

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**PUBLIC INTEREST LITIGATION NO. 119 OF 2023  
WITH  
INTERIM APPLICATION NO. 12908 OF 2024  
WITH  
INTERIM APPLICATION NO. 8159 OF 2024  
WITH  
INTERIM APPLICATION NO. 15325 OF 2023**

**Mr. Sunil Modi**

**}**

**Petitioner**

**versus**

**The State of Maharashtra & Ors. }**

**Respondents**

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Mr. Yashraj Sing Deora, Senior Advocate with Mr.Sangramsingh R. Bhonsle, Mr. Siddharth A. Mehta, Mr.Nrupal A. Dingankar, Ms. Pushkara A. Bhonsale, Mr.Naman Sherstra, Ms. Harshada Shrikhande, Mr. Mahesh Jadhav and Mr.Sanmitra Pol for petitioner.

Dr. Birendra Saraf, Advocate General with Mr. P. P. Kakade, Government Pleader, Mr. O. A. Chandurkar, Additional Government Pleader, Ms. G. R. Raghuwanshi, AGP and Mr.Satchit Bhogle, 'B' Panel Counsel for State-respondents.

Mr. Devang Vyas, Additional Solicitor General with Ms.Savita Ganoo, Mr. D. P. Singh, Mr. S. Shah, Ms.Vaibhavi Chaudhary and Mr. J. Parekh for respondent-UoI.

Mr. Rajat V. Dighe i/b. Mr. P. C. Kamble for applicant in IA/15325/2023.

**CORAM: DEVENDRA KUMAR UPADHYAYA, CJ. &  
AMIT BORKAR, J.**

**RESERVED ON : OCTOBER 7, 2024  
PRONOUNCED ON : JANUARY 9, 2025**

**JUDGMENT (PER : CHIEF JUSTICE)**

1. Proceedings of the instant PIL petition have been instituted with a prayer to quash withdrawal of the decision of the Cabinet of the State of Maharashtra, dated 6<sup>th</sup> November 2020 making recommendation to Hon'ble the Governor of the State for nominating 12 persons as members of the Maharashtra State Legislative Council in terms of the provisions contained in Article 171(3)(e) of the Constitution of India.

2. Another prayer made in the PIL petition is that by issuing an appropriate writ, order or direction, the office of Hon'ble the Governor of the State be requested either to nominate 12 persons as members of the Legislative Council in terms of the recommendations of the State Government, dated 6<sup>th</sup> November 2020 or to return the said recommendations with reasons.

3. The essential facts, necessary for consideration of the issue involved in this petition, briefly stated, are as under:

(a) In a meeting held on 29<sup>th</sup> October 2020 the Council of Ministers of the State decided to recommend to Hon'ble the Governor 12 persons for being nominated as members of the Legislative Council. The said recommendations were forwarded by the Hon'ble the Chief Minister to Hon'ble the Governor on 6<sup>th</sup> November 2020. It is stated by the petitioner that since Hon'ble the Governor was not acting, by taking an appropriate decision on the recommendations made in respect of 12 nominations, a PIL petition viz PIL

(L) No.10300 of 2021 was filed by one Mr.Ratan Soli Luth before this Court with a prayer seeking a declaration that Hon'ble the Governor has acted in breach of Article 163(1) read with Article 171(5) in failing to make nominations of 12 members under Article 171(5) of the Constitution of India. A further declaration was sought in the said PIL petition that Hon'ble the Governor is constitutionally bound to act on and in accordance with the advice/decision of the Council of Ministers of State and further that the Hon'ble Governor is constitutionally required to make nominations to the Legislative Council pursuant to the recommendations made by the Council of Ministers as communicated to Hon'ble the Governor by the Hon'ble the Chief Minister on 6<sup>th</sup> November 2020.

(b) The said PIL petition was finally decided by a Division Bench of this court by means of judgment dated 13<sup>th</sup> August 2021 wherein this Court concluded the matter by making a public law declaration that the obligation, which the Constitution vests in the Governor to either accept or return the recommendations as made by the Council of Ministers forming part of the advice, has to be discharged within a reasonable time. The Court further observed that eight months, on facts, seem to be beyond reasonable time and that the Court, having regard to the gravity of the issue involved and the necessity to fill up the vacant seats of the members expeditiously as well as to sub-serve the aims set by the Constitution, would consider it eminently desirable if the obligation, in the present case, is duly

discharged without undue delay.

(c) The Court, in the said judgment dated 13<sup>th</sup> August 2021 further observed that Hon'ble the Governor is not answerable to the Court in view of Article 361 of the Constitution and no direction can be issued to the Governor; hence, the petitioner had not joined the Secretary of the Governor as a party despite liberty granted by an earlier order of the Court. The Court also expressed its hope and trust that things would be set right at an early date and that if indeed, during pendency of the said PIL petition, the Governor had acted on the advice of the Council of Ministers, in whatever way it was thought appropriate by him, that would take care of the petitioner's concern completely. The concluding portion of the judgment of this Court dated 13<sup>th</sup> August 2021 rendered in PIL (L) No.10300 of 2021 is quoted hereunder:

**"CONCLUSION:**

*86. This Court, therefore, concludes the judgment by making a public law declaration that the obligation, which the Constitution vests on the Governor to either accept or return the recommendations as made by the Council of Ministers forming part of advice, has to be discharged within a reasonable time. Eight months, on facts, seems to be beyond reasonable time. This Court, having regard to the gravity of the issue involved and the necessity to fill up the vacant seats of members expeditiously as well as to sub-serve the aims set by the Constitution, would consider it eminently desirable if the obligation, in the present case, is duly discharged without undue delay.*

*87. Of course, the Governor is not answerable to the Court in view of Article 361 of the Constitution and no direction can issue to the Governor; hence, the petitioner has not joined the Secretary of the Governor as a party despite liberty granted by*

*an earlier order of this Court. Before parting, this Court expresses hope and trust that things will be set right at an early date. If indeed, during the pendency of this writ petition, the Governor has acted on the advice of the Council of Ministers, in whatever way it was thought appropriate by him, that would take care of the petitioner's concern completely."*

(d) The said judgment of this Court dated 13<sup>th</sup> August 2021 was challenged by the petitioner of the said PIL petition before the Hon'ble Supreme Court by way of instituting Special Leave Petition (Civil) No.18265 of 2021.

(e) During pendency of the aforesaid SLP, the Cabinet took a decision in its meeting held on 10<sup>th</sup> August 2022 to withdraw the earlier proposal made on 6<sup>th</sup> November 2020. Pursuant to the Cabinet decision dated 10<sup>th</sup> August 2022, Hon'ble the Chief Minister of the State, by means of his letter dated 23<sup>rd</sup> August 2022 addressed to Hon'ble the Governor requested him to return the proposal made earlier and in the light of the same Hon'ble the Governor, by means of his letter dated 30<sup>th</sup> August 2022 returned the recommendations made earlier.

(f) On 26<sup>th</sup> September 2022, the Hon'ble Supreme Court, in the aforesaid SLP granted an interim order directing therein that no steps shall be taken in respect of the vacancies which were sought to be filled up on the basis of nomination dated 7<sup>th</sup> November 2020 (6<sup>th</sup> November 2020) which was the subject matter of litigation, till the next date of hearing.

(g) The petitioner of the present PIL petition filed an

application for intervention before Hon'ble Supreme Court in the said SLP on 12<sup>th</sup> October 2022. In the said SLP the petitioner of the earlier PIL petition, viz. Ratan Soli Luth moved an application for withdrawal of the SLP. Thereupon the petitioner of the instant PIL petition moved an application seeking his substitution as petitioner in the SLP before the Hon'ble Supreme Court.

(h) Hon'ble Supreme Court, by means of order dated 11<sup>th</sup> July 2023 allowed the prayer for withdrawal of the proceedings of the SLP, however, the Hon'ble Supreme Court clarified that it had not expressed any opinion on the question of law which was kept open to be agitated in an appropriate case. On the prayer made by the petitioner of the instant PIL petition, liberty was granted to him to institute independent proceedings. The said order passed by Hon'ble Supreme Court on 11<sup>th</sup> July 2023 is quoted hereunder:

***Upon hearing the counsel the Court made the following order:***

*1 The application (IA No.195052/2023) for withdrawal of the proceedings is allowed. However, the Court has not expressed any opinion on the question of law raised which is kept open to be agitated in an appropriate case.*

*2 At this stage, Mr. Nikhil Nayyar, senior counsel appearing on behalf of the intervenor submits that the intervenor has applied for transposition. Liberty is granted to the intervenor to institute independent proceedings.*

*3 The Interlocutory Application is disposed of, permitting withdrawal of the Special Leave Petition in the above terms.*

*4 Pending applications, if any, including the application for intervention, stand disposed of."*

(i) It is pursuant to the liberty granted by Hon'ble Supreme Court by means of its order dated 11<sup>th</sup> July 2023, that the instant PIL petition has been instituted with the prayers as aforementioned.

(j) During pendency of the instant PIL petition, vide Notification dated 14<sup>th</sup> October 2024, seven persons have been nominated as members of the Maharashtra Legislative Council by the Hon'ble Governor under Article 171(3)(e) and Article 171(5) of the Constitution of India.

4. The petitioner, primarily, has challenged the withdrawal of the nominations recommended on 6<sup>th</sup> November 2020 by the State Government and has also prayed that an appropriate order be issued requesting the office of Hon'ble the Governor to either nominate the 12 persons as members of the Legislative Council as recommended on 6<sup>th</sup> November 2020 or to return the said recommendations with reasons.

5. In essence, the insistence of the petitioner in the instant PIL petition is that Hon'ble the Governor, by not acting upon the recommendations made by the Council of Ministers on 6<sup>th</sup> November 2020 by taking an appropriate decision, has acted contrary to the provisions contained in Article 163(1) read with Article 171(5) of the Constitution of India. It is the contention on behalf of the petitioner that by not acting upon the recommendations made for nomination of 12 members of the State Legislative Council on 6<sup>th</sup> November 2020, Hon'ble the

Governor has exercised "pocket veto" which is not permissible as per the mandate of the Constitution contained in Article 163(1) and 171(5) of the Constitution of India.

6. Learned Counsel for the petitioner has argued that as held by this Court in the judgment dated 13<sup>th</sup> August 2021 in the PIL petition filed by Mr.Ratan Soli Luth, Hon'ble Governor is not completely denuded of discretion while acting under Article 171(3)(e) read with Article 171(5) of the Constitution of India and accordingly, it is the contention on behalf of the petitioner that Hon'ble Governor ought not to have acted as a rubber stamp on the decision of the Cabinet dated 10<sup>th</sup> August 2022 as communicated by Hon'ble the Chief Minister vide letter dated 23<sup>rd</sup> August 2022.

7. It has further been argued on behalf of the petitioner that while considering the Cabinet decision dated 10<sup>th</sup> August 2022 as communicated by the letter dated 23<sup>rd</sup> August 2022, it was incumbent upon Hon'ble the Governor to consider the material on the basis of which the earlier recommendations were sought to be withdrawn by the State Government especially keeping in view the mandate of this Court contained in the judgment dated 13<sup>th</sup> August 2021. It has also been contended that the decision to withdraw the earlier recommendation got precipitated on account of change of Government and therefore, this aspect ought to have been taken into account by Hon'ble the Governor while returning the earlier recommendations based on the decision of the Cabinet dated 10<sup>th</sup> August 2022, keeping in view that in respect of earlier recommendations, this Court, by means

of its judgment dated 13<sup>th</sup> August 2021 had expressed its hope and expectation that the decision shall be taken by Hon'ble the Governor. In support of these submissions, reliance has been placed on behalf of the petitioner on the judgments of Hon'ble Supreme Court in the case of ***Rameshwar Prasad & Ors. Vs. Union of India & Anr.***<sup>1</sup> and ***M.P. Special Police Establishment Vs. State of M.P. & Ors.***<sup>2</sup>, which have already been discussed by the Court in its judgment dated 13<sup>th</sup> August 2021 rendered in the PIL (L) No.10300 of 2021.

8. Dr. Saraf, learned Advocate General, on the other hand, has vehemently opposed the petition by stating that upon subsequent decision of the Cabinet the earlier recommendations stood withdrawn and if the advice tendered by the Cabinet stood withdrawn, it was not open to the Hon'ble the Governor to act upon the advice tendered by the Cabinet earlier.

9. He has further argued that in the matters relating to nomination of members to State Legislative Council under Article 171(3)(e) and Article 171(5) of the Constitution of India, the Hon'ble the Governor has limited discretion, however, such a discretion can be exercised only once there exists before him some advice or recommendation by the Cabinet.

10. Dr. Saraf has vehemently argued that the entire foundation of the petition is highly misconceived and flawed for the reason that the recommendation made earlier by the Council of Ministers was withdrawn and there was no recommendation or

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<sup>1</sup> (2006) 2 SCC 1

<sup>2</sup> (2004) 8 SCC 788

advice pending before Hon'ble the Governor which could be acted upon by him and therefore, the prayers made in the instant PIL petition cannot be granted.

11. Having considered the respective submissions made by learned Counsel for the parties and having regard to the prayers made in the instant PIL petition, one of the issues which falls for our consideration is as to whether the Council of Ministers was well within its constitutional authority and power to withdraw the earlier recommendations made by it to the Hon'ble the Governor for nomination of the members of the Legislative Council.

12. The other issue which needs consideration and decision in the instant matter is as to whether in the facts of the case any direction can be issued by the Court requesting the office of the Hon'ble the Governor to nominate the 12 members as recommended by the Council of Ministers on 6<sup>th</sup> November 2020 or to return the recommendations with reasons, as has been prayed for by the petitioner.

13. Elaborate discussion has been made by this Court in its earlier judgment dated 13<sup>th</sup> August 2021 rendered in PIL (L) No.10300 of 2021 as to the nature of power to be exercised by Hon'ble the Governor in the matters governed by Article 171(3) (e) and Article 171(5) of the Constitution of India. The Court has held that Hon'ble the Governor, in such matters, is not completely denuded of his discretion and in certain circumstances, as discussed in the said judgment, Hon'ble the Governor has discretionary authority and power which he can

exercise.

14. Though it is quite disturbing to note that despite the judgment of this Court in the earlier PIL petition rendered on 13<sup>th</sup> August 2021, Hon'ble the Governor did not take any decision on the earlier recommendations made by the Council of Ministers on 6<sup>th</sup> November 2020, however, the fact remains that on the said recommendations or the advice tendered by the Council of Ministers, the decision was not taken and accordingly, no order based on any such decision could be issued in terms of the provisions as contained in Article 166 of the Constitution of India.

15. Since no decision by Hon'ble the Governor was taken on the earlier advice tendered by the Council of Ministers in respect of nomination of the 12 members and no Government order was issued as per the requirement of Article 166 of the Constitution of India, in our opinion, it cannot be said that any right stood conferred on those persons who were recommended for nomination as members of the Legislative Council. In this view of the matter, before the advice tendered by the Council of Ministers could take shape of a valid decision, it was open to the Council of Ministers to withdraw the recommendations.

16. In other words, the process initiated with the recommendations made and advice tendered by the Council of Ministers on 6<sup>th</sup> November 2020 could not reach its final destination and accordingly, in the mid of such decision making process, in our opinion, it was well within the authority of the

Council of Ministers to withdraw the earlier recommendations.

17. This Court, in its judgment dated 13<sup>th</sup> August 2021 in the PIL (L) No.10300 of 2021 filed by Ratan Soli Luth has outlined certain circumstances in which Hon'ble the Governor, while exercising his powers under Article 171(3)(e) read with Article 171(5) of the Constitution of India, can exercise his discretion and the advice tendered in such matters by the Council of Ministers may not be binding on him as it is.

18. The petitioner has put-forth a case in this matter that Hon'ble the Governor ought to have exercised his discretion while taking decision on the earlier advice tendered to him by the Council of Ministers on 6<sup>th</sup> November 2020, however, simultaneously, it has also been urged that once Hon'ble the Governor exercised his discretion and acted upon the advice tendered by the Council of Ministers subsequently to withdraw the earlier recommendations, the same is bad in law. The argument of the petitioner, thus, manifests contradiction.

19. Additionally, we may observe that once the Council of Ministers took subsequent decision to withdraw the earlier recommendations for which the Council of Ministers was legally competent, there was no advice in existence before Hon'ble the Governor on which any decision was required to be taken by him.

20. At this juncture, we may refer to the judgment of Hon'ble Supreme Court rendered in the case of ***State of Kerala Vs.***

***Smt. A. Lakshmikutty & Ors.***<sup>3</sup> In the said judgment, Hon'ble Supreme Court has considered the provisions contained in Articles 163 and 166 of the Constitution of India and has held that unless and until the decision taken by the Council of Ministers is translated into action by issue of a Notification expressed as per the requirement of Article 166, it cannot be said to be an order of the State Government and till then the earlier decision of the Council of Ministers will be only a tentative one and it is, therefore, fully competent for the State Government to reconsider the matter and come to a fresh decision.

21. In the instant case as well, since no decision by Hon'ble the Governor was taken on the advice tendered by the Council of Ministers on 6<sup>th</sup> November 2020 and consequently, no order was issued in terms of the requirement of Article 166 of the Constitution of India, in our opinion, it was open for the Council of Ministers to withdraw the earlier recommendations taking a fresh decision.

22. Having held as above, we are also of the opinion that the other prayer made by the petitioner for issuing a direction requesting the office of Hon'ble the Governor either to nominate 12 members to the Legislative Council as recommended on 6<sup>th</sup> November 2020 by the Council of Ministers or to return the said recommendations, cannot be granted for the reason that the said recommendations stood withdrawn on account of subsequent decision taken by the Council of Ministers in its

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<sup>3</sup> ***(1986) 4 SCC 632***

meeting held on 10<sup>th</sup> August 2022 on the basis of which the the Hon'ble Chief Minister requested the Hon'ble the Governor vide letter dated 23<sup>rd</sup> August 2022 to return the proposal earlier made.

23. For the discussion made and the reasons given above, we find that the PIL petition is misconceived, which is liable to be dismissed.

24. Resultantly, the PIL Petition is hereby dismissed.

25. However, there will be no order as to costs.

26. The Interim Application (s), if any, stands disposed of.

**(AMIT BORKAR,J.)**

**(CHIEF JUSTICE)**