated MLAs. There is no dispute before us that these are

only FIRs and that even a charge sheet has not been filed and no trial has commenced. It is also urged on behalf of nominated MLAs before us that these FIRs were also lodged against nominated MLAs owing to their political affiliation and more so the events pertain to public agitations for public causes. We do not delve more on this aspect of the matter, as there is no dispute before us that it is only pendency of FIRs and even charge sheet has not been filed and no trial has commenced much less has any one been convicted.

4(t) With regard to political affiliation, it is to be noted that there is no bar for a member of a political party from being nominated as an MLA. It was also pointed out before us that on all earlier six occasions, when nominations were made, all nominated MLAs belonged to one political party or the other. This factual aspect of the matter pertaining to previous six nominations is not in dispute at all before us. Therefore, the nominated MLAs being members of a political party, i.e., BJP, is certainly not a bar for their nomination. It cannot be put against them. To be noted, we have also set out supra that we posed a pointed query to all learned counsel before us as to whether such nominated MLAs become part of the legislature party of that political party, which they belong to on being nominated and it was fairly submitted by learned Solicitor that this area requires examination. In fact, it was submitted by the learned Solicitor that this is a grey area. To be noted, we are informed that in the previous six occasions the political parties to which the nominated MLAs belonged already had a legislature party in the house at the time of their nominations, unlike the present scenario where the political party to which the nominated MLAs belong does not have a legislature party in the Assembly / house as BJP had drawn a blank in the last General elections in Puducherry. It may be necessary that this aspect of the matter also requires to be clarified in an appropriate manner, so as to avoid ambiguity and uncertainty. The submission that one of the three MLAs unsuccessfully contested the general election from Lawspet assembly constituency and lost so badly that he even did not get back his deposit, to our mind, is of no consequence. Nominated MLAs and nominations to legislature or in other words, nomination of legislators itself is a concept, which can be traced to sending to the legislature persons who have some limitations in being successful in electoral politics, but who are otherwise necessary for valuable contribution to the legislature. Therefore, both these aspects of the matter with regard to credentials of the nominated MLAs, i.e., pendency of FIRs (against two of them) and having political affiliation fail. We hold that there is no illegality or infirmity in nominations of these three MLAs.

4(u) One more very interesting aspect of the matter unfurled in the hearing. We were informed that nominations of MLAs to

Puducherry Legislative assembly had not been challenged in the past six occasions, though all the grounds that are being canvassed now were available for challenge on earlier occasions also (with the exception of violation of procedure ground). Apparently, the political complexion of the ruling establishments being same (or at least not diametrically opposite political opponents) in the Union Territory and the Central Government is what had made the difference in the earlier occasions. This, we were able to notice from the nature of submissions that were made before us, as one of the submissions was that a political party which has no presence in the legislature or in other words a political party which does not have a single MLA in the legislative assembly is bringing in three MLAs through the nominated MLAs route. It was also urged that this is being done after unsuccessfully contesting the general election and after not being successful in getting even one candidate returned to the assembly. However, considering what has been put in issue in these writ petitions, we deem it appropriate to leave it at that and it would suffice to say that we have noticed this aspect of the matter.

4(v) This takes us to the proceedings of the Speaker. The question is whether the Speaker has to necessarily accept the nominations made and as to whether the Speaker has powers to disregard the nominations or overrule the nominations of MLAs.

4(w) Speaker, undoubtedly, is the master of the House. In this view of the matter, the office of the Speaker has a very exalted position in the scheme of COI. One of the important aspects in this regard is, the Speaker is vested with powers under Tenth Schedule of the COI to decide about the competence of a legislator to sit in the House. However, Tenth Schedule is an anti defection mechanism made with the sanctus and laudable objective of making people the ultimate sovereign in a democracy / republic, it may not have direct relevance qua nominations of an MLA. An argument was also propounded that Speaker of the Legislative Assembly is in a slightly different position being a statutory Speaker unlike Speaker holding a constitutional office.

4(x) With regard to challenge to the Speaker's order, one more aspect that has to be noticed is that the impugned order that has been called in question before us is merely a communication. In other words, the impugned order in the three writ petitions filed by the nominated MLAs is a communication dated 13.11.2017 bearing reference No.124/LAS//Ref.2017 sent by the Secretary of the Legislative Assembly or in other words, it is a letter from the Secretary of the Legislative Assembly Secretariat, Puducherry. A perusal of this impugned order (letter / communication as it actually is) shows that the Secretary has mentioned that the Hon'ble Speaker has passed an order dated 12.11.2017 and directed him to communicate his decision regarding nominations. Therefore, we pointed out that

the impugned order before us is not the order of the Honble Speaker, but a communication from the Assembly Secretary, communicating an order of the Speaker. We wanted to see the assembly secretariat files to satisfy ourselves about this position. The files were produced and photocopies of the same were also placed before us. We do find that there is an order of the Hon'ble Speaker dated 12.11.2017 regarding nomination of the three MLAs. By consent of all learned counsel before us, it was agreed that this order also requires to be examined for making this judgment comprehensive, complete and conclusive.

4(y) Before we proceed further, it is deemed appropriate to extract the order of the Speaker which is articulated in paragraphs 35 to 37 of the proceedings of the Speaker as contained in the official file No.124/LAS/Ref/2017 placed before us by the learned counsel for the Speaker. The same reads as follows :

"35.I have perused the documents, correspondences and communications from the Lt. Governor secretariat, Chief Secretary, Official Gazette Extraordinary No.100 dated 04.07.2017 of Government of Puducherry, relating to the nomination of (1).Shri. V.Saminathan, (2).Shri.K.G.Shankar and (3). Shri. S.Selvaganapathy as Members of the Puducherry Legislative Assembly and the legal opinion obtained from the Government Pleader, Puducherry Government at the High Court, Madras.

36.After giving my serious considerations to the issues involved in the nomination of the above said three persons, I find that their nominations were made by an incompetent authority and without jurisdiction in contravention of the Constitution of India and the Government of Union Territories Act 1963. I also find that just because they were administered oath or affirmation by the Hon'ble Lt. Governor they cannot be recognised as Members of the Puducherry Legislative Assembly as their nominations are void in law.

37.Hence, convey my orders that as Speaker of the Legislative Assembly, I cannot accept and recognize them as Members of the Puducherry Legislative Assembly and their claim that they are members of legislative Assembly are rejected."

4(z) We have perused the order of Hon'ble Speaker and it is seen that Hon'ble Speaker has proceeded on the basis that the nominations have been made by an incompetent authority and without jurisdiction in contravention of the UT Act. It also proceeds on the basis that three nominated MLAs cannot be recognised as members of the Puducherry Legislative Assembly merely because they were administered oath of affirmation by the Hon'ble Lt. Governor.

4(aa) We put it to the learned senior counsel appearing for the Speaker as to what is the provision under which such order has been passed. It was submitted that the Speaker has passed this order in his capacity as the Master of the House. It was also submitted that it is not traceable directly to any constitutional provision.

4(ab) While the competence of a legislator to sit in the House can be examined by the Speaker under Tenth Schedule to COI, which is an anti defection mechanism based on people being ultimate sovereign in a Democracy / Republic or for that matter pertaining to a privilege motions, there is no constitutional provision for the Speaker to examine the validity or otherwise of nominations of legislators made to the legislative assembly. As alluded to supra, the submission before us is that the order of the Hon'ble Speaker dated 12.11.2017 is not traceable to any constitutional provision.

4(ac) Though not cited before us, we thought it appropriate to remind ourselves about the scope of judicial review qua order of Speaker as enunciated by a Constitutional Bench of the Hon'ble Supreme Court in the celebrated Kihoto Hollohan v. Zachillhu [1992 Supp (2) SCC 651] case. The four grounds of judicial review qua Speaker's order are: (a) violation of constitutional mandate; (b) non compliance with the principles of natural justice; (c) mala fides; and (d) perversity.

4(ad) The office of the Speaker is by its very nature is very high and it cannot but be an embodiment of propriety and impartiality.

4(ae) In the instant case, as alluded to supra, submissions to the effect that Speaker of Puducherry Legislative Assembly may not be a constitutional Speaker, but may only be a statutory Speaker were also made. The basis on which this submission was made inter-alia turns on the obtaining position that the office of the Speaker of a Union territory is traceable to some provisions, like Section 7 of UT Act. To our mind, considering the nature of the controversy in the instant matter, it makes little difference as to whether a Speaker is a constitutional Speaker or a statutory Speaker. We say so without delving into the debate as to whether the Speaker of Puducherry Legislative Assembly would be a constitutional Speaker or a statutory Speaker. The reason is, we are only concerned with the high office of the Speaker in this order for the limited purpose of testing the order of Speaker and communication of the same. In this regard, to our mind, it makes very little difference as to whether Speaker is a constitutional Speaker under Article 178 of COI or statutory Speaker under the UT Act. By the very nature of powers and functions of Speaker in a democracy / Republic, the high office of the Speaker and rigour applicable to

propriety and impartiality can be no less. Even if we delve on the debate as to whether Speaker of Puducherry Legislative Assembly is constitutional Speaker or statutory Speaker and come to a conclusion that he is only a statutory Speaker, it can at best make some difference if at all on other aspects of the office of the Speaker. It would certainly not make any difference with regard to high status and position of great respect and esteem in Parliamentary traditions in a democracy.

4(af) While saying this, we draw inspiration from the judgment of the Supreme Court in Jagjit Singh Vs. State of Haryana [(2006) 11 SCC 1], wherein Hon'ble Supreme Court raised the bar qua high status of Speaker's office to the level of saying that Tenth Schedule to COI which deals with disqualification, defection, etc., was upheld by a Constitution Bench of Supreme Court in Kihoto Hollohan v. Zachillhu, [1992 Supp (2) SCC 651] owing to the high office of the Speaker.

4(ag) In the instant case, the order of Speaker has nothing to do with the conduct of a member of the House. It in fact relates to membership by nomination of the House. When we wanted to know the exact statutory or constitutional provision under which Speaker has passed the impugned order in the instant case, it was submitted by learned Senior counsel appearing for the Speaker that it can be deciphered, deduced and inferred from a over all healthy reading inter-alia of the UT Act. It was his specific submission that it can be deduced, deciphered and inferred from over all healthy reading of UT Act that the Speaker is the master of the House. It is not in dispute before us that there is no provision of law empowering the Speaker to nullify nominations. In the instant case, we find the impugned order to have the effect of nullifying the nominations. The reason is, in the facts and circumstances of the case, it is not as simple as not permitting a stranger from entering and functioning as member of the House. In this case, the effect of Speaker's order is actually a legal scrutiny of the process of nominations and it tantamounts to verdict which has the effect of nullifying the nominations. This, we are afraid, is outside the realm of the Speaker's power in his capacity as master of the house.

4(ah) In our considered view, such an order of Speaker, setting at naught and nullifying the nomination made to the legislative assembly will clearly and squarely be covered under the ground of 'violation of constitutional mandate' inter alia for two reasons. One is, the Speaker's order runs contrary to the spirit of Article 239A, particularly sub article (a) of Article 239A of COI. Second is, the order is not traceable to any provision of COI. Not even to the statute, i.e., UT Act. Even in the statute, i.e., UT Act, there is a clear distinction in the language of the statute, viz., Section 14 of the UT Act,

which is in complete contradistinction to Section 14A of the UT Act. While Section 14A introduced in the UT Act with effect from 29.3.1985 which makes provisions of Tenth Schedule of COI applicable to members of Puducherry Legislative Assembly deploys the expression 'disqualified for being a member of the Legislative Assembly', Section 14 which is outside the realm of the Speaker deploys the expression 'disqualified for being chosen as and for being a member'. In other words, Section 14A which is Speaker's power, talks only about disqualification of a member, whereas only Section 14 which is outside the realm of the Speaker talks about disqualification for being chosen as a member also. Considering the difference in the statutory language in Sections 14 and 14A, particularly the expressions which have been alluded to herein would mean that the Speaker's powers operate only post membership and not regarding choosing a member. In this regard, we have also noticed elsewhere in this order the submission of learned Senior Counsel for the Speaker that the order of Speaker dated 12.11.2017 is not traceable to any specific provision and that it is only on a healthy over all reading inter-alia of the UT Act. We, therefore, have no hesitation in holding that the impugned order and the order / proceedings of Hon'ble Speaker dated 12.11.2017 which it purports to communicate, deserve to be set aside and quashed.

4(ai) The aforesaid discussion puts to rest to all issues that have been raised before us qua the three nominations. Though it puts to rest issues raised qua the specific issues raised herein, the ambiguities qua larger principles which have been brought into sharp focus deserve attention of the law makers.

4(aj) In the light of the controversies raised before us and elaborate submissions made before us, considering the importance of the matter and in the light of the fact that some aspects of this case are unprecedented, we deem it appropriate to make some recommendations for consideration by the Parliament. We set out these recommendations infra and it is necessary that these recommendations are read in the light of the discussions supra.

5 RECOMMENDATIONS :

(i) A clear and unambiguous procedure has to be laid down for nomination of MLAs to the Puducherry Legislative Assembly, with particular clarity about where it should emanate from and how it should be carried to its logical end.

(ii) It has to be laid down with specificity as to who / which office will actually exercise the powers of nomination under Section 3(3) of the UT Act eliminating the need to resort to inferential process which has become necessary in the instant case.

(iii) Qualifications, qualities and credentials which will go to make a 'well rounded personality'

for qualifying for being nominated as an MLA have to be set out. To be noted, we are not on 'eligibility' or 'educational qualification'. We are on 'suitability'.

(iv) If the nominated MLA belongs to a political party on the date of nomination, it should be made clear that he shall become part of the legislature party of that political party. If there is no legislature party in the house on the date of nomination, the nominated MLA/s shall constitute the legislature party of that political party. This is inter-alia owing to Explanation (b) to paragraph 2(1) (b) of Tenth Schedule to COI using the term 'political party' and not 'legislature party'.

6 CONCLUSION :

6(a) We hold that nomination of three MLAs to Puducherry Legislative Assembly is valid. The impugned order dated 13.11.2017, communicating the order / proceedings of Hon'ble Speaker and the order of the Hon'ble Speaker dated 12.11.2017 are set aside, as a consequence of which the three nominated MLAs will take their seat in the Puducherry Legislative Assembly forthwith.

6(b) We conclude with the fervent hope that our recommendations lead to necessary statutory amendments/statutory enactments that are deemed necessary by Parliament in its wisdom. If deemed necessary in Parliamentary wisdom, Constitutional amendments can also be considered.

7 DECISION :

W.P.No.16275 of 2017 filed by the Whip and W.P.No.18788 of 2017 filed by PIL petitioner are dismissed. Writ petitions, being W.P.Nos.29591 to 29593 of 2017 filed by nominated MLAs are allowed. Considering the nature of the matter and in the light of the trajectory this litigation has taken, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

W.P.Nos.16275, 18788, 29591 to 29593 of 2017

Ms.Indira Banerjee, Chief Justice

I am in absolute agreement with the judgment of my esteemed brother.

2. Under Article 239 of the Constitution of India, a Union Territory is to be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify.

3. Article 239A of the Constitution provides that Parliament might by law create for the Union territory of Puducherry (a) a body, whether elected or partly nominated and partly elected, to function as a Legislature for the Union territory, or (b) a Council of Ministers, or both with such constitution, powers and functions, in each case, as may be specified in the law.

4. Sub Article (2) of Article 239A of the Constitution reads that "Any such law as is referred to in clause (1) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending this Constitution."

5. In exercise of power under Article 239A of the Constitution, the Parliament has enacted the Government of Union Territories Act, 1963 (hereinafter referred to as "the UT Act").

6. Section 3 of the UT Act provides as follows:

"Section 3. Legislative Assemblies for Union territories and their composition.

(1) There shall be a Legislative Assembly for each Union territory.

(2) The total number of seats in the Legislative Assembly of the Union territory to be filled by persons chosen by direct election shall be thirty.

(3) The Central Government may nominate not more than three persons, not being persons in the service of Government, to be members of the Legislative Assembly of the Union territory.

(4) Seats shall be reserved for the Scheduled Castes in the Legislative Assembly of the Union territory.

(5) The number of seats reserved for the scheduled castes or the scheduled tribes in the Legislative Assembly of the Union territory under sub-section (4) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the scheduled castes in the Union territory or of the scheduled tribes in the Union territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the Union territory."

7. By a notification, being F.No.11012/1/2014-UTL, dated 23.6.2017, the Government of India, Ministry of Home Affairs, New Delhi, nominated (i) Mr.V.Saminathan; (ii) Mr.K.G.Shankar; and (iii) Mr.S.Selvaganabathy, to be Members of the Legislative Assembly of Puducherry, after which the Administrator appointed by the President, designated Lieutenant Governor, administered oath to them on 4.7.2017.

8. Section 4 of the UT Act provides that a person shall not be qualified to be chosen to fill a seat in the Legislative Assembly of the Union Territory unless he fulfills the conditions specified in sub-sections (a), (b) and (c) of the said Section. It is nobody's case that the three persons nominated to be members of the Legislative Assembly by the said notification dated 23.6.2017 do not possess the qualifications specified in Section 4 of the UT Act.

9. Section 6(1) of the UT Act empowers the Administrator, in this case designated Lieutenant Governor, to summon the Legislative Assembly to meet at such time and place as she thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session. The Administrator (Lieutenant Governor) is empowered to prorogue the Assembly or even to dissolve the Assembly.

10. Section 7 of the UT Act provides for the election of two members of the Assembly as Speaker and Deputy Speaker respectively. Section 7 read with Sections 8 and 12 of the UT Act confers on the Speaker, and in his absence the Deputy Speaker, the duty to preside over sittings of the Legislative Assembly except in circumstances specified in Section 8(1) of the UT Act, which are not relevant to the issues involved in these writ petitions.

11. Section 8(2) of the UT Act confers on the Speaker the right to speak in, and otherwise take part in the proceedings of the Legislative Assembly, to exercise a casting vote in the case of an equality of votes and to adjourn the Assembly or suspend a meeting for want of quorum, which is one third of the total Members of the Assembly under Section 12(4) of the UT Act.

12. A perusal of the provisions of the UT Act read with Chapter XXI of the Rules of Procedure and Conduct of Business of the Pondicherry Legislative Assembly, 1966, more particularly, Rules 264 to 313, makes it amply clear that the Speaker has no power to decide questions relating to disqualification. It is the duty of the Speaker to regulate Legislative proceedings and discussions in the Assembly.

13. The Speaker might disallow amendment, which is frivolous; frame Rules for regulation of proceedings; communicate decisions taken by the House; and before a debate, the Speaker might address the House and regulate addresses by Members of the House. The Speaker can direct a Member, whose conduct in his opinion, is disorderly, to withdraw from the House and the Member so required to withdraw is to do so immediately.

14. As part of the power to regulate proceedings in the House, Rules 294 to 296 empower the Speaker to regulate and/or restrict the admission of strangers during the sittings of the House and Rule 297 empowers the Speaker to authorize any officer of the Secretariat to remove from the precincts of the House or to take into custody any stranger from any portion of the precincts of the House reserved for the exclusive use of its members. However, persons nominated by notification and administered oath by the Administrator cannot be treated as strangers.

15. None of the Rules confer on the Speaker the power and/or authority to decide if the election or nomination of any Member of the Legislative Assembly is valid, or to decide the question of disqualification of any Member, except in case of disqualification under the Tenth Schedule of the Constitution of India, which has expressly been incorporated into the UT Act with contextual modifications by Section 14A of the UT Act. The Tenth Schedule deals with disqualification on the ground of defection from a political party and has no application at all in the instant case.

16. On the other hand, Section 14 of the UT Act, which relates to disqualification of membership provides as follows:

"Section 14. Disqualifications for membership.

(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly of the Union territory--

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

(b) if he is for the time being disqualified for being chosen as, and for being, a member of either House of Parliament under the provisions of sub-clause (b), sub-clause (c) or sub-clause (d) of clause (1) of article 102 or of any law made in pursuance of that article.

(2) For the purposes of this section, a person

shall not be deemed to hold an office of profit under the Government of India or the Government of any State or the Government of the Union territory by reason only that he is a Minister either for the Union or for such State or Union territory.

(3) If any question arises as to whether a member of the Legislative Assembly of the Union territory has become disqualified for being such a member under the provisions of sub-section (1), the question shall be referred for the decision of the President and his decision shall be final.

(4) Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion."

(emphasis supplied)

17. There is no express provision either in the Constitution or in the UT Act or in the Rules framed thereunder, which expressly deal with the validity of the nomination of a Member by the Central Government.

18. In my view, on a reading of Article 239 of the Constitution with Section 14(3) of the UT Act, all questions of disqualification, including disqualification of a nomination can only be referred to the President, whose decision is to be final. The words "has become disqualified" in the aforesaid Section have to be interpreted to include "is disqualified". The fact that Sub-section (3) has been made part of Section 14 of the UT Act and the opening words of Section 14 that a person shall be disqualified for being chosen and for being a Member of the Legislative Assembly supports such interpretation, since it is patently clear that sub-section (3) is sequel to sub-section (1) of Section 14 of the UT Act and at the same time, an independent provision to deal with all other cases of disqualification, whatever be the reason, except for disqualification on the ground of defection, which is covered by the Tenth Schedule of the Constitution of India, incorporated into the UT Act by Section 14A.

19. It is not for the Speaker to decide which is the appropriate authority of the Central Government to make a nomination and that too in the absence of any specific rules in this regard and when no other authority of the Central Government has questioned the notification.

20. In this case, as observed above, the nomination has been made by a notification of the Home Ministry of the Central Government and is signed by its Joint Secretary. Any objection on the ground of competence of the department to make the

nomination would necessarily have to be taken by the Competent Authority of the Central Government and not by so-called public interest litigants, or, for that matter, the Speaker or the Chief Government Whip.

21. In view of Article 239 of the Constitution, whereunder a Union Territory is administered by the President acting through an Administrator, in this case designated the Lieutenant Governor, read with Section 11 of the UT Act enabling the Administrator to administer oath, the Speaker had no power and/or authority and/or jurisdiction to reject the claim of the nominated Members of having been nominated to be Members of the Legislative Assembly, after the Lieutenant Governor administered oath to them.

22. It would also not perhaps be out of context to note certain inconsistencies in the records of the Secretariat of the Legislative Assembly produced before us. The Speaker has simply directed that letter be sent to the Secretary to Lieutenant Governor informing that no communication has been received by the Puducherry Legislative Assembly Secretariat from the Competent Authority regarding nomination of three Members and, therefore, the Assembly Secretariat is not bound by the letter communicated by the Secretary to the Lieutenant Governor.

23. Significantly, paragraph (3) of the said note dated 7.7.2017 in File No.124/LAS/Ref/2017, prepared by the Secretariat of the Legislative Assembly reads:

"3. From the Notification, the identity of the persons to be the Members could not be verified in the absence of their Father's name, age, address, photograph and their background etc. Hence, the file was referred to the Chief Secretary to Government, Puducherry to obtain and furnish the details of the above Members nominated by the Ministry of Home Affairs, New Delhi. In turn the Chief Secretary vide Lr.No.1-35/CS/PS/2017 dated 5.7.2017 has addressed the Joint Secretary (UTs), Ministry of Home Affairs to furnish the details, which are yet to be received from MHA."

24. However, the Speaker has not questioned the identity of the three nominated persons, but taken the stand that he is not bound by the letter communicated by the Secretary to Lieutenant Governor, as no communication has been received from Competent Authority. There is not a whisper as to who, according to the Speaker, is the Competent Authority.

25. My esteemed brother has very elaborately and rightly observed that the Speaker has no power to set at naught and nullify the nomination.

26. The argument that the Lieutenant Governor could not have administered oath to the nominated Members without the advice of the Council of Ministers headed by the Chief Minister is also legally unsustainable.

27. Section 44 of the UT Act is set out herein below for convenience:

"Section 44. Council of Ministers.

(1) There shall be a Council of Ministers in each Union territory with the Chief Minister at the head to aid and advice the Administrator in the exercise of his functions in relation to matters with respect to which the Legislative Assembly of the Union territory has power to make laws except in so far as he is required by or under this Act to act in his discretion or by or under any law to exercise any judicial or quasi-judicial functions:

Provided that, in case of difference of opinion between the Administrator and his Ministers on any matter, the Administrator shall refer it to the President for decision and act according to the decision given thereon by the President, and pending such decision it shall be competent for the Administrator in any case where the matter is in his opinion so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary:

(2) xxxx

(3) If and in so far as any special responsibility of the Administrator is involved under this Act, he shall, in the exercise of his functions, act in his discretion.

(4) If any question arises as to whether any matter is or is not a matter as respects which the Administrator is by or under this Act required to act in his discretion, the decision of the Administrator thereon shall be final.

(5) If any question arises as to whether any matter is or is not a matter as respects which the Administrator is required by any law to exercise any judicial or quasi-judicial functions, the decision of the Administrator thereon shall be final.

(6) The question whether any, and if so what, advice was tendered by Ministers to the Administrator shall not be inquired into in any court.

28. The Council of Ministers headed by the Chief Minister can aid and advise the Administrator in the exercise of his functions in relation to matters with respect to which the Legislative Assembly of the Union Territory has power to make laws, except in so far as he is required by or under the UT Act to act at his discretion or by or under any law to exercise any judicial or quasi-judicial functions. Even in such cases, in case of difference of opinion between the Administrator and his Ministers on any matter, the Administrator is required to refer the difference to the President for decision and act according to the decision given thereon by the President and pending such decision, it would be competent for the Administrator in any case where the matter is in his opinion so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary. There was not even any request to the Administrator to refer the matter to the President. At least that is nobody's case and records do not indicate anything to the contrary.

29. Administration of oath to Members of the Legislative Assembly is a duty conferred on the Administrator under Section 11 of the UT Act. It is not a matter in relation to which the Legislative Assembly of the Union Territory has power to make laws. It was not necessary for the Lieutenant Governor to act on the advice of her Council of Ministers with regard to administration of oath to the Members nominated by the Central Government. The nomination of the Members was also made in exercise of power under Section 3(3) of the UT Act, enacted by the Union Parliament.

30. Unlike the President of India or the Governor of a State, the Administrator of a Union Territory has powers to act independently irrespective of the advice given by the Council of Ministers headed by the Chief Minister.

31. In this context, it would be pertinent to note the difference in the language and tenor of Section 44 of the UT Act (extracted above) and the language and tenor of Articles 74 and 163 of the Constitution of India set out herein below:

"Article 74. Council of Ministers to aid and advise President.

(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such

advice:

Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

Article 163. Council of Ministers to aid and advise Governor.

(1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

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

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

32. The Constitution of India requires the President to act in accordance with the advice of his Council of Ministers with the Prime Minister at the head. The President might require the Council of Ministers to reconsider such advice either generally or otherwise, but is obliged to act in accordance with the advice tendered after such reconsideration. This is apparent from the use of the expression "shall act in accordance with the advice tendered after such reconsideration" in the proviso to Article 74 of the Constitution of India. The Court, under Article 74(2) of the Constitution, is debarred from going into the question of whether any, and if so what, advice had been tendered by the Ministers to the President.

33. Under Article 163 of the Constitution, the Council of Ministers headed by the Chief Minister of a State is to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion. The Governor of a State, however, has wider discretion than the President in view of Sub-Article (2) of Article 163 of the Constitution, which provides that if any question arises whether any matter is or is not a matter in respect of which the Governor is by or under the Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

34. However, the power of the Council of Ministers of a Union Territory to aid and advise the Administrator is, as observed above, restricted to matters in respect of which the Legislative Assembly has power to make laws and no other. Even in such a case, difference of opinion, if any, between the Administrator and his Ministers is to be referred to the President and pending such decision, the Administrator is competent to take action. Moreover, if any question arises as to whether any matter is or is not a matter in respect of which the Administrator is by or under UT Act required to act in his discretion, the decision of the Administrator is to be final. If any question arises as to whether any matter is or is not a matter in respect of which the Administrator is required by law to exercise any judicial or quasi-judicial functions, the decision of the Administrator thereon is to be final.

35. Furthermore, Section 46(2) of the UT Act provides that all executive action of the Administrator, whether taken on the advice of his Ministers or otherwise, shall be expressed in the name of the Administrator. The use of the expression "or otherwise" in Section 46(2) of the UT Act makes it amply clear that the Administrator has independent powers to act and is not bound to act only on the advice of his Ministers.

I endorse the reasons given by my esteemed brother for his conclusion, with which I fully agree.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

vvk

To

- 1.The Secretary to Government,
The Union of India,
Ministry of Home Affairs,
Government of India,
New Delhi.
- 2.The Joint Secretary to Government of India,
Ministry of Home Affairs,
New Delhi.
- 3.The Chief Secretary to Government,
Union Territory of Puducherry,
Secretariat,
Government of Puducherry,
Puducherry.
- 4.The Secretary,
Legislative Assembly Secretariat,
Government of Puducherry,
Puducherry.
- 5.The Secretary to Lt. Governor
of Union Territory of Puducherry,
Rajnivas,
Puducherry.

+1 3 cs to the Govt Pleader sr 21832,21833
21834

+1 cc to Mr.Prakash Adiapadam Advocate sr 21912
+2 ccs to Mr.T.Saikrishnan Advocate sr 21876,21877
+5 cc to Mr.M.Vaikunth Advocate sr 21911
+1 cc to M/s.D.Ravichander Advocate sr 22007
+3 ccs to M/s.A.Gandhirajan Advocate sr 22473,22474

W.P.Nos.16275, 18788,
29591 to 29593 of 2017

ss(co)
aa23/08/2018

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